

**REPORTS OF INTERNATIONAL
ARBITRAL AWARDS**

**RECUEIL DES SENTENCES
ARBITRALES**

Oliva Case (of a general nature)

1903

VOLUME X pp. 600-609



NATIONS UNIES - UNITED NATIONS
Copyright (c) 2006

OLIVA CASE

(By the Umpire:)

Expulsion under circumstances of contumely and upon mere suspicion will sustain a claim for damages.

Concession indirectly taken away by unlawful expulsion may be compensated for, the measure of damages in this case being limited to amounts properly expended in procuring it, speculative and conjectural profits being rejected.

AGNOLI, *Commissioner* (claim referred to umpire):

The principle involved in the claim under consideration is analogous to the one which was fully studied in the Boffolo case, in which was delivered an elaborate decision by the honorable umpire, and to the case of Clemente Giordana, in which an indemnity was agreed upon between the Commissioners.

The circumstances attending the expulsion of Lorenzo A. Oliva, however, and the consequences flowing from the arbitrary proceedings against the interests and to the injury of the claimant, are of special gravity and require to be set forth in detail.

Oliva had lived in Venezuela a number of years, and from 1891 to 1898 was employed in the important commercial house of Bisagno, Oliva & Co., Italian merchants of Maracaibo. It does not appear, and no proof to the contrary has been adduced, that the claimant during all this time had ever embroiled himself in the political struggles of the Republic, notwithstanding that during this period the Crespo revolution burst forth. We have from this moment evidence of Oliva's pacific tendencies, for, on the 3d of July, 1900, he made arrangements with the Government of Caracas to contract for the erection of a public cemetery, the clauses of which contract we will examine more closely further on in the course of this memorial. On the 31st of October of that year he entered into an agreement with the firm of I. Brocchi & Co., of Habana, in virtue of which said firm was to advance him \$50,000 American with which to commence the construction of the cemetery. On the 23d of November following the claimant went to the Venezuelan consul at San Juan de Puerto Rico and asked for and obtained a passport for La Guaira. It will be noted that, as passports are not required of foreigners disembarking at ports of the Republic, the spontaneous presentation of himself at the office of the consul, as aforesaid, constitutes for the claimant presumptive evidence that he was proceeding to Caracas for the transaction of important business and not for political reasons.

The claimant reached La Guaira the 27th of that month and Caracas the 28th. On the day following he was arrested, and the next, by official decree, he was expelled.

What were the reasons of the Government of the Republic for issuing an order which not only infringed the liberty of the claimant, granted him under the constitution and by the treaties, but prevented him from carrying out an advantageous contract stipulated nearly five months before between him and the Government of Caracas?

The writer believes there were no reasons, and this from the following considerations:

The decree of expulsion in nowise explains, nor does it even fasten upon the claimant, the vague and indefinite stain of being "notoriously injurious to public order."

He had had personal relations with the ex-president, Ignazio Andrade, and from this arose the suspicion that not only was he a revolutionist, but so closely allied with the rebel factions as to have undertaken to carry with him their

political correspondence to Venezuela. All of which is extremely improbable and even absurd. No proof has been advanced in support of these suspicions, and no incriminating papers were found on him at the time of his arrest.

The Venezuelan Government which, when the royal Italian legation, in December, 1900, intervened in behalf of claimant, had alleged as the cause of expulsion "the inconvenience of the attitude assumed by that subject (i.e., the claimant) as contrary to the security of the peace," has not been able to furnish this Commission anything more definite than a report of the Venezuelan consul at San Juan de Puerto Rico that there were rumors connecting Oliva with the Andradists.

It is worthy of note that the consul, to whom Talleyrand would have found it unnecessary to give his famous advice, "Surtout pas trop de zèle," waited until the 2d of April, 1901, to explain why he had conceived suspicions in the preceding November regarding the claimant, and there is nothing to show that he had, either by telegraph or in a letter by the steamer on which Oliva was traveling, denounced him to the Venezuelan authorities; but even admitting that he had done so, it is beyond question that had the consul attributed any weight to the rumors concerning the claimant he would have taken steps to have him searched or arrested on board the *Philadelphia*, so that the Government might eventually gather proofs in support of the accusations directed against him and prevent all danger from the supposed revolutionary correspondence. But, however all this may be, it is indisputable that nothing material or convincing has been submitted to us that would make us believe or admit that Oliva was a revolutionary agent, or was returning to Venezuela for any other purpose than to complete the contract for the erection of the cemetery at Caracas.

