

REPORTS OF INTERNATIONAL  
ARBITRAL AWARDS



RECUEIL DES SENTENCES ARBITRALES

VOLUME X

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REPORTS OF INTERNATIONAL  
ARBITRAL AWARDS

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RECUEIL DES SENTENCES  
ARBITRALES

VOLUME X



UNITED NATIONS — NATIONS UNIES



## FOREWORD

In the preceding volume of this series, one part of the Venezuelan Arbitrations of 1903-1905 was included—namely, the awards of three Mixed Claims Commissions (United States-Venezuela, Belgium-Venezuela and Great Britain-Venezuela), created by virtue of protocols concluded at Washington in 1903.<sup>1</sup> The present volume is devoted to the remainder of these Arbitrations. It contains the awards of seven other Mixed Claims Commissions (France-Venezuela, Germany-Venezuela, Italy-Venezuela, Mexico-Venezuela, Netherlands-Venezuela, Spain-Venezuela and Sweden-Norway-Venezuela), created by virtue of protocols likewise concluded at Washington in 1903. It also includes the awards of the eleventh Mixed Claims Commission (France-Venezuela), constituted under the protocol signed at Paris on 19 February 1902.

A note indicating the origin of the Venezuelan Arbitrations of 1903-1905 was printed in the preceding volume.<sup>2</sup>

The texts reproduced in the present volume have been taken from the two reports by Ralston entitled, respectively, *Venezuelan Arbitrations of 1903*,<sup>3</sup> and *Report of French-Venezuelan Mixed Claims Commission of 1902*.<sup>4</sup> The latter, which forms a supplement to the former, contains the work of the Franco-Venezuelan Mixed Claims Commission, constituted by virtue of the Paris protocol of 1902. Most of its work was completed only in 1905, after the date of the publication, in the first report of Ralston, of the work of the other Mixed Claims Commissions created under the Washington protocols of 1903.

The order of presentation of the awards of the Venezuelan Arbitrations is that followed in the two reports by Ralston. The awards of the Franco-Venezuelan Mixed Commission created by virtue of the protocol of 1902, however, follow immediately those of the Franco-Venezuelan Mixed Commission created under the protocol of 1903.

The head-notes are those printed in the original reports. The index is based upon the texts of the opinions handed down by the Commissioners, as well as those of the Umpire.

As with volumes IV to IX, the present volume has been prepared by the Codification Division of the Office of Legal Affairs of the Secretariat of the United Nations.

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<sup>1</sup> *Reports of International Arbitral Awards*, vol. IX, pp. 111-533.

<sup>2</sup> *Ibid.*, pp. 103-104.

<sup>3</sup> Washington: Government Printing Office (1904).

<sup>4</sup> Washington: Government Printing Office (1906).



## AVANT-PROPOS

Dans le volume précédent, on a inclus une partie des arbitrages vénézuéliens de 1903-1905, à savoir ceux des trois Commissions mixtes des réclamations (Etats-Unis d'Amérique-Venezuela, Belgique-Venezuela et Grande-Bretagne-Venezuela), créées en vertu de protocoles conclus à Washington en 1903.<sup>1</sup> Le présent volume est consacré au reste de ces arbitrages. Il comprend, en effet, les sentences des sept autres Commissions mixtes des réclamations (France-Venezuela, Allemagne-Venezuela, Italie-Venezuela, Mexique-Venezuela, Pays-Bas-Venezuela, Espagne-Venezuela et Suède-Norvège-Venezuela), créées en vertu de protocoles conclus également à Washington en 1903, ainsi que les sentences de la onzième Commission mixte des réclamations (France-Venezuela), constituée en application du protocole signé à Paris le 19 février 1902.

Une note indiquant l'origine des arbitrages vénézuéliens de 1903-1905 a été publiée dans le volume précédent.<sup>2</sup>

Les textes reproduits dans le présent volume ont été tirés des deux rapports de Ralston intitulés l'un *Venezuelan Arbitrations of 1903*,<sup>3</sup> l'autre *Report of French-Venezuelan Mixed Claims Commission of 1902*.<sup>4</sup> Ce dernier rapport, qui constitue un supplément au premier, comprend les travaux de la Commission mixte des réclamations franco-vénézuélienne, créée en vertu du protocole de Paris de 1902, travaux qui n'ont, en grande partie, été achevés qu'en 1905, ultérieurement à la date de la publication, dans le premier rapport de Ralston, de ceux des autres Commissions mixtes des réclamations constituées conformément aux protocoles de Washington de 1903.

L'ordre suivi dans la présentation de l'ensemble des sentences rendues à l'occasion des arbitrages vénézuéliens est ici le même que dans les deux rapports de Ralston. Toutefois, les sentences de la Commission mixte franco-vénézuélienne créée en vertu du protocole de 1902 sont reproduites immédiatement après celles de la Commission mixte franco-vénézuélienne constituée en application du protocole de 1903.

Les notes sommaires sont empruntées à ces rapports. L'index est basé sur le texte des opinions émises aussi bien par les Commissaires que par les Sur-arbitres.

Le présent volume, comme les volumes IV à IX, a été préparé par la Division de la Codification du Service juridique du Secrétariat de l'Organisation des Nations Unies.

<sup>1</sup> *Recueil des sentences arbitrales*, vol. IX, pp. 111-533.

<sup>2</sup> *Ibid.*, pp. 103-104.

<sup>3</sup> Washington: Government Printing Office (1904).

<sup>4</sup> Washington: Government: Printing Office (1906).



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MIXED CLAIMS COMMISSION  
FRANCE - VENEZUELA  
CONSTITUTED UNDER THE PROTOCOL  
SIGNED AT WASHINGTON  
ON 27 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. 483-493.**



PROTOCOL, FEBRUARY 27, 1903<sup>1</sup>

[Washington protocol.]

The undersigned, Herbert W. Bowen, Plenipotentiary of the Republic of Venezuela, and J. J. Jusserand, Ambassador of the French Republic at Washington, duly authorized by their respective Governments, have agreed upon and signed the following protocol:

## ARTICLE I

All French claims against the Republic of Venezuela, which have not been settled by diplomatic agreement or by arbitration between the two Governments, shall be presented by the French foreign office or by the French legation at Caracas, to a mixed commission, which shall sit at Caracas, and which shall have power to examine and decide the said claims. The Commission to consist of two members, one of whom is to be appointed by the President of Venezuela and the other by the President of the French Republic.

It is agreed that Her Majesty the Queen of the Netherlands will be asked to appoint an umpire.

If either of said commissioners or the umpire shall fail or cease to act, his successor shall be appointed forthwith in the same manner as his predecessor was. 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 day 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 carefully to examine and impartially decide, according to justice and the provisions of this convention, all claims submitted to them, and such oaths 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 of the provisions of local legislation.

The decisions of the Commissioners, 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 French gold or its equivalent in silver.

## ARTICLE II

The commissioners, or the 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 the respective Governments in support of or in answer to any claim, and to hear oral or read 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.

---

<sup>1</sup> Original texts: English and French: For the French text see the Report mentioned on the previous page.

Every claim shall be formally presented to the commissioners within thirty days from the day 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 language of both countries to assist them in the transaction of the business of the Commission. 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 to the umpire for their services and expenses, and the 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 France shall be promptly paid according to the terms of the respective awards.

Done in duplicate in the French and English texts at Washington, February 27, 1903.

JUSSERAND [SEAL]  
H. W. BOWEN [SEAL]

#### PERSONNEL OF FRENCH-VENEZUELAN COMMISSION <sup>1</sup>

*Umpire.* — J. Ph. F. Filtz.  
*French Commissioner.* — Peretti de la Rocca.  
*Venezuelan Commissioner.* — José de Jesús Paúl.  
*French Secretary.* — Charles Piton.  
*Venezuelan Secretary.* — J. Padrón Ustáriz.

<sup>1</sup> No rules of procedure were formulated by this Commission.

## OPINION IN FRENCH-VENEZUELAN COMMISSION OF 1903

[Washington protocol.]

ACQUATELLA, BIANCHI, ET AL., CASE <sup>1, 2</sup>

In this case it was held by the Venezuelan Commissioner that a government can not be held liable to respond in damages for injuries to person or property caused by the acts of revolutionists. The umpire of the Commission, however, decided that Venezuela should make compensation for damages or injuries caused by such revolutionists.

PAÚL, *Commissioner* (claims referred to umpire):

The papers which have been presented as proofs of the facts on which the above-mentioned claims are based consist of receipts dated at Ciudad Bolívar, and signed by different revolutionary leaders, among whom are Gens. R. C. Farreras, Nicolás Rolando, and A. Villegas, and by the treasurer-general of the revolution during the period elapsing after the withdrawal of the State of Bolívar from its allegiance to the constitutional government in consequence of the uprising at the capital of said State, on the 23rd of May, 1902, which was headed by General Farreras. Of these receipts only two exist, issued at Guasipati, in favor of Pietrantoni Brothers, by Gen. M. Silva Medina, on the 13th and 15th of August, 1902, for the sums of 13,000 and 2,704.60 bolivars, respectively, said General Medina being at the time governor of the Territory of Yuruary, and were for cash and merchandise taken as a loan for the maintenance of auxiliary troops of the neighbouring State of Bolívar.

The signatures which acknowledge these receipts appear to be vouched for by the French consular agent at Ciudad Bolívar, and in all these certifications the consul states that the signers were at the time exercising the functions ascribed to them in the documents, in the absence of all legally constituted Venezuelan authorities, and certifying besides that the signatures which are subscribed to the papers are those customarily used by the signers, and that the sums mentioned therein have not been paid to the claimants, who could not avoid furnishing the goods and money therein mentioned.

Notwithstanding the respect which the Commissioner for Venezuela owes to the decision which has been rendered by the honorable umpire in the claim of Antoine Bonifacio, and in other cases where indemnity has been claimed for damages to property by revolutionary forces which have committed depredations in various towns of Venezuela, and principally in that of Carúpano, I consider it my duty to maintain the opinion heretofore expressed by me that claims based on negotiations, loans contracted between revolutionary chiefs and private individuals, as well as those for forced requisitions and damages sustained at the hands of revolutionary troops by neutrals, do not entail the liability of the Government of Venezuela.

In the decision given by Mr. Filtz in the claim of Bonifacio, the question principally considered was that of violence, and standing on the assumption

<sup>1</sup> This opinion was filed in the cases of José Acquatella for 4,488.29 bolivars, Jeronimo Bianchi for 4,800 bolivars, Francisco Casale for 156 bolivars, Ineco & Abreu for 1,118 bolivars, Jean Leonardi for 50 bolivars, Pietrantoni & Co. for 8,400 bolivars, Ange Poggi for 287 bolivars, Pietrantoni Frères for 18,504.60 bolivars, Pierre Segurani for 172 bolivars, and Jos. Bianchi for the value of 152 head of cattle and 4 horses.

<sup>2</sup> For a French translation see: Descamps-Renault, *Recueil international des traités du XX<sup>e</sup> siècle*, 1903, p. 868.

that such existed in the case of loans, and that the papers in the case need not necessarily contain proof of such violence, the umpire accepted the claim and awarded the sum called for in the receipt signed by Gen. Nicolás Rolando as chief of a revolutionary force. In the same session the umpire also decided that the abuses and pillage committed by the revolutionary troops in the course of their seizure of a place should be considered as fixing liability, as in the cases of damages occasioned by said troops, after having taken possession of a district, and that therefore these abuses and unlawful seizures imply the necessity, on the part of the Commission, of awarding indemnity to the victims of these acts.

This decision was not based on any exposition of principles invalidating the rules established by international law and by precedent decisions of other arbitral tribunals, from which has been derived the fixed doctrine of international law that governments, like individuals, are liable only for the acts of their agents, or of those who have directly assumed responsibility. These principles and precedents establish that the existence of a state of revolutionary struggle presupposes that a certain portion of the members composing the nation has temporarily withdrawn from its obedience to constituted authority, and that only when it appears that the Government has failed to make prompt and efficient use of its authority to cause a return of said dissatisfied party to obedience, and to protect, within the measure of its ability, the property and persons threatened by the revolutionary disturbance, may it be considered as liable for the consequences of such abnormal condition. Many decisions of international tribunals might be cited in support of this rule,<sup>1</sup> but it will be sufficient to mention its adoption by the Mexican-American Commission of 1868, by the British-American Commission of 1871, with reference to the destruction of cotton plantations by Confederate troops during the war of the rebellion; by the Spanish-American Commission of 1871, and finally by the Commission instituted by the treaty of December 10, 1898, between Spain and the United States, to settle claims of individuals of both nations arising from the last Cuban insurrection. This Commission decided that—

Where an armed insurrection has gone beyond the control of the parent Government the general rule is that such Government is not responsible for damages caused to foreigners by the insurgents. (Spanish Treaty Claims Commission, Opinion No. 8.)

This view is sustained by an almost inexhaustible number of international law writers, among whom it suffices to mention such eminent names as those of Laurent, Pradier-Fodéré, and Despagnet, the last of whom, in his *Droit International Public* (p. 353), says:

Mais les étrangers peuvent souffrir un préjudice à la suite d'une guerre, d'une révolution ou d'une émeute éclatant dans les pays où ils se trouvent; il est universellement admis aujourd'hui que la protection diplomatique ou consulaire ne peut être invoquée en pareil cas, parcequ'il s'agit d'un accident de force majeure dont les étrangers courent le risque absolument comme les nationaux du pays.

Referring to loans negotiated by a revolutionary faction which has control of one section of the country, but is nevertheless a government of usurpation, not recognized by foreign powers, and whose acts the legitimate government has the right to, and should disavow and annul, it is opportune to quote the opinion of an eminent French jurist, obtained by the holders of bonds on a loan of such character:

If it be true [said Mr. Odillon Barrot] that it is, generally speaking, a wise and sound policy for a government to recognize the obligations contracted by the

<sup>1</sup> See *infra* Sambiaggio case, p. 666 (umpire's opinion).

government which preceded it, even while disputing its legitimacy, it would be nevertheless impossible to construe it as an absolute rule of international law. When, for example, as in the present instance, two governments are struggling for the mastery, and one of them contracts a loan with which to endeavor to insure its success, then to compel the other government on triumphing to pay the loan contracted by the other, in virtue of a strict and absolute right, would be to introduce in international law a principle sanctioned by no authority.

M. Rolin-Jaequemyns, in a bibliographic article referring to a publication on this subject by M. Becker, in the "Revue de Droit International," is still more precise:

Le pays était donc dès lors en état de guerre civile, et, cela étant, la question n'est plus de savoir si un gouvernement reprend de droit les engagements de son précédent, mais si le parti qui l'emporte, dans une guerre civile, succède aux dettes que le parti vaincu a contractées pour trouver les moyens de le combattre. Il est à noter en effet que l'emprunt de Don Miguel a été contracté précisément pour combattre le parti constitutionnel. Or, à la question ainsi posée, la réponse ne nous paraît pas devoir être affirmative. Dans la guerre civile américaine les deux parties étaient belligérantes et reconnues telles; les États du Sud comme ceux du Nord ont contracté des emprunts; mais on n'a pas en général trouvé mauvais que les États du Nord répudiasent les emprunts du Sud. Ici la bonne foi publique n'est pas trompée. Car nul ne peut s'attendre à ce que le vainqueur consente à payer les frais de la guerre que lui a faite le vaincu. (Revue de Droit International, 1875, vol. 7, p. 714.)

The decisions just rendered in this capital by the umpires of the Italian-Venezuelan<sup>1</sup> and German-Venezuelan<sup>2</sup> Commissions declare with entire justice and in accordance with the principles of international law, the nonliability of the Government for injuries of persons or property of foreigners by revolutionary troops, and even the difference maintained by the latter umpire derived from his interpretation of the Washington protocol of February 13, 1903, according to which he holds that Venezuela expressly admitted, in said protocol, liability for damages arising from the civil war in progress at the time the protocol was signed, safeguards the principle which maintains that such liability is not applicable to damages caused by unsuccessful revolutionists at any other time or under any other conditions. The declaration of the Hon. Mr. Duffield is conclusive:

The Government of Venezuela is liable under her admissions in the protocol for all claims for injuries to or wrongful seizures of property by revolutionists resulting from the recent civil war.

Such admission does not extend to injuries to or wrongful seizures of property at any other times or under any other conditions.<sup>3</sup>

The umpire of the Italian-Venezuelan Mixed Commission maintains the nonliability under such circumstances absolutely, denying the application thereto of the clause of the Italian and Venezuelan protocols as an extension which would result in placing Venezuela in a position entirely exceptional and contrary to international law and the principles of justice on the bases of perfect equality to which she has a right by reason of her treaties with the other nations.

It is indisputable that the French-Venezuelan protocol signed at Washington, no more than those of the other pacific powers, imposes responsibilities not fixed by international law. On the contrary, a spirit of equity inspired the provisions of the said protocol, leaving to the commissioners the duty of examining and deciding all claims on a basis of absolute equity, which means that

<sup>1</sup> *Infra*, p. 512.

<sup>2</sup> *Infra*, p. 370.

<sup>3</sup> *Infra*, p. 369.

the Government of Venezuela can not be held liable according to international law, and previous decisions of arbitral tribunals, with respect to damages occasioned by rebels to the property of neutrals and affecting their interests.

In the claims under discussion there is to be considered, moreover, that they are in no relation to the acts of a military leader who had withdrawn from obedience and military discipline by an act of disloyalty while in temporary command in the State of Bolívar, out of the Federal union, it having become necessary, in order to put an end to this state of things, to engage in a contest which cost the lives of many Venezuelan citizens and might have totally destroyed all neutral property in Ciudad Bolívar and caused grave injuries to the persons of neutrals. Now, if for such destruction and injuries, international law affords no redress, it would be absurd to assume that the Government of Venezuela is compelled to reimburse the money and supplies used by the revolutionary leaders to prolong the struggle, thus contributing to the resistance which cost the Republic 1,500 of her sons.

From the foregoing reasons, and considering that it is within the power of the honorable umpire, in the event that the honorable Commissioner for France does not agree with my views, to give his definite opinion with a more careful and deliberate study of the subject-matter, I conclude by rejecting damages based on receipts signed by revolutionary leaders in Ciudad Bolívar, and accepting only those based on receipts signed by the governor of Yuruary in favor of Piedrantoní Brothers for the sum of 15,904 bolívars, with interest at 3 per cent from August 15, 1902, to August 31, 1903, making 496.32 bolívars, or in all 16,300.92 bolívars.

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MIXED CLAIMS COMMISSION  
FRANCE - VENEZUELA  
CONSTITUTED UNDER THE PROTOCOL  
SIGNED AT PARIS ON 19 FEBRUARY 1902

**REPORT: Ralston and Doyle, *Report of French-Venezuelan Mixed Claims Commission of 1902*, Washington, Government Printing Office, 1906, pp. 1-465.**



PROTOCOL OF 19 FEBRUARY 1902 <sup>1</sup>

Les soussignés, M. H. Maubourguet, Plénipotentiaire des États-Unis du Vénézuéla, et M. Th. Delcassé, Député, Ministre des Affaires Étrangères de la République Française, dûment autorisés par leurs Gouvernements respectifs, sont convenus de ce qui suit:

## ARTICLE I

En même temps qu'ils nommeront leurs Ministres à Paris et à Caracas, les Gouvernements Vénézuélien et Français désigneront chacun un arbitre et choisiront, pour tiers arbitre, Son Excellence M. F. de Leon y Castillo, Marquis del Muni, Ambassadeur Extraordinaire et Plénipotentiaire de Sa Majesté le Roi d'Espagne près le Président de la République Française.

Les deux premiers arbitres se réuniront à Caracas, aussitôt après la remise par le Ministre de France au Président des États-Unis du Vénézuéla de ses lettres de créance, à l'effet d'examiner, de concert, les demandes d'indemnités présentées par de Français pour des dommages subis au Vénézuéla du fait des événements insurrectionnels de 1892. Les demandes d'indemnités qui ne pourraient être réglées à l'amiable entre ces deux arbitres seront soumises par eux au tiers arbitre.

S'il n'a pas été définitivement statué, soit par les deux arbitres, soit par le tiers arbitre, dans un délai d'une année à compter de l'arrivée de l'arbitre français à Caracas, le Gouvernement Vénézuélien remettra au Gouvernement français, pour être réparti par ses soins entre les ayants droit, un million de bolivares en dette diplomatique 3 p. 100, moyennant quel versement toutes les réclamations du fait des événements insurrectionnels de 1892 seront définitivement réglées.

## ARTICLE II

Les demandes d'indemnités autres que celles qui sont visées à l'article 1<sup>er</sup>, mais fondées sur des faits antérieurs au 23 mai 1899, seront examinées de concert par le ministre des affaires étrangères du Vénézuéla et par le ministre de France à Caracas. Si dans le délai de six mois à dater de la remise des lettres de créance du ministre de France à Caracas, ils ne tombent pas d'accord sur le montant des indemnités à allouer, les demandes seront soumises par eux au tiers arbitre désigné à l'article précédent.

Le ministre des affaires étrangères du Vénézuéla et le ministre de France à Caracas pourront déléguer, chacun en ce qui le concerne, pour l'exécution des dispositions ci-dessus, l'arbitre nommé par leur gouvernement.

Si plusieurs demandes d'indemnités, fondées sur des faits différents, sont présentées par le même réclamant et que l'une d'entre elles soit dans le cas d'être soumise à la procédure établie au présent article, les autres y seront jointes, pour faire l'objet d'un règlement unique.

