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MIXED CLAIMS COMMISSION
NETHERLANDS - VENEZUELA
CONSTITUTED UNDER THE PROTOCOL OF
28 FEBRUARY 1903

REPORT: Jackson H. Ralston-W. T. Sherman Doyle, *Venezuelan Arbitrations of 1903,* **including Protocols, personnel and Rules of Commission, Opinions, and Summary of Awards, etc., published as Senate Document No. 316, Fifty-eighth Congress, second session, Washington, Government Printing Office, 1904, pp. 889-916.**

PROTOCOL, FEBRUARY 28, 1903 [1]

Protocol of an Agreement between the Plenipotentiary of Her Majesty, the Queen of the Netherlands, and the Plenipotentiary of Venezuela for submission to arbitration and payment of all unsettled claims of the Government and subjects of the Netherlands against the Republic of Venezuela.

Her Majesty the Queen of the Netherlands and the President of the Republic of Venezuela, having deemed it expedient to conclude the above-mentioned protocol, have to that end appointed as their Plenipotentiaries:

Her Majesty the Queen of the Netherlands, Baron W. A. F. Gevers, and the President of Venezuela, Herbert W. Bowen, who, after having communicated to each other their respective Full Powers, found in due form, have agreed upon and signed the following protocol:

ARTICLE I

All claims owned by the Government or citizens of the Netherlands against the Republic of Venezuela which have not been settled by diplomatic agreement or by arbitration between the two Governments, and which shall have been presented to the Commission hereinafter named, by the Department of Foreign Affairs at The Hague or Her Majesty's Legation at Caracas, shall be examined and decided by a Mixed Commission, which shall sit at Caracas, and which shall consist of two members, one of whom is to be appointed by Her Majesty the Queen of the Netherlands and the other by the President of Venezuela.

It is agreed that an umpire shall be named by the President of the United States of America.

If either of the said commissioners or the umpire shall fail or cease to act, his successor shall be appointed forthwith in the same manner as his predecessor. Said commissioners and umpire are to be appointed before the first day of May 1903.

The commissioners and the umpire shall meet in the City of Caracas on the first of June 1903. The umpire shall preside over their deliberations, and shall be competent to decide any question on which the commissioners disagree. Before assuming the functions of their office the commissioners and the umpire shall take solemn oath, or solemnly promise to examine and impartially decide, according to justice and the provisions of this convention, all claims submitted to them, and such oaths or promises shall be entered on the record of their proceedings. The commissioners, or in case of their disagreement, the umpire, shall decide all claims upon a basis of absolute equity, without regard to objections of a technical nature or the provisions of local legislation.

The decisions of the commission and in the event of their disagreement those of the umpire, shall be final and conclusive. They shall be in writing. All awards shall be made payable in United States gold or its equivalent in silver.

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[1] For the Dutch text see the original Report referred to on page 707.

ARTICLE II

The commissioners or umpire, as the case may be, shall investigate and decide said claims upon such evidence or information only as shall be furnished by or on behalf of the respective Governments. They shall be bound to receive and consider all written documents or statements which may be presented to them by or on behalf of their respective Governments in support of or in answer to any claim, and to hear oral or written arguments made by the agent of each Government on every claim. In case of their failure to agree in opinion upon any individual claim, the umpire shall decide.

Every claim shall be formally presented to the commissioners within thirty days from the date of their first meeting, unless the commissioners or the umpire in any case extend the period for presenting the claim, not exceeding three months longer. The commissioners shall be bound to examine and decide upon every claim within six months from the day of its first formal presentation, and in case of their disagreement the umpire shall examine and decide within a corresponding period from the date of such disagreement.

ARTICLE III

The commissioners and the umpire shall keep an accurate record of their proceedings. For that purpose each commissioner shall appoint a secretary versed in the languages of both countries, to assist them in the transaction of the business of procedure. Except as herein stipulated, all questions of procedure shall be left to the determination of the commission, or in case of their disagreement, to the umpire.

ARTICLE IV

Reasonable compensation to the commissioners and the umpire for their services and expenses, and other expenses of said arbitration, are to be paid in equal moieties by the contracting parties.

ARTICLE V

In order to pay the total amount of the claims to be adjudicated as aforesaid, and other claims of citizens or subjects of other nations the Government of Venezuela shall set apart for this purpose, and alienate to no other purpose, beginning with the month of March, 1903, thirty per cent, in monthly payments, of the customs revenues of La Guaira and Puerto Cabello, and the payments thus set aside shall be divided and distributed in conformity with the decision of The Hague Tribunal.

In case of the failure to carry out the above agreement, Belgian officials shall be placed in charge of the customs of the two ports, and shall administer them until the liabilities of the Venezuelan Government in respect of the above claims shall have been discharged. The reference of the question above stated to The Hague Tribunal will be the subject of a separate protocol.

ARTICLE VI

All existing and unsatisfied awards in favor of the Netherlands or Netherlands citizens shall be promptly paid, according to the terms of the respective awards.

WASHINGTON, D.C., *February 28, 1903.*

GEVERS [SEAL.]

H. W. BOWEN [SEAL.]

PERSONNEL OF THE NETHERLANDS-VENEZUELAN COMMISSION

Umpire. — Frank Plumley, of Northfield, Vt.
Netherlands Commissioner. — N. J. Hellmund, who was succeeded by J. Möller.
Venezuelan Commissioner. — José Vicente Iribarren.
Netherlands Secretary. — C. S. Gorsira, E.S.
Venezuelan Secretary. — Delicio Abzueta.
Umpire's Secretary. — J. Earl Parker, of Washington, D.C.
Netherlands Agent. — W. T. Sherman Doyle, of Washington, D.C.
Venezuelan Agents. — F. Arroyo-Parejo and José I. Arnal.

RULES OF NETHERLANDS-VENEZUELAN COMMISSION

I

All claims will be presented to the Commission by the Government of the Netherlands through its representative and will be presented within the time specified in the protocol. If possible, the presentation will be by way of a memorial in each case, accompanied by all documents and proofs. For cause shown to prevent a failure of justice, a memorial may also be waived by the Commission and the time extended beyond the thirty days named in the protocol. In lieu of the memorial in such case there must be a concise statement of the facts constituting such claim.

II

All documentary and other evidence presented for the consideration of the Commission will be in the language of the Government presenting the same and in Spanish, accompanied if possible by translations into English.

III

Each memorial or statement will specify as far as possible with precision the sum claimed and the grounds thereof, and may also state the claim as to interest, and will clearly state the currency in which the damages are calculated. Whether interest will be allowed in a given case, and if allowed, at what rate per cent., will be determined by the commissioners if they agree; and if they do not agree, it may be referred to the umpire.

IV

When a memorial, or statement, is presented a written receipt will be given by the secretaries to the representative presenting the same. It will then be inscribed in the proper register, a note being made by the secretaries on the memorial, or statement, of the date of its receipt and number.

V

The Venezuelan representative of record will have the right within five days after the presentation of any claim to indicate whether he intends to oppose it upon the question of fact or law, or both; and in the absence of such indications within such time, or before with the consent of the commissioners, the Commission may proceed to the disposition thereof. If the Venezuelan representative decides within the time stated above to oppose the claim upon the question of fact, he may have twenty days after the presentation of such claim to answer the same in writing, presenting with his answer such proofs and counterproofs as he may think relevant, producing all necessary documents. Such answer

will be presented and registered as provided in Section IV, and notice thereof given to the representative of the Netherlands. In case the opposition of the Venezuelan Government is based on the insufficiency of the documents presented, the representative of the Netherlands Government will be so informed and a suitable time will be allowed him in which to present the required documents.

VI

The Netherlands representative, or the person whom he will appoint as agent to support the Netherlands claims before the Mixed Commission, will have the right within five days after the presentation of the answer of the Venezuelan Government in any case to indicate whether he will join issue upon the memorial and answer, or desires to make reply to such answer. If he does not indicate his desire within such time to make reply, at the expiration of the said five days, or before with the consent of the commissioners, the Commission may proceed to dispose thereof. If the Netherlands representative, or above-named agent, decides within the time stated above to make a reply to such answer, he may have twenty days from the date of the presentation of such answer in which to make such reply, either verbally or in writing, accompanied by the proper translations and proofs. Such reply will be presented and registered as provided in Section IV, and notice thereof given to the representative of the Venezuelan Government.

VII

The Venezuelan representative may have five days after the presentation of such reply in which to decide whether he desires to make a written or verbal reply thereto, or to submit his case on the papers as they then stand. If he does not indicate his desire within the time stated above to make such counter reply, at the expiration of the said five days, or before with the consent of the commissioners, the Commission may proceed to dispose thereof. If the Venezuelan representative decides within the time stated above to make a counter reply to such replication, he may have twenty days from the date of the presentation of such replication in which to make his counter reply in writing or verbally, accompanied by the proper translations and proofs. Such counter reply will be presented and registered as provided in Section IV, and notice thereof given to the representative of the Netherlands, or his agent.

VIII

When the issue is formed in either of the ways suggested in the foregoing sections, the secretaries will forthwith inscribe the claims for hearing, giving immediate notice thereof to the representatives of both Governments. The tribunal will then fix a date for the hearing.