The foregoing would be sufficient to prove his expulsion harsh and arbitrary; but there are other very strong reasons for believing that he was simply the victim of a precipitate and abusive measure.

Even though the claimant be in nowise bound to furnish negative proof of his abstention from political affairs, a most difficult thing in any case, but particularly so in his case, on account of having been compelled for many years to live far from Venezuela, he nevertheless exhibits the statement of Ramiro Callazo, then consul for Venezuela in Habana, from which it appears that that ex-functionary had always known him in that city as a man of pacific habits and one occupied exclusively with the conduct of his business affairs.

It should also be remembered that he had contracted with agents of the very Government that had deposed Andrade from the Presidency to build the cemetery; that there never had been the least probability that the deposed President would ever again assume the reins of government, nor even was there a party that thought of restoring him to his high office after his forced departure from his country. It can not be shown that he ever schemed or intrigued with this end in view, or ever encouraged revolts. It is notorious that Andrade is far from being venturesome, but is of a conciliatory disposition, and his recent submission to President Castro, who has permitted him to return to Caracas, where he is now living peacefully, is the best evidence of the truth of these assertions.

These circumstances are so well known that it is not worth the while to insist on them. They have merely been related to show the impossibility of admitting, except on absolute proof to the contrary, that the claimant at the time he was coming to Caracas for the purpose of constructing the cemetery according to the contract entered into by him with the functionaries of the existing Government, was simultaneously in the secret service of a President and a party that had not the slightest probability of returning to power; he, who from his long

residence in the Republic, must have been perfectly acquainted with the internal political conditions among which he had always observed the strictest neutrality. To hold the contrary would be to consider the claimant as guilty of both imprudence and improvidence to an improbable degree.

On the question of the arbitrariness of claimant's expulsion the Italian Commissioner believes he has said enough to place it beyond doubt. An indemnity should therefore be awarded, and it only remains to fix the amount thereof according to rules of equity.

The claimant demands 2,158,707 bolivars, which is an exaggeration. The sum is thus divided by him: 1. For the forced settlement of his business house in Habana, 32,295 bolivars; for moral reparation of his arbitrary arrest and expulsion, 1,000,000 bolivars; for loss of his share of profit following the forced suspension of the contract, 1,126,512 bolivars.

Let us examine these three items.

The claimant has submitted an extract from his account books, sworn to before a notary, from which it appears that during the period from July 1, 1899, to December 31, 1900, his business house in Habana suffered a loss of 32,295 bolivars, as before stated. Of this sum 4,917 bolivars were spent in voyages to Venezuela on business connected with the construction of the cemetery, and this sum it would seem proper to reimburse. It is not possible to state exactly, nor can the claimant on this point give more conclusive evidence than that already furnished, whether the ulterior loss of 27,378 bolivars was the direct result of the precipitate liquidation of the Habana business, but it is presumable that it was largely so. Therefore the writer begs that the honorable umpire, in determining what amount of indemnity shall be allowed, will take into due consideration in this respect the indications furnished by the claimant of the losses suffered by him in consequence of the forced abandonment of the contract for the erection of the cemetery.

The item of 1,000,000 bolivars in compensation for expulsion is by far too large, but an award is certainly due him under this head. Considering, therefore, the good reputation always enjoyed by the claimant, his industrious character, and the high social class in which he moves, as well as the fact that the expulsion was from a free country, without just motives or the assignment of any adequate reasons therefor, besides the injury to his standing and business relations resulting from so arbitrary an act, the writer is of opinion that an indemnity of not less than 40,000 bolivars should be conceded, independently of any sum which might justly be found due him for losses resulting from the arbitrary rupture of the contract aforementioned, since there can be no doubt that, even had he not obtained the concession referred to, the sole fact of his arbitrary expulsion would furnish sufficient ground for a demand of indemnity.