Il est entendu que cette procédure, comme celle qui est adoptée pour les réclamations de 1892, n'est instituée qu'à titre exceptionnel et n'infirme pas la convention du 26 novembre 1885.

<sup>1</sup> French and Spanish texts published in the Report mentioned on p. 9.

## ARTICLE III

Le tiers arbitre décidera sans appel.

Les indemnités seront versées au Gouvernement Français, en titres de la dette diplomatique 3% dans les trois mois qui suivront l'entente ou le prononcé de la sentence.

## ARTICLE IV

Le Gouvernement Vénézuélien demandera au Congrès d'inscrire au Budget des dépenses les sommes nécessaires au payement des mensualités arriérées de la dette diplomatique, les porteurs de titres de cette dette devront d'ailleurs bénéficier de tous les avantages qui résultent pour eux de la stricte application des lois vénézuéliennes organiques sur la matière.

Le présent Arrangement sera ratifié et les ratifications en seront échangées à Paris ou à Caracas le plus tôt que faire se pourra et au plus tard le 30 avril 1902.

En foi de quoi, les soussignés, dûment autorisés par leurs Gouvernements respectifs, ont dressé le présent acte et y ont apposé leurs cachets.

Fait à Paris, en double exemplaire, le 19 février 1902.

H. MAUBOURGUET [L.S.]

DELCASSÉ [L.S.]

## PERSONNEL OF COMMISSION

*Umpire*.<sup>1</sup> — Hon. FRANK PLUMLEY, of Northfield, Vt.

*French Commissioner*. — COUNT E. DE PERETTI DE LA ROCCA.

*Venezuelan Commissioner*. — Dr. JOSÉ DE JESÚS PAÚL.

*Secretary to Umpire*. — Mr. CHARLES A. PLUMLEY.

*French Secretary*. — M. PAUL WALTZ.

*Venezuelan Secretary*. — Dr. J. F. PADRÓN USTÁRIZ.

OPINIONS IN FRENCH-VENEZUELAN COMMISSION OF 1902 <sup>2</sup>

## LEDUC, ST. IVES, FISCHER &amp; CO. CASE

Commission declared without jurisdiction because claims arose subsequent to May 23, 1899

PAÚL, *Commissioner* (for the Commission):

This claim arose out of a debt by the Government of Venezuela in favor of Mr. Domingo R. Wetto, a tailor domiciled in Caracas, for the price of uniforms for the national army, which debt was assigned by said Mr. Wetto on September 6, 1901, to the firm of Leduc, St. Ives, Fischer & Co., as appears by a document authenticated by the parochial court of this city on the 23rd of said month and year.

<sup>1</sup> By the protocol the Marquis del Muni, ambassador extraordinary and plenipotentiary of Spain to France, was appointed, but, he declining, Hon. Frank Plumley was finally selected.

<sup>2</sup> The opinions rendered by this Commission in the six following cases are published in Ralston's Report, *Venezuelan Arbitrations of 1903* (pp. 497-509), as well as in Ralston's *Report of French-Venezuelan Mixed Claims Commission of 1902* (Appendix, pp. 454-464): Leduc, St. Ives, Fischer & Co. Case, Rogé Case, Decauville Company Case, Lalanne and Ledour Case, Ballistini Case, Piton Case. These six opinions are reproduced from the former source.

The orders of payments drawn by the minister of war and marine in favor of Wetto are dated August 1, September 12 and 14, and October 19, 1899.

As appears from the dates of these orders, they are all subsequent to May 23, 1899, and consequently the examination of this claim does not belong to this Commission, in conformity with article II of the protocol of Paris, which determines its jurisdiction, wherefore the Venezuelan arbitrator is of opinion that the Commission should declare itself without jurisdiction to examine it.

(This opinion was concurred in by the French Arbitrator.)

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ROGÉ CASE

Damages allowed for unlawful imprisonment

PAÚL, *Commissioner* (for the Commission):

From the documents presented following, the facts are proven:

That Dr. J. M. Aveledo, as attorney of Alfonzo Samterre and Carlos Luciani, on the 17th of October, 1888, before the court of the first instance, of the first judicial circuit of Ciudad Bolívar, instituted a suit for libel against Ernesto Rogé, superintendent of the syndicate Alto Orinoco. The judge of the first instance received testimony requested by the complainant and that of said Mr. Rogé, and, not finding any merit from the summary proceedings to follow up the suit, issued a decree on November 5 of said year discontinuing the action and declaring that it did not injure the defendant in any manner as to his reputation.

This decision having been called to the attention of the superior judge in the ordinary manner, the latter official by a decree dated January 7, 1889, revoked the decree issued by the judge of the first instance and made an order for detention against the citizen Ernesto Rogé. Dr. F. A. Hammer and Ramón Barrios Gómez having certified that Rogé was suffering from rheumatism in the præcordial region, which prevented him from remaining in the public jail as a prisoner of that city, said superior judge made an order to the judge of the first instance that he should transfer said Rogé to the hospital for men of that city.

The judgment of the superior judge having been appealed from in turn by Rogé, the record passed to the supreme court, which in a judgment dated February 13, 1889, revoked in all its parts the judgment rendered by the superior court, and confirmed the decree issued by the court of the first instance on November 5, 1888, ordering that the proper order be issued so that the defendant, Rogé, might be placed at liberty, which order was made on the same day. E. Rogé bases his claim for indemnity upon the injury, which he asserts was committed against his person, in ordering his detention and committing him to be deprived of his liberty for the space of thirty-seven days, the superior judge of Ciudad Bolívar violating by this proceeding the definite provisions of article 271 of the code of criminal procedure.

On July 4, 1892, Ernesto Rogé addressed himself to the minister of foreign relations of France, asking that his claim be pressed against the Government of Venezuela for damages and injuries which he estimated at the sum of 200,000 bolivars.

During the detention of Rogé notes were exchanged between the representative of France in Venezuela and the minister of foreign relations of the latter country, the minister of France interposing his diplomatic action in order to procedure the prompt release of Rogé and reserving in said notes all rights concerning the moral and material satisfaction that the Government of France on the one part, or Mr. Rogé on the other, might believe they were entitled to

obtain from the Government of Venezuela with reference to the attempt consummated against the liberty of a French citizen.

Proof also exists in the record, which shows that the President of the Republic and the minister of foreign relations, then in authority, addressed themselves by telegraph concerning the actions of the French minister to the president of the State of Bolívar, asking the necessary information for a correct understanding of the matter, of which demand the said representative was duly advised. There exists also a telegram dated on January 16, from Mr. Saint Chaffray, minister of the French Republic, addressed to Mr. Delort at Ciudad Bolívar, which says:

Relying upon the intentions and sentiments of equity of the Government, I do not doubt that what is necessary will be done in order to assure Mr. Rogé of the benefits of constitutional guaranties and, on this occasion, to give a new proof of its benevolent intentions towards the Alto Orinoco Company.

The superior judge of Ciudad Bolívar, in ordering the detention of E. Rogé, violated the provisions of articles 200 and 271 of the code of criminal procedure. It being expressly provided by said articles that—

In every case of discontinuance if the act in controversy has warranted the detention of the defendant, and if said detention has been effected, the person or persons released from responsibility shall immediately be placed at liberty, under bond, while the superior tribunals affirm or overrule the judgment as they are empowered to do by this code.

Rogé not having been properly imprisoned in accordance with the discontinuance of the judge of the first instance, because the committing magistrate did not find any reason to order his detention in conformity with article 137 of said code, the superior judge could not order the arrest of the accused, because he had not been put at liberty, but he ought to have limited himself to referring his judgment to the supreme court, and until it was rendered final by its confirmation it was the place of the committing magistrate or the judge of the first instance to fulfill what had been definitely adjudged, and his place to decree the detention of the accused.

The arbitrator considers this violation of the law as an unjust and illegal act perpetrated by the superior judge of Ciudad Bolívar; but at the same time he cannot help but appreciate the attitude of the judge of the first instance, who in a truly justified and honorable judgment gave every sort of guaranty and satisfaction. Likewise he considers the proceeding of the supreme court entirely in accord with the law, and the acts which the President of the Republic and his ministers of interior and foreign relations performed with all diligence in order to satisfy as far as possible the demand of the minister of France in favor of Rogé, showing without any doubt what the said representative expressed in his telegram copied above, *the good intentions and sentiments of equity of the Government, and that the necessary steps were being taken to assure Mr. Rogé of the benefit of the constitutional guaranties.*

The amount of indemnity which is demanded is under every aspect disproportionate, seeing, as it is demonstrated, that relief was sought to be given by the National Government for the illegal act in question with the least possible delay, and it was corrected by the judgment of the supreme court in the State of Bolívar.

The Venezuelan Commissioner considers that it would be a reasonable and equitable compensation for the damage suffered by Rogé on account of his detention in the hospital of Ciudad Bolívar for thirty-seven days to award him the sum of 10,000 bolívars.

The French Commissioner concurred in this opinion, agreeing to reduce the amount which, in his opinion, ought to have been allowed Rogé.

DECAUVILLE COMPANY CASE

Demand that claim be paid for the amount demanded in bonds of diplomatic debt at 40 per cent of their face value refused. Held, that the Commission had no jurisdiction to change manner of payment prescribed by protocol.

PAÚL, *Commissioner* (for the Commission):

This claim for indemnity is made up of the following amounts:

Balance of the debt of the Government of Venezuela to the Decauville association, due May 15, 1889 . . . . .	<i>Bolivars</i> 10,923.46
Installment due September 15, 1889 . . . . .	25,923.47
Interest at 6 per cent, in accordance with the liquidation . . . . .	9,896.55
Difference on account of the value which is contained in the claim of the bonds of the diplomatic debt, estimating them at 60 per cent . . . .	.31,162.32
	77,905.80

The document presented in support of this claim consists of a contract made between Mr. Alberto Smith, minister of public works, with the authorization of the President of the Republic, and the Vicomte Gonzague de la Baume, as representative of the Decauville du Petit Bourg Company, whereby the indebtedness which said company held against the Government of Venezuela for the sale of four iron bridges was liquidated and the amount of said indebtedness was fixed at the sum of 77,770.39 bolivars, inclusive of interest to the dates of the respective expirations of the three terms agreed on in said contract for the total payment of the debt.

It appears from a communication addressed by the citizen minister of the treasury to the minister of foreign relations, dated June 5 of the present year and numbered 284, a copy of which has been transmitted to this Commission, that the account which the representative of the Decauville Company makes of the payments made by the Government of Venezuela, upon the dates therein indicated, on account of the debt, is correct, and the balance which results as being owed on account of this debt at the date of the termination of the respective obligations, amounting to 36,848.93 bolivars, is likewise correct. Notwithstanding that the liquidation of interest made in the contract between the minister of public works and the representative of the Decauville Company was made at the rate of 6 per cent annually up to the dates established for the subsequent payments of the debt, there is no proof that it was agreed to make any agreement in the future for interest upon the sums which might remain owing at the same rate, wherefore the rate established by this Commission ought to govern in this case; that is to say, that in the cases in which there is no express agreement concerning interest there will be allowed upon liquidated debts or obligations for loans of cash at the legal rate of 3 per cent, in conformity with article 1720 of our code, which is in accord with article 1907 of the French civil code. This liquidation being carried into effect from the respective dates upon the balances which have remained owing, a result of 4,530.85 bolivars is obtained.

The contention which the claimant makes that he should be allowed 40 per cent more upon the amount of the principal debt and upon the interest because of the fact that the payment was made, in conformity with the terms of the

protocol, in bonds of the 3 per cent diplomatic debt instead of in cash, is entirely inadmissible, because the party claimant has spontaneously submitted his demand to this Commission, whose authority is limited to examining the claims presented by Frenchmen, founded upon facts prior to May 23, 1899, fixing the amount thereof in conformity with the proofs which relate to the facts upon which they are based, and in conformity with the grounds that may justify them.

The method of payment established by article III of the protocol is a fact entirely separated from the duty of judging concerning the justice or injustice of the demand.

This fact relates solely to the execution of the judgment which the arbitrators may pronounce, and this conclusion is clearly deduced from the terms of said article, which reads as follows:

Awards [those which the arbitrators or the umpire may allow] shall be paid to the French Government in bonds of the 3 per cent diplomatic debt within three months after the agreement or judgment.

The provision which article IV of the protocol contains is of the same character and provides:

That the Government of Venezuela shall ask Congress to include in the provision for expenses the sums necessary for the payment of the monthly installments in arrears of the diplomatic debt, and the holders of bonds of that debt shall, besides, participate in all the advantages which may accrue to them from the strict application of the Venezuelan laws applicable to the premises.

The definite provision of article III and that which article IV of the protocol contains relate solely to negotiations of Government with Government, which refer to the manner of paying obligations incurred, be it by contract, by former arbitral decisions, or by those which the present Commission may pronounce. It is solely for the respective Governments to determine the manner of payment by special agreement, and in no way can this be attributed to the arbitrators, who are only called upon to decide concerning the justice of the claim and to determine the amount which the Government of Venezuela has to pay, in case it has to pay, taking into consideration the facts and foundation of the claim.

It is to be observed that among the 40 claims which have been presented before this Commission up to date, embraced in article II of the protocol signed at Paris February 19, 1902, the claim concerning which this decision is given is the first to set up the extraordinary and rash contention that there be attributed to the diplomatic debt by the arbitrators a value of 40 per cent, thereby causing a notorious injury to the actual holders of said debt and to those who are authorized by the findings of this Commission to receive in payment of their debt, according to the terms of the protocol, bonds of the said diplomatic debt. Such an arbitrary proceeding would cause the continued depreciation of the value of the debt until it destroyed it completely, and the holders of it would be the first to suffer the consequences of the values established against the economic rules which govern public securities.

Therefore this portion of the claim is disallowed, and it is admitted for the principle and interest estimated until the 15th of September of the present year, or, say, three months after the date of the present award, amounting to 41,377.78 bolivars.

The French Commissioner concurred in this opinion.

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## LALANNE AND LEDOUR CASE

Damages allowed because of unjustified refusal of customs officials to clear ship from Venezuelan port.

PAÚL, *Commissioner* (for the Commission):

This claim is composed of 34,376.40 bolivars demanded by G. Lalanne for damages and injuries resulting from the fact that the head of the custom-house of Ciudad Bolívar did not permit the shipment, in June, 1886, on the steamer *Dieu Merci*, of 120 head of cattle which Gen. G. Ballistini held ready to send to Guayana, as had been done in other prior shipments, in order to fulfill the contract made by Lalanne with the governor of French Guayana, for furnishing meat to the penitentiary, garrison, and other administrations of Guayana, and for 14,400 bolivars which the owner of the steamer *Dieu Merci* demands for the freight which the cargo of 120 head of cattle ought to have produced him, at 120 francs each, of which he was deprived.

From the documents presented in this claim and in that of G. Ballistini, which is joined with it, it is seen that G. Lalanne periodically sent to Ciudad Bolívar a steamship to load cattle destined for Guayana for the purpose of complying with contract with the governor of said colony; that a contract being in existence, made between Messrs. Fonseca, Navarro & Co., merchants, of Ciudad Bolívar, with the National Government, which accorded them the exclusive privilege of exporting cattle by steamships, which said firm ought to have put in operation for the navigation of the Orinoco River between Ciudad Bolívar and the West Indies; that they had consented to the exporting of cattle in steamers sent by Lalanne, charging for each shipment 8 bolivars per head; that in its turn the national custom-house in Ciudad Bolívar required, in order to give permission for shipments of cattle, that there be presented by the shipper the order or permission of Fonseca & Co. showing the payment to them of the tax imposed; that in accordance with this rule G. Ballistini had been permitted to ship cattle for Cayena in steamships, by order and for the account of Lalanne, up to the number of 767 head, from September, 1885, to March, 1886, Ballistini having paid to Fonseca, Navarro & Co, the sum of 6,136 bolivars, as is proven by the receipt of cash by Alejandro Mantilla, as attorney for Fonseca & Co.; that in the month of June, 1866, the steamer *Dieu Merci* arrived at Ciudad Bolívar to load the customary 120 head of cattle which G. Ballistini had ready for this journey upon the order and for the account of Lalanne, and that it was not possible to complete the shipment because the custom-house had refused to permit it, alleging that the order of Fonseca & Co. had not been presented to it, as was necessary; that it was impossible to obtain this order because Messrs. Fonseca & Co. refused to give it, notwithstanding that payment of the tax was offered them, as had been done before, and even Ballistini had offered to buy from Fonseca & Co. their own cattle and ship them in place of those Ballistini held ready; that these refusals of Fonseca & Co. and that of the maritime government house at Ciudad Bolívar caused the detention for several days of the steamer *Dieu Merci* in the harbor of Ciudad Bolívar, and caused it to depart from the port without loading the cattle under the protest of the captain; and, finally, it is also proven that in the months following, the voyages of the steamer and the shipments of cattle were continued for the account of Lalanne, the shipment being permitted by the Government custom-house at Ciudad Bolívar, because the hindrances placed upon traffic in cattle on the Orinoco by the house of Fonseca & Co. had, in fact, ceased.

During the period of the first events the president of the State of Guayana was Gen. Raimundo Fonseca, an active member of the firm of Fonseca, Navarro

& Co., and at the time when the opposition of said house to the shipment of cattle in Ciudad Bolívar ceased General Fonseca ceased to be president of that section, being called by Gen. Guzmán Blanco to form a part of his cabinet in September, 1886. These facts being taken into consideration in the light of an impartial and just appreciation, the conviction results that an abuse of authority was committed by the president of the State of Guayana by refusing, in his capacity as an associate of the firm of Fonseca & Co., to permit the shipment of cattle under the same conditions that his commercial firm had adopted in prior shipments, and that this abuse was arbitrarily sustained by the chief of the customs of Ciudad Bolívar, who ought to have authorized the shipment upon learning that the owners of the cattle were disposed to pay to Fonseca & Co. the same duties or taxes which in prior shipments they had received. This dual entity of first magistrate of a body politic and partner of a commercial firm putting in action the influences of his power in order to obtain pecuniary benefits at the cost of legitimate interests created under the protection of the constitutional guaranties naturally produced a disturbance in the dealings established at Ciudad Bolívar by Lalanne for the shipment of cattle, and gave rise to the present claim, which, even if excessively exaggerated, has in its favor the principle of equity. Having admitted this in the claim of Lalanne and Ledour, the former a contractor in the purchase and exportation of cattle for Cayena and the latter the owner of the steamer *Dieu Merci*, the Venezuelan Commissioner proceeds to estimate the damage suffered by both.

The death of the 29 head of cattle, which Lalanne claims took place in the journey from Demerara to Cayena, is not proven, and it is only proven that the *Dieu Merci* took on board at Cayena 75 head of cattle coming from Demerara. Nor is the difference in price between the cost of the cattle bought at Demerara and the cost of the cattle in Ciudad Bolívar destined for the shipment proved. The prospective profit of 122.50 bolivars for each head of cattle which the contractor believed he would obtain for the 120 head which ought to have been shipped from Ciudad Bolívar is exaggerated, since it is equivalent to 100 per cent on the price of the cattle in that city; besides this, damage can not be demanded except for 45 head, since 75 were unloaded in Cayena upon that voyage of the *Dieu Merci*, and upon them the contractor realized the profit which they ought to have yielded. There is likewise an exaggeration in the demand of the shipowner for 14,400 bolivars for the freight upon 120 head of cattle which he did not take on at Ciudad Bolívar, since this damage is reduced to the freight on 45 fewer cattle loaded upon said voyage, to the expenses of delay during his stay at Ciudad Bolívar, and to those of the journey and stay at Demerara.

Taking these points into consideration, the Venezuelan Commissioner allows G. Lalanne an indemnity of 4,000 bolivars, and the owner of the ship *Dieu Merci* 4,000 bolivars—in all, for the total claim, 8,000 bolivars.

The French Commissioner concurred in this opinion.

#### BALLISTINI CASE

Damages allowed claimant for unjustified refusal of customs officials to clear ship, whereby claimant suffered injury.

Damages allowed for wrongful imprisonment.

Claim for payment of outstanding bonds disallowed because of want of proof of ownership thereof.

Claim allowed against Federal Government for supplies furnished the State of Guayana.

PAÚL, *Commissioner* (for the Commission):

This claim is composed of ten distinct items, which the petitioner classifies, estimating the amount of each one of them, wherefore this opinion will refer particularly to each of them, examining the origin and the proofs upon which they are based, and will indicate the opinion which the corresponding demand for indemnity may merit.

1. For hindrances opposed to the departure of the French steamer *Dieu Merci* with a cargo of cattle destined for Demerara and Cayena, and the consequent necessity of leaving this cargo on shore when the cattle were destined for the provision of the government of Cayena, the claimant demands 100,000 bolivars.

A claim on account of these same facts has been presented before this Commission by Messrs. G. Lalanne and H. Ledour, the former a contractor for the furnishing of cattle for the Government of French Guayana, and the latter the owner of the steamer *Dieu Merci*, and that claim was decided, an allowance of 8,000 bolivars being made for the damages, because the custom-house at Ciudad Bolívar did not allow the shipment of 120 head of cattle destined by Ballistini to fulfill the order of shipment for his constituent, Lalanne. The cattle appear to have been the property of Ballistini, who sold them to Lalanne at a given price. It does not appear that these cattle were lost or decreased in value as a consequence of remaining in Ciudad Bolívar, and it is proved that the voyage of the steamers and shipment of cattle continued without interruption, Ballistini himself carrying out said shipment for the account and by order of Lalanne.