IX

The umpire will be present at all formal meetings of the Commission, and his decision upon any point necessary for the progress of the case may be invoked at any stage of the proceedings. His decision when thus invoked will be entered in the records of the proceedings.

X

After hearing the case, if the commissioners are agreed, the tribunal may give its decision as soon as the same can be put in writing. If the commissioners disagree, but mutually consider that further consideration is necessary, the

tribunal may order such further investigation, fixing the time and place therefor, and if the commissioners are then agreed, the decision may be rendered as provided in the first part of this section.

XI

No one may attend the sittings of the tribunal except the agents or other representatives of their respective Governments, the official secretaries, and the secretary to the umpire, the claimants or their representatives, and such other persons as first obtain the authorization of the tribunal either verbally or in writing.

XII

The secretaries will keep, besides the register mentioned in Section IV, a book in which they will enter a record of the proceedings and the decisions of the tribunal in each case, and another in which they shall enter the minutes of the sittings. These books will be kept in duplicate, one copy in Dutch and the other in Spanish, and will be verified, approved, and signed from time to time by the tribunal.

XIII

The representative or agent of the respective Governments will have the right at any time before a case is taken up for final consideration to present oral or written arguments in connection therewith, but no person will be entitled to recognition before the Commission except such representative or agent.

XIV

The secretaries will be charged with the custody of all records submitted to them, and will not deliver them to anyone save the members of the Commission, taking his receipt therefor. All papers will be indorsed by them with the date of filing. If, at any time, the Government submitting the same shall demand it, it will be entitled to receive from the secretaries a copy duly certified by them of any documents or papers filed before the Commission. Documents belonging to the archives of either the Dutch legation or the Venezuelan Government and presented to substantiate any claim shall, however, remain in the custody of the parties who have presented them.

XV

All documents and records shall be considered confidential.

OPINIONS IN THE NETHERLANDS-VENEZUELAN COMMISSION

J. N. HENRIQUEZ CASE

In accordance with the accepted principles of international law, to hold a government responsible for the seizure of goods or property such seizure must be made by the government itself, through its proper authorities, or by those who had a right to act in its name or behalf; it must be made by some one having authority to express the governmental will and purpose.

A government can not be held responsible for contract obligations incurred by the authorities of an unsuccessful revolution.

A government to be considered a de facto government must be one that is recognized as the ruling or supreme power. It is not one temporarily in authority in a district or state in revolution against the de facto and de jure government of the nation.

The Government of Venezuela is responsible to aliens, commorant or resident, for injuries they receive in its territory from insurgents or revolutionists whom the Government could control and not otherwise. That the Government was negligent in a given case must be alleged and proved.

PLUMLEY, *Umpire:*

In this case the commissioners failed to agree, and it came to the umpire for his opinion and decision.

The umpire finds that the claimant was the sole owner of the firm of Henriquez, Cadet & Co., doing business as a merchant under that name in the city of Coro, capital of the State of Falcón, Republic of Venezuela, and that he was a subject of the Netherlands, at and during the time of the happening of the events herein complained of.

His claim is for the sum of 19,250 bolivars.

The sum of 13,513 bolivars and 4 centimos was for goods and cash voluntarily loaned or delivered to revolutionary chiefs or their official subordinates, commencing with the so-called de facto government of General Rivera, in the State of Falcón, in June, 1902.

The sum of 5,737.20 bolivars is for cash and goods — mostly cash — furnished the present Government from November, 1899, to June, 1900. This sum is admitted to be lawfully due from the Republic of Venezuela to the claimant.

It is not questioned by either party that General Rivera was in control of that portion of the Republic of Venezuela of which the claimant was an inhabitant during the time mentioned, and that he was a revolutionary chieftain warring against the constitutional Government. Neither party questions that it was a revolution in fact, nor that the funds and effects furnished General Rivera and his subordinates went for the support and the benefit of the revolutionary forces only. But the claimant insists that it was the de facto government of the State of Falcón; that he was obliged to recognize its authority, and that, being a de facto government, the Republic of Venezuela is responsible for the loans and goods furnished to the superior powers then in control of that State. It is not claimed, however, that General Rivera held any office de facto or de jure under the authority or by the consent of the Republic of Venezuela. Indeed, it is recognized and admitted that such government as there was under him was in direct opposition to the constitutional Government, and was seeking the life of that Government. So far from having the authority to pledge the Government of the Republic of Venezuela for moneys or goods, every dollar received in value by General Rivera was to be used for the destruction of the Government, which it is now sought to charge with its payment. There is no claim or proof that the loan of the money or the delivery of the goods was in fact compulsory. It was placed upon other grounds. If, however, the claimant had been compelled to pay out this money and to deliver the effects mentioned, under such circumstances that in law it would amount to the seizure of them by General Rivera, or his subordinate officers, it would not then occupy such relation to the constitutional Government as would require its payment out of the treasury of such Government.

The umpire has already held in the case of James Crossman *v.* the Republic of Venezuela,[1] in the British Mixed Commission, now sitting in Caracas, that to hold the Government of Venezuela responsible for seizure of goods or property, it must be made by the Venezuelan Government through its proper authorities or by those who had a right to act in the name of and on behalf of the Government of Venezuela; that it must be done by some one having authority to

[1] Vol. IX of these Reports, p. 356.

express the governmental will and purpose. Such, in the opinion of the umpire, is the inflexible rule of international law as held by text writers, and by courts and mixed commissions, in all cases where the revolution or insurrection had passed beyond the control of the Government.

Wharton's International Law Digest, sec. 223, quoted in Moore, 2951:

> The sovereign is responsible to alien residents for injuries they receive in his territory from belligerent action or from insurgents whom he could control. * * *

Hall's International Law, 4th ed., pages 231-2 lays down the law as follows:

> When a government is temporarily unable to control the acts of private persons within its dominions, owing to insurrection or civil commotion, it is not responsible for injury which may be received by foreign subjects in their person or property in the course of the struggle, either through the measures which it may be obliged to take for the recovery of its authority, or through acts done by the part of the population which has broken loose from control. When strangers enter a State they must be prepared for the risks of intestine war, because the occurrence is one over which from the nature of the case the Government can have no control; and they can not demand compensation for losses or injuries received, both because, unless it can be shown that a State is not reasonably well ordered, it is not bound to do more for foreigners than for its own subjects, and no government compensates its subjects for losses or injuries suffered in the course of civil commotions, and because the highest interests of the State itself are too deeply involved in the avoidance of such commotions to allow the supposition to be entertained that they have been caused by carelessness on its part which would affect it with responsibility toward a foreign State.

Ralston, umpire, in the case of Sambiaggio *v.* Venezuela, before the Italian-Venezuelan Mixed Commission, now sitting in Caracas, held upon this question in part as follows: [1]

> 1. Revolutionists are not the agents of government, and a natural responsibility does not exist.
> 2. Their acts are committed to destroy the government, and no one should be held responsible for the acts of an enemy attempting his life.
> 3. The revolutionists were beyond governmental control, and the Government can not be held responsible for injuries committed by those who have escaped its restraint.

Duffield, umpire, in the case of Kumnerow *v.* Venezuela, before the German-Venezuelan Mixed Commission, late sitting in Caracas, concerning the late civil war in Venezuela, held as follows: [2]

> From its outset it went beyond the power of the Government to control * * *. Under such circumstances it would be contrary to established principles of international law, and to justice and equity, to hold the Government responsible.

See decisions of Thornton, umpire, in the United States-Mexican Commission, Moore's International Arbitration, pages 2977-8-9-80. See the United States-Spanish Commission of 1871, Ib. pages 2981-2. See United States and British Claims Commission of 1871, Ib. 2982, 2987, 2989. See United States-Mexican Commission of 1849, Ib. page 2972. See United States-Mexican Claims Commission of 1868, Ib. pages 2973, 2902, 2900. See also Ib. pages 2900-2901.

Such would be the position of the present claim if the claimant was allowed to be considered as one having suffered from the taking or seizure of his property and goods by force and against his will. This is the strongest position to which

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[1] *Supra*, p. 499.
[2] *Supra*, p. 370.

his claim can be assigned, and if in that position it is not well founded much less could it be when resting upon a basis of contract voluntarily entered into between him and those who as revolutionists had received his money and goods. As resting on such voluntary contract it would have no standing whatever before this Commission. Hence, in placing his claim for the purpose of investigation upon the same ground as though the property had been seized or forcibly taken, it is being considered from the best point of advantage possible to be given it.

A de facto government which would give this claim a position before this Commission must be one recognized as such for the Republic of Venezuela, and not one temporarily in authority in a State or district under revolution and against the will and purpose of the de jure and de facto government of the nation. Such a rule may work occasional hardship in the individual case, but it is the unvarying rule of international law, and taken as a whole works beneficially to the nation at large. Insurrections and revolutions are to be deplored, and the cases of especial hardship resulting within the territory subject to such conditions may call for sympathy, but they can have no right of compensation from the national treasury. Insurrections and revolutions more than all other forms of belligerency are always against the will of the constituted government and originate without its ability in any way to prevent them. To hold the Government responsible for the means by which its life is sought would be destructive of all governmental conditions.