Let us now turn to the oft-cited contract, and assume that no consideration need be given the clause in article 10 thereof, in which Oliva renounces the right to claim by diplomatic recourse. The claimant could not renounce what was not exclusively his, since governments exercise diplomatic protection whenever the same seems to them a just and proper measure in defense of their interests and dignity, without regard to any private agreements to the contrary, particularly as these latter are often made through necessity on the part of their subjects. Never has any validity been attributed to clauses analogous to that found in the Oliva-Otanez contract, and which are frequently encountered in contracts entered into with governments of South American republics, and it has sometimes been necessary to depart from the rule adopted by the legislatures of many of those States, according to which foreigners have not, except in extreme cases, the right to appeal to their governments for protection; this in deference to the principle that sovereignty is not absolute, but limited

by the right of others to make good whatever valid reasons they may have.

But in the present case there is more, and that is that by the protocol of February 13, 1903, the Venezuelan Government expressly renounced all exceptions of this nature in the Mixed Commission.

Now we must consider in the first place that the contract drawn up between the claimant and the municipal government of Caracas, which is nothing more than a branch of the Federal Government, has nothing in common with those fantastical concessions so frequently put forward as the bases of unjustifiable claims. Oliva undertook to furnish Caracas with something of which it stood and still stands greatly in need. With this object in view, he closed out his business in Habana with the intention of definitely abandoning that city, and made trips to Venezuela, submitting to the Government officials here plans of the proposed cemetery (which are to be found among the papers) designed by the engineer Enrico Giorgi, to whose collaboration the claimant had had recourse.

Before leaving Habana he secured, by means of a special contract, the financial aid of the firm of G. Brocchi & Co., which agreed to furnish him at once \$50,000 for the commencement of the proposed work, and additional sums later on, all of which conclusively shows the earnestness of Oliva's purpose. The calculation which he makes of the losses to which the breaking of the contract has subjected him, while certainly not exact, is by no means devoid of foundation.

He certainly could not predicate the number of deaths in Caracas during the twenty years' duration of the concession, nor how many of the families of such deceased would have been minded to purchase the sepulchers that it was proposed to construct, and no one could tell with any degree of exactness whether the prices which it was proposed to charge for the various tombs and chapels would have been within the means of said families, but there is no doubt whatever that the death rate of Caracas is considerable and that many persons intend honoring the remains of their dear departed by depositing them in appropriate sepulchers, and that here one can neither live nor die cheaply.

It is quite possible that claimant may have, in his calculations as to profits, indulged his fancy somewhat largely; but, considered as a whole, his claim is just.

It is worth our while to compare the accounts of the claimant with certain data. From various documents forming part of the expediente, and particularly from the issue of the *Gaceta Municipal* of January 10, 1903, it is shown that in 1902 3,368 bodies were buried in Caracas. Of this number 2,340 were classed as insolvent. The remaining 1,028 belonged to classes in easier circumstances and were officially designated as solvent. From the report of the governor of the Federal District of February 27 and laid before the National Congress of the present year, it appears that during the years 1901, 1902, and 1903 the number of deaths in this capital were 2,838, 3,233 and 3,199, respectively, and that of those who died during the last of these three years 949 were solvent and 2,257 insolvent. It would therefore seem that the claimant's calculations as to the death rate here is correct; but he exaggerates somewhat the number of families able to purchase tombs for deceased members. According to his figures these would amount to between 33 and 40 per cent, while official data in our possession show not more than 30 per cent.

We must observe, however, that claimant's memorial is dated March, 1901 — that is to say, before the last war, which caused great dearth in business and brought ruin to many families. Should the present conditions of public tranquillity continue, as is hoped and as everything seems to indicate, the normal condition will again be reached.

As to the prices at which the tombs were to be sold, we have not, in truth any official and correct data to establish this point. From the contract we gather that for each high-class funeral the claimant had agreed to turn into the treasury of the city 40 bolivars and for ordinary funerals 20 bolivars, and further that the contract authorized him to receive from whoever might desire to possess a tomb, either large or small, the sum of 350 bolivars, retaining the privilege of disposing of the mortuary chapels at any price that might be agreed upon. These latter, according to plans, were to be 124 in number.