The injury suffered by Ballistini, who is the owner of pasture lands on the banks of the Orinoco, was nothing but his returning these cattle to the pastures or their sale in Ciudad Bolívar at a price not so high as the transaction of Lalanne assured him. Estimating this expense or loss conservatively, the sum of 5,000 bolivars is allowed in this respect.

2. For the matter of Caliman, civil chief of Ciudad Bolívar, who (according to the record) has committed injustices in detriment to his interests, 20,000 bolivars.

From the record it appears only that the civil chief, Caliman, ordered the withdrawal from public market of Ciudad Bolívar a quantity of raw meat, which Ballistini had sent there for its sale, disobeying positive orders not to do so, because this act was contrary to a contract made with certain persons for the furnishing of meat in the market. The meat withdrawn was attached and sold at public auction by the police officer. There exists no other proof referring to the action of the civil authority against the interests of claimants, and no claim against the nation can be founded upon this procedure of municipal regulation.

3. For the claim of Pereira Alvarez, judge of the first instance at Ciudad Bolívar, who, as Ballistini says, has committed abominable injustices against his person and against his interests, for which he has not been able to obtain any reparation before the tribunals, 40,000 bolivars.

It is proven that because Ballistini had protested against the action of the civil chief, Caliman, in withdrawing from the market his raw meat, a protest which the subtreasurer of Ciudad Bolívar did not wish to record, because he considered it offensive to the authority, Judge Pereira Alvarez rendered judgement for calumny and injuries against Ballistini, and issued an order of arrest against him and a mandate to all the authorities to carry it into effect. Ballistini fled from the locality and came to the capital of the Republic seeking protection. The son of Ballistini complained to the judge, and the latter revoked the order of detention, because the offense had not been proven, that is, because there was nothing injurious or calumnious in Ballistini's protest. Ballistini sued

the judge, Pereira Alvarez, before the court for neglect in the exercise of his duties, but the court could not move because Ballistini was not able to obtain the necessary copies of documents which the judge in question ought to have ordered to be issued to him, and his solicitations in this regard before the president of the State and other local officials were futile. These facts prove the denial of justice, because the local authorities deprived Ballistini of the legal means of instituting before the competent tribunals the actions which the laws would authorize him in case he might improperly have been condemned to a criminal judgment. In this respect the Venezuelan Commissioner believes that Ballistini is entitled to an indemnity which, in relation to the offense and the injuries which the arbitrary order of detention of the judge caused him, he estimates at 25,000 bolivars.

4. This item of the claim is a demand for indemnity amounting to 75,000 bolivars for principal and interests for a certain number of coupons or bonds of the debt of the State of Guayana, of which Ballistini says he is the owner, and that by decree of President-General Fonseca, it was ordered that they should not be admitted as had been the custom in payment in the tax offices of the State unless they had been redeemed up to date. The claimant has not presented the original bonds or any part of them which he may have in his possession. The failure to present said bonds makes an appreciation regarding the legitimacy of the claim impossible because its essential foundation, which is the ownership or existence under the control of Ballistini of such certificates or bonds and the exact ascertainment of their amount, is wanting. Besides this circumstance, which by itself alone nullifies the claim, it appears from the claim of Ballistini himself that these bonds are nothing else but bonds of a public debt of the State of Guayana extinguishable from the time of their issue in 1878 by 10 per cent of the ordinary receipts of the treasury of the State; that later, in November, 1882, the President of the State suspended the circulation of said bonds, and on December 9 of said year he issued a decree ordering their redemption by means of payments to be made out of an allotment of 25 per cent of the special revenue of the State of Bolívar destined for the section of Guayana on June 7, 1884, and payment was made whereby the value of the bonds was reduced from 104,837 bolivars, the amount of the first issue, to the sum of 49,507 bolivars, which sum Ballistini says was completely in his possession; that the effects of the financial crisis that took place at that time and the reduction of 25 per cent in the revenue of the allowance and by the territorial revenues hindered the continuation of the extinguishment, and finally that the legislature of the State by a legislative act of 1888 passed a law concerning the public debt which had as an object to consolidate all the debts of the State. It is to this decree that the judgments of the court in the various grades of jurisdiction of the State of Bolívar have remitted Mr. Ballistini in the suit which he instituted against the treasury of the State for the payment of the bonds which were in his possession. In May, 1890, Ballistini, the claimant instituted a proceeding of cassation against this decision in the supreme court of Ciudad Bolívar as a court of last resort, and on the 16th of that month the court of cassation granted the appeal which, as appears from the statement of Ballistini, was allowed to lapse.

There are, therefore, final judgments which decree that Ballistini, like any other holder of the internal debt of the State of Guayana, is obliged to submit himself to the laws or decrees which govern the extinguishment of said debt.

It is a principle of public international law that the internal debt of a state, classified as a public debt, which is subject to speculations current amongst that sort of values which are acquired freely and spontaneously at very different rates of quotations which mark great fluctuations of their rise and fall, can never be the subject of international claims in order to obtain their immediate payment

in cash <sup>1</sup> just as they can not be the subject of judgments before the tribunals of the country in order that their holders may obtain the payment of their nominal value. To establish such a principle would be to put a premium upon stock jobbing, which would be often possible with this sort of public values, and would place nations at the mercy of speculators who might obtain control of all their internal debt. The certificates or bonds, in question in the matter of the claim of Ballistini, in this subdivision, are in the same conditions as the internal debt of the nation, which amounts to many millions and bears interest, and it is more than four years since payment for its extinguishment and the payment of interest has been suspended on account of the abnormal condition caused by the war. Could these mixed commissions have jurisdiction to decide claims which the foreign holders of this internal debt might present to them in order to obtain the payment of the principal and interests?

This could not be sustained even with respect to the foreign, or as it is called diplomatic debt, of 3 per cent, nor with respect to any public debt which has been put upon the speculative market and may therefore pass from hand to hand by virtue of transactions prompted daily by those who profit from the rise and fall of public securities.

This portion of the claim is declared inadmissible, because it can not be prosecuted before this Commission.

5. This portion of the claim arises out of the recovery of a private debt which Mr. Hernandez Lopez contracted in favor of Ballistini, amounting to the sum of 12,228 bolivars, and which gave rise to a suit prosecuted before the competent judge of Ciudad Bolivar, in which judgment was rendered and ordered to be executed ordering the attachment of the property of the debtor. This attachment could not be carried into effect because Hernandez disappeared from the place of execution and the property of the debtor could not be found upon which to lay it. Ballistini seeks to make the nation responsible for the insolvency of his private debtor, an unsustainable and evidently rash pretension, which only indicates in the petitioner a true monomania for claims. The amount of this portion of the claim therefore is disallowed, which is 25,000 bolivars.

6. The claim of 35,000 bolivars for a certain quantity of *sarrapia*, which was declared contraband after a formal judgment which was twice appealed and terminated in the full Federal court confirming the judgments of the first and second instances, which condemned Ballistini to lose the sacks of *sarrapia*, a contraband article, and to the payment of double duties, lacks all foundation, because there is upon this matter *res judicata*, and it ought therefore to be disallowed.

(Items, 7, 8, and 9 dismissed for want of proof.)

10. For the value of a certificate issued in favor of Domingo María Ballistini April 29, 1891, by the general internal treasurer of the State of Bolívar, recognizing the debt against the old State of Guayana, amounting to 13,780 bolivars, for supplies made to the State of Guayana and by order of the citizen president of the same State, No. 2307. This is admitted for said sum.

For interests upon this receipt and other general injuries there is allowed by the arbitrators the sum of 6,220 bolivars.

This claim was allowed for 50,000 bolivars.

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<sup>1</sup> In the Italian Commission (Boccardo case, not reported) judgment was given on internal bonds on authority of *Aspinwall case*, Moore, p. 3616.

## DANIEL CASE

Prescription unless pleaded by the debtor will not be taken into consideration by the Commission.

PAÚL, *Commissioner* (for the Commission):

The claimants, in their capacity of French citizens, and sole and legitimate children of P. Claudius Piton and Augustina Piton, née Lemoine, as appears from the public documents which have been presented before this Commission, demand from the Government of Venezuela the payment of the sum of 489,468.64 bolivars for capital and interest accrued since the date of their claim, arising out of the acknowledgment made by the minister of interior and justice on January 7, 1868, and by a resolution of the same date marked No. 5, in favor of Messrs. A. Lemoine & Co., for the following amounts: For the balance due on a credit of \$50,000, to which they have a right by the contract of July 20, 1856, made with the honorable municipal council of La Guaira, and approved by the government of the former Province of Caracas on August 28 of the same year, said contract having as an object the furnishing of drinkable water to the city of La Guaira by means of an iron pipe, the construction of various public fountains, the building of a reservoir for the storage of the waters, and the repairing of the aqueduct in various places, \$38,411.16.

For interest accrued upon this balance at the rate of 6 per cent per annum from June 1, 1860, until December 31, 1867 . . . . .	\$16,751.50
For damages and injuries which A. Lemoine & Co. claim for the breach of the contract (it being remembered that this amount is much less than what the profit of 1 per cent per month would have been which was indicated as simple interest in the original contract) . . . . .	7,500.00
	62,662.66

It was moreover resolved that this sum of \$62,662.66 should be paid by the administration of the revenues of the department of Vargas by the receipts from the public market of said city of La Guaira, and by the tariff for pure water which should be collected at that place, the payments having to be made monthly and the account to bear interest at said rate of 6 per cent per annum only upon the balance of \$38,411.16, since in no case could interest be paid upon interest.

As appears from the documents registered at La Guaira on January 28, 1868, under No. 4, protocol 8, the collector of revenues of the municipal council of the department of Vargas, Mr. G. Quevedo, by virtue of the special authorization of said body, by said instrument, put Messrs. A. Lemoine & Co. into possession of the receipts of the market and of pure water which might be collected by the administration of municipal revenues of the department of Vargas, its product to be delivered monthly, without any other reduction except what might be caused by its collection.

It appears from the documents presented that the administrative council of the department of Vargas carried on with A. Lemoine & Co. an open account in fulfillment of the resolution of the ministry of the interior and justice, under the division of districts until November 1, 1871, when the change of application of the funds destined for the extinction of the capital acknowledged to be due A. Lemoine & Co. and the interest on said capital at one-half per cent per month. From this last account it appears that upon the above date, November 1, 1871, the municipal council of the department of Vargas owed A. Lemoine & Co. the following:

For capital . . . . .	\$31,944.04
Interest . . . . .	25,234.62
Damages and injuries acknowledged . . . . .	7,500.00
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	64,678.66

An account has been presented bearing date April 17, 1882, showing an amount due of \$84,643.66 as the balance of the capital and interest in favor of A. Lemoine & Co. and a note addressed by the president of the municipal council of the district of Vargas, dated June 1, 1883, No. 188, to Mr. Daniel Dibble, in order that he might transmit it to the heirs of A. Lemoine, deceased, wherein he announced to them that said municipal council at its session of June 7, 1883, had resolved with reference to the claim presented by said heirs upon March 31 of said year, to approve the opinion of representative Manuel F. Sojo couched in the following terms:

That it being a matter of the greatest importance, and his many duties not permitting him to examine it, he returned it, indicating that he thought it would be well to have the advice of a lawyer.

The president of the council in said communication also announced that the body had postponed until another session the choice of the lawyer to be consulted.

Under letters D and E two plain copies of the two communications, the first addressed in July, 1895, by Carlos Piton in his own right, and Santiago Carias as the representative of Amelia and Isabel Piton to the municipal council of the department of Vargas, in which they requested that order be given that a liquidation might be made showing the indebtedness of said council to the heirs of Augusto Lemoine on account of the iron pipe line at La Guaira, in accordance with the contract in the premises which appeared in evidence in said record, and they demanded that a certified copy be issued to them of such liquidation.

The second communication, dated at Caracas in September, 1896, is written by the same petitioners and was addressed to the president of the State of Miranda, of which State the city of La Guaira then formed a part, asking said official that he examine the documents which the demand mentioned and that he might signify that he considered it just, and that he might fix upon a fortnightly payment for the gradual extinguishment of the debt. It is not proved that these two demands have reached their destination, and that consequently any determination with respect to them was reached.

From the facts stated, it appears that an agreement duly recorded existed by which the National Government through its official, the minister of the interior and justice, acknowledged an indebtedness in favor of Messrs. A. Lemoine & Co. of \$66,682.66, as capital, interest, and damages, and injuries in January, 1868, ordering the gradual extinction of this debt by means of the receipts of the rents of the market and pure water of the city of La Guaira; that this agreement was performed for the space of three years and ten months, Messrs. A. Lemoine & Co. receiving from the municipal rents of the district of Vargas various sums from said rents, which extinguished in part the balance owed upon the capital, and that portion owed for interest increased, whereby, by November 1, 1871, the general balance of the running account in favor of A. Lemoine & Co. amounted to \$64,678.66; that from this last date it does not appear that there has ever been any action taken by the owner of the debt directly, nor by their legitimate successors in interest, before the competent tribunals or officials of the country, demanding the fulfillment of the agreement made with the municipal corporation of La Guaira. It is not possible to leave out of consideration this notable circumstance which as a consequence has caused the default in payment

of a debt, recognized by a public instrument, for the extinguishment of which the party debtor had set aside certain receipts of the municipal revenues, thus constituting a pledge which in law establishes a legal right in favor of the creditor.

It is a notorious fact that the district of Vargas has since the year 1871 passed through a series of political and economic changes which have radically altered its organization and greatly decreased for various reasons the receipts of the municipal revenues.

The liability which might attach to the National Government to-day for a debt which was originally contracted by the municipal council of the district of Vargas, of the former province of Caracas, and which debt should be paid by these very municipal revenues which said corporation administered, can not be founded legally except in the ultimate territorial distribution sanctioned by the constitution of 1901 whereby the States obligated themselves to cede to the nation, among other cities, that of La Guaira.

Upon the date of this session the debt due the successors in interest of A. Lemoine had for a great many years remained without action, without their having been presented before this Commission any sufficient reason or motive to show that that situation was not owing to the neglect of the creditor and his legitimate successors in interest. The reason upon which all legislations base the right of the debtor to invoke prescription as a means of extinguishing an obligation is the abandonment in which the creditor has for a number of years left the exercise of his right, the legal presumption of payment arising therefrom. Prescription has not been invoked before this Commission in the present case by the Government of Venezuela, wherefore it can not of its own motion take it into consideration, in conformity with the principles which govern, but there is no right for the allowance of interest upon the amount of the debt; and taking moreover into consideration that the amount shown to be due by the liquidation of November 1, 1871, includes an item of \$7,500 for damages, and at the same time another amount for interest up to that date upon the capital at 6 per cent, which amounts to the sum of \$25,234.62; and that in all equity this double indemnity should not be allowed for interest and for damages, there should be deducted from the total amount of said liquidation the sum of \$7,500, and the balance in favor of the successors in interest of A. Lemoine should be allowed, say the sum of 228,714.64 bolivars, without interest.

(This opinion was concurred in by the French arbitrator.)

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#### HEIRS OF JULES BRUN CASE <sup>1</sup>

- A state of war, a battle, or a skirmish excuses only those casualties which are unavoidable.
- A city not in revolt, but temporarily occupied by insurgent forces, is entitled to receive from the Government the *utmost care and protection* not inconsistent with the retaking of the town from the insurgent forces, and is subject only to the *inevitable* contingencies attending such an undertaking.

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<sup>1</sup> EXTRACT FROM THE MINUTES OF THE SITTING OF MAY 27, 1903.

Proceeded to examination of claim presented in the name of the heirs of Mr. Brun (Jules), late superintendent of the French Company of Venezuelan Railroads.

Doctor Paul observes that this claim is not presented by a representative of Mr. Brun and in his opinion this fact would suffice for its not being taken into

There is a presumption that the Government will do its duty in this regard; but it is met, if not overcome, by a presumption which arises from a refusal of the Government in such a case to permit the use of its judicial processes to settle the exact facts easily ascertainable.

If there is a claimant rightfully in the case, however informally present, it is sufficient to permit and to require a disposition of the case on its merits and all parties will be fully bound by the decision.

Where the claimant is the mother, a widow, and the claim is for the unlawful killing of her son, the measure of damages is the amount which will meet the pecuniary loss she has sustained where there is no ground for exemplary damages.

The protocol constituting this commission having provided that the award be paid in bonds of the diplomatic debt of 3 per cent of Venezuela, which are at present greatly reduced in market value, the umpire cannot because of this augment the actual damage or the actual debt in making his award. Such a course would be unjust to the respondent Government and to every holder of these debts. The umpire is not competent to do this under the protocol.

#### OPINION OF THE VENEZUELAN COMMISSIONER

This claim is wanting every document proceeding from the lawful heirs or successors to Jules Brun formulating a claim against the Government of Venezuela for the death of said gentleman, so that all such elements are lacking as are indispensable for taking into consideration either the lawfulness of the personality of the claimant or the sum to which the claim is made to amount.

Among the papers presented by the French arbitrator there only appears a telegram dated the 4th of June, 1898, addressed by Mr. Hanotaux to the French legation in Caracas running as follows:

Take steps necessary to protect eventual rights of the Brun family, assuring guarantee of the French personnel of the company.

There are also presented two rough copies of writing corresponding to two notes addressed to the minister of foreign affairs of Venezuela on the 4th and 12th of June, 1898, by Mr. Quiévreux, inviting him to ask the local authorities

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consideration by the commission. He adds, besides, that the death of Mr. Brun was caused by purely accidental means and that in no manner can it serve as a basis for a claim of indemnity against the Venezuelan Government.

Mr. de Peretti replies that in presenting this claim the French Government is substituted in place of the heirs whose interests it takes in hand, the mother of Mr. Brun being aged and infirm.

Moreover, the responsibility of the Venezuelan Government appearing to him well established he accords an indemnity of 500,000 bolivars.

It is therefore decided that this claim be reserved for the umpire to examine.

Doctor Paúl inquires of his colleague upon what basis he has estimated the amount of the indemnity which he thinks is due the heirs of Mr. Brun. Mr. de Peretti replies that in view of the rejection by his colleague of the present claim he does not feel obliged to disclose the reasons which have led him to fix the amount of 500,000 bolivars. However, he is willing to state that this amount, which is exactly estimated by the French Company of Venezuelan railroads as an equitable compensation for the injury done to the family of its superintendent, represents almost precisely in capital the annual salary that Mr. Brun earned by his labors.

of the State of Zulia to tender their assistance to the officials of the "Compagnie Française de Chemins de Fer Vénézuéliens," with the purpose of establishing the exact truth of the events that took place at Santa Bárbara on the day Mr. Brun was wounded.

In reply to one of these notes the minister of foreign affairs on the 11th of June of the same year expressed himself to be willing to take it into consideration, foreseeing that the fact of his not considering it might lend itself to interpretations alien from the views of the Government as to the death of a truly appreciated person, which had had its origin in a regrettable accident during the progress of battle.

The fact of the wound of Mr. Brun, with which the communications of the consul of France deal, occurred under circumstances of such a nature so precise, so evident, and so indisputably accidental that all investigation after the death of the wounded gentleman became unnecessary. The very employees of the company, personal witnesses of the fact, narrate with all its details the unfortunate accident of the wound of Mr. Brun, and the commissioner for the Government of Venezuela will take precisely those declarations into consideration to weigh the reason and justice of the alleged claim.

Mr. J. B. Peysselon, representative of the "Compagnie Française de Chemins de Fer Vénézuéliens," after the death of Mr. Brun, in a statement which he ratified before the consular agent of France at Maracaibo, relates the facts as follows:

From the 4th day of May the village of Santa Bárbara, the place of our residence, was occupied by a revolutionary troop. On Sunday, the 8th, the legal troops, transported by the steamer *Progreso*, arrived at midday at the village. Under these circumstances we must foresee a battle in the streets. This foresight ordered us to immediately close all the doors and blinds of our dwelling house. While I was closing a window overlooking the square Mr. Brun was closing that of his sleeping room, which overlooks Santo Domingo street. At the same moment the musket volleys began in this street; the window was already closed; but Mr. Brun had no time to remove his hand from the lock when the bullet of an arm of precision pierced the blind through, twisted the lock in an extraordinary way, pierced Mr. Brun's hand through and through and threw the chips on his breast. Mr. and Mrs. Crinière, who inhabit the house of the director, attended Mr. Brun on this sad circumstance. I immediately went out to the square to call a physician. I met with 20 armed men of the Government, and the only person known to me to whom I could apply was Gen. Eleazar Montiel, the head of the party. As the physician had not arrived, I went out for a second time and saw the same Montiel with Messrs. Bellais and Acosta, his lieutenants, and another troop of the Government. When the first panic was over, Drs. J. Rosales and J. Cohen could be called, and immediately came to attend our friend.