Austin speaks of it [a government de facto] as one which presumably commands the habitual respect and obedience of the bulk of the people.

Halleck describes it as a government submitted to by the great body of the people and recognized by other States. (Halleck, p. 127.)

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It has been held in England that the courts of that country will not take notice of a foreign government not recognized by the Government of Great Britain. (City of Berne *v.* Bank of England, 9 Ves., 347.)

The Supreme Court of the United States in noting the features by which a government de facto is to he discriminated, mentions as one of these, recognition by a foreign power. (Thorington *v.* Smith, 8 Wallace, p. 9.)

This power has been elsewhere styled the ruling — the "supreme power" of the country. (Nesbitt *v.* Lushington, 4 Term, 763.)

(See Moore's Int. Arb., pp. 3553-3554.)

While the government of General Rivera might have been a de facto government for certain municipal purposes within the State or District, when, for the time his was the supreme force he had power to compel respect and obedience, it lacked all of the characteristics of a de facto national government that could speak and act in the name of Venezuela.

The umpire holds concerning the responsibility of Venezuela for the acts of unsuccessful revolutionists that the Government of Venezuela is responsible to aliens, commorant or resident, for injuries they receive in its territory from insurgents or revolutionists whom the Government could control, and not otherwise. That the Government of Venezuela was negligent in a given case must be alleged and proved.

So held by the present umpire[1] in the case of the Aroa Mines, Limited, supplementary claim, recently decided by him in the British Mixed Commission, now sitting in Caracas.

See authorities supra. Also see the treaties of Italy-Venezuela, 1861;[2]

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[1] Vol. IX of these Reports, p. 402.

[2] British Foreign and State Papers, Vol. 54, p. 1330.

Italy-Colombia, 1892; Spain-Venezuela, 1861;[1] Spain-Ecuador, 1888;[2] Spain-Honduras, 1895; Belgium-Venezuela, 1884;[3] France-Mexico, 1886;[4] France-Colombia, 1892;[5] Germany-Mexico; San Salvador-Venezuela, 1883.[6]

These are identical in principle with the one between Germany and Colombia of date 1892, which is here quoted:

> It is also stipulated between the contracting parties that the German Government will not attempt to hold the Colombian Government responsible, unless there is due want of diligence on the part of the Colombian authorities or their agents, for the injuries, vexations, or exactions occasioned in time of insurrection or civil war to German subjects in the territory of Colombia, through rebels, or caused by savage tribes beyond the control of the Government.

The umpire allows the sum of 6.164 bolivars, which is the sum of 5,737.20 bolivars for which he holds the Government of Venezuela responsible, including interest for two years and six months at 3 per cent, and disallows the claim of 13.513.04 bolivars, and judgment may be entered accordingly.

BEMBELISTA CASE

No compensation will be allowed for injuries received in the course of battle, and in the rightful and successful endeavor of the Government to repossess itself of one of its important towns.

It will always be presumed that the Government will be careful in the direction of the fire of the troops.

The general rule is that the bombardment of an open city is not admissible.

PLUMLEY, *Umpire:*[7]

This case came to the umpire on the disagreement of the Commissioners.

This claim is founded upon injuries to the claimant's dwelling house, furniture, and ware service by the Government troops in the engagement which took place at Puerto Cabello on the 11th day of November, 1899, which damages the claimant estimates at 1,900 bolivars.

The proofs show that the house was situated about 12 meters distant from one of the intrenchments of that town, and that it sustained serious injuries by the bullets during the severe fight which resulted in the taking of said town by the Government forces under the command of Gen. Ramón Guerra, the town being defended by the troops under General Paredes. The proofs further show that this house was at one of the points where the attack upon the town had been most formidable.

There seems to be no question as to the facts being as alleged by the claimant, but these facts indisputably show that the injuries complained of were received at a time and under such conditions as to forbid any recovery from the Government by the claimant. His injuries were received in the course of battle and in the rightful and successful endeavor of the Government to repossess itself of one of its important towns and ports. The Government owed a duty to the

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[1] Idem, Vol. 53, p. 1050.
[2] Idem, Vol. 79, p. 632.
[3] Idem, Vol. 75, p. 39.
[4] Idem, Vol. 77, p. 1090.
[5] Idem, Vol. 84, p. 137.
[6] Idem, Vol. 74, p. 298.
[7] For a French translation see Descamps-Renault *Recueil international de traités du XX*eme *siècle, 1903*, p. 874.

claimant and to all the inhabitants of Puerto Cabello to become the government in fact of the town in question. And as their repossession of it was resisted by the troops then in charge it became the due course of war to take and carry the intrenchments of the town. It was the misfortune of the claimant that his building was so near to one of the principal intrenchments, where there was the most serious resistance, and the injuries occasioned his property were one of the ordinary incidents of battle. Had his property been situated in such a part of the town as was out of the line of the intrenchments and the usual and proper course of battle, the case would be different. There is always a presumption in favor of the Government that it will be reasonable and will not be reckless and careless, and in this case the facts proven prevent any possible removal of that presumption. The Government bullets were directed toward the place required to insure success, and that there was so far a misdirection of those bullets as to do harm to his property located in such close proximity was a mere accident attending the rightful performance of a solemn duty. The most careful inspection of the case shows nothing that puts this property within the list of exceptional instances, but rather they all place it in the immediate line of battle, and in the very track of flagrant war.

The rules laid down concerning bombardment, in article 32 of the Manual of the Institute of International Law, are in part as follows:

> It is forbidden:
> *(a)* To destroy private or public property if that destruction is not compelled by the imperious necessity of war.
> *(d)* To attack and bombard Localities which are not defended.

The destruction of these intrenchments and the carrying of the town by the Government troops were compelled by the imperious necessity of war. The intrenchments and the town were defended. The better rule seems to be that the bombardment of an open city — that is to say, one which is not defended by fortifications or other means of attack or resistance for immediate defense, or by detached forts situated in its proximity — for instance, at a maximum distance of 4 to 10 kilometers — is inadmissible in ordinary cases. But an unfortified town may be bombarded for the purpose of quelling armed resistance. Since this was a fortified town, of course the rule prohibiting bombardment in general does not apply, and if the bombardment of unfortified towns were permissible under the circumstances named, much more would it be true that towns intrenched, as was Puerto Cabello at the time complained of, might be attacked and bombarded without just cause of complaint.

It was held in Cleworth's case, American and British Claims Commission, Moore, 3675, that the value of a house destroyed in Vicksburg by shells thrown into the city by the United States forces during bombardment could not be recovered against the United States. This was the unanimous opinion of the Mixed Commission. So held in Dutrieux's case, Moore, 3702, Commission under convention between the United States and France, January 15, 1880. The claimant was the owner of two houses at Charleston, S.C. These houses were injured by shells striking them during the bombardment of that city by the United States. This case was carefully discussed and ably considered, and in the end the claim was disallowed.

In Lawrence on International Law, page 443, quoting from Brussel's Code, articles 15-17, Manual of the Institute of International Law articles 31-34, it is stated that —

> Even in bombardments it is now deemed necessary to spare as far as possible churches, museums, and hospitals, and not to direct the artillery upon the quarters

inhabited by civilians unless it is impossible to avoid them in firing at the fortifications and military buildings.

Lawrence, says, page 344:

But had the guns of the besiegers been deliberately turned upon the dwelling houses of the bombarded town, or had an open and undefended village been fired into, the person responsible for such proceedings would have been justly accused of barbarity forbidden by modern usage.

Wharton, volume 3, sec. 349, page 338, says:

The bombardment of unfortified towns is not permitted by the law of nations. (See Calvo, 3d ed., vol. ii, 137.) An exception to this rule is recognized in cases where the inhabitants of an unfortified city oppose by barricades and other hostile works, the entrance of the enemy's army, or wantonly proceed in the destruction of his property and refuse redress.

Lawrence's report, page 274: [1]

The American rule of international law was early adopted, that the Government was under no obligation to compensate its citizens for property destroyed or damages done in battle, or by necessary military operations in repelling an invading enemy.

And ibid, page 275:

No government, but for a special favor, has ever paid for property, even of its own citizens, destroyed in its own country, on attacking or defending itself against a common public enemy, much less is any government obliged to pay for property belonging to neutrals domiciled in the country of its enemy which may possibly be destroyed by its forces in their operations against such enemy. (Citing Perrin *v.* U. S., 4 C. Cls., 547.)

Mr. Seward, Secretary of State, said, in relation to a claim upon the United States by a French subject for property destroyed by the bombardment of Greytown, in July, 1854, that " the British Government, upon the advice of the law officers of the Crown, declared to Parliament its inability to prosecute similar claims. In 1857 Lord Palmerston applied the decision in the case of Greytown as a precedent for refusing compensation to British merchants whose property in a Russian port had been destroyed by a British squadron during the Crimean war. (See note in Lawrence's Wheaton, p. 145.)

" The governments of Austria and Russia have applied the doctrine involved in the Greytown case to the claims of British subjects injured by belligerent operations in Italy in 1849 and 1850. (See note p. 49, vol. 2, of Vattel, Guilaumin & Co.'s edition, 1863.)