The claimant in his calculations assumes he might have sold the small tombs at 240 bolivars each, the large at 340 bolivars, and the mortuary chapels at 10,000 bolivars each. The tombs, not counting the chapels, numbered, according to the plans, 7,930, and as about 1,000 persons of the better class die each year in Caracas, this claimant affirms, apparently not without good reason, that in less than twenty years the cemetery to be constructed by him would have been filled.

In order to establish the accuracy of his calculations it would be necessary to have data which, perhaps from the lack of statistics and economic research, neither the claimant nor anyone else could here produce. In other words, it would be necessary to determine beyond question what number of those classed as "solvents" belong to families capable of purchasing tombs at from 240 to 340 bolivars each, and how many (certainly few in Caracas) would undertake to purchase a mortuary chapel at 10,000 bolivars.

It is upon this point that the claimant is, perhaps through no fault of his, vague and indefinite in his estimate. The writer thinks therefore that it would not be equitable to award the sum claimed under this head as representing the value of a ten or twenty years' exploitation of the cemetery.

If the act of expulsion, of which he justly complains, prevented his carrying out an enterprise which would have proved profitable, and besides entailed upon him the expense of voyages and compensations to those who were associated with him in this enterprise, loss of time, etc., it is nevertheless true that since his enforced absence from Caracas he has been at liberty to display elsewhere the activity which he would have employed here.

It is equally to be borne in mind that the sum of 971,000 bolivars which was to be used in the construction of the cemetery could not have been furnished him gratuitously by his capitalists, and even though a portion thereof was to be lent him by Brocchi & Co., of Habana, who, in consideration of which loan, were to have a special interest in the future profits of the cemetery (a deduction on account of which the claimant has already made), the remainder of the funds required to carry on the proposed work must necessarily have been productive before its amortization, whether furnished by himself or obtained from others, but this circumstance seems not to have been considered by him. Had it been it would have lessened his estimate of the amount of prospective benefits.

Taking all these facts into account, the Italian Commissioner is of the opinion that the claimant is entitled to an indemnity for enforced nonexecution of his undertaking of not less than 280,000 bolivars — that is, one-fourth the amount claimed by him under this head; for his arbitrary expulsion, 40,000 bolivars, as above stated; for reimbursement of expenses for voyages to Venezuela, etc., 4,917 bolivars; in all, a total of 324,916 bolivars.

ZULOAGA, Commissioner:

Lorenzo A. Oliva, an Italian, domiciled in Habana, was expelled from the territory of the Republic by a decree of the chief executive magistrate of November 30, 1900. The Government of Venezuela considered the foreigner, Oliva, objectionable, and made use of the right of expulsion, recognized and established

by the nations in general, and in the manner which the law of Venezuela prescribes. Italy makes frequent use of this right. The undersigned does not believe that Venezuela is under the necessity of explaining the reasons for expulsion.

Nevertheless, in the Oliva case, the agent of Venezuela has presented a report of the consul of Venezuela in Puerto Rico and two letters, from which it appears that Oliva was denounced by several persons with whom he came in a ship from Habana as an agent of the revolution of General Andrade, and this denunciation having been transmitted to Caracas, was the cause of the arrest of Oliva. The latter in an interview published in the *Pregonero* says that on being apprehended he was shown an official telegram in which there appeared the denunciation of the consul at San Juan, and in his letter to the minister of Italy at Caracas, December 6, 1900, he says that "The Government proceeded by virtue of a letter from its representative at San Juan;" and he admits, moreover, that he traveled with General Andrade from Habana to Puerto Rico.

The circumstances which the consul of Venezuela recites and the letters which he sent (which were confidential documents of the minister of foreign relations) are entirely sufficient to justify the suspicions of Oliva's revolutionary character. To this circumstance there is added the fact that Oliva was in fact a personal friend of Andrade, and that he had lived a long time in Venezuela in former years, whereby his complicity with the revolutionists was very plausible. The act of having gone to demand a passport from the consul of Venezuela in order to come to this country when it was not necessary shows also that his mind was not easy, and there were reasons for this. (The denunciation which was made to the consul was subsequent to the granting of a passport, as appears from the report.) As to how far it was ascertained that Oliva was a revolutionist is not a matter for discussion. It was sufficient that there existed well-founded reasons in order that the Government of Venezuela might so believe, and this appears to be proved. The honorable Commissioner of Italy asserts that General Andrade was not a revolutionist. The opinion of the Venezuelan Government was different.