Mr. A. Crinière, book-keeper of the company at Santa Bárbara, declares before the same consular agent:

We were anxious, because we heard and saw nothing. When at midday the report circulated that the steamer *Progreso* was at the entrance of Santa Bárbara, a great movement took place, and we saw a white flag at the station. This inspired us with some confidence, and we thought that the two parties would come to an understanding. Unfortunately it did not happen so, and at the same time a lively musket firing broke out in Santo Domingo street. It was the soldiers from Maracaibo that arrived at the bottom of the village and attacked the forces of Generals Figuera and Pozo in the rear. Immediately Messrs. Brun, Peysselon, and myself ran to close the doors and windows to protect ourselves from the bullets. I had already heard the noise of something like mortar falling behind me. It was a bullet that had pierced through the window of the hall overlooking the square which

had two flags. Almost at the same time I heard Mr. Brun cry, "I am wounded." We all ran to him to help and saw his right hand horribly mutilated by a bullet. All of this passed like a thunderbolt. We rendered the first attentions required by so serious a wound, and, the musket firing having ceased, Mr. Peysselon ran in search of a physician. I followed him and saw soldiers of the legal forces with the French flag over their heads guarding the entrance of the office in the street, which did not prevent them from preparing to fire at us; but fortunately Mr. Peysselon had sufficient presence of mind to cry: "French company," which produced the effect of changing their bad intention, and Mr. Peysselon was able to go out.

From the medical inspection made by Dr. J. Cohen and reported to the consular agent at Maracaibo, it appears that Mr. Brun, immediately after the incident, presented a wound in his right hand, with the following circumstances: On the palm side of the hand the wound presented an extent of from 7 to 8 centimeters and a strange appearance that showed that it had been produced not only by the bullet, but also by the violent pressure of a hard body, with half-cutting edges, which intersected the skin, the muscles, and the arterial arc. It also appears that the physician, in view of the dangerous nature of the wound, proceeded to render the patient, in company with Dr. Paminas Rosales, all such attention as medical science prescribed; that these cares continued during all the days 9, 10, 11, and 12, in which nothing particular occurred, the treatments being made regularly and with a great attention; that on the 12th, at 11 a.m., Mr. Brun was embarked on board the steamer *Progreso* for his transportation to Maracaibo without showing theretofore any alteration; that at 4 o'clock that day Doctor Cohen proceeded, on board the *Progreso*, to dress the wound, and found in the purulent focus formed at the side of the wound on the dorsal face of the hand a complete absence of gleet and three gangrenous points on the dorsal face of the thumb; that such symptoms inspired him with the fear of a great danger, for which reason he notified the acting representative of the rights of the company what he had seen and ordered a certain preventive method. The patient was well until 7, when in a violent manner the fever made its invasion with a strong delirium and all the consequences attending an infection; that everything was attempted, but in vain, for neither scientific cares nor those of friendship were enough to avoid the catastrophe that took place at 8.45, when the patient died of a purulent infection of violent invasion, which could not be overcome.

The corpse having been carried to Maracaibo on the same steamer *Progreso*, the government of the State of Zulia, upon learning the regrettable event, thought it to be its duty to join, as it did in effect, in the sorrow produced in the State by the death of Mr. Brun, and decided among other manifestations to assist at the act of the burial of the corpse of the esteemable gentleman, who lost his life on account of a lamentable accident.

Another proof given by the government of the sympathy with which it was inspired by the fate of Mr. Brun appears from a note addressed by Gen. J. M. Gomez, chief of the third military circumscription of the Republic to Mr. Julio d'Empaire, in charge of the consular agency of France in the city of Maracaibo.

In that note a copy is inclosed of that which in the name of Mr. Brun, while suffering in his bed the consequence of his wound, was addressed on the 12th of May, 1898, by Mr. J. B. Peysselon, inspector of the exploitation, to Gen. Mamerto D. González, military agent of Gen. García Gomez in the Santa Bárbara district. Mr. Peysselon's note runs thus:

Compagnie Française de Chemins de Fer Vénézuéliens. Line from San Carlos to Mérida. Direction of the exploitation. L.R.No. 658. Santa Bárbara, 12th May, 1898. General Mamerto D. González. My dear sir: As the agent of the company, and Mr. Brun being unable to do so himself, I thank you for the restoration of

order and for having taken the proper measures for the bringing of the steamer *Santa Bárbara*. It would be highly agreeable to us to see you among us protecting our persons and our interests. I am with all consideration,

Your respectful servant,

J. B. PEYSSELON,  
*Inspector of the Exploitation.*

This note, under the circumstances under which it was written, Mr. Brun being already wounded, order being restored in the place by the forces commanded by Gen. Mamerto González, and the steamer *Santa Bárbara*, that had been taken by the revolutionaries, being returned to the company, throws sufficient light to make one consider as ungrounded the attacks which Mr. Peysmelon desired to adduce with the purpose, after the death of Mr. Brun, of giving the accident happening to the latter a character of aggression against the building of the company, that is not in any way proved.

For all the reasons above stated the claim presented by the Commissioner of France on account of the death of Mr. J. Brun is destitute of any ground that may render it acceptable for any amount, and the Commissioner for Venezuela, therefore, entirely rejects it.

CARACAS, *May 27, 1903.*

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#### OPINION OF THE FRENCH COMMISSIONER

The 8th of May, 1898, M. Brun, superintendent of bridges and causeways on leave, director of the French company of Venezuelan railroads was grievously wounded by a discharge from Government troops which took place in the village of Santa Bárbara occupied by the insurgent forces. M. Brun, who was in his house, over which floated the French flag, had his hand shattered by a ball, at the moment when he was closing the shutters of the window of his room, and died four days later because of this wound. These facts have caused the lodgment by the French Government of the claim of 500,000 bolivars before the mixed commission appointed according to the protocol of the 19th of February, 1902. These facts are well established by the depositions of eyewitnesses and of the doctor who cared for M. Brun. The Venezuelan authorities have by their attitude confirmed their correctness, which the Venezuelan Government has never placed in doubt. At the sitting of the 27th of May, 1903, the mixed commission considered this claim.

Dr. Paúl rejected it, considering that it had not been presented by a representative of M. Brun and that this fact suffices for its not being taken into consideration at all by the commission; that the death of M. Brun had a cause purely accidental, and that it could not in any way serve as a basis for a demand of indemnity from the Venezuelan Government. I replied that the French Government had substituted itself for the presentation of this claim by the heirs whose interests it had taken in hand, the mother of M. Brun being aged and infirm, and that besides the responsibility of the Venezuelan Government seeming to me established I accorded a demand and indemnity in satisfaction of 500,000 bolivars.

It is said nowhere in the protocol that the claims must be presented by those having a right in themselves. It is at the same time conformable to international law and commanded by good sense and equity that the French Government present in its name the claims of those of its dependents who are not capable themselves of defending their rights, and nothing interferes with this. As for the responsibility of the Venezuelan Government, it is difficult to place it in doubt, even holding to the principles generally admitted by international European law, the existence of which are often disregarded in affairs between

the countries of Europe and certain South American republics, because of the social and political conditions of these countries.

Immediately after the decease of M. Brun, M. Hanotaux, minister of foreign affairs, telegraphed the 4th of June, 1898, to M. Quiévreux, chargé d'affaires of France at Caracas, to take the necessary steps to safeguard the eventual rights of the family. M. Quiévreux the same day wrote to the minister of foreign relations of Venezuela, rendering homage to the correctness of the attitude of the high authorities at Maracaibo, whose evidences of sympathy were an undeniable proof of the confidence which M. Brun had inspired and of the services which he had rendered to the country in directing a great enterprise of public utility. Quiévreux made known that the local officials had not conducted themselves so well. The successor of M. Brun in the direction of the company could not obtain from the judge of the district permission to proceed according to the legal forms to make the different proofs relating to this dreadful incident and to the circumstances accompanying it.

The house of M. Brun, property of the company, was connected with the shops and storehouse for material and the central office. But the doors of the principal shop of the office of bookkeeping and the telegraph office were broken down after one of the discharges fired upon the property of the company had wounded M. Brun.

In conclusion M. Quiévreux asked relief from the Federal Government and that they kindly invite the local officers to lend their indispensable assistance to an investigation of this nature by the agents of the French company.

In his reply the minister for foreign affairs tried to establish theoretically that the judicial authorities were not obliged to proceed to any investigation. He added that the death of M. Brun and the breaking of the doors were simply accidents of war. The death of M. Brun could no more require compensation than that of a Venezuelan who, crossing a street in Paris in 1871, during the struggles of the Commune, was killed by a stray ball.

The representative of France in his reply called attention to such strange theory, as it seemed to him. He suggestively remarked that the terms of the letter of the minister had only strengthened his purpose to have an examination of the unfortunate incidents which had marked the taking of Santa Bárbara by the troops of the Government. It was inadmissible, he added, that the department of foreign relations should try, under cover of the authorities of international law, to liken the breaking of the doors of the buildings of the French company to the destruction of the hostile intrenchments, which would lead one to suppose that the aforesaid buildings over which floated the French flag were occupied by revolutionary forces, but this hypothesis was so contrary to the real fact that the Venezuelan Government itself has not thought to claim it. M. Quiévreux said at the end of his letter—

I regret that it does not seem possible to your excellency that the judicial authorities of the district in which Santa Bárbara is situated should lend to the officials of the French company of Venezuelan railroads their aid in view of establishing the exact truth about the events which the national Government deploras with me. I see myself obliged, therefore, to make all my reserves for the case where the interested party having to formulate a precise claim upon the subject of this affair it would not be possible for them to base it upon the statements made according to the usual and legal forms. This will not be in accordance with their will or mine.

In spite of this courteous admonition the Venezuelan Government persists in its resolutions. This attitude proves clearly that it feared the consequences of a legal investigation and that it was ready to intrench behind technicalities more or less contestable upon explanations, upon international law and upon comparisons not well justified. We are convinced besides that this eagerness to

defend itself by the aid of citations of authorities of international law even before having been attacked, to reject a claim which was not yet presented, shows clearly that the Venezuelan Government itself confessed that a compensation for damages might be demanded of it under a just title. If it had been assured that an investigation conducted conformably to Venezuelan laws by the Venezuelan officials would have simply permitted to conclude upon the irresponsibility of the Government for the accident of the war no doubt but that it would have proceeded immediately to the aforementioned investigation. That would have established the responsibilities. That is what the Venezuelan Government wished to avoid. It has not recoiled before a denial of justice and it has thus condemned itself.

In the several trips I have made to Santa Bárbara for the purpose of forming personal opinions upon the French claims I have been able, although five years have passed since the events, to make some observations which have terminated by convincing me that the wounding of M. Brun could not be regarded as a simple accident of war. Accompanied by the commander of the French cruiser *Jouffroy*, by a representative of the French company, by the civil head of Santa Bárbara, and by some prominent men of the place, I visited the house where M. Brun was wounded. The window of the room situated on the first floor where this accident took place is pierced by several balls, the traces of which one sees clearly on the shutters of smooth wood and on the walls back of the chamber. Stray balls do not converge thus on a precise point. It is certainly a question of a volley fired intentionally upon a window which had just been closed and above which floated the French flag. According to the declarations which have been made to me by the civil chief and by the notables who were at Santa Bárbara when the village was taken, the troops which fired came by a street perpendicular to the side of the house where the window of M. Brun was located. There were neither in the street nor in the house any insurgents, the presence of whom could have explained the shots, and the armed band was commanded by an officer, Mr. Montiel, and composed of soldiers who knew the house of M. Brun and M. Brun himself very well. The tone with which these declarations were made lead me to believe that the aggressors knew what they were doing and were led by a chief who profited from an occasion offered to satisfy a former grudge. The investigation asked for and refused under the conditions, which I have explained, would at least have permitted the Government of Venezuela to punish those who thus fixed its responsibility. These necessary explanations tend to transform the simple accident of war which the Venezuelan Government would like to content itself with deploring into a murder committed knowingly, perhaps premeditated, and in any case accompanied by acts of violence upon foreign property without any provocation or any resistance being able to excuse or even explain them. Can one equitably establish a parallel between a like instance and the fortuitous death of a Venezuelan who, in 1871, was hit by a stray ball while crossing a street during a combat going on between the insurgents and the army of Versailles? M. Brun, director of a public service, who was obliged to remain at his post, has been wounded in his house surmounted by a French flag by a volley intentionally aimed at his window by a party of regular soldiers who knew him without one's being able to find in it any excuse or provocation. The same soldiers then broke down the doors of the buildings which they invaded and can not give as an excuse for this violation of foreign property the necessity of driving insurgents from it and of making them cease their resistance.

The nature of the acts, the conduct of the local authorities, the attitude of the Venezuelan Government, and the result of a personal investigation have led me to judge that an indemnity was due the family of the victim. I have

placed it at 500,000 bolivars, judging as an arbitrator who acts according to his conscience without allowing himself to be influenced by the quality of the parties which he has no mission either to attack or defend. I have estimated, and still estimate, after having heard my honorable colleague express his opinion, that this indemnity is an equitable reparation for the material damage suffered by the family of M. Brun. This sum represents in capital the annual salary of the director of the French company, who earned in pursuit of his duties from 20,000 to 25,000 bolivars. We should reach a much greater sum if we calculated the indemnity at the normal rate of interest in Venezuela, which is practically 12 per cent. We ought to consider besides that, according to the terms of the protocol, this indemnity has to be paid in bonds of the diplomatic debts and not in gold. Thanks to this concession kindly granted by the French Government to the Venezuelan Government to permit it to pay its debts with greater facility, the figure of the indemnity finds itself singularly reduced in reality. The bonds issued by the Venezuelan Government have an actual variable value in fact which always rests far from their nominal value. In May, 1903, they underwent a depreciation of 30 per cent. To-day the Venezuelan Government, having proceeded to new issues to pay the indemnities accorded by the mixed commission, the depreciation reaches 70 per cent. The latter can only increase still more by future issues. It would be then, if the umpire should partake of the sentiment of the French arbitrator, scarcely the sum of 150,000 bolivars in gold which the heirs of M. Brun would receive from the Venezuelan Government.

*December 15, 1903.*

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EXHIBIT ATTACHED TO THE OPINION OF THE FRENCH COMMISSIONER

Under date of June 17 last, the mother of M. Brun, having learned that the Venezuelan arbitrator had raised a question of fact because the Brun claim was not directly presented by the interested parties, sent me the attached letter.

Mme. Brun, aged and infirm, has counted upon the French Government to sustain her claim against the Venezuelan Government. She declares that she approves what the ministry of foreign affairs has done in her interest and requests it to continue its proceeding in the same manner.

JUNE 28, 1904.

M. DE PERETTI DE LA ROCCA,  
*French Arbitrator in Venezuelan Claims,  
Ministry of Foreign Affairs, Paris, France.*

LODÈVE (HÉRAULT),  
*June 17, 1904.*

SIR: I have learned that the Venezuelan arbitrator at Caracas has raised some difficulties with regard to the claim which I have for the death of my son, José Brun, director of the Company of French-Venezuelan Railways, assassinated at Santa Bárbara, Venezuela, because I have not acted myself, but I count upon what has been done by the French Government in maintaining my claim to follow its course.

I inform you then by the present that I give full approbation to what the ministry of foreign affairs has done, asking it to be pleased to maintain my claim in the manner in which it has supported it itself.

WIDOW BRUN (NÉE GARRED).

BOULEVARD DE L'HÔPITAL,  
*Maison Laurès, Lodève, Hérault.*

## ADDITIONAL OPINION OF THE VENEZUELAN COMMISSIONER

As commissioner for Venezuela, I have held, as shown by the abstract of the oral proceedings had on May 27, 1903, that the commission should abstain from considering the merits of the documents produced, as at first glance it appeared that a claim for indemnification had not been properly entered against the Venezuelan Government by a citizen or a party in interest of French nationality, showing his capacity as universal heir to M. Jules Brun, nor his legal title to receive any sum by way of indemnification. I also held that, from the examination of the documents then before me, no cause was shown to substantiate the alleged liability of the Venezuelan Government for the death of M. Brun, as the testimony of the eyewitnesses clearly proved that the death of the party was produced accidentally, was due to a casualty, at the time an armed conflict was taking place near his residence.

In support of the first point held in my opinion, I beg to call the attention of the honorable umpire to the precise language of article 1 of the protocol made in Paris on the 17th of February, 1902, to which the existence of the present commission is due, and supplemented by article 2, relating to claims submitted to the investigation and decision of said commission.

Both articles refer to *claims for indemnification presented by French citizens only*, and this commission can not, because more or less plausible reasons of similarity or inference are put forth, extend its limited powers to deal with other matters, except such as are *brought before it by French citizens in the shape of a claim demanding a stated indemnification*. Individual action is one of the requisites necessary to the possibility or faculty of the commission to deal with cases involving private interests of French citizens who claim as against the Venezuelan Government to have sustained damages or to be aggrieved parties.

Other questions exclusively affecting the Governments of both countries do not come within the scope of this commission, in the same manner that the diplomatic action of the Government taking in hand the representation and defense of the rights of its citizens does not extend so far as to create such rights nor to enforce them when the party concerned has not made use of such right nor yet to supersede the party when the party has not shown signs of existence. It is not amiss to quote, in this connection, the opinion of the learned commissioner, Mr. Little, in the claims of Narcissa de Hammer and Amelia de Brissot, before the commission created by the convention of December, 1885, between Venezuela and the United States:

This of course, is not saying that the United States has no cause for reclamation on the account of the killing of her citizens—Captain Hammer and Mr. Brissot. It is only holding that under the terms of the convention the question is not submitted to us. It would be to go beyond the limits of just interpretation and to enter the forbidden domain of judicial legislation to say that *claims on the part of citizens means or includes claims growing out of the injuries to citizens*. (Moore, 2459--2460.)

All questions relating to the nationality of the claimant and to the legal status or judicial capacity of the person to receive an award grow out of the presentation of such person as a claimant, whether it is a real living person or a judicial person, which by law has a supposed existence. On the other hand, the claim must state the amount claimed as a fair indemnification, such data as are furnished by the claimant being of great importance in the estimation of damages.

None of the requisites is found in the documents submitted to the commission, as such evidence only consisted of a collection of notes and depositions made by employees of the company and consular officers in regard to the death of M. Jules Brun. From the contents of said notes in regard to the consular action

it appears that such action was reduced to soliciting immediately after the death of M. Brun the cooperation of the Venezuelan authorities for the *further investigation* of a fact then made sufficiently clear by the testimony of the only eyewitnesses to the accidental wounding, the employees of the company. Such extreme investigation was asked for the sole purpose of—

securing the possibility that the parties concerned may have to enter a *precise claim* on the subject, being thus enabled to base it upon proofs established according to legal proceedings.

The telegram of M. Hanotaux, minister of foreign affairs of France, to the French legation at Caracas reads as follows:

Prenez dispositions nécessaires pour sauvegarder droits éventuelles famille Brun.

[Translation]

Take necessary steps to safeguard eventual rights of Brun family.

What is the meaning of the note of M. Quiévreux and of this telegram? That it might be possible for the interested parties to enter a *precise claim* on this subject and that the consular agent should endeavour to safeguard any eventual rights of the Brun family. Neither has the claim been made *precise*, nor is there anything to show that such rights of the Brun family have passed from their eventual condition to that of positive and distinct rights; nor has the French Government duly entered any such claim against the Venezuelan Government in behalf of the Brun family, nor yet has it deemed that the case has arrived when, by virtue of its sovereignty and in view of the testimony furnished by the employees of the company, witnesses to the wounding of M. Brun, said Government should demand a certain sum of money from the Venezuelan Government as an amend for a wrong done to the nation or as a penalty and under no circumstances by way of a humanitarian compensation or a charitable gift made to the Brun family. These courts can not measure in money the wrong done to a nation, as a nation, in case such wrong exists, nor have they been created to make grants in order to remedy the needs of a widow and orphans by reason of the accidental death of a beloved husband and father.

The honorable commissioner for France has lately produced as an annex to his opinion a letter from M. Brun's relict, dated on the 17th of June of last year — that is, one year after having presented and examined the documents in the case which I had before me in Caracas when I gave my opinion on the case. Such letter lacks weight, as it only ratifies the proceedings adopted in this matter by the minister of foreign affairs of France, and it has been shown that such proceedings do not constitute a claim for an indemnification for a given sum in behalf of a given person. That which has had no existence can not be the subject of approval or ratification. That which lacks legal force because of the omission of an indispensable requisite to make the act or contract valid may be ratified or approved in order to make it valid. To do this, however, it is also indispensable that such act or contract should exist even in a weak condition. That which has never existed can not be ratified or revalidated, and the claim of Mme. Brun against the Venezuelan Government for indemnification did not exist either prior to or at the time of the signature of the protocol of February 17, 1902, nor yet during the six months provided by article 2, as an extension of the time granted for the presentation and the examination in the first place by the French and Venezuelan commissioners of *all claims for indemnification* growing out of events prior to May 23, 1899.

In consequence I maintain the first point of my opinion that, as no claim whatever for indemnification was presented in due time by or in behalf of a specified French citizen, this commission is not under obligation to examine the

documents bearing on the case in point, as the commission has no authority in the premises, and that the claim must therefore be rejected.

In case the honorable umpire should deem it proper to examine the documents in reference on their merits and to weigh the proof of the facts in order to ascertain whether the conclusions arrived at by the honorable commissioner for France and the assertions contained in his memorandum in regard to the death of M. Jules Brun are justified, I have no need to go into a deep analysis of the testimony introduced to convince the honorable umpire of the slight connection there is between the opinion of my learned colleague and the conclusive proof shown by the testimony of the eyewitnesses, MM. A. Crinière, bookkeeper of the company and J. B. Peysselon, representative of the company after the death of M. Brun.