" We have applied the same principle in declining to make reclamations for citizens of the United States whose property was destroyed in the bombardment of Valparaiso by a Spanish fleet, and in resisting the claims of subjects of neutral powers who sustained injury from our military operations in the Southern States during the recent rebellion. It will probably be found a sufficient answer to the reclamations of many of our citizens who have sustained losses from belligerent operations on both sides during the recent occupation of Mexico by French troops."

This is the rule recognized by Vattel, who says: " But there are other damages caused by inevitable necessity; as, for instance, the destruction caused by the artillery in retaking a town from the enemy. These are merely accidents. They are misfortunes which chance deals out to the proprietors on whom they happen to fall. * * * No action lies against the State for misfortunes of this nature, for losses which she has occasioned, not willfully but through necessity and by mere accident, in the exertion of her rights." (Vattel, book 3, ch. xv, sec. 232, p. 403.)

The umpire has made careful examination of nearly all of the international law text-books, and finds the principles herein laid down to receive their unqualified sanction. Hence he is compelled to say that in this case there is no

[1] H. R. Report 134, 43d Cong., 2d sess.

just ground for complaint against the Venezuelan Government and no claim thereon arises because of the injuries received.

The claim is disallowed, and judgment may be entered accordingly.

SALAS CASE

The Government of Venezuela is responsible to aliens, commorant or resident, for injuries they receive in its territory from insurgents whom the Government could control and not otherwise. That the Government of Venezuela was negligent in a given case must be alleged and proved.[1]

PLUMLEY, *Umpire:*

In this case the commissioners failed to agree and it came to the umpire for his decision.

The claimant is a Dutch subject resident at Barquisimeto. He claims an amount of 26,906 bolivars on account of damages upon his buildings and the personal property therein contained, which he sustained during the siege of Barquisimeto by the revolutionary troops under Gen. Luciano Mendoza in the month of June, 1902.

There seems to be no dispute concerning the facts, and they are substantially as follows: That the injuries and losses to the claimant occurred at the time when Barquisimeto was besieged by revolutionary forces; that during the besiegement the mercantile establishment of the claimant was occupied by these forces; the merchandise and furnishings of his store were taken and carried away by them, also a large deposit of stamps and national stamp paper, and the money in the drawer, as well as his account books, which were in the safe of said establishment, which safe was broken open; that starting from the partition wall between the house of the claimant and the one inhabited by one of the witnesses, and continuing up to the room where the office of Mr. Salas was kept, there were evident signs of walls and doors having been broken; the stands, wardrobes, and shelves of his lemonade factory were destroyed; the furniture generally broken; some excavations were made in the floor of the building, and there were places in the walls made to be used by the soldiery of the revolutionary army through which to fire their arms; all his mercantile stock and his machines for the manufacture of lemonade and gaseous waters were destroyed, and everything about the building was left in a decided ruin.

There is no claim that any injury was received to the buildings or property from the Government troops, which had been occupying the town, and which fought to maintain their possession thereof, but the proof is that all of the injury was caused by the voluntary acts of the revolutionary troops during their successful attack upon the city. As a result of this attack the Government troops were driven out of the city and the revolutionary forces were the victors and occupied the city for some time thereafter.

While the attack upon Barquisimeto was successful and the revolutionary party for the time became the dominant force in that immediate vicinity, the revolution itself was unsuccessful. There can be no question that the injuries were received from the hands of revolutionary soldiers, who for the time being and within that city were beyond the control of the Government. The Government in fact was defeated and was driven out of the city, so that in no way can it be held that they could have prevented these acts, and they can not be charged with a neglect of duty in not having done what they could not do.

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[1] See Sambiaggio case, *supra*, p. 499; Aroa Mines case, vol. IX of these Reports, p. 402; Kummerow case, *supra*, p. 370; J. N. Henriquez case, *supra*, p. 713.

The case comes clearly within the rule prescribed by the umpire in the case of J. N. Henriquez [1] (No. 1), concerning the responsibility of Venezuela for the acts of unsuccessful revolutionists:

That the Government of Venezuela is responsible to aliens, commorant or resident, for injuries they receive in its territory from insurgents or revolutionists whom the Government could control and not otherwise. That the Government of Venezuela was negligent in a given case must be alleged and proved.

The opinion of the umpire in the Henriquez case may be examined for the authorities there cited or quoted sustaining this proposition.

The claim is disallowed, and judgment may be entered accordingly.

EVERTSZ CASE

By article II of the protocol the Commission is bound to receive and consider all evidence whether taken ex parte and without notice or not.[2]

The Venezuelan Government held liable to indemnify claimant for property taken for the maintenance of prisoners left on claimant's estate [an island] without claimant's permission and without food.

Damages awarded for the property taken or destroyed at the price fixed by claimant. Claimant had the right to fix any price not extortionate if property was taken without his consent.

PLUMLEY, *Umpire:*

This case came to the umpire for his consideration and decision upon the disagreement of the honorable commissioners.

Before entering upon the consideration of the case proper, it seems wise to look first at the contention of the learned agent for Venezuela, who objects that the testimony presented on the part of the claimant Government can not be accepted as proof of any fact because taken in foreign parts and ex parte. While testimony prepared in the absence of the other party, without giving them an opportunity to elucidate the facts by cross-examination, would not have the evidential force which it otherwise would have, and while testimony so taken without due and reasonable notice to the opposing party of the time and place of such taking might be refused admission into courts controlled by definitive or restrictive rules and statutes covering such matters, yet here it must be both received and considered, however adduced or obtained, in virtue of the specific provision in that regard found in article II of the Netherlands-Venezuelan protocol of February 28, 1903, which protocol is the perfect law of this tribunal. It is there stated:

* * * They shall be bound to receive and consider all written documents or statements which may be presented to them by or on behalf of the respective Governments in support of or in answer to any claim. * * *

The probative force of the testimony presented is for the tribunal to determine, but that it must be received and considered is settled in advance.

Having determined that the evidence must be considered and weighed, it is next to determine what facts are to be found therefrom. If the testimony introduced on behalf of the claimant were in any material part untrue, it concerns facts so lately within the knowledge of the respondent Government, and its opportunity for countervailing proof is apparently so perfect and immediate

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[1] *Supra*, p. 713 and cases therein referred to.

[2] See Faber case, *supra*, p. 438 and note.

that the absence thereof is tantamount to the admission of the truth of the claimant's proof, and the umpire will deal with the case upon the assumption that the facts are as alleged.

It appears that the island of Orchila is a part of the territory of Colón, of the Republic of Venezuela; that in 1885 one Manuel Roblín assigned and transferred to Gen. Juaquín Crespo and Marco Julio Rivera the rights which he had previously acquired through a contract with the Venezuelan minister of fomento to burn lime and to raise cattle upon said island; that in August, 1890, Rivera ceded all his rights in the same to General Crespo, and, that on February 3, 1897, General Crespo sold outright to the claimant the cattle and dwelling house on said island and transferred to the claimant his usufructuary interest in said island for the term of fifteen years. These facts being admitted, it is not important to the determination of the questions here involved to study the especial terms of the original contract. It is enough for the umpire to know, what he finds to be true, that at the time of the happening of the events complained of the claimant was the lawful owner of the cattle and the boat in question and was in rightful and actual possession of the island.

Through the fortunes of war the respondent Government in January, 1902, found itself with certain military prisoners under its charge and within its control; through the fears or necessity of the respondent Government it had also in its control the persons of several of its citizens whom it deemed necessary to hold to insure its safety or welfare.

In accordance with what the umpire must assume was the wisdom of the respondent Government, it entered upon the deportation of these persons to the island of Orchila. As these persons were left on this island without any means of maintenance provided by the Government, it can not for a moment be assumed that the respondent Government was unaware of the fact that out of the cattle of the claimant they could obtain sustenance. Any other assumption is too contrary to the claims of humanity under the sway of christian civilization to be entertained. That their presence might be injurious otherwise to the rights of the claimant must have been in the mind of the respondent Government. There is no other rightful view of this act apparent to the umpire than that under the stress of its peculiar circumstances it decided to do as it did in full view of all the facts known and in full expectation of meeting and canceling all the obligations and consequences which might naturally flow from its acts.

As the case stands, the respondent Government must be held liable for the loss occasioned the claimant through the coast guard of the island of Orchila by the seizure and confiscation of the sloop of the claimant.

There is no suggestion by the learned agent for the respondent Government that the indemnity claimed is excessive, and since the claimant had no voice concerning the coming of these persons on to his estate and had no alternative in permitting his property to be taken for their maintenance, and since he was given no chance to decide concerning the taking and the selling of his boat, it is eminently just that he should name any price not extortionate for the losses incurred by him through the acts of the authorities of the respondent Government.

The umpire therefore finds for the claimant in the sum of $1,200 in the gold coin of the United States of America, or its equivalent in silver at the rate of exchange at the time of payment, and judgment may be entered accordingly.

BAASCH & RÖMER CASE

The jurisdiction of an international claims commission over the claims of a corporation is controlled by the nationality of the corporation and not by the nationality of the stockholders.[1]

Interest at the legal rate in Venezuela allowed on claims after the expiration of one year from the time that the Government is presumed to have had notice of them.