Oliva demands fantastic amounts as damages, which he says he suffered because he could not execute a contract which he had made with the municipal council of Caracas to construct the cemetery of Caracas, a chapel, and a pantheon for families, and the honorable Commissioner of Italy believes that a large part of them should be allowed him. If Venezuela makes use of a right in decreeing the expulsion, it is clear that it can not be condemned to pay damages, although they were ascertained. This doctrine appears virtually to have been established in the decision of the honorable umpire in the case of Boffolo,¹ since the damages there allowed are not and could not have been for damages inflicted in the exercise of a right, but for "useless vexations in exercising it," which is very different.

It is useless, therefore, to enter into a concrete examination of what is demanded by Oliva, but it is not useless to observe, even if it only be for the moral appreciation of the case, that all his premises are false.

First. It is not true that because of his expulsion it was impossible for him to complete the work, because he might have done so through another person, or at least obtain new extensions of time within which to begin the work, by the consent of the authorities over him.

Second. The assertion is not true that he had the concession for the cemetery of Caracas. He had only the right to construct therein a building to keep

¹ *Supra*, p. 528.

remains and build vaults to deposit cadavers in. The cemetery was to remain such as it is.

All the statements are therefore erroneous.

I do not find that it is shown that Oliva has suffered in his expulsion violences or insults which were not the natural consequences of the decree, and of the necessity of carrying it out, and considering the charges made against Oliva it is easily understood that he was not allowed liberties which might aid the fulfillment of a revolutionary commission, if perchance he carried it.

AGNOLI, *Commissioner* (in reply):

The Venezuelan Commissioner has characterized the principle that I have maintained as absurd; that is to say, that a contract is broken as soon as one of the contractors is expelled by the other from the territory of the state in which the contract ought to have been performed.

The undersigned refrains from calling the opinion of his colleague as absurd, but he finds it very original, to say the least.

Mr. Oliva stipulated with the municipality of Caracas, which is nothing but a branch or an organ of the Federal Government, to execute his contract himself.

To demand that Oliva should have had recourse to managers or to powers of attorney, to ask of him and impose on him the placing of his confidence in people whom we do not know and whom perchance he could not find — to pretend in fine that he should assign his contract without knowing that anyone would accept his terms or that he should direct the work which was to have been done at Caracas from Habana or any other place — is preposterous.

His contract was broken *de facto*, because its execution under the conditions agreed on, was rendered impossible by an arbitrary measure of the *state*, it is true, but of a state which had been by the intervention of one of its organs one of the contracting parties.

Has the Venezuelan Government at last shown its good will by revoking the decree for the expulsion of Oliva? Never.

Under these circumstances it is certain and sure that the claimant has a right to an indemnity because of the consequences of the breach of his contract.

There is not a court in the world that would not allow damages under such circumstances, and the Mixed Commission, which is a tribunal of equity, ought all the more to allow them.

If the demand which Oliva presents on this account is rejected under the pretext that he had not commenced the work on the cemetery when he was expelled, and that therefore he suffered no direct damages, the absolutely subversive principle is sanctioned that the Venezuelan Government can, by an act of expulsion, or by no matter what illegal act, fail in the performance of its obligations assumed by contract, without making itself liable to any penalty.

The Valentiner case¹ that the Venezuelan Commission cites proves nothing, or rather proves that the claim of Oliva is well founded in principle.

Mr. Valentiner made a claim because of the consequences of the recruiting of his laborers. The recruiting was a *legal act* in principle; and the umpire of the German Commission, in refusing indemnity, has acted properly.

Liability can not attach to a person who exercises his right.

Oliva makes a claim on account of the consequences of an *illegal act*, and all the more unjust because this act was committed against a person who was in

¹ *Supra*, p. 403.

possession of a contract entered into with the Government itself, which by this abusive measure injured him.

The Venezuelan Commissioner finds that Mr. Oliva has not proved his innocence. It is not his place to prove this innocence. Every man is considered innocent until the proof of the contrary is produced. It was therefore the Venezuelan Government that should have proved that the claimant was guilty and this is just what it has not done.