Mr. Crinière's *verbatim* testimony is as follows:

Dans la matinée du dimanche 8 mai, craignant un engagement sérieux des deux parties, nous arborions vers les dix heures du matin à la maison de la Direction des drapeaux nos couleurs françaises, dont deux à la fenêtre du salon donnant sur la place, par M. Brun lui-même et aidé de Miguel Labarca, deux par moi dont un très grand sur la rue Santo Domingo; *c'est par cette rue que les soldats de la force légale ont entouré le village et où donnait la chambre dans laquelle M. Brun a trouvé la mort en fermant une fenêtre.* \* \* \* Une vive fusillade éclate au même moment dans la rue Santo Domingo; c'était les soldats envoyés de Maracaibo qui arrivaient par le fond du village, et prenant par derrière les forces des généraux Figuera et Pozo, immédiatement Messieurs Brun, Peysselon et moi, nous précipitons pour fermer portes et fenêtres pour nous préserver des projectiles. Déjà j'avais entendu comme un bruit de plâtre tomber derrière moi; c'était une balle qui avait traversé la fenêtre du salon donnant sur la place et munie des deux drapeaux (a window different from the one where a few moments later M. Brun was wounded) et presque aussitôt j'entendais Monsieur Brun s'écrier: Ah, je suis blessé, nous tous nous précipitons vers lui pour lui porter secours et lui voyons la main droite horriblement mutilée d'une balle. Tout ceci a duré l'espace d'un éclair. \* \* \* J'ai été témoin de tous ces faits et je suis en possession du verrou de la fenêtre de la chambre de Monsieur Brun, et aussi d'une balle que j'ai ramassée au milieu du salon (not M. Brun's room); je les tiens à votre disposition et ils prouveront surabondamment la véracité de ces faits regrettables.

[Translation]

On the morning of Sunday, May 8, fearing a serious fight between the two parties, we hoisted our French colors at about 10 a.m. over the company's house. Two of said flags were placed in the window of the parlor overlooking the square by M. Brun himself, assisted by Miguel Labarca, and two by me, the very large one in the window facing the street of Santo Domingo. It was by this street that the legal troops surrounded the village and which the window overlooked where M. Brun met his death in closing this window. A lively fusillade rang out at that moment on Santo Domingo street; it came from the soldiers sent from Maracaibo, who were arriving at the rear of the village, taking the forces of Generals Figuera and Pozo at their back. Messrs. Brun, Peysselon, and I at once proceeded to close doors and windows to protect ourselves from the missiles. I had already heard a noise behind me as of falling plaster; it was from a ball that had come through the parlor window that overlooked the square and from which hung the two flags; almost at the same instant I heard M. Brun cry out, "I am wounded." We all rushed to his aid and found his right hand horribly mangled by a ball. All this had happened in a flash. I have been a witness to these events and have in my possession the window bolt of M. Brun's room and also the ball which I picked up in the middle of the salon; they are entirely at your disposal and afford abundant proof of these lamentable facts.

Mr. Peysselon states:

Le dimanche 8, les troupes légales amenées par le vapeur *Progreso* arrivaient à midi et demi dans le "pueblo". Nous devions dans cette circonstance *prévoir*

une bataille dans les rues. Cette prévoyance nous commandait de fermer immédiatement toutes les portes et volets de notre maison d'habitation; pendant que je fermais une fenêtre donnant sur la place, M. Brun fermait celle de sa chambre donnant sur la rue Santo Domingo; au même instant la fusillade commençait dans cette rue, la fenêtre était déjà fermée, mais Monsieur Brun n'avait encore pas eu le temps de quitter la main dessus le verrou, quand une balle d'arme de précision est venue traverser le volet, tordre le verrou d'une façon extraordinaire, percer de part à part la main de Mons. Brun, et lui projeter des éclats en pleine poitrine. \* \* \* Mons. Brun est resté à Santa Bárbara jusqu'à la première occasion pour descendre à Maracaibo et il a été embarqué le jeudi matin vers les dix heures avec plus grands soins. Son état ne nous permettait pas de prévoir une issue aussi fatale et si prompte. Il est mort pendant la traversée, le même jour à 8 heures 45 minutes du soir. Tel est l'exposé sincère des faits dont j'ai été témoin oculaire jusqu'à l'embarquement de M. Brun.

[Translation]

On Sunday, the 8th, the legal troops brought on the steamer *Progreso* arrived in the "pueblo" at half-past twelve, noon. Under such circumstances we anticipated a fight in the streets. This led us to immediately close all the doors and shutters of our dwelling house. While I was closing a window overlooking the square M. Brun was closing that of his room facing Santo Domingo street; at the same moment firing began in this street; the window had been already closed, but M. Brun had not had time yet to withdraw his hand from the bolt when a bullet from a rifle (*arme de précision*) came and perforated the shutter, twisted the bolt in an extraordinary manner and pierced through the hand of M. Brun, sending splints all over his chest. M. Brun remained in Santa Bárbara until the first opportunity to go down to Maracaibo. He was embarked Thursday morning at about 10 o'clock with the greatest care. His state did not warrant our foreseeing such a fatal and sudden issue. He died during the trip on the same day at 8.45 in the evening. This is a sincere statement of the facts of which I was an eyewitness until M. Brun was put aboard.

After reading such sincere and truthful accounts given by two responsible parties, employees of the company and fellow-countrymen of M. Brun, how can it be explained that the learned commissioner should in his opinion endeavor to construe a mere accident of war which the Venezuelan authorities were the first to deplore, as shown by the record of the case, into a murder committed knowingly and perhaps with premeditation, averring at the same time that the wound received by M. Brun was due to a shot from a volley designedly aimed at the window by regular soldiers who knew him? Where is the proof of so grave an accusation? Inferences like these, which originate in the mind preoccupied with the idea of finding guilt where there is only a regrettable incident, as indicated by the testimony of M. Crinière, can not fail to bring to the mind of an impartial and upright judge the conviction that such an assertion lacks all reasonable foundation.

So grave a charge against the Government of any country should be maintained by the most unquestionable proof. It should be alleged as a distinct fact and ground of reclamation and proved by evidence of the clearest character. Case of *Johnson v. Mexico*, before the Mexican Claims Commission, 1849. (Moore, p. 3032.)

As a proof of the correctness of his assertions M. de Peretti de la Rocca introduces in his memorandum a statement of the inspection he himself made of the house wherein M. Brun was wounded, when he went to Santa Bárbara on board of the French cruiser *Jouffroy*, in the course of a trip to Venezuela, five years after the incident. M. de Peretti states that according to the declarations made to him by the civil authority (*jefe civil*) and prominent persons who were in Santa Bárbara at the time the town was captured —

The troops that fired came through a street running at right angles to the side of the house where M. Brun's window lies, and that there were neither in the house nor in the street any revolutionists whose presence might explain the firing and that

the armed troop was under the command of an officer by the name of Montiel and consisted of soldiers well acquainted with M. Brun's house and M. Brun himself.

This supplementary proof which, for lack of a better one, the honorable commissioner for France endeavours to introduce, a proof resting upon his personal investigation, lacks all force in the present instance as we, the commissioners, must give our several decisions in strict accordance with the proofs submitted *ex parte*, and we can not find other elements to form our opinion unless they are from the documentary evidence submitted to us. To act otherwise would be tantamount to changing the mission of arbitrator and become an earnest defender of one of the parties. In order to show how easy it is to err when the field of sober thought is left where the judge must preside to enter into the arena where the eager defense is made it suffices to compare the text of the depositions of the eyewitnesses Crinière and Peysselon with the report of the French commissioner.

The witnesses state:

It was by *Santo Domingo street* that the soldiers of the legal troops surrounded the town, and M. Brun's room, where he was wounded when shutting a window, overlooks the street. \* \* \* A lively fusillade rang out at that moment in *Santo Domingo street*. It came from the soldiers sent from Maracaibo, who were arriving at the rear of the town and taking the revolutionary forces at their back; immediately (we) proceeded to close doors and windows to protect ourselves from the missiles. Under such circumstances we anticipated a fight in the streets. This led us to immediately close all the doors and shutters of our dwelling house.

While I was closing a window (Peysselon states) overlooking the square, M. Brun was closing that of his room facing *Santo Domingo street*, and at the same moment the firing began in this street. The window had been already closed, but M. Brun had not yet had time to withdraw his hand from the bolt when a bullet from a rifle perforated the shutter, twisted the bolt in an extraordinary manner, and pierced the hand of M. Brun.

Now, do not these two depositions clearly show the imminent risk which all the persons living in the house were running that the missiles might come in through doors and windows, and for this reason they hastened to close them? And was it not precisely in obedience to the instinct of self-preservation that M. Brun went to the window in his room, which faced *Santo Domingo street*, when a lively fusillade rang out in this street, and while being precisely there with his hand still on the bolt, the window being closed, a bullet wounded his hand?

Neither the conclusions arrived at by the learned commissioner from France in the narrative of his ocular inspection nor his theory of the perpendicular line in the subject of the direction of projectiles in a fight, which grew to the proportions of a battle, can alter in the slightest degree the deep conviction produced by the depositions of Peysselon and Crinière that the wound received by M. Brun, which some days later brought about his lamented death, was an accident, and by no means the outcome of a malicious plan.

I beg to call the attention of the honorable umpire to the contents of the official communications addressed by the president of the State of Zulia, and by the commander of the Third military zone, where the town of Santa Bárbara belongs, to M. Jules d'Empaire, in charge of the French consular agency in Maracaibo, wherein such officers express their earnest regret on account of the death of M. Jules Brun, a French subject, produced by a wound received under sad and fortuitous circumstances.

With the last-named communication, the military commander of the zone also sends a true copy of a letter M. Peysselon, inspector of the company, addressed in behalf of M. Brun to the military commander of the district, the letter in question being *verbatim*, as follows:

Como agente de la compañía y por impedimento del Sr. J. Brun (this is four days after being wounded), doy a Vd. las gracias por el restablecimiento del orden y por haber tomado las disposiciones eficaces para la traída del vapor *Santa Bárbara*. Nos complacemos altamente verlo a Vd. entre nosotros para proteger nuestras personas y nuestros intereses.

[Translation]

As the agent of the company and by reason of disability on the part of M. J. Brun, I beg to thank you for the restoration of order and for having taken effective steps for the coming of the steamer *Santa Bárbara*. We are highly pleased to see you among us to protect our lives and property.

Could it be possible that M. Brun would instruct M. Peysselon to thank the military commander of the district having under command the troops which made the attack on the town of Santa Bárbara, and to whose body the group of soldiers under the officer Montiel belonged, if M. Brun had not been satisfied that the wound he received and for which he was then suffering had not been entirely accidental?

I come to a close, confirming in all its particulars my former opinion, which I send with the present opinion, in which opinion I differ from my learned colleague, rejecting in full the claim that the Venezuelan Government must indemnify with any amount whatever the mother or family of M. Brun by reason of his death, which was entirely fortuitous and does not create any liability whatsoever on the part of said Government.

NORTHFIELD, VT., *February 1, 1905.*

#### ADDITIONAL OPINION OF THE FRENCH COMMISSIONER

After having heard the additional opinion drawn up by my honorable colleague I ought to declare that his arguments have not in any wise weakened my convictions. In the first place, I maintain that one could not refuse the French Government the faculty of the right to interfere for Mme. Brun, aged and infirm, and consequently incapable of acting by herself. This would be contrary to humanity, to good sense, and to the protocol of 1902. It is superfluous to indicate in fact that the French Government would have failed in its duty in not presenting this claim, but it is important to remark here that it has not in doing this acted contrary to the obligations which the protocol places upon it. Article 2, which concerns the claims which we are considering, is formulated thus:

The demand of the indemnities other than those which are covered by article 1. but founded on acts anterior to the 23d of May, 1899, shall be examined in concert, etc.

It is not said that these demands will have to be presented by the claimants themselves, who are at liberty to have them presented to the arbitrators by advocates or by their natural representative which is the government of their country. In the mixed commissions established at Caracas by the protocols signed in 1903 at Washington did not each government have an agent charged with presenting the claims in its name? It is necessary to remark besides that in the particular case the French Government by a scruple which can only honor it has not made itself the advocate of Mme. Brun. Nothing, however, forbade this, but it is content to serve as impartial intermediary. On the contrary, in denying the French Government the faculty of presenting this claim one goes against the spirit of the protocol, which has for its end the settlement of all the claims of French citizens, for one would oblige the French Government to reply to this claim by the diplomatic way now that the protocol has been signed, precisely in view of removing these difficulties from the ordinary

course. to submit them to arbitration. In the second place, in my opinion, the responsibility of the Venezuelan Government rests plainly established by the incident which has led to the death of M. Brun. I remain persuaded that M. Brun has not been the victim of a simple accident of war. The results of my personal investigation are not at all proofs, without doubt. I present them merely as the basis which has permitted me to form a conviction. I persist, moreover, in considering the refusal of the Venezuelan Government to proceed after the incident to an investigation upon the spot by its own officers as a valuable indication of the fear which the result of such an investigation would inspire in it.

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#### OPINION OF THE UMPIRE

The honorable commissioner for France asserts a claim of 500,000 francs, while the honorable commissioner for Venezuela rejects the claim in its entirety. Hence it comes to the umpire for his decision.

The unquestioned facts are that in the State of Zulia in the United States of Venezuela on May 8, 1898, there was a railroad extending from San Cárlos to Mérida and in San Cárlos was the village of Santa Bárbara about the harbor of the same name. That this railroad was operated by a certain French company, whose superintendent or director was Mr. Jules Brun. His residence and the shops and offices of the company were in said village of Santa Bárbara.

That for some time preceding the date mentioned there had been a revolt in the State of Zulia against the government of that State and of the Republic, and that these insurgents had taken possession of the country in the vicinity of San Cárlos and since May 4 had been in possession of the said village of Santa Bárbara. That the government was taking measures through military operations to dislodge the insurgents from this village and to defeat and disperse them; and for that purpose on Sunday, May 8, the Government troops arrived in the harbor of Santa Bárbara on the steamer *Progreso*, a little before noon of the day. That about 10 o'clock in the morning Superintendent Brun, his associates, and those who were occupants of the house with him, fearing an engagement between the two forces, placed conspicuously five French flags over their residence to attest its neutrality and mark it for protection. Not far from 12, noon, a battle seemed imminent between the two forces and the inmates of this residence, including the superintendent, made haste to close the shutters of the house. While Superintendent Brun was engaged in closing the shutters of the window overlooking the public square he was wounded by a rifle ball coming from the gun of a Government soldier, which penetrated the shutter, struck the bolt and drove it into his right hand, the ball passing through. It proved to be a most serious injury, crushing the hand and bones and lacerating the arteries, so that he lost seriously in blood and had a very jagged wound. Four other rifle bullets penetrated the house, coming through the window practically at the same time with this one which wounded Mr. Brun. Almost immediately following the wound two of the inmates went to the door to call a physician and found standing very near the residence about twenty soldiers, certain minor officers, and General Montiel in charge. At substantially the same moment of the firing into the house as aforesaid the doors of the principal shop and the office of the bookkeeper and the telegraph office belonging to this company were broken down by the Government soldiers by the order of General Montiel.

There were summoned as soon as possible to the aid of Mr. Brun competent physicians and surgeons who gave him thereafter so long as he survived skillful care and attention. However, despite the best of care, gangrene super-

vened and Mr. Brun died from the effects of the wound on May 12, four days after the wounding.

May 14, two days after the death of Mr. Brun, the gentleman then in charge of the French company's Venezuelan railroad made application in writing to the citizen judge of that district, praying that judicial proceedings be had to ascertain the facts connected with the injury and death of Mr. Brun and the damage to the railroad property occurring at the same time. There was no reply to his request, but General Montiel evidenced a violent hostility to this request. Following this application there came letters from the chargé d'affaires of France at Caracas to the minister of foreign affairs of Venezuela, the first being written on June 4 and the second on June 12, asking the minister to request the local authorities of the State of Zulia to take the proper judicial steps to ascertain the exact truth of the events of May 8, resulting in the fatal wounding of Mr. Brun and the damage to the railroad property. The first communication was not answered, but to the second letter a reply was made, courteous and sympathetic, but claiming that the injury arose under such circumstances as to free the Government of Venezuela of all liability for the death of Mr. Brun and the damages to the railroad property and declining to accede to the request of the chargé d'affaires that the facts be ascertained by proper judicial inquiry.

It appears that in conversation the military authorities of Zulia explained the attack of the Government troops upon the property of the French company, on the ground that the company had revolutionists concealed in its office. This allegation is wholly denied by the representatives of the company.

Mr. Jules Brun was 38 years old at the time of his death, was unmarried, was a French citizen, and was superintendent of a railroad at a salary of 25,000 francs a year, and he left surviving him as next of kin his mother, a widow and a resident citizen of France, who still survives. It is in her interest that this claim is presented by the French Government.

It is not claimed by the honorable commissioner for Venezuela, nor has it been claimed in any of the correspondence between the company and the Government of Venezuela that either the French company or Mr. Brun had failed to observe proper neutrality; and no claim is made by the Venezuelan Government that anything done on May 8th by the military authorities was because of any aid given to the insurgent forces by the company or by anyone directly or indirectly in its behalf, so that the umpire takes no account of the claim of the military authorities of Zulia, stated above.

There are certain other matters of fact which will be especially adverted to in the progress of the opinion.

Reference may be had to the very able opinions of the honorable commissioners to learn their respective positions upon the facts as developed; and the umpire takes this opportunity to express his appreciation of their great value to him in considering and determining this claim and, as well, his obligation to the honorable commissioners for their valued answers to the interrogatories submitted by him to them.

The honorable commissioner for Venezuela contends that the occurrence was of such a nature, its circumstances so precise, so evident, that all investigation after the death of Mr. Brun concerning the manner of his death became unnecessary. That this evidence disclosed indisputably that the wound was an accident due to a casualty and at the time an armed conflict was taking place near his residence. In fact, that it was an ordinary hazard of war.

Out of the same facts the honorable commissioner for France finds that there are shown to have been no insurgents in the street near the house, the presence of whom would explain the shots fired, and that the troops who did the firing

were at the time under command of a general of the national army, and that the bullets which struck the house and the bullet which wounded to his death Mr. Brun were the result of an unprovoked, unnecessary, and murderous attack on a well-known neutral who personally was held in high regard by the citizens and officials. He considers the damage to the buildings of the company at the same time to be corroborative of this view.

The umpire does not see in the injury of Mr. Brun and of the property of the French company any certain indication of a deliberately hostile act to him or to the property. Indeed, the sorrow of the president of the State, of the chief of the national forces, and of the inhabitants generally was so marked and so sincere that to find such a fact as is alleged by the honorable commissioner of France would require very strong and positive proof — proof to a degree of which this case is wholly destitute.

The umpire is convinced, however, that there were no insurgent forces in the immediate vicinity of the house of Mr. Brun at the time of his being wounded. The umpire arrives at this conclusion by an analysis of all the facts which have come to his knowledge in this case. (a) When the firing had ceased, Mr. Peyselson ran from the house to call a doctor and Mr. Crinière followed to get water. Mr. Crinière saw some of the national troops near the entrance to the house, but he mentions no insurgents. (b) Mr. Peyselson said that their egress from the house was *immediately* after Mr. Brun was wounded and that he found himself "face to face with about twenty armed men of the Government \* \* \*, General Montiel in command." As the doctor did not come, he went out a second time and saw General Montiel and two of his lieutenants, whom he names. But neither then nor before does he make mention of the insurgent forces, nor does he mention seeing any insurgent forces while going after the doctor or returning therefrom on either occasion. (c) The umpire fails to find any statement by anyone in any part of the papers of the claim suggesting the immediate presence of the insurgents at these premises at any time before, during, or after the battle. (d) It is accepted apparently by all parties, individual and governmental, that the shots in question were fired by Government troops. If there had been also present and engaged in an armed conflict insurgent troops and there had been at this point at the time in question a battle or even a skirmish in progress in which both were participating, there would have been always a serious question whether these shots were in fact from national or insurgent guns. (e) The fact that immediately following the injury there were twenty armed soldiers and a general in command at repose, apparently, near this building; that the general and his lieutenants, at least, remained there until such delay had occurred that a second attempt was made to call the doctor, are attitudes and facts which remove the probability that the shots which hit the house and wounded Mr. Brun were fired in the midst of battle against a contending or even a fleeing force. (f) When Peyselson or Crinière went out from the house there was no insurgent force in retreat, there was no national force pursuing. (g) There is an entire absence of all indicia common to such an occasion, if there had been at this point a battle or even a skirmish. The umpire is satisfied, therefore, to a moral certainty that no battle took place around or near this house at the time in question, and that the firing which did occur and from which the fatal wound resulted was unnecessary, and was in the presence of a high officer in command of the military forces. From all of the facts in the case the umpire finds that the bullet wound thus inflicted was the proximate cause of the death of Jules Brun, that the injury came under circumstances engaging the responsibility of the respondent Government, and that it must be held in damages for such sum as in equity should be assessed therefor.

The umpire might hesitate to adopt these findings if it were not true, and

had not been always true, that the respondent Government could ascertain and produce before this mixed commission the exact facts regarding the positions and movements of its own soldiers, and the position and movements of the insurgent forces at the time in question. Especial force attaches to this when it is known that the respondent Government was asked and urged by the representatives of the French company and by the representatives of the claimant Government to permit the use of its judicial processes and functions, in order that the truth might be established, but the privilege was denied them.

Hence against the very proper presumption that the Government of Venezuela will always do its duty by its own nationals and by its neutral friends resident within its domain may very properly be placed the presumption which arises when one is in possession of important truths essential to a judicial inquiry and elects not to produce them.