PLUMLEY, *Umpire:*

Messrs. Baasch & Römer, claimants, are successors of Messrs. Leseur, Römer & Co., which firm was composed of J. R. Leseur, M. A. Romer, H. A. Leseur, and E. Baasch. It is alleged and proven that the first three are Dutch subjects.

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[1] This subject of the nationality of legal persons is at large discussed in an article by P. Arminjon in the Revue de Droit International, series 2, Vol. IV, 1902, p. 381, the length of which precludes copying or even digesting it here. The subject is discussed under the following headlines, with the citations indicated:

I. Application of the idea of nationality to moral persons, citing —

Laurent, Principes de droit civil français, t. I, p. 404; Theorie und Praxis des internationalen Privatrechts, sec. 104, n. 1. Voir dans le même sens les auteurs cités par M. de Bar. Lyon-Caen et Renault s'expriment en termes presque identiques, Traité de droit commercial, t. II, sec. 1167. Dans son livre sur Les personnes morales, M. de Vareilles-Sommières s'efforce de démontrer avec beaucoup de vigueur et de talent que " la personnalité morale n'étant qu'un résumé et une représentation (purement doctrinale d'après l'auteur) des associés. * * * n'a point de nationalité, car elle n'est qu'un procédé intellectuel, qu'une image dans notre cerveau * * * Seuls les associés ont une nationalité " (p. 645, no. 1503). Par contre, d'après M. Planiol, Traité de droit civil, t. 1, sec. 2017-2019: " Les prétendues personnes morales n'ont pas de domicile, puisqu'elles ne vivent pas et que le domicile est avant tout le lieu d'habitation d'un être vivant." Au fond, ces théories qui prétendent ainsi rectifier le langage courant en refusant aux êtres de raison, les unes la nationalité, les autres le domicile, ne jouent-elles pas un peu sur les mots?

II. Nationality of corporations — systems proposed — how is such nationality determined?

First system. The corporation takes its nationality from the state which authorizes its existence, citing —

Droit intern. privé, traduction Pradier-Fodéré, p. 638; idem., t. II, p. 150; Russian imperial decree of November 9, 1887; Annuaire de législ. étrang., 1889, p. 806. Sur la condition des sociétés étrangères, spécialement des sociétés françaises en Russie, voir J. Barkowski, Journ. de droit intern. privé, 1891, p. 712, et Winter-Haller, Journ. de droit intern. privé, 1898, p. 40 et suiv.; Journ. de droit intern. privé, 1888, p. 438; Royal imperial order of Austria, November 29, 1865; Roumanian Code of Commerce, article 244; Euclides, condition légale des sociétés de commerce étrangères en Grèce, Journ. de droit intern. privé 1889, p. 59 et suiv. Code de commerce hellénique, art. 37; loi du 10 août 1881, art. 2.

Second system. The nationality of the corporation is determined by that of the country within whose jurisdiction it is constituted, citing —

Congrès des sociétés de 1889. Observations de M. Brunard, Compte rendu, p. 213; Congrès des sociétés de 1900. Observations de M. Cassano, Compte rendu, p. 291. Diverses décisions de jurisprudence qui visent presque toutes une constitution de société arguée de fraude semble admettre implicitement que le lieu de l'acte aurait pu servir à déterminer la nationalité sociale s'il avait été choisi de bonne foi: V. Tr. com. de la Seine, 17 novembre 1875; Clunet, 77, p. 45, et 10 février 1881; Clunet, 81, p. 158; Cass (Ch. cr.), 21 novembre 1889; Clunet, 1889, p. 850. Tr. com de la Seine, 7 janvier 1891; Clunet, 92, p. 1025, et 22 octobre 1895; Clunet, 1896, p. 138. Gand, 21 avril 1876; Clunet, 76, p. 305. Cour d'Alexandrie, 12 décembre 1895; Clunet, 1896, p. 904; Clunet, 1888, p. 652. Observations de M. Larombière, Compte rendu de congrès de 1889, p. 230.

Third system. By the nationality of the stockholders, citing —

Vareilles-Sommières, Synthèse de droit international privé, t. II, p. 74. Les personnes morales, p. 645, sec. 1503 et s.; La synthèse de droit international privé, t. II, p. 78. En ce sens Brocher, I, 193. Tr. civil Seine, 26 mai 1884; Journ. de droit intern. privé, 1885, p. 192 et s. 88, 2, 89 (note de M. Chavegrin). Tribunal fédéral suisse, 11 novembre 1892; Journ. de droit intern. privé, 1894, p. 640. Cour d'Alexandrie, 11 mars 1899; B. L. J. ég., XI, p. 140. En sens contraire tr. com du Havre, 3 février 1874 et tr. de Nancy, 16 avril 1883. S. 88, 2, 89, Tr. de com. Seine, 24 octobre 1895. Journ. de droit intern. privé, 1896, p. 138. Note précitée de M. Chavegrin. Cohendy, note sous D. P. 1890, 2, 1. Et les auteurs qui adoptent les systèmes dont il va être parlé.

The claimants are liquidators of the firm of Leseur, Römer & Baasch, which firm was composed of J. R. Leseur, M. A. Römer, H. A. Leseur, H. G. Römer, O. Baasch, and O. E. Römer. It is alleged and proven that the first four are Dutch subjects.

On behalf of Leseur, Römer & Co. accounts against the respondent Government are set down as follows, viz:

July 7, 1892. Order No. 578, for 1,680 bolivars, drawn by the governor of the *Federal District* against the municipal revenues for wool stuff. The order states that it is by the authority of the President of the Republic and is for war uses. Frequent demands are asserted, but no payment made. Interest at 8 per cent is claimed. It is allowed with interest at 3 per cent after one year, amounting to *2,208.36 bolivars*. As three-fourths of the firm are proven to be of Dutch nationality this item is allowed to the claimants at 1,656.27 bolivars.

Fourth system. That of the country where the stockholders reside, or which is the domicile of the majority of the stockholders at the time of their subscription, citing —

Annales de droit commercial, 1890, 2, 257 et s.

Fifth system. The nationality of the corporation is the same as that of the country where it has its principal place of business, citing —

Loi belge du 18 mai 1873, art. 128 et s.; code commercial italien, art. 230; code de commerce portugais, art. 109-111, traduction, Lehr, p. 40-41; code de commerce roumain, art. 239. Acte 44 du 25 février 1889 de l'Etat de Nevada. Annuaire de lég. étr., 1890, p. 918. Circulaire du département fédéral suisse de justice et de police * * * concernant l'inscription au registre du commerce des sociétés commerciales étrangères. " * * * il est d'usage d'inscrire dans le registre les succursales des sociétés étrangères * * * pourvu que ces sociétés soient valablement constituées au lieu de leur siège principal * * * Il convient de consacrer cet usage." Journ. de droit intern. privé, 1900, p. 443. Lyon-Caen, Journ. des sociétés, 1880. p. 36. Surville et Arthuys, Droit intern. privé, sec. 456. Weiss, p. 418-419. Asser et Rivier, Elém. de droit intern. privé, p. 197. Despagnet, Précis, sec. 64. Boistel, sec. 396. Gand, 18 février 1888. Pasicr. 1888, 2, 203. Traité de droit commercial, II, sec. 1167, p. 824. Lyon-Caen et Renault, op. cit. * * * II, sec. 1167.

Sixth system. The judge shall determine the nationality of the corporation in accordance with all the facts which have been enumerated, fortifying them, if necessary, with others, citing —

Lyon-Caen et Renault, Traité de droit commercial, t. II, sec. 1168. Maguero, Traité alphabétique des droits de l'enregistrement, cité par J. Robin, Régime des valeurs étrangères (thèse), p. 26. Cour de cassation, 30 juin 1870. D 1870-1-416. Tout en admettant " en général " le critérium tiré de centre d'affaires, l'excellent Traité de droit international privé de M. Rolin semble incliner vers le système éclectique. Pour cet auteur " la question n'est pas susceptible d'une solution absolue " (t. III, sec. 1278). " Des sociétés constituées à l'étranger et fonctionnant en France " (Journal de droit international privé, 1875, p. 348). Surville et Arthuys, Cours de droit intern. privé, sec. 456: " Nous pensons qu'il est impossible de donner une règle générale et que l'on devra s'attacher à celui des deux établissements (le siège social ou le centre d'exploitation) qui doit être considéré en fait comme le principal."

III. Solution of the problem. Intention of the parties as to the nationality that the corporation shall assume.

Brocher, Revue de droit intern., 1872, p. 189 et s., Cours de droit intern. privé. p. 315 et s.; Aubry, " Domaine de la loi d'autonomie " (Journ. de droit intern. privé, 1896, p. 465, 471); Vareilles-Sommières, Synthèse du droit intern. privé, t. I, sec. 396-402; Rolin, Principes de droit intern. privé, t. I, sec. 251-291. Vareilles-Sommières, Synthèse, t. I, 247, sec. 401.