When expulsion is resorted to in France or Italy the proofs are at hand. Mere suspicions may justify measures of surveillance, but never a measure so severe as that of forbidding the residence in a country of a man who has important interests therein. In the opinion of the Venezuelan Commissioner there is constant mention of a *chapel*. It was not only a chapel that Mr. Oliva was to have built; it was a chapel and a *cemetery*. A plot of ground had been granted him of 19,600 square meters in which the chapel should have been built with a great many annexes and sepulchers besides the cemetery. The neighboring ground, 100 meters square (in all 10,000 square meters), was to have been filled with sepulchers.

According to the proposed management and plans the number of sepulchers to be constructed was to have been 7,930, without counting 120 little chapels, which were anticipated being sold at 10,000 francs each.

There was therefore a matter of importance under consideration, and not merely a chapel of which the Venezuelan Commissioner speaks.

RALSTON, Umpire:

The above entitled claim has been duly submitted to the umpire upon difference of opinion between the honorable Commissioners for Italy and Venezuela. The claim, which is for the sum of 2,158,807 bolivars, grows out of the expulsion of Oliva from Venezuela, and the facts in connection therewith seem to be as follows:

In the month of November, 1900, Oliva went as a passenger from Santiago de Cuba to San Juan, Puerto Rico, at which point he changed his steamship for one going directly to La Guaira. At San Juan he received a passport from the consul of Venezuela. He reached La Guaira on the 27th and Caracas on the evening of the same day. In the afternoon of the day succeeding his arrival he was arrested upon the order of the governor of the Federal District in consequence of a telegram sent by the prefect of La Guaira, resulting from a denunciation made by the Venezuelan consul in Puerto Rico, declaring that he was an intimate friend of General Andrade, and was going to Venezuela in the capacity of revolutionary agent. He was taken to the prefecture, where he was detained until 7 o'clock in the evening. He was then returned to his hotel, but kept under guard until the President should order his restoration to liberty, which, it was believed by the police officers, would be immediate. He was placed incommunicado for a number of hours, and was not allowed to speak to his counsel or seek relief in the courts of justice. All of his commercial books, correspondence, and letters were examined without the discovery of anything of an incriminating nature. His companions in jail were French criminals who had escaped from Cayenne. He was then taken to La Guaira, and under circumstances of contumely sent out of the country.

In the month of July, 1900, Oliva had entered into a contract with the municipal council of the Libertador Department of the Federal District, obliging himself to construct a family pantheon in the cemetery of the south, and he had immediately thereafter gone to Habana, where he had been engaged in business, closed up his business, as it is said, at a loss, arranged to raise the money necessary to construct the pantheon, and when arrested was about

to commence the work. His expulsion rendered it impossible for him to proceed with the concession so obtained, and he was compelled to abandon it, together with all prospects of future profits.

The umpire does not find it necessary to again discuss the principles governing the right of expulsion. The existence of this right was recognized and the dangers incident to its exercise were sufficiently pointed out in the case of Boffolo, in which an award of 2,000 bolivars was given. It is sufficient in the present case to say that the expulsion of Oliva appears to have taken place without legal right, although it is recognized that the Government at the time felt itself authorized to exercise its power. The mere idle suspicion of a consul should not, however, in an international commission be received as a sufficient justification for the infraction of an international right.

In the Boffolo case, the umpire, in granting but 2,000 bolivars, was influenced by what seemed to be the unworthy character of the man. In the present case the claimant appears to have been a man of standing and character and recognized by a branch of the Venezuelan Government as a worthy concessionary. The honorable Commissioner for Italy now asks 40,000 bolivars for the expulsion, and this amount is not, under the circumstances, considered as excessive.