It must be remembered also that the village of Santa Bárbara was not in revolt. It was a loyal community temporarily under the control of an enemy — the insurgent forces. Within this loyal community were the shops and offices of a neutral company and the residence of the superintendent, also a neutral, whose conduct in Venezuela had been such as to gain and hold universal esteem. This property was then distinguished by a display of its national colors. Both the community and the company were the friends, not the enemies, of the Government and were both entitled to receive from the Government the utmost care and protection not inconsistent with the retaking of the town from the hands of the revolutionary forces and were subject only to the inevitable contingencies attending such an undertaking.

The umpire considers that in fixing responsibility upon the respondent Government he walks in the path of conscience, prompted by the spirit of justice and sustained by principle, by publicists, and by precedent. He invites the courteous attention of the honorable commissioners to the authorities and precedents which follow.

In the case of Terry and Angus between the United States of America and Mexico, Moore's Arb., 2995, the commissioners found that —

So far as the evidence discloses he had done nothing which could be construed into a violation of the neutrality which his position required. The destruction of the property was neither incidental nor a consequence of the military operations which the Mexican forces adopted to recover the possession of the city. That part of the city in which the property was located was wholly in the possession of the Mexican troops, and it does not appear that its destruction could in any manner facilitate their efforts to dispossess Colonel Childs of the part which was occupied by him.

This property was in Puebla in Mexico, which city had been taken possession of by the United States Army; and that portion of the United States Army left in command had been forced by the Mexican army, seeking to repossess itself of the city, into a remote part of the city from the property in question, and the property in question was wholly within the zone of the occupancy of the Mexican authorities. In view of these facts the commissioners also held that —

The destruction of the property of the claimants, under these circumstances, in the opinion of the board, constituted a valid claim for indemnity against the Mexican Republic. Moore's Arb., 2995.

See the case of Jaennaud *v.* United States, Moore's Arb., 3000, where it was held that the damage was not done "in battle or as a necessary and lawful military act." The cotton gin in which the cotton was stored which was burned "had not furnished a shelter from which the Confederates had fired or might thereafter fire upon the United States forces."

The evidence shows that the burning was a wanton act of the soldiers in the excitement of the moment, as they were marching back to their camp from a successful battle with the Confederates. It was without any justifiable excuse, in violation of order and discipline, and committed when marching back to camp under the command and in the presence of their officers, who by the usual and ordinary enforcement of military discipline might and could and should have prevented it, but who do not appear to have used any means whatever to prevent it.

In such a case we think that an allowance should be made. Moore's Int. Arb., 3000-1.

In the case of Alfred Jeannotat *v.* Mexico under the convention of July 4, 1868, Sir Edward Thornton, umpire, it was held by him that since—

the mischief is unnecessary and wanton, the responsibility must be accepted. \* \* \*. It does not appear that without the arrival of the military force which *ought to have protected the peaceable inhabitants of the town*, there would have been any inclination to commit such acts of violence. The umpire is therefore of opinion that compensation is due to the claimant from the Mexican Government. Moore's Int. Arb., 3673.

See also the case of Edward C. Du Bois against the Government of Chile, Moore's Arb., 3712-14.

See Turner's case, Moore's Arb., 3684-5.

See Hollenbeck's case, Moore's Arb., 3716-17.

In the case of George Pen Johnston *v.* Mexico, Moore's Arb., 3673, Sir Edward Thornton, umpire, held:

With regard to the damage alleged to have been done to the crops of cotton, barley, and oats by General Corona's forces in the spring of 1866, the umpire is of opinion that some damage was done, but not to the extent of the claim made, \* \* \*; that as the defendants have not proved that the requirements of war rendered that damage necessary, it must therefore be considered to have been unnecessary; and that therefore the claimants are, on account of that damage, entitled to compensation.

Distinctions, however, should always be made in regard to the character of the people in the district of country which is militarily occupied or passed over. The people of the country in which you are likely to operate may be divided into three classes: First, the truly loyal, who neither aid nor assist the rebels except on compulsion, but who favor or assist the Union forces. Where it can possibly be avoided this class of persons should not be subjected to military requisitions but should receive *the protection of our arms*.

The preceding paragraph is taken from instructions by the commander in chief of the armies of the United States (Gen. Henry W. Halleck) to the commanding officer in Tennessee under date of March 5, 1863. Halleck's Int. Law, vol. 2, page 56.

The military commander of the legitimate government, in a war of rebellion, distinguishes between the loyal citizen in the revolted portion of the country and the disloyal citizen.

Common justice and plain expediency require that the military commander protect the manifestly loyal citizens, in revolted territories, against the hardships of the war as much as the common misfortune of all war admits.

Instructions for the government of armies of the United States in the field, April 24, 1863. Halleck's Int. Law, 55.

Military necessity, as understood by modern civilized nations, consists in the necessity of those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war.

Military necessity admits of all direct destruction of life or limb of *armed enemies*,

and of other persons whose destruction is incidentally *unavoidable* in the armed contests of the war. *Ib.*, 41, par. 14-15.

Even in bombardments it is now deemed necessary to avoid as far as possible injuries to churches, museums, and hospitals, and not to direct the artillery upon the quarter inhabited by civilians, unless it is impossible to avoid them while firing at the fortifications and military buildings.

But had the guns of the besiegers been deliberately turned upon the dwelling houses of the bombarded town, or had an open or undefended village been fired into, the persons responsible for such proceedings would have been justly accused of barbarity, forbidden by modern usage. Lawrence, p. 344.

In further support of the finding of the umpire herein he cites Ralston, umpire in the Biajo Cesarino case, Venezuelan Arb. of 1903, 771. He also cites the De Lemos case, *ib.*, 303.

The honorable commissioner for Venezuela contends that this case lacks the essential prerequisite of a claimant, who, being a French citizen, by his individual action brings his claim before the commission, demanding a stated indemnification; and the honorable commissioner supports his contention by quoting from the learned opinion of Commissioner Little in the claims of Narcissa de Hammer and Amelia de Brissot before the United States and Venezuelan Commission, found in Moore's *Int. Arb.*, 2459-2460.

In the case cited the two claimants were widows, respectively, of Captain Hammer and Mr. Brissot, deceased, and upon the manner of whose killing the claims arose. The widow de Hammer and the widow de Brissot were each Venezuelan born and of Venezuelan nationality until married, when by the laws of both countries they became American citizens and remained such until the death of their respective husbands, when they reverted to their original Venezuelan nationality and were Venezuelans when they appeared before the American-Venezuelan commission claiming compensation of Venezuela for the killing of their respective husbands. It was under these conditions that Commissioner Little gave his opinion as to the scope of the protocol constituting that commission, and, as the umpire understands it, these two claimants, widows as aforesaid and Venezuelans, were denied place before that commission, because they were Venezuelans and not Americans.

The difference between the case cited and the case before the umpire is easily seen. The *case* for this claim exists in the claim of Jules Brun, which occurred before May 23, 1899, and at the time of his death, and always since, the claimant, Mme. Brun, mother of the deceased, has been a French citizen, resident of France and entitled to invoke the aid of France, and under the protocol of February 17, 1902, to appear before the tribunal there constituted to present her claim. That she has now actually done this, although in an informal way, can not be fairly questioned. She will be estopped from any future right or claim against the respondent Government on account of the death of her son as fully and as completely as though she had appeared earlier in the case, and the respondent Government will be protected and the claimant Government barred as effectually in every particular as though matters had proceeded more precisely and more formally.

In a case like the present, where the judgment of the umpire is the sole arbiter of amounts, the facts upon which his judgment is to be predicated are essential, but the stated indemnification of the claimant is not especially important. It is a matter of regret that the umpire knows so little concerning important matters which would have greatly aided him in arriving at the sum to be assessed as damages, and he may easily err because of such ignorance.

He is of the opinion that he has jurisdiction of the parties and of the subject-matter and must make a decision upon the merits.

There remains to be determined the sum to be assessed against the respondent Government because of this unfortunate incident, and here occurs a wide divergence of views between the honorable commissioners. In the opinion of the umpire it is such an amount as will meet the pecuniary loss which the widowed mother has sustained through the death of her son. This is not the sum which put at interest would earn an amount equal to his annual wage. It is only her fair expectancy in his wage and from his accumulations, which, had he lived, would reach her from year to year. In the absence of all proof that he had accumulated aught, or that he had contributed anything to her comfort and support, there is for the umpire no rule of action but to assume the ordinary conditions as to accumulations and the ordinary willingness of a dutiful son to contribute generously to the comfort and happiness of his widowed mother in her declining years, where as in this case the deceased had no dependent family. Her age is not stated, but to be the mother of one born forty-five years since, she is a woman near " threescore years and ten " and her expectation of life is relatively short.

The honorable commissioner for France insists with much learning and ability that the sum which would otherwise be assessed by the umpire in this case must be augmented by the difference which now exists in the market value in gold of the Venezuelan diplomatic debt of 3 per cent which is the method of payment provided in the protocol. This proposition is seriously opposed and with marked ability by the honorable commissioner for Venezuela. If the umpire were to take the advice of the honorable commissioner for France in assessing this sum he must hold to the same rule where the amounts due are capable of exact ascertainment and in his award augment these fixed sums by the same ratio of increase. If he did not do this, he might cause serious inequity, by inequality, between the individual claimants now before him; and if he did do this, he would preserve equity by equality, among the claimants directly before him, but he would work injustice and inequity, by inequality, to every other holder of this diplomatic debt. He would reduce still lower the market value of such diplomatic debt to the manifest loss of all, and it would not be impossible to deprive the diplomatic debt of all value if each lowering rate per cent in this diplomatic debt of 3 per cent was followed by a proportionately increased assessment. Aside from the apparent unwisdom and inequity of such a holding, the umpire is satisfied that he is not competent under the protocol to do other than to ascertain as nearly as he can the actual sum due from the respondent Government in each particular case and to award that particular sum. Under the protocol it is not for him to determine the means or the methods of payment; this is wholly with the treaty-making power of the two Governments, and it has been settled by the protocol in accordance with their high judgment.

It follows, therefore, that the sum to be assessed and awarded in this case and in all others before this umpire must be based on the damages actually sustained, and must be stated without reference to the way or market value of the means of provided payment.

In his best judgment the sum due from the respondent Government to the claimant Government for the benefit of Madame Brun is 100,000 francs, and the award will be prepared and signed for that sum.

NORTHFIELD, *July 31, 1905.*

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FRIERDICH AND COMPANY CASE <sup>1</sup>

- The burden is upon the company to establish clearly and definitely that the respondent Government proceeded in an unlawful manner concerning the boat of said company after it arrived in the port of Güiria.
- The initial wrong was all with the claimant company (a) in the engagement of an incompetent captain, with knowledge of his incompetency, (b) in the taking away of the ship's papers by a partner of the company, (c) in permitting the ship thus stripped of its papers to go out on the open sea, (d) in entering the harbor of Güiria under these circumstances.
- The arrival of this ship in port under the circumstances attending it justified suspicion and examination of the real status of the schooner by the revenue officers of the port.
- The schooner was not in the port of Guiria through any imperious necessity, but voluntarily. Such compulsion as existed was through the act or neglect of a member of the company; and its unjustifiable departure from the Port of Spain, its journey across the sea, and its entrance to the harbor of Güiria were wholly attributable to the company and its agents.
- In order that there may be intervention on the part of France, there must be a legal wrong on the part of Venezuelea.
- If Venezuela conforms with its own laws in its own ports, and if these laws are such as are the product of civilization, then there is no error, hence no responsibility on the part of Venezuela and no right of intervention on the part of the claimant Government.
- It appears that Venezuela acted in this respect through its regular officers and, until the contrary is clearly shown, the acts of these officers must be assumed to be regular and proper.
- Such a presumption of regularity and propriety is a proper protection of the public and its interests.
- Venezuela is also entitled to that presumption of good faith in favor of its public officers which ordinarily attends the acts of public officials.
- So far as appears, the court in proceeding to condemn the schooner to pay a fine was acting within its jurisdiction and within its right, and until the contrary appears its acts will be presumed to be regular and its judgment righteous.
- The laws of Venezuela in regard to such matters as are before the umpire in this case appear to be in harmony with the laws of other civilized countries.
- That the Government at Caracas permitted the boat to be returned to its owners without exacting payment of the fine is not an admission on its part that its acts in reference to the schooner had been irregular and unlawful.
- The question presented here is one of detention only, and the detention involves only the question of its reasonableness in point of time. Sufficient time to know all the facts, to assemble them before the court, and for the court to act upon them was a necessary adjunct of the situation.

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<sup>1</sup> EXTRACT FROM THE MINUTES OF THE SITTING OF MAY 12, 1903.

An examination of the claim of the Orinoco Asphalt Company, amounting to 176,080.10 bolivars, was next taken up. Doctor Paúl rejected it absolutely as without foundation. M. de Peretti, considering the schooner belonging to the company had been illegally detained at Guiria for thirty-four days, asks therefor an indemnity of 5,000 bolivars.

Doctor Paúl does not recognize the illegality of the measure in question. The arbitrators not having been able to come to an agreement, this claim will be likewise submitted to the umpire.

## OPINION OF THE VENEZUELAN COMMISSIONER

This claim, presented to the minister of foreign affairs of France by Mr. A. Sanary, who styles himself liquidator of the "Sociedad Betunes del Orinoco," is destitute of all documents proving the juridic personality of such company or the capacity of him who calls himself its liquidator as its trustee. What has been produced is a contract entered into in Paris, on the 2d of December, 1898, by which Messrs. Ernesto Nicolás Friedrich and Tácito Delort, on the one part, and Messrs. Courtant Bergerault and A. Cremer, on the other, agree upon constituting a commercial partnership on the part of Friedrich and Delort, and a silent partnership on the part of Bergerault and Cremer, the firm-name of which was to be "E. Friedrich & Co." Messrs. Friedrich and Delort only were authorized to manage and sign for the company. Besides, the fact on which the claim is based is only the detention sustained by the schooner *Love and Lulu* in the harbor of Güiria during thirty-seven days on account of a confiscation suit entered against her before the finance court for having arrived at that port without a matricula or register and other papers concerning her correct clearing, and in which suit she was condemned to pay a fine, she being released afterwards at the instance of the consul of Holland in Port of Spain, who claimed the preferential payment of debts contracted in said island, for which she was sold to the highest bidder there.

As is seen from the simple statement of these events, there exists no ground to demand an indemnity for the consequences of a suit brought in conformity with the laws on the matter, it being observed that it was Delort himself who denounced to the authorities at Güiria the want of papers of the schooner, alleging that they had been violently taken from the captain by his (Delort's) associate, Friedrich, when the vessel was leaving the island of Trinidad.

For the reasons expressed the arbitrator disallows the claim presented.

CARACAS, *May 12, 1903.*

## OPINION OF THE FRENCH COMMISSIONER

The liquidator of the French Society Friedrich & Co., known also by the name of the Orinoco Asphalt Society, claims of the Venezuelan Government an indemnity of 176,030.10 bolivars, because the latter having retained illegally in the port of Guiria the schooner of this society for thirty-nine days should be responsible for the complete ruin of the concern. The information which I have gathered at Trinidad and in Venezuela about this company has convinced me that the condition in which it operated did not bring about such a serious result. At the moment when the accident happened which incited the claim it was already in insolvency. We can not argue, then, that the intervention of the Venezuelan administration, stopping the affairs of the company, obliged it to abandon its operation. If the *Love and Lulu* had not been detained at Güiria and could have been able freely to pursue her voyage, the fate of the enterprise would not have been changed. However, it seems to me that the administration of the custom-house of Guiria committed an abuse of power in retaining for more than a month, without reason, the schooner *Love and Lulu*, and I consider that the damage caused the owners of a boat of its towage by its lying idle for more than a month should be compensated by the granting of an indemnity of 5,000 bolivars. In fact, the nominal owner of the schooner, Mr. Tacite Delort, silent partner of the firm Friedrich & Co., was on board at the arrival of the boat at Güiria, and he himself implored the aid of the authorities of the port against the insubordinate crew. The absence of navigation papers was due to a case of *force majeure* (superior force) analogous to those

which the Venezuelan law anticipated; the papers in question were besides delivered as soon as possible; and finally, the rigorous measure, the forfeiture and sale of the boat, ordered by the tribunal of Güiria, were carried out upon the order coming from Caracas. I have not taken into account a letter which Mr. Frierdich addressed to me the 28th of April, 1903, to request me to withdraw the claim presented under the firm-name of Frierdich & Co., because it was not Mr. Frierdich who presented this claim, but the liquidator of the company. Mr. Frierdich, resident in Venezuela, an insolvent, it appears, was on bad terms with his former partner, to whom he was indebted for quite a large sum. This situation and also, without doubt, the fear of displeasing the authorities of a country where he has definitely established his residence, and where he has married, explains sufficiently the proceeding of Mr. Frierdich. In these conditions, this proceeding (the sending of the letter) could not be taken into consideration. The indemnity of 5,000 bolivars, which I believe equitable, would be, it is necessary to note, diminished by more than half by the fact of payments in bonds of the diplomatic debt, accepted by the French Government, to the end of permitting the Venezuelan Government to pay its debts more easily.

PARIS, August 26, 1904.

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ADDITIONAL OPINION OF THE VENEZUELAN COMMISSIONER

As stated in my opinion preceding this additional opinion the detention of the schooner *Love and Lulu* by the authorities of the port of Güiria and the subsequent legal action thereon was due, as shown by the documents submitted, to the fact that said schooner arrived in the above-mentioned port without her register and other papers which the laws of Venezuela require from vessels coming into a Venezuelan port from foreign ports. Only in case of showing proof that the arrival of said schooner at the port under said conditions was due to any of the unforeseen circumstances specified by law, could the schooner *Love and Lulu* be exempted from the penalty imposed by article 48 of the "Código de Hacienda" (Code of Fiscal Laws) of Venezuela then in force. The detention of the schooner lasted the time necessary for the investigation of the facts and the hearing of the testimony of her owner, whose defense was the allegation that the papers had been violently snatched from him in Trinidad by his partner, Mr. E. Frierdich, and that the schooner had sailed by order of the master and crew who did not obey his (the owner's) determination to discontinue the trip.

It is moreover shown by the same documents (see note of the consul for the Netherlands in Port of Spain dated March 1, 1901, to the minister of the Netherlands in London) that the schooner *Love and Lulu* returned sometime afterwards to Port of Spain, where she was embargoed and sold under the hammer by the courts of the island, for the payment of the workingmen and other creditors. It is also shown by another communication bearing the signature of the consular agent for the Netherlands, under date of May 29, 1899, to F. A. Thompson, register, that on that date, a few days later than the 17th of May of the same year, when the schooner was released by the courts of Güiria, she had been already condemned by the courts of Port of Spain, and that it was on May 29, 1899, that the public sale was to take place.

The register was not the only document lacking the schooner when she came into the port of Güiria. As shown by the note of the consul for the Netherlands, under date March 1, 1901, already quoted, Frierdich, Delort's partner, also took in Trinidad from the master of the *Love and Lulu* the permit or clearance issued by the Venezuelan consul enabling the schooner to go into Venezuelan

ports, the certificate issued by the same official showing that the ship had complied with all the requirements, and other papers.

Article 48 of the Fiscal Code (Código de Hacienda) then in force in Venezuela provides that should only the register be missing, then such measures as are provided by law shall be taken on board of the vessel, \* \* \* and the fine of 5,000 bolivars shall not be levied and collected, nor shall the bond be demanded *when the master can prove* that the lack of the register is due to an accident which he could neither prevent nor foresee, such as *shipwreck, fire, or violence from an enemy or pirates*.<sup>1</sup>

In the case of the schooner *Love and Lulu*, which came under the authorities of Güiria, upon whom devolved the duty of strictly complying with the law, the master did not suffer violence from enemies or pirates, but it was Mr. Friedrich himself, the partner of the plaintiff, Tácito Delort, who took the schooner's papers, and it was the master, Luis Rodriguez, who of his own accord resolved to sail without the indispensable documents which he left behind at the port whence he sailed.

Article 194 of the same code provides that the ship's master is guilty of an offense and is liable to a fine of 10,000 bolivars and other stated penalties whenever he does not produce the other documents, if during the trial, as provided, he fails to show that the absence of such documents is due to any of the unforeseen circumstances set forth in section 2 of article 48.<sup>2</sup> It was not shown, nor was any endeavor whatever made to show at the trial of the schooner *Love and Lulu* that the absence of the other papers was due to unforeseen circumstances of shipwreck, fire, or under duress from enemies or pirates. On the contrary, the proofs then adduced show the party responsible for the absence of the ship's papers to be a partner of Mr. Delort.

The Venezuelan courts by virtue of their rightful and well-established jurisdiction and in conformity with the laws under which they are established were authorized and under obligation to bring an action against the schooner *Love and Lulu* to hold her and to compel the settlement of the liability incurred by her master for gross offenses (*faltas graves*) expressly defined and punished by the Venezuelan laws.

From the above statement of the facts it appears that it was through the fault of the claimant, Mr. Delort, and through the fault of the master in com-

<sup>1</sup> ART. 48. Cuando el buque traiga el sobordo y sus demás papeles despachados en forma por el Cónsul de la procedencia, y sólo le falte la patente de navegación, se tomarán a su bordo las precauciones prevenidas en el artículo anterior, y además de imponerse al Capitán la multa del artículo 194, número 1º, se le exigirá una fianza de cinco mil bolívares, si el buque fuere de vela, o de diez mil si fuere de vapor, otorgada por él y por dos comerciantes abonados, a satisfacción del Administrador, la cual se hará efectiva en el caso de que el buque salga del puerto sin permiso de la Aduana, y de la autoridad política respectiva, sin perjuicio de las demás penas a que haya lugar.