The nationality of the corporation follows that of the State whose territory is the center of its juridic existence, that is to say, that within the borders of which it carries on its activity and attains its end, in a word, as we have already established, that of its principal social and administrative seat, citing —

En ce sens, Cass., 24 juin 1880 S., 1881, 1, 130. Chavegrin, note S., 1888, 2, 89. Cohendy, note D., 1890, 2, 1. Pic., " Faillite des sociétés en droit international privé " (Journ. de droit intern. privé, 1892, p. 584-585). Tribunal de commerce de la Seine, 24 octobre, 1895; Journ. de droit intern. privé, 1896, p. 138. Cass. (Req.), 22 décembre 1896; Journ. de droit intern. privé, 1897, p. 364. Tr. Seine, 12 juillet 1897; Journ. de droit intern. privé, 1898, p. 341. Thaller, Traité, sec. 625. Bar, I, secs. 47, 104, et s. Dicey. Conflicts of Laws, pp. 154-156. Wharton. secs. 48a et 105. Chambéry, 1er déc. 1866, D., 66; t. 246. Cass (Req.), 25 février, 1879, affaire du

An account for 26,484.52 bolivars for supplies furnished the "national revolution" of 1892 — a successful revolution. The time covered by these accounts was from December 9, 1892, to February 10, 1893. The documents proving these accounts were very early delivered to the "Board for the examination of credits for supplies to the national revolution," and they are still in the hands of the respondent Government although their return was twice requested by the claimants in writing. That they are not produced on request or in opposition to the claim as made will be accepted by the umpire as proof that the claim is well founded as laid. Interest is claimed at 8 per cent, and is allowed at 3 per cent after July 10, 1894, amounting to *34,343.80 bolivars*. The claim is allowed at three-fourths of such sum, which is 25,757.85 bolivars.

Crédit foncier suisse. Journ. de droit intern. privé, 1879, p. 396. Cour de cass. de Florence, 5 juin 1896, 25 juin 1896. Journ. de droit intern. privé, 1899, p. 323.

IV. Concerning fraud, citing —

P. Pic., "Faillite des sociétés commerciales en droit international privé" (Journ. de droit intern. privé, 1892, p. 585). Wharton, Conflict of Laws, sec. 695. Thol cité par Bar, sec. 122, n. 38. La loi, 27 mai 1899. Journ. de droit intern. privé, 1900, p. 802. Annales de droit commercial, 2, 1890, p. 257. Robin, Régime légal des valeurs mobilières étrangères (thèse), p. 38. Paris, 4 nov. 1886, S. 88, 2, 89. note de M. Chavegrin. Observations et amendements de M. Lebel, compte rendu sténograpique, p. 368-370. C'est dans cette hypothèse d'un siège social fictif qu'ont été rendues les décisions suivantes qui déclarent nulle la société constituée en violation des lois du pays de son domicile véritable. Conseil fédéral suisse, 21 janvier 1875. Journ. de droit intern. privé, 1875, p. 80. Tr. de com. de la Seine, 27 août 1891. Journ. de droit intern. privé, 1891, p. 1241. Cass. (Req.,) 22 décembre 1896. Journ. de droit intern. privé, 1897, p. 364.

V. Practical application of the freedom of the parties, saying —

Peut-on soutenir, par exemple, que la société qui revêt la nationalité de son centre d'opérations peut légitimement prétendre avoir intérêt à échapper aux impôts perçus seulement sur les sociétés nationales dans le pays où elle possède son domicile? Voir le rapport de M. Lyon-Caen à la session tenue à Hambourg, en 1897, par l'Institut de droit international. (Annuaire de 1891-92, p. 160.) Lyon-Caen et Renault, Traité de droit commercial, t. II, p. 824-825.

VI. Concerning the change of the corporate nationality, citing —

Aix, 30 janvier 1868; Sirey, 68, 2, 343; Cass., 17 juin 1880 (Journal de droit international privé, 1881, p. 262 et 263); tribunal de l'empire allemand, 5 juin 1882 (Journal de droit international privé, 1883, p. 315). Pineau, Des sociétés commerciales en droit international privé. Dans le même sens, Vavasseur, Des sociétés, sec. 957. Le jugement précité du tribunal de l'empire allemand exprime la même idée sous une forme un peu détournée. "Si les sociétés d'origine allemande, qui fixent leur siège à l'étranger, sont déchues de leurs droits, cela tient uniquement à ce que la perte de leur nationalité, si l'on peut ainsi s'exprimer, doit entraîner pour elles celle des privilèges que cette nationalité leur conférait. Il en résulte que le transport du siège social à l'étranger produit les mêmes effets." (Journal de droit international privé, 1883, p. 316, Laurent, Droit civil, t. I, p. 389. Ibid., loc. cit., p. 370. Note de M. Boistel, sous Paris, 6 décembre 1891. Dalloz, 1892, II, 385. Paris, 19 avril 1875. Dalloz, 1875, II, 161. Dalloz, 1893, I, 103, note. Voir aussi Dalloz, 1894, I, 313, note de M. Desjardins, sous cassation, 29 janvier 1894. Cassation, 26 novembre 1894 (Dalloz, 1895, I, 57); Amiens (chambres réunies), 29 juin 1895 (Journal de droit international privé, 1897, p. 158). Cassation, 29 mars 1898 (Journal de droit international privé, 1898, p. 758). Tribunal consulaire de France, à Constantinople, septembre 1899 (Journal de droit international privé, 1900, p. 657). Companies act de 1862, sec. 4, Consulter sur les Joint Stock Companies, l'excellent manuel de Jordan et Gore-Brown.

VII. Nationality of associations and endowments, saying —

La cour de cassation de Rome a eu l'occasion de proclamer dans un arrêt cité par le Journal de droit international privé, 1890, p. 739, "Qu'un ordre religieux, présentât-il un caractère d'universalité, comme celui des Jésuites, ne pouvait être, au point de vue des rapports de droit civil, considéré et traité comme constituant une personne morale universelle. * * * Par suite, pour tout ce qui concerne l'acquisition ou la possession des biens, l'ordre des Jésuites se résout en autant de personnalités juridiques qu'il y a d'États dans lesquels il est reconnu." Geoufire de la Pradelle, des fondations (thèse), p. 8. L'auteur justifie par de solides raisons ce procédé "plus terne, moins pittoresque, que le second," mais, selon lui, plus simple, plus pratique, plus respectueux de la réalité. Les expériences, faites depuis quelques années semblent pourtant lui donner tort. Bien des fondations indépendantes de toute association fonctionnent actuellement en France et y donnent d'excellents résultats. Saleilles, Étude sur la théorie de l'obligation, 2e édition, p. 151. (Voir le code civil allemand, art. 80-88.) Truchy, Des fondations (thèse), p. 159. A parler rigoureusement, ni le trust ni le ouakf n'ont une véritable personnalité juridique. Ils n'en forment pas moins l'un et l'autre un ensemble de biens distinct du patrimoine du nazir ou de celui du trustee, et indépendant des changements subis par la personnalité de ces individus.

An account of 1,385.72 bolivars for merchandise supplied to the army May 10, 1892, under direction of its commander, and the bill vouched by him, and its payment ordered. The umpire understands that the army is national, not of the State, and hence, he holds this claim properly chargeable to the National Government. Interest is demanded at 8 per cent, and is allowed at 3 per cent after May 10, 1893. He assumes that this claim was reported to the Government by the commander, as was his official duty to do, and the Government is allowed one year as a reasonable time in which to make payment. It amounts to *1,828.05 bolivars*. The claim is allowed for three-fourths of the foregoing, which is 1,371.04 bolivars.

The claimants are also liquidators of the extinct firm of Leseur, Römer & Baasch, which firm was composed of J. R. Leseur, M. A. Römer, H. A. Leseur, H. G. Römer, O. Baasch, and O. E. Romer.

It is alleged and proven that the first four are Dutch subjects.

The first item is for a document termed a bond issued by General Aquilino Juarez March 22, 1898, for 3,000 bolivars in recognition of a payment made to him by the extinct firm on account of the military necessities of the National Government. The document is proved and brought in to the Commission by the claimants. Interest is claimed at 8 per cent, and is allowed at 3 per cent after March 22, 1899. The same reasons apply here as in the last sum allowed and need not be repeated. It amounts to 3,429.75 bolivars. It is allowed at two-thirds of this amount, which is 2,286.50 bolivars.

A claim of 1,910 bolivars, based on an order of General Diego Bta. Ferrer, minister of war and marine, of date September 27, 1899, on the ministry of finance, for cash supplied by the extinct firm to General Juarez to ration the forces of the Government garrisoned at Barquisimeto. The order is produced and is in the hands of the Commission. Interest is claimed at 8 per cent, and is allowed at 3 per cent from its date, it being regarded by the umpire as a debt of which the financial department of the Government undoubtedly had immediate notice through the proper channels, and being also for cash, which relieved the Treasury of just so much of its burden. Interest, therefore, should begin at once. It amounts to *2,354.14 bolivars*. It is allowed at two-thirds that amount, which is 1,436.08 bolivars.