Large damages are asked for the practical loss of the concession above referred to, and elaborate calculations have been made as to the probable number of deaths in Caracas during the period of the concession, the number which would have been interred within this pantheon, and the probable profits arising from each sepulture. In the opinion of the umpire this method of computation must be entirely rejected. It is first to be borne in mind that the concession was not exclusive in its nature. Any number of concessions might have been given, the effect of which would have been to render this one valueless. Furthermore, the number of interments in this pantheon and the possible profits on each interment are so absolutely uncertain that they could not be accepted as a basis of calculation in an ordinary civil tribunal, much less in an international one. We have only to refer, so far as international tribunals are concerned, to the Geneva arbitration; some of the reasons for the conclusions arrived at being stated by Mr. Frazier, on the part of the United States, in the American and British Claims Commission, as follows (4 Moore's International Arbitration, p. 3926):

The allowance of prospective earnings by vessels was denied by the tribunal at Geneva unanimously. It is not, so far as I am aware, allowed by the municipal law of any civilized nation anywhere. The reason is obvious and universally recognized among jurists. It is not possible to ascertain such earnings with any approximation to certainty. There are a thousand unknown contingencies, the happening of any of which will render incorrect any estimate of them, and hence result in injustice.

The municipal law of the United States is to much the same effect. Thus in *Hodges v. Fries* (34 Florida, 63) it was held that profits which are speculative or conjectural are not generally regarded as elements in fixing damages in actions for breach of contract between lessor and lessee, not because there is anything in their nature per se which demands their reduction, but because they can not be estimated with reasonable certainty.

Again, in *Newbrough v. Walker* (8 Grattan, 16) it was held that the same rule applied to breach of covenant to lease a mill, and evidence in an action for the breach as to what the lessee could have cleared from the use of the mill was speculative and conjectural, and furnished no legitimate basis on which to estimate damages, and the same rule has been followed in a very great number of like cases.

It is not to be inferred, however, that Venezuela has the right, either directly or indirectly, to break the concession, or that no recovery therefor should be allowed against it. A nation, like an individual, is bound by its contract, and although it may possess the power to break it, is obliged to pay the damages resultant upon its action. In the present case, what was the value of the contract? This value is not determined by prospective profits, for the reasons above indicated. In this case, and referring only to the particular facts involved in it, we may concede that the value of the contract is the amount expended to obtain it (plus a reasonable allowance for the time lost by the claimant in connection therewith), and while the proof upon these points is not as clear as might be asked, we may accept as the amount recoverable the figures given in the profit and loss account of Oliva, as expended in his first voyage to Venezuela in the cemetery matter, to wit, \$675.54, or 3,512.81 bolivars. For his time, evidently covering several months, the sum of 5,000 bolivars may be allowed.

There is also to be allowed in favor of the claimant the expenditures of his second voyage, amounting to \$357.03, or 1,856.56 bolivars.

The umpire is asked to allow the loss to which it is said Oliva was subjected, because of being compelled to dispose of his stock of goods in Habana at a reduced price, to enable him to go to Caracas and enter upon the cemetery concession. So many elements enter into a matter of this sort that the umpire can not accede to this suggestion. The goods may have been sold at a reduced price, because of a falling market, because of their age, or for other reasons he is incapable of appreciating, all the surroundings not being presented to him. He would not be justified in charging this loss, therefore, against Venezuela, even were it otherwise proper, with relation to which he expresses no opinion.

An award will therefore be signed for the amount of 50,369.37 bolivars, with interest on 10,369.37 bolivars from October 28, 1903, to and including December 31, 1903.

CORVAIA CASE

(By the Umpire:)

This Commission only has jurisdiction over "Italian claims," meaning thereby claims which were Italian in origin and Italian when the Commission was formed.

In the present case the original claimant, born a subject of the Two Sicilies, lost his citizenship, according to the code of that country, by accepting diplomatic employment from Venezuela, and never regained it, and the claim of his heirs must, therefore, be rejected.

Venezuela knowing that when Corvaia entered her diplomatic services he abandoned Sicilian citizenship, Italy is now estopped from claiming him as a subject.

Semble that a man (and consequently his heirs as well) who accepts, without permission of his government and against her laws, such public and confidential employment from another nation is estopped from claiming his prior condition to the prejudice of the country whose interests he has adopted.

Sambiaggio case¹ affirmed in its interpretation of "most-favored-nation" clause.

AGNOLI, *Commissioner* (claim referred to umpire):

Contrary to the position taken by his learned colleague of Venezuela, the Commissioner for Italy holds that Baron Fortunato Corvaia did not, by the

¹ *Supra*, p. 499.