No se impondrá la multa ni se exigirá la fianza cuando compruebe el Capitán que la falta de la patente provino de un accidente que no pudo prever ni evitar, como naufragio, incendio o violencia perpetrada por enemigos o piratas. En este caso se dará cuenta al Ministerio de Hacienda con todos los pormenores.

<sup>2</sup> ART. 194. El Capitán de un buque incurre en falta y paga multa en los casos siguientes:

1º. Cuando no presente la patente de navegación, pagará de cuatro mil a cinco mil bolívares en el caso del artículo 48; doblándose esta multa y haciéndose efectivas las demás penas a que haya lugar por la no presentación de los otros documentos, en el caso del artículo 47, si en el juicio respectivo no compruebe el Capitán que la falta proviene de alguno de los accidentes fortuitos previstos en el inciso 2º del artículo 48.

mand of the schooner *Love and Lulu*, and the fault of Mr. Delort's partner, Mr. E. Frierdich, that the schooner in question was subjected to legal proceedings before the fiscal court (tribunal de hacienda) of the port of Güiria, and to be held and condemned in conformity with the laws in the premises. It is to his own acts or negligence, to say the least, that the claimant owes, either directly or indirectly, the grievances or injury he complains of, if he ever did suffer any grievance or injury.

I beg to submit, together with this opinion, a letter duly authenticated, which was sent to Caracas to me in my capacity of commissioner, by Mr. E. Frierdich, a partner of the plaintiff, of the firm of Frierdich & Co., in liquidation, which letter shows, as does also the letter which the same Mr. Frierdich sent my learned colleague, that he has authorized no one to enter a claim against the Venezuelan Government by reason of the seizure of the schooner *Love and Lulu*, and that he does not consider that the authorities of the port of Güiria have given any cause in the present case to enter any claim whatever.

I beg to differ completely from the learned commissioner of France's opinion, that the letter in question must not be taken into consideration by reason of certain personal facts connected with the writer thereof, such as his being insolvent with his partners, and a resident of Venezuela married in the same country, and to be acting under fear of offending the authorities of the country where he resides. The contention that he is insolvent with his partners and the facts of his having his residence in Venezuela and having married a Venezuelan are not, in my opinion, of sufficient weight to destroy the testimony of a person bound no less than by the ties of business association to the claimant, who makes use of the name of the firm to enter the claim in question. As regards the charge of fear, so far no proofs have been offered to show the fact that Mr. Frierdich is susceptible to such fear nor that he is actually laboring under it.

In view of the foregoing, I come to a close supporting my opinion that the claim of the partnership Frierdich & Co., in liquidation, named "Société des Bitumes de l'Orénoque", has no grounds whatever and that under the circumstances it should be disallowed. And I beg the honorable umpire to grant my request.

NORTHFIELD, VT., *February 1, 1905.*

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ADDITIONAL OPINION OF THE FRENCH COMMISSIONER

The reading of the additional memoir of my honorable colleague has not changed my opinion on the two single points which I have thought I ought to mention in the above memoir and upon which I am not in agreement with Doctor Paúl. In the first place, it seems to me evident that the society of Frierdich & Co. being in insolvency it pertains to the liquidator, Mr. Sanary, whose powers to represent the aforesaid society are contained in the dossier.

Mr. Frierdich, insolvent debtor of his associates, proves by his proceedings that, not content with not paying his debts, he still tries to injure his creditors by preventing them from getting the benefit of an eventual indemnity. I am not called upon to consider this manner of action. I am content to refuse to Mr. Frierdich the right which he arrogates to himself of speaking in the name of a company at present in insolvency of which he is only the debtor. Consequently I think the arbitrators have to take no account of his letters.

In the second place, I consider that the custom-house of Güiria has caused, by retaining for thirty-nine days without reason the schooner *Love and Lulu*, an injury to her owners, whatever might have been the condition of the latter at that moment, a situation as to which I share, besides the opinion of my col-

league. In fact, either the custom-house of Guiria proceeded according to the Venezuelan law in retaining this vessel and then should have inflicted the penalty provided by law, and in case of nonpayment should have proceeded to sell according to law, or indeed the law did not authorize the retention of this vessel after the delivery of the papers on board, and then it ought to have delivered her immediately to Mr. Delort. But it stopped the procedure entered upon, which seems to indicate that it had no longer a legal right to prosecute, but it continued to retain the boat, which it did not sufficiently protect against depredations and which it only surrendered thirty-nine days after the seizure.

I maintain, then, that the custom-house of Guiria committed an error; that this error entailed an injury upon the partnership of Friedrich & Co. in depriving it for more than a month of the use of this schooner, and that this injury would be equitably compensated by an indemnity of 5,000 bolivars.

NORTHFIELD, *February 3, 1905.*

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OPINION OF THE UMPIRE

The claimant company was organized in France and has unquestioned French nationality.

Tacite Delort and Ernesto Nicolás Friedrich are the active partners and managers of the company, and two other French gentlemen are silent partners.

The business of the company consisted of mining, refining, exporting, and marketing the products of a certain asphalt mine situated at Pedernales in Venezuela, about 70 miles from Port of Spain, Trinidad.

The company entered upon this business in 1898, and to aid in the importation of materials and men for the works and in the exportation of the asphalt to Port of Spain the company bought a schooner, *Love and Lulu*, which at the time of its purchase and thereafterwards was of Dutch nationality. It was registered in the name of Tacite Delort.

Owing to the character of the channel through which Pedernales was approached, it was necessary that the boat be of a peculiar build, which necessity was fully met by the *Love and Lulu*. Its purchase price was \$2,100.

From the commencement of work at the mines to April 8, 1899, the company had exported and sold about 800 tons of asphalt.

On the date last named the *Love and Lulu* was in the harbor of Port of Spain and Mr. Delort and Mr. Friedrich were in the city of Port of Spain.

One Luis Rodriguez had been engaged as captain of the boat. This man could neither read nor write, had been previously a river pilot, did not understand the laws attending navigation, and objected to the service at the time of the engagement, because of his ignorance and of his fear that he would commit some blunder in the office. Notwithstanding the knowledge of the company of this ignorance he was made captain.

On said 8th of June, 1899, Mr. Delort learned that the schooner had received its clearance papers and was about to sail for Guiria. He desired to go with the boat when it sailed, but did not desire to go then. He undertook to detain the boat and obtained an order from the Dutch consul to the captain, directing him not to go. He was taken to the schooner and gave the captain the order of the Dutch consul; but the captain refused to recognize the authority of the consul and upon being ordered by Mr. Delort not to sail, the captain refused to recognize Mr. Delort's authority and proceeded to prepare to sail. It was about this time that Mr. Friedrich, the other manager, came to the schooner in a small boat and demanded of the captain, and received from him, all of the ship's papers. Mr. Delort attempted to prevent their delivery to Mr. Friedrich by personal intervention and the use of some violence, but the captain over-

came Mr. Delort's resistance and delivered the ship's papers to Mr. Friedrich, as above stated. Notwithstanding that he had no papers permitting him to sail and against the continuing and earnest protest of Mr. Delort, and with him on board, the captain set sail for Güiria, which port he reached some time that day.

Immediately upon the arrival of the schooner at Guiria Mr. Delort informed the harbor master of that port of the condition of affairs, and on the next morning he made protest before the vice-consul of Spain at Güiria, and at the request of Mr. Delort the testimony of the captain and of the steward was taken.

Some time after April 11 Mr. Friedrich surrendered the ship's papers to the Dutch consul at Port of Spain and they were forwarded by special messenger to Güiria, reaching there about the 14th day of April, on which day they were brought to the attention of the customs officers of that port, and there being no Dutch consul at Güiria the vice-consul of Spain, as the officer of a friendly nation, on the same day at the request of Mr. Delort visited the customs officials at Güiria and solicited of them and also of the captain of the port that the *Love and Lulu* be turned over to Mr. Delort. A formal refusal was made by these officers.

On April 17 the papers had been sent back to the Dutch consul at Port of Spain and he presented them to the Venezuelan consul of that port and formally asked the release of the *Love and Lulu* at Guiria.

Proceedings were instituted against the *Love and Lulu* before the proper tribunal at Güiria under articles 48 and 144 of the Maritime Code of Venezuela. A fine of 5,000 bolivars was duly imposed by the court and due notice was given of the sale of the schooner for the recovery of the fine.

Friedrich & Co. had no other boat than the *Love and Lulu* and not being able to obtain one at Port of Spain suited to the channel of Pedernales they could not transport supplies to the works or bring out the products of the mines, and, as a result, the asphalt works were abandoned and the workmen taken back to Port of Spain. The company had no means to pay the workmen for their labor or to answer the demands of their other creditors, and possession was taken by these creditors of such property of the company as they could find in order to secure their pay.

Pending the sale of the schooner at Guiria, the Dutch consul at Port of Spain asserted to the customs authorities at Guiria a prior and superior lien upon the schooner and demanded its return to Port of Spain to answer to this lien. It resulted that the Government of Venezuela, recognizing the validity of this claim, directed the return of the *Love and Lulu* to Port of Spain, and the schooner arrived there May 17. The fine has been in no part paid. No appeal was taken from the action of the tribunal imposing this fine, and it remains a final and unsatisfied judgment.

On the arrival of the *Love and Lulu* at Port of Spain it was seized under process issuing from the court of Port of Spain and was sold at public auction under such process. Before the sale, however, due notice was given by the Dutch consul to the proper parties in charge of the sale of the superior lien of his consulate, and he demanded payment of this amount before the purchaser could take possession of the schooner.

Later, proceedings in liquidation were instituted at Havre, France, and Mr. A. Sanary was constituted liquidator, and it is on his behalf, at his initiative, and for the benefit of the insolvent company and its creditors as such liquidator, that this claim is here presented.

Mr. Friedrich has filed with both of the honorable commissioners a protest against this claim, denying that there was any fault on the part of the authorities at Güiria at the time in question, or that any responsibility attaches to Venezuela on account of what happened in connection with this schooner.

Quite a large sum of money is claimed by the company of Venezuela on account of its alleged fault, but in the opinion of the honorable commissioner for France there is a just claim for 5,000 bolivars only. He does not ascribe the insolvency of the company to the detention of the schooner at Güiria, and he limits his award to a sum which he regards as not excessive for the abuse of power which he holds was committed by the administrators of the custom-house at Güiria and through the action of the court in detaining the schooner for the time stated, which detention he considers unreasonable.

The honorable commissioner for Venezuela sees no error in the action of the Venezuelan authorities and refuses any compensation.

The honorable commissioners having failed to agree, they join in sending the claim to the umpire for his decision. They have rendered the umpire very efficient aid in their opinions, original and supplementary, and by their courteous answers to his interrogatories.

If the company has a right to claim anything of Venezuela, it is the loss of use of the schooner by its detention a certain length of time in the port of Güiria. This right of use or the rental value of the schooner can not be very large, since the value of the schooner as determined by its selling price was only \$2,100. In order that the company should have a claim upon Venezuela, the burden is upon it to establish clearly and definitely that the respondent Government has proceeded in an unlawful manner concerning said boat since it arrived in that port on the 8th of April, 1899. A detention without reason is suggested, but certainly some detention was not only reasonable but necessary. It was at least six days before its papers arrived from Port of Spain which would permit the company to justify in any way the right of the schooner to be upon the seas or in this port of Venezuela. The spirit with which this claim is pressed by the company is manifest from the fact that the claim for detention covers the entire thirty-nine days which elapsed from the time the schooner sailed from Port of Spain and the day of its return to that port. This is so manifestly wrong that it raises a suggestion of insincerity on the part of the claimant which must necessarily affect the value of the company's assertions in other particulars.

The initial wrong was all with the claimant company. It began in the reckless and ill-advised engagement of a captain entirely unfitted for his place, of which unfitness they were advised by the captain himself. It continued in the serious quarrel which had some time developed between the two managers of the company and, so far at this case is concerned, first manifested itself in the open rupture at the schooner's side at Port of Spain on April 6, when the captain, apparently through the advice and approval of one of the managers, openly defied the other, and where one of its managers was willing to see the schooner leave the port stripped of every essential paper to protect itself upon the seas, to become a floating derelict without right, opposed to the laws of all civilized nations and open to capture and condemnation without recourse or remedy. It was concluded when this same captain, ignorantly riding over the laws of every sea and the laws of every civilized port, sailed into the harbor of Güiria. The statements of Mr. Delort, made to the harbor master of the port and to the customs officials and before the consul of Spain, supported as they were in great part by the captain and whilom steward, were so improbable as to stagger belief and might well awaken just suspicions in the breast of the revenue officers of that port concerning the real status of the schooner.

Article 48 of the Fiscal Code then in force in Venezuela was:

Should only the register be missing, then such measures as are provided in law shall be taken on board the vessel, \* \* \* and the fine of 5,000 bolivars shall not be levied and collected, nor shall the bond be demanded when the master

can prove that the lack of the register is due to an accident which he could neither prevent nor foresee, such as shipwreck, fire, or violence from an enemy or pirates.<sup>1</sup>

But more than the register was lacking. The clearance issued by the consul of Venezuela at Port of Spain was lacking. There were lacking, also, the certificate by the same consul of compliance on the part of the schooner with all the requirements of the law and all other papers ordinarily belonging to a ship that is about to sail or that is sailing on the seas. The master could not prove in excuse that he was in this plight through any lack of foresight or through any accident. By the statement of both Mr. Delort and the master it was essentially true that there had been no accident of any kind, and they were not in the port of Güiria through any imperious necessity which they could not meet and overcome. They were there voluntarily so far as the master was concerned, and such necessity as attended their situation and their presence was the act of one of the managers of equal power with the other; no stranger had intervened, no trespasser had done them any evil; their unjustifiable departure upon and across the seas and their entrance into the harbor of Güiria were wholly attributable and only attributable to the company, its managers and agents. Thus far Venezuela is not involved. Does it act without law afterwards or without legal right? If it does not, then, even if it may be considered as acting harshly, which the umpire does not assert, the Republic of France has no right of intervention; for before there is right of intervention there must be a legal wrong on the part of Venezuela. If it conforms with its own laws in its own ports, and if those laws are such as are the product of civilization, then there is no error, hence no responsibility upon the state and no right of intervention on the part of the claimant Government. It appears that Venezuela acted in this respect through its regular officers and, until the contrary is clearly shown, the acts of those officers must be assumed to be regular and proper. There is a very proper presumption to this effect; and it is proper public policy and a proper protection of the public and its interests that such a presumption should attend the execution of official duties. (120 U. S. Sup. Ct., 605; 14 Johnson (N. Y.), 182; 19 Johnson (N. Y.), 345.)

The general presumption is that public officers perform their official duties, and that their official acts are regular. (American and Eng. Enc. of Law, 2d edition, Vol. 22, page 1267, citing in note 24, a long line of cases in England and the United States.)

Where some preceding act or preexisting fact is necessary to the validity of an official act, the presumption in favor of the validity of the official act is presumptive proof of such preceding act or preexisting fact. (Ib. 1269 and note 1 on same page, citing long line of supporting cases in the U.S. Sup. Ct. and in State courts.)

Similarly there is a presumption of good faith in favor of public officers. This presumption is applied to sustain the regularity of official acts in favor of individuals who rely thereon. (*Supra* and note 3, citing a line of decisions made by the United States Sup. Ct.)

A natural presumption attends them to that extent.

So far as appears, the court which proceeded to condemn the schooner to pay a fine was acting within its jurisdiction and within its right, and, until the contrary appears, its act will be presumed to be regular and its judgment righteous.

This presumption, supported by authorities above cited, applies equally to the actions and decisions of courts. It is only necessary to show that jurisdiction is clearly vested, and then the maxims or rules "Omnia præsumuntur rite esse

<sup>1</sup> See footnote, p. 34.

acta" and "Omnia præsumuntur legitime facta, donec probetur in contrarium" apply. (See Am. and Eng. Enc. of Law, 2d edition, Vol. 22, pages 1270-71 and the cases cited under note 4 of page 1271, both from the United States Sup. Ct. and from many of the State courts.)

The acts of the court must, in the first instance, be presumed to be regular and in conformity with settled usage, and are conclusive until reversed by a competent authority. *Williams v. U.S.*, 1 Howard (U.S. Sup. Ct.) 290.

Best, "Principles of the Law of Evidence," first American from the sixth London edition, Subsection IV, under head of "Presumptions in favor of validity of acts," the entire subsection and notes.

So far as has appeared before the umpire, the laws of Venezuela in regard to these matters are in harmony with the laws of other civilized countries, and it does not yet appear before the umpire wherein the fiscal court at the port of Guiria committed error in subjecting this schooner to the fine which had been voluntarily invited by its appearance in the condition which is proven and admitted.

That the Government at Caracas yielded later to the strenuous demand of the consul of Holland at Port of Spain rather than to withstand the demand is not to the umpire an admission on the part of the respondent Government that its acts in reference to the *Love and Lulu* had been irregular and unlawful.

From the facts appearing in this case the umpire is fully satisfied that Frierdich & Co. was practically defunct on the 8th of April, 1899, and that, regardless of the incident of the *Love and Lulu*, it would have met substantially the same subsequent conditions and would have ended in as complete and hopeless failure as in fact followed. This failure was in no especial sense hastened by the incident at Guiria, and the only burden which the detention of the *Love and Lulu* at Guiria placed upon the company was the sum which it had to pay for the use of the boat that took the workmen from its asphalt mines back to Trinidad; and this is, of course, a sum of no great significance.

Whether or not the action of the customs officers at Guiria and of the fiscal court were in fact regular and necessary is a matter of but slight pecuniary importance to the claimant company, and since it was the primary and potent cause of its own misfortunes in connection with this incident and by its own voluntary misconduct brought these inquiries, vexations, and expenses upon the customs officers and the court at Guiria, it is not in position to scrutinize very closely what the officers or court of Venezuela did or did not do.

Here may be applied with a certain degree of propriety one of the most important maxims of equity, viz, "He who comes into equity must come with clean hands."

It certainly has brought pecuniary indebtedness to Venezuela in virtue of what occurred at Guiria through its own fault, which it has not yet asked the privilege to discharge.

And in this connection the claimant company may properly consider the value of another of the maxims of equity, viz, "He who seeks equity must do equity."

As the question is presented here, it does not involve the final judgment of the court condemning the ship to a payment of the fine; nor any matter of restitution of the ship, for that occurred. It involves only the question of detention, and detention involves only the question of its reasonableness in point of time consumed, for a sufficient time to know all the facts and to assemble them before the court, and for the court to act thereon was a necessary adjunct to the situation. If the conditions on both sides are regarded as producing an equilibrium, justice is done, in the opinion of the umpire; and he so holds.

This claim is dismissed for want of equity in the claimant company, and the award will be drawn accordingly.

NORTHFIELD, July 31, 1905.

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CASE HEIRS OF JEAN MANINAT <sup>1</sup>

The respondent Government is held liable for injuries suffered by a Frenchman in the presence of the general in command of a division of the Venezuelan army, it appearing that the party injured was in the presence of the commanding general by his personal order and that the injury was caused by a subordinate officer without justifying reasons.

The injury being found to be reprehensible in character and the respondent Government for reasons of state declining or neglecting to punish the guilty persons, it is chargeable with the actual damages suffered by the injured person and such further sum as is held to be sufficient to make proper amends to the claimant Government for this affront to it through one of its nationals.

It being found by the umpire that the person came to his death through the injuries thus suffered, but before February 19, 1902, it is held that such only of his brothers and sisters as are of French nationality can present a claim before this commission to recover for his death.

This tribunal does not exist because of damages suffered in Venezuela, except these be damages of Frenchmen, limited in this case to the next of kin of the deceased, who are themselves Frenchmen. If none be French, then the claim falls. It is not possible to hold other than that the national quality of the claimant in fact determines the jurisdiction of the commission.

It is elementary that the burden of establishing nationality is with the claimant. It cannot be assumed or conjectured, but must be clearly proven.

Record proof is not essential if there be other that is convincing.

The marriage of a sister of the deceased to a Frenchman established her French nationality during marriage, which under French law remains after the death of her husband. There is some proof that she was born in France, none that she was born in Venezuela. Her French nationality being clearly established in her marriage, the burden shifts and rests upon Venezuela to show Venezuelan

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<sup>1</sup> EXTRACT FROM THE MINUTES OF THE SITTING OF MAY 19, 1905.

We then took up the examination of the claim of the heirs of Mr. Jean Maninat. The French arbitrator, considering on one hand that Mr. Jean Maninat has died as a result of a wound which the Venezuelan officer gave him, but, on the other hand, that Mr. Pierre Maninat does not prove sufficiently his grievance against the Venezuelan authorities in the course of his legal proceedings with his creditors, accords to the heirs of Mr. Jean Maninat a sum of 500,000 bolivars for the *ensemble* of damages which they have suffered for the reparations which were due them.

The Venezuelan arbitrator is of the opinion that Mr. Jean Maninat was cured of his wound when he was attacked by tetanus, from which he died; that none of the grievances formulated by him or his heirs is established by sufficient proofs; that besides Pierre Maninat, born in Venezuela, is a Venezuelan according to Venezuelan law, and that all his four sisters, were born without doubt also in Venezuela. Two are married to foreigners, and have consequently lost their French nationality. Wherefore he rejects absolutely the claim in question.