A claim of 2,200 bolivars, based on a certificate issued by the board for the examination and qualification of credits, approved by the minister of finance, of date July 26, 1901. The certificate is produced and is in the hands of the Commission. Interest at 8 per cent is claimed, but interest is allowed at 3 per cent from its date, for the same reason as named in the last claim. It amounts to *2,354.96 bolivars*. It is allowed at two-thirds of that amount, which is 1,569.96 bolivars.

A claim for the practical destruction of the plant of the Luz Electrica de Barquisimeto Company, a corporation with a paid-up capital of 240,000 bolivars, by troops in command of General Freites. The extinct firm of Leseur, Römer & Baasch held capital stock to the amount of 26,800 bolivars. The destruction of the plant bankrupted the company and they claim to recover for the full amount of the shares. It is not necessary to consider this claim further than to accede to the position taken by the learned agent of the respondent Government. It is a Venezuelan corporation created and existing under and by virtue of Venezuelan law and has its domicile in Venezuela. This Mixed Commission has no jurisdiction over the claim. It is the corporation whose property was injured. It may have a rightful claim before Venezuelan courts, but it has no standing here. The shareholders being Dutch does not affect the question. The nationality of the corporation is the sole matter to be considered. This claim is therefore dismissed without prejudice.

The umpire holds for the purposes of this case that the two firms being extinct the claims may be allowed in proportion to the stated interest of the Dutch members thereof. He does this the more readily because there seems to be no question about the indebtedness of the National Government, and it at most means a payment in this way instead of some other and will be a cancellation of its indebtedness pro tanto, which indebtedness it must discharge in some manner. No inequity or injustice is therefore done, even if a technical mistake has been made.

SUMMARY

	Bolivars	
On account of extinct firm Leseur, Römer & Co.	1,656.27 25,757.85 1,371.04	
Total		28,785.16
On account of extinct firm Leseur, Römer & Baasch	2,286.50 1,436.08 1,569.96	
Total		5,292.54
Total award		34,077.70

Judgment may be entered for the sum of $6,553.40 in the gold coin of the United States of America, or its equivalent in silver at the rate of exchange at the time of payment.

JACOB M. HENRIQUEZ CASE

Claim dismissed for want of proof of nationality of other members of the firm and their respective interests therein.

Where in a pleading the respondent Government sets out that a firm is of Venezuelan origin and domicile, and no contradiction is interposed by the claimant Government, the claim will be dismissed for want of jurisdiction.

A government will not be held responsible for the wanton, reckless acts of unofficered troops.[1]

PLUMLEY, *Umpire:*

Upon the disagreement of the honorable commissioners this case came to the umpire for his consideration and determination.

This claimant appears before this Commission as a late member of the extinct firm of Jacob M. Henriquez & Co., merchants at Maracaibo, and asks compensation for the sacking of a store, by Government troops, belonging to said merchants in the parish of Nueva Era, in the jurisdiction of Betijogue, in the State of Trujillo. The sacking is alleged to have occurred on the 25th of August, 1899, by forces forming a part of the army commanded by Gen. Antonio Fernandez while the said troops were in possession and occupancy of the store building of these merchants, which occurred during the time that the troops were passing through the place. The goods were ironware, kept for the purposes of wholesale, and in addition to the sacking of the store it is claimed that the troops tore down the inclosure of the yard and broke down the interior doors of the building, and that such goods as they did not take they left in ruin.

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[1] See Roberts case, Vol. IX of these Reports, p. 205, and Chilean Claims Commission (1901) Report, Bacigalupi case, No. 42.

A careful examination of the proof offered does not disclose that any of this ironware was of such character as to be useful to the Government troops while en route or in garrison.

The nationality of Jacob M. Henriquez is fully established as being a Dutch subject, but no proof is offered of the nationality of the other members which comprised the firm or association prior to its extinction. Neither is there any proof offered nor any suggestion made as to the respective interests of the members constituting said firm or association, prior to its extinction, or subsequent thereto. No proof is offered and no claim, in terms, is made that the claimant is the lawful owner of all the rights of action, credits, and properties of said extinct firm or association. No proof is offered or claim made that the possession and occupancy of said store building was with the knowledge or in the presence or by command of the officers of the Government army. So far as the facts are stated it would appear more to be an unauthorized sacking and looting of the merchandise of the store than of any taking of the goods for the purposes and uses of the army by direction and through the approval of the Government officers. There is no proof that the injuries done to the building were in consequence of, or as an incident to, the occupancy of said building as a place of rendezvous under official orders, but it has more the appearance of reckless and undirected action of ungoverned soldiery.

Both the learned agent for the respondent Government and the honorable commissioner thereof assert as lawyers, and the latter with the added responsibility of his oath as such commissioner, that this association, or partnership, or mercantile establishment, by whatever name it may be called, was in fact and law, by virtue of the Venezuelan code governing such associations and establishments, of Venezuelan origin and domicile; that it is therefore not a Dutch citizen or subject, but Venezuelan, and hence this Commission has no jurisdiction over it or any claim which it may present or which may be presented for it. This claim of the Venezuelan Government, first appearing in due course through the answer of the learned agent, being subjected to the scrutiny and inspection of the learned agent for the claimant Government, was neither answered nor denied, but instead the said learned agent for the claimant Government renounced his right to make a reply thereto. Since this jurisdictional position of the learned agent for Venezuela is neither answered nor denied by the learned agent for the claimant Government, whose duty it was to make such denial or answer if such jurisdictional position was not properly taken, it is proper that the umpire should assume that it is not susceptible of answer or denial and is to be taken as in effect admitted. It is also true that it would be impossible for the umpire, under the facts stated by the claimant in his own declaration and in his proof, to award the claimant the whole of any sum which he might adjudge proper, and if not the whole then for the same want of proof the umpire could make no sensible division of said sum. If the contention of the respondent Government is to prevail, then the umpire has no jurisdiction over the question presented. If all these legal questions were susceptible of solution favorable to the claim of Mr. Henriquez, there is still left the fact that on the proof it is impossible to say that the goods taken and the injury done to the property of the claimant was done under such circumstances as to entitle the claimant to an award. Since either one of these contentions being resolved in favor of the respondent Government would be a sufficient answer to the claim and an explicit denial of an award, it is the opinion of the umpire that this claim must be disallowed, and such may be the judgment entered.

ARENDS CASE

A government may bring to port vessel found within its territorial waters in order that a thorough investigation may be made concerning the ship, but in so doing the government is obliged to treat the master and crew with consideration and complete the investigation promptly.

PLUMLEY, *Umpire:*

Upon the disagreement of the honorable commissioners this case came to the umpire for his determination:

The salient facts succinctly stated are these: The claimant is a Dutch subject and a resident of the island of Aruba; that in March, 1897, he was the owner of the Dutch schooner *Jupiter*, Capt. Arnodus Rees. On the 15th of that month the captain, with five fishermen and a cook, left the port of Paardenbaar, of the island of Aruba, provided with a fishing permit on the high seas, in a westerly course from the island. They arrived at their destination and entered upon their purpose, but on the 19th, the Friday following, they found that the staves of one of their principal water casks had been broken and nearly all the water had leaked, and they had only two small barrels of water left. Not daring to remain longer on the high seas with so small a quantity of water, they set sail to return to the island of Aruba. After having unsuccessfully tacked during one day northwest of the island, on Saturday, the 20th of March, they sailed toward the south with the hope of finding better seas in which to navigate and the sooner reach their island. At about 11 o'clock of that night, while they were sailing toward the south, they were detained by the Venezuelan man-of-war *Mariscal de Ayacucho* in Venezuelan waters. The commander of the war vessel finding this ship in Venezuelan waters with nothing but a fishing permit for a different part of the seas determined, notwithstanding the explanation of the captain, to take the vessel in tow to La Vela de Coro, in the Republic of Venezuela, where they arrived at about 2 o'clock in the afternoon of the 22d of March. After their arrival at this port the captain was taken before the customs-house principal office at La Vela de Coro to be interrogated. Subsequently he was ordered not to leave the town and not to communicate with his vessel. It was on Wednesday following that the captain and the crew were all taken before the judge and there interrogated, after which they were given their liberty and permitted to return on board and to land their fish. On request of the captain the judge allowed him to sail out of the port on his giving surety for his ship, which he obtained. His official permit for fishing was not returned to him, although he asked for it, but he was given a document signed and sealed according to which he could sail without any objection. It appears that the water on board the *Jupiter* was all exhausted about 11 o'clock on the morning of the 22d; that the crew asked the customs guard left on board for some water, but it was not given them, and it was not until Tuesday morning — the next day — that another ship provided them with some water.

The owner of the ship claims 5,000 bolivars for the unlawful seizure and detention of his ship and of the crew and captain.

It is the opinion of the umpire that the captain was justified in taking the course he did in sailing south for better waters in which to navigate and the sooner return to the island of Aruba on account of the shortness of water, but that the misadventure of sailing into Venezuelan waters justified the commander of the man-of-war in making the investigation that he did: and on finding a ship in the waters of his country with no other reasons than those given and with only a fishing permit for another part of the sea, there was sufficient cause for him to take the ship in tow to the port where there was

competent authority under Venezuelan law to interrogate the captain and his crew, examine their papers, and determine whether the ship was innocent in the waters of that country. This view of the case is especially enhanced by the well-known conditions concerning smuggling existing between the Dutch West Indies and the country of Venezuela, and the consequent increased care and caution necessary for an efficient execution of the duties of the officials whose duties are to prevent such offensive operations against the revenues of Venezuela. But it seems to the umpire that too long a time elapsed between the arrival of the ship in the port and the hearing of its officer and men and the examination of its papers. Arrived at 2 o'clock on the afternoon of the 22d, the examination might well have been had, the vessel relieved of its necessities in the way of water, and allowed to sail that same night. It was in fact detained without any explanation for such lapse of time until the 24th.

The treatment of the crew, who were refused their petition for water by the officer left in charge of their boat, is also an element proper to be considered, and by no inaction on the part of the Venezuelan authorities should they have been allowed to remain without water for about two days. This conduct is contrary to that spirit of commerce and amity which should exist between the two nations and their respective citizens under circumstances where the one is perforce dependent upon the action of the other. While the delay attendant upon the tow of the ship *Jupiter*, nearly two days, that they might explain its presence in Venezuelan waters was a necessary hardship following the misadventure to the captain of getting within those waters, although unintentionally, it was the duty of the officers in charge of the port having those matters in hand to give their immediate attention to this matter, and any delays beyond the necessary time for the conclusion of their labors was an unlawful detention of the vessel. The damages consequent upon the detention of this vessel are necessarily small, but it is the belief of the umpire that the respondent Government is willing to recognize its responsibility for the untoward act of its officers under such circumstances and to express to the sovereign and sister State, with which it is on terms of friendship and commerce, its regret for such acts in the only way that it can now be done, which is through the action of this Commission by an award on behalf of the claimant sufficient to make full amends for the unlawful delay.

In the opinion of the umpire this sum may be expressed in the sum of $100 in gold coin of the United States of America, or its equivalent in silver, at the current rate of exchange at the time of payment, and judgment may be entered for that amount.

MAAL CASE

Every government has the right to exclude or expel foreigners from its territory if they are prejudicial to public order or the welfare of the state.[1]

Expulsion of a foreigner is justifiable only when his presence is detrimental to the welfare of the state, and when it is resorted to it must be accomplished with due regard to the convenience and personal and property interests of the person expelled.

The Government of Venezuela must stand sponsor for the acts of its officers no matter how odious these acts may be, and in the event that it is not shown that officers committing unwarranted offenses in the exercise of their duty have been reprimanded, punished, or discharged the Government will be condemned to pay a fitting indemnity to the person injured.

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[1] See *supra*, p. 528.

PLUMLEY, *Umpire:*

On the disagreement of the honorable commissioners this case came to the umpire for his consideration and determination.

The salient facts are that the claimant at the time of the happening of these events was a commercial traveler representing important houses in the United States of America and in Europe; that in the prosecution of his business he left Curaçao on the 9th of June, 1899, on the Red " D " Line steamship *Caracas*, bound for La Guaira and thence to the city of Caracas, there to attend to his duties as such commercial traveler. On the 10th of June he arrived at the port of La Guaira; had disembarked from the steamship *Caracas* and was about to enter the train for the city of Caracas when he was accosted by a Venezuelan citizen, who informed him that he was under arrest and that he must go with him to the port; that he was accompanied also by armed police. His trunks and baggage were opened and examined in the minutest detail. While thus under arrest he was subjected to the indignity of being stripped of all his clothing and made the subject of much mirth and laughter on the part of the bystanders; that he was later taken by order of the customs administrator to the civil chief of that city, who, after communicating by telephone with the President of the Republic, informed the claimant that he was suspected of being a conspirator against the Government of Venezuela and in the interest of revolutionists, and that he must at once reembark and leave the country of Venezuela not to return, and was conducted by this same posse to the steamship *Caracas*, where after much solicitation he was permitted to enter for his return trip to Curaçao. He claims large damages because of his arrest, the indignities which he suffered, and the delay which it brought about in his anticipated trip to Europe in the prosecution of his business enterprises, causing him the loss of much money. He denied at the time all connection with revolutionary matters incident to Venezuela and protested that he was utterly indifferent to the political conditions of this country. He makes full proof of his Holland citizenship, and the case is properly within the jurisdiction of this tribunal.

Notwithstanding the objections of the learned agent for Venezuela, the umpire has found these facts from the testimony submitted by the claimant, and for the reasons governing him in so finding, he refers to his opinion delivered before this Commission in the claim of Carel de Haseth Evertsz, No. 12.[1]

There is no question in the mind of the umpire that the Government of Venezuela in a proper and lawful manner may exclude, or if need be, expel persons dangerous to the welfare of the country, and may exercise large discretionary powers in this regard. Countries differ in their methods and means by which these matters are accomplished, but the right is inherent in all sovereign powers and is one of the attributes of sovereignty, since it exercises it rightfully only in a proper defense of the country from some danger anticipated or actual.

This Government could never give up the right of excluding foreigners whose presence they might deem a source of danger to the United States. (Mr. Everett, Sec. of State, to Mr. Mann, Dec. 13, 1852.) Wharton's Int. Law Dig., vol. 2, sec. 206, p. 516.

Every society possesses the undoubted right to determine who shall compose its members, and it is exercised by all nations both in peace and war. A memorable example of the exercise of this power in time of peace was the passage of the alien law of the United States in the year 1798. (Mr. Marcy, Sec. of State, to Mr. Fay, Mar. 22, 1856.) Ibid.

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[1] *Supra*, p. 721.

It may always be questionable whether a resort to this power is warranted by the circumstances, or what department of the Government is empowered to exert it; but there can be no doubt that it is possessed by all nations, and that each may decide for itself when the occasion arises demanding its exercise. (Supra, p. 517.)

This Government can not contest the right of foreign Governments to exclude, on police or other grounds, American citizens from their shores. (Mr. Frelinghuysen, Sec. of State, to Mr. Stillman, Aug. 3, 1882.) (Supra, p. 520.)

The umpire understands that by the laws, organic and civil, of Venezuela this power is lodged in the hands of the chief executive, who, acting under the methods laid down may expel one who is a menace to the Republic, if not domiciled by a two years' residence. It is historic that the date of this exclusion from Venezuela was within that period of Venezuela's national life when there were more than the ordinary hazards to the country from revolutionary actions and conspiracies, and it was undoubtedly necessary that the national Government should be on the alert to protect itself against such evils; and had the exclusion of the claimant been accomplished in a rightful manner without unnecessary indignity or hardship to him the umpire would feel constrained to disallow the claim.

The modern theory and the practice of Christian nations is believed to be founded on the principle that the expulsion of a foreigner is justified only when his presence is detrimental to the welfare of the State, and that when expulsion is resorted to as an extreme police measure it is to be accomplished with due regard to the convenience and the personal and property interests of the person expelled. (Sec. Olney in Hollander case in U. S. For. Rel. for 1895, p. 776; and also see p. 801 same volume; these citations to be found in sec. 206, vol. 2, Wharton's Int. Law Dig.)

This is his grievance, and as to this I have to say that on general principles it is within the power of the German Government to make and enforce such a decree of expulsion, nor can this Government object, *unless the exclusion be enforced with undue harshness*. (Mr. Bayard, Sec. of State, to Mr. Pendleton, July 9, 1885.) Whartons' Int. Law Dig., vol. 2, p. 525, sec. 206.

Great Britain in 11th and 12th Vict. c. 20, and by Executive order in the United States, 19 Aug., 1861, during times in both countries of peculiar stress and danger, authority was given to exclude and to remove aliens and to require passports. (See supra, p. 528.)

There was no possible occasion for the public stripping, or private stripping in fact, of the claimant. It was not for the protection of Venezuela that he was compelled to suffer this indignity to his person and to his feelings. From all the proof he came here as a gentleman and was entitled throughout his examination and deportation to be treated as a gentleman, and whether we are to consider him as a gentleman or simply as a man his right to his own person and to his own undisturbed sensibilities is one of the first rights of freedom and one of the priceless privileges of liberty. The umpire has been taught to regard the person of another as something to be held sacred, and that it could not be touched even in the lightest manner, in anger or without cause, against his consent, and if so done it is considered an assault for which damages must be given commensurate with the spirit and the character of the assault and the quality of the manhood represented in the individual thus assaulted. The umpire acquits the high authorities of the Government from any other purpose or thought than the mere exclusion of one regarded dangerous to the welfare of the Government, but the acts of their subordinates in the line of their authority, however odious their acts may be, the Government must stand sponsor for. And since there is no proof or suggestion that those in discharge of this important duty of the Government of Venezuela have been reprimanded, punished or discharged, the only way in which there can be an expression of

regret on the part of the Government and a discharge of its duty toward the subject of a sovereign and a friendly State is by making an indemnity therefor in the way of money compensation. This must be of a sufficient sum to express its appreciation of the indignity practiced upon this subject and its high desire to fully discharge such obligation.

In the opinion of the umpire the respondent Government should be held to pay the claimant Government in the interest of and on behalf of the claimant, solely because of these indignities the sum of five hundred dollars in gold coin of the United States of America, or its equivalent in silver at the current rate of exchange at the time of payment; and judgment may be entered accordingly.