M. de Peretti replies that according to the French law M. Pierre Maninat and his sisters, save those two who have married foreigners, have conserved their French nationality, besides the fact that Mr. Jean Maninat, born in France, enjoyed incontestably French nationality justifies in his eyes the competency of the commission.

As he maintained his opinion previously expressed, it is agreed that the claim be submitted to the Hon. Frank Plumley, Northfield, Vt.

- origin to divest her of the nationality attained through her marriage. This not being done by Venezuela, she is declared French and competent to present her claim as next of kin to her deceased brother for the damages suffered by her because of his death.
- Both Governments must be assumed to have had definite knowledge of the serious disagreement between them in the matter of citizenship, yet they agreed upon the use of the expression "Frenchmen." To agree there must have been mutual assent and common understanding of the term employed. It is not suggested that either of the contracting parties yielded any point of its difference in this matter of citizenship. To agree, then, they must meet upon a common ground. This common ground must have been the plain whereby the laws of *both* countries the claimant is a Frenchman.
- Two interpretations being possible, that is to be taken which is least onerous upon the party to be charged with the service or with the loss resulting from the agreement.
- There is also the rule that in conflict of laws the law of the place of domicile should prevail. For France to intervene where the claimant is a Venezuelan by the laws of Venezuela and French under the laws of France would make the law of France superior to the law of Venezuela, which is not permissible between two sovereign nations.
- The right of the respondent Government to regulate her own internal affairs by determining who are her citizens, which involves mutual protection and support, is too essential an attribute of sovereignty to be invaded or disturbed.
- The rule of a nation requiring that one who is born in the country shall ordinarily be its citizen is a reasonable requirement.
- To all the world but Venezuela France may follow each succeeding generation born in Venezuela but of French origin so long as her affections dictate or her laws require or permit; but not so as to Venezuela.
- The effort of one of the sons to establish French nationality by acts of allegiance after the death of the injured person cannot affect his right as a claimant here, as that depends in this case upon the national quality of the claimant at the time of the inception of the claim.
- The next of kin found to be of French nationality, being a widowed sister, can properly sustain and maintain a claim for some pecuniary loss, although she was never dependent upon him for care or support and although there is no proof that he ever rendered either and no proof that she was ever so circumstanced as to need either.
- In this case the greater portion of the damages assessed and made payable to the next of kin, found to be French, is because of the unatoned indignity to France through the injury received by one of her nationals.
- This tribunal has no part in the final allotment or distribution of the sum awarded to France through the personality of the sister for whom France has a right of intervention. France has absolute dominion over the proceeds of the award, and with its distribution this commission has nothing to do.

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OPINION OF THE VENEZUELAN COMMISSIONER

Pedro Maninat, now a resident in Guatemala, presented to the minister of foreign affairs of France, on the 19th of August, 1901, a demand of indemnity against the Government of Venezuela for the sum of 2,000,000 francs, adducing as the ground thereof that in the year 1898, while he, with his brother Juan Maninat, was residing and established in the city of Valencia, under the firm

name of "Maninat Hermanos," with two branch houses, one at Tinaquillo and the other at San Carlos, a revolution broke out; that his houses were robbed and submitted to requisitions; that his brother Juan Maninat was illtreated and wounded in the presence of General Atilio Vizcarrondo, the second chief of the expeditionary army of the government of General Andrade, and died one month after that outrage; that Pedro Maninat himself was the victim of numerous persecutions, in the subsequent years, which compelled him to abandon the country and thus avoid attempts of murder.

Mr. Pedro Maninat adds that the conformity of the amount of his claim is proved by the following documents, deposited with the legation of France at Caracas:

A. Declaration written by his brother himself before his death and addressed to Mr. Quiévreux.

B. Declaration signed by thirty-three merchants, witnesses of the facts that took place at Tinaquillo.

B<sup>bis</sup>. Copy, certified and legalized by the legation at Caracas, of the final part of the declaration B, corroborating its contents.

C.D.E.F. Declaration of which the author of the outrage pretended to make use in order to make it appear that he had been attacked by the brother of Maninat. Extract of the certificate of birth. Report of the physicians. Certificate of death.

G. Petition of Mr. Pedro Maninat to Mr. Quiévreux asking him to ask for a certified copy of several writings forming part of the records relating to the bankruptcy of "Maninat Hermanos," existing in the archives of the court of the first instance in civil and mercantile matters at Valencia mentioned with indication of sheets, and which Maninat considers indispensable to ask for the intervention of the French Government and demand from the Government of Venezuela the payment of a just indemnification, the justice and precision of which are irrecusably established in the documents asked for.

There also appears among the papers of these records a letter dated Lima, the 2d of March of the current year, signed by Justina Maninat, widow of Cossé, addressed to the minister of France in Venezuela, bringing to his knowledge that she is one of the sisters of the late Juan Bautista Maninat, whose claim initiated by him in 1898 and pursued after his death by his brother Pedro Maninat in 1901, must be in his possession. The signer of this letter asks the minister of France, at the same time, to kindly take note of the existence of her sister Clotilde Maninat de Saldías, domiciled in Lima, and in whose house she lives with her sister Juana Maninat, as well as of the existence of Josefina Maninat de Beguerisse, residing in Guatemala; and that, as they are the only persons entitled to the claim brought against the Government of Venezuela for the robberies, outrages, and chiefly for the proved murder of their brother Juan, she asked, in her own name and in that of her sisters, to be informed as to the present state of said claim.

In this claim two orders of facts are intermingled *and confounded*, so as to give rise to a variety of questions, which, based only on the statement of the claimant, are destitute of all proof and ground. Some are relative to the wound received by Juan Bautista Maninat in the city of Tinaquillo on the 15th of April, 1898, and others to the suit of bankruptcy entered at Valencia in the year 1899, against the firm of "Maninat Hermanos" on account of the state of insolvency in which said firm was at the death of Juan Bautista Maninat, which took place on the 13th of May, 1898.

What is styled "claim initiated by Juan Bautista Maninat, in the year 1898, and continued after his death by his brother Pedro Maninat," is only a simple statement of facts narrated by the former to Mr. Quiévreux in a letter of seven

pages, written in his own handwriting by Juan Bautista Maninat on the 26th of April, 1898, in which, already recovered from his wounds, gives him details as to the attempt of which he held that he was a victim on the 14th of April and asks in conclusion for the protection of the French Government for the punishment of those he considered guilty, and to the end that the fact of which he complained should not remain unpunished.

As appears proved by the letter dated the 26th of April of the same year, addressed by the consular agent at Valencia to the vice-consul of France in Caracas, Mr. Quiévreux, Mr. Juan Bautista Maninat was in a position by said date to come to Caracas, overrunning a distance of 150 kilometers, and to return soon after to Valencia. From the certificate produced by Messrs. Juan Bautista Posadas and Francisco Cisneros, medical doctors who examined at the request of the judge of the municipality of Tinaquillo, Juan Bautista Maninat, on the 16th of April, the following day after the occurrence, it appears that the wound situated on the left temporal auricular region had affected the skin and subcutaneous tissues, the respective auricular lap and a superficial part of the masseteric muscle, wherefore they declared it to be less dangerous.

From the certificate of death presented, issued by the competent official of the city of Valencia, the domicile of Juan Bautista Maninat, it appears that the latter died in said city on the 13th of May, twenty-eight days after the medical examination and sixteen days after his trip to Caracas, of traumatic tetanus, as was certified by Dr. J. R. Revenga. From what has been exposed it is inferred that the death of Juan Bautista Maninat was not caused by the wound he received at Tinaquillo, and that it was the consequence of a disease acquired, how and for what reasons it does not appear. The civil responsibility for indemnification of damages and prejudices in the cases of perpetration of an offense constitutes a claim of the person damaged against the author of the damage and is brought simultaneously with the penal action or separately. There is no responsibility on the part of the government of a country for such facts, except in the case of denial of justice or of notorious injustice in the action brought by the party offended against the author of the offensive act. The suit for civil responsibility that may be brought by everyone that has sustained a damage in his person or interests against the author or authors of an offensive act was not entered by Juan Bautista Maninat or by his lawful heirs against the party suspected of responsibility for the damage done to the former.

The claim against the Government of Venezuela, which can only be based on a denial of justice, in the respective suits in which both the penal and the civil action have been evidenced and decided, simultaneously or separately, is therefore destitute of all ground that may render it admissible, for Juan Bautista Maninat, or the present claimants, who have not entered the civil action pertaining to them against General Atilio Vizcarrondo.

The civil action to be entered for the reparations and restitutions in the cases established by the penal law can not be decided without a firm sentence having been rendered in the penal action, when the former has been entered separately, and when it has been simultaneously entered, or when the party offended has become a party in the civil suit, then the condemnatory sentence, which imposes a punishment on the defendant, gives by itself to the party offended a right to the reparations owed him by the author of the offense.

The commission of an offense can only give rise, therefore, to reparation by means of a civil action, the offended party constituting himself a civil party in the respective penal process, or separately entering his action as plaintiff, in which latter case, that such reparations may be obtained, the exhaustion must precede of all ordinary and extraordinary remedies which the law offers the defendant against the sentence declaring him guilty.

Nothing of this appears proved by the documents produced before this commission.

The declaration which has been presented with several signatures of private individuals of Tinaquillo, and another of the judge of the municipality of the district of Falcón relating to the acts which occurred during the stay of the forces of Gen. Atilio Vizcarrondo at Tinaquillo, are destitute of all evidential force and are not authentic, for which reason, besides our being unable to take them into consideration, they are not proper as evidence that there has been any denial of justice against Mr. Juan Bautista Maninat while endeavoring to obtain before the court the condemnation to the payment of damages and prejudices against him whom he considered responsible for his wound, as for that he would have been required to constitute himself as plaintiff in the respective process.

The local authorities proceeded to open the investigation ordered by the law immediately after the wound of Mr. Maninat had occurred, and the national Government, as appears from the notes interchanged between its minister of foreign affairs and the vice-consul of France, took, as soon as it was informed of the occurrence, all the steps leading to the investigation of the particulars of the case. It thus appears from the proceedings shown by the records kept in the court of the district of Falcón upon which the investigation of the fact was incumbent.

The Venezuelan arbitrator, therefore, finds no ground for the concession of an indemnity to the heirs of Juan Bautista Maninat, even if any of his sisters were of French nationality and had preserved it, for the wound received by the former, which wound was the object of investigation on the part of the competent officials who complied therein with the legal prescriptions, whilst it is not proved that Maninat ever brought on his part any action against those he considered responsible, and much less that the courts called to try and decide this demand of indemnification had committed any denial of justice or notorious injustice.

As to the acts mentioned by Mr. Pedro Maninat to justify the amount of his claim and relating to the bankruptcy suit entered before the competent tribunals of the State of Carabobo against the firm of "Maninat Hermanos," domiciled in Valencia, no faith-deserving evidence has been presented in support of the pretensions of Pedro Maninat; and, on the contrary, from the terms of the official notes of the vice-consul of France, Mr. Quiévreux, inserted in the records, it appears proved that said official always considered it to be his duty to remain alien to the reiterated demands of Pedro Maninat, that he should interfere in a commercial affair, exclusively submitted to the tribunals of the country and which could only be taken into consideration when there was a denial of justice, after the exhaustion of all the legal remedies. All the circumstances of that suit, presented by the claimant himself in different statements and letters, tend to prove the perfect regularity of the bankruptcy suit and the correctness of the proceedings followed by the tribunals that tried the case in conformity with the provisions of the commercial code. It is to be observed that it is proved by the certificate of birth existing in the parish church of Valencia that Pedro Maninat was born in that town in 1868, and that, therefore, he is of Venezuelan nationality, wherefore he can not claim from the Government of Venezuela before this commission.

For all the preceding reasons the claim of Pedro Maninat, amounting to the sum of 2,000,000 francs, is disallowed in all its parts, and likewise what Justina Maninat, widow of Cossé, pretends to adduce concerning the same claim must be rejected.

CARACAS, *May 19, 1903.*

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## NOTE BY THE VENEZUELAN COMMISSIONER

The French arbitrator, as appears from the record of the proceeding, allowed for this claim the sum of 500,000 bolivars for the death of Maninat, which he considered to have been occasioned by the wound, and for the damages that death caused the commercial house. In the discussion to which this opinion gave rise the Venezuelan arbitrator argued that the person who had presented the claim was Pedro Maninat, a Venezuelan citizen by birth, as he could soon prove it by producing the certificate of birth existing in the city of Valencia; that the sisters, Clotilde Maninat de Saldías and Josefina Maninat de Beguerisse, even in case of their having been French on account of their birth in French territory, by the time of the facts on which the claim is based and thereafter, had lost their French nationality by their marriages with persons alien to that nationality. These circumstances did not modify the opinion of the French arbitrator and the decision was submitted to the umpire.

## OPINION OF THE FRENCH COMMISSIONER

M. Pierre Maninat and his sisters, Mdmes. Justine Cossé (née Maninat), Clotilde Saldías (née Maninat), Josephine Beguerisse (née Maninat), and Mlle. Jeanne Maninat, claim jointly an indemnity of 2,000,000 bolivars for the murder of their brother, M. Jean Maninat, who died in May, 1898, from the result of a wound received at the headquarters of the Government forces, for the damage which this death caused this house of commerce, Maninat Brothers, which had to liquidate its affairs after the departure of its head, for the requisitions and the confiscations upon the proprietors of this house by the Government and insurgent troops, for the persecutions and denials of justice of which M. Pierre Maninat was the victim in the years following in the course of the defense of his rights. I have reduced to 500,000 bolivars the indemnity which I believe in equity due to those interested. I have considered in the first place as not debatable that the Venezuelan Government is responsible for the death of M. Jean Maninat. The 15th of April, 1898, an officer sent by General Vizcarrondo, chief of the staff of General Crespo, presented himself at the home of M. Jean Maninat at Tinaquillo and requested him to hand over to him four drays, of which General Vizcarrondo had need to transport his ammunition. This Frenchman, who had already often loaned without remuneration a like aid to the Venezuelan authorities to further the reestablishment of public order and who had just been the victim of an armed invasion and of the theft of an amount of merchandise, showed himself ready to conform to this requisition on condition that General Vizcarrondo give him a written order. In this he only followed the precepts of good sense and conformed to the recommendations given by the legation of France to its compatriots. Then he sent to the general one of his employees, who, far from obtaining a written order, was told to invite his employer to present himself without delay at headquarters. Being questioned by the general in the midst of his staff and summoned to obey, M. Maninat did not refuse, but renewed his demand for a written order. This very natural insistence exasperated this strange chief of staff. M. Maninat was insulted, maltreated, threatened with death, grievously wounded by a Venezuelan officer, and put in prison, from which he only got out by the intervention of the French representative at Caracas. If there had been on his part the least provocation, the authorities would not have failed to invoke it and apply the penal law in all its rigor. The prompt release of the prisoner, culpable merely of having spoken the language of reason, of defending his rights, and the absence of all further prosecution, sufficed to prove that the report of the victim is true in every point. No one, besides, has denied the accuracy and the public opinion at the time of the incident and, since I have been able to verify during my sojourn at

Valencia, has been on the contrary unanimous in confirming it. In like manner the numerous witnesses and the certificates of the doctors who figured in the dossier confirm it, and also the authorized declaration of Mr. Quiévreux, representative of the French Government at Caracas, who received the visit of the victim some days after the incident. M. Jean Maninat was wounded by a blow from a saber, which laid open his face from the forehead to the ear and would have killed him if the straw hat which he wore had not lessened the violence of the blow. The wound was dressed, and M. Maninat was able to come to Caracas, but it was so little healed that the 13th of May M. Maninat died from traumatic tetanus. He surely would never have been attacked by this disease, which one can not contract except as a result of a wound, if he had not been wounded. One can affirm, then, that his death has certainly been caused by unqualified violence committed upon his person by a Venezuelan officer. It seems to me just that Venezuela indemnify the family of the victim of such treatment, which in all countries, even in time of war, would have raised a universal reprobation and led to an immediate reparation. It is necessary to consider in the second place that M. Jean Maninat was the elder of the family. His untimely death gave a blow the more disastrous to the house of Maninat Brothers, because of the circumstances, difficult for every commercial enterprise. Even in the hypothesis that the affairs of this company may have been jeopardized for some time, which is not in any way proven, but which would be very likely considering the state of the country, one ought to recognize that the disappearance of the head of the house was not calculated to ameliorate the situation of the firm. We know besides, by the report of the Venezuelan commission in bankruptcy, that the result of the examination of the books and of the correspondence has not resulted in finding any indication of fraud or of culpability on the part of the bankrupt, and on the contrary permits the conclusion that the bankruptcy was caused by the requisitions and exigencies of the two parties in the armed struggle continued for more than two years.

On these two main points the Venezuelan Government is much involved in the ruin of the house of commerce, Maninat Brothers, which must have had a considerable capital, if one can judge from the extent of its business and its triple establishment at Valencia, Tinaquillo, and San Carlos.

Finally, so far as concerns the denials of justice of which M. Pierre Maninat has been the victim during the suit which on the occasion of the bankruptcy he had to present before the different judiciary powers, nothing seems to me sufficiently established to involve the responsibility of the Venezuelan Government and justify a demand for indemnity.

The reading of the articles merely show that delays have been produced, and they are not exaggerated. As for the persecutions of which the interested party would have been the object on the part of the administrator and judiciary authorities, if they are not proven by the dossier, it is almost certain that they have not been spared to M. Pierre Maninat. I wish to cite as proofs of this the unanimous opinion of the French and Venezuelan colonists whom I have questioned during my journey to Valencia, and also the fact that M. Pierre Maninat has had to leave Valencia and go to establish himself at Guatemala, and that they seem to have made his departure necessary.

It is true, on the other hand, and that has been confirmed equally at Valencia, that M. Pierre Maninat brought about many of the troubles which he had to undergo by his gruffness and his imprudent manners. He ought, consequently, to take upon himself more of the blame for his misfortunes. One could, however, object that it is not because a pleader is sturdy that one can refuse to render him justice.

Since he has left the country the ill will of Venezuelan authorities has con-

tinued to follow M. Pierre Maninat. They have raised in his way a thousand difficulties when he wished to have delivered to him copies of the exhibits of his suit. These copies were officially refused the minister of France, who demanded them, as the arrangement in force gave him a right, and the interested party had to resort to indirect means and to pay quite a large sum to obtain these copies which he wanted to join to his dossier. For all these reasons I have thought that the indemnity demanded might in justice be reduced to 500,000 bolivars, which would be for the heirs of M. Jean Maninat a just recompense for the death of their brother and the damage which preceded and followed his death.

My colleague has not shared this opinion. He concludes first, from the fact that M. Jean Maninat did not succumb until twenty-eight days after having been wounded, that the wound received at Tinaquillo was not the cause of his death, which was "the result of a disease contracted no one knows in what manner nor from what causes." The certificate of Doctor Revenga attests, however, M. Jean Maninat has died from traumatic tetanus; that is to say, of tetanus following his wound. We know that tetanus is a disease which develops only in those who are wounded. It is then indubitable that the saber blow received by M. Maninat was the efficient cause of his death, since the death was caused by tetanus, and tetanus is the result of a wound; but even if one refuses to admit it contrary to the declaration of the Venezuelan doctor and also contrary to the evidence, it remains, nevertheless, that M. Jean Maninat has been struck under circumstances of which we are acquainted; that he was wounded by an officer at headquarters where he had been ordered to come and where nothing proves that he did not conduct himself conformably to the proprieties. Even if not followed by the death of its victim, this cowardly deed, which nothing renders doubtful and which no one thinks a benefit, would it not have called for an indemnity so much the more so as no procedure has been set in motion against the guilty one? Why then reject entirely the claim? Doctor Paúl then established that M. Jean Maninat not having invoked a civil action consequent upon or parallel with a penal action because of a tort of which he was the victim, the responsibility of the Venezuelan Government is not involved, that resulting only from a denial of justice, or notorious injustice. One can reply that none of the numerous strangers injured in the course of the Venezuelan revolution and beneficiaries to this right of indemnity accorded by the mixed commission have appealed to the justice of the country. All protocols of Washington, like the protocol of Paris, have had precisely for their end to take away, by an exception, entered upon by its own free will so far as concerns France, by the Venezuelan Government, foreign claimants from ordinary tribunals to international tribunals before whom Venezuela is represented. One can not refuse to M. Jean Maninat and his heirs the privilege granted to several million other foreign claimants who have been benefited by this exception justified by the circumstances. It is to be noted that the protocols do not speak merely of denials of justice. They concern every claim of whatever nature it may be. In fact, of about five hundred French claimants three only have claimed for denials of justice, the others, like the Maninats, not having commenced by recourse to the Venezuelan justice and having directly addressed themselves to the commissions of arbitration. As for the investigation ordered by the local authorities, not only does it not seem to have been done intending to bring about a serious result, but it lacked penalty; besides it does not invalidate in any way the statement of the victim.

Moreover the Venezuelan commissioner holds that the claim of Pierre Maninat and his sisters is not admissible because they are Venezuelans by nationality, being born in Venezuela, but Jean Maninat, whose death and

material losses are the exclusive grounds of the indemnity to be awarded, was born in France, of French parents, and never did acquire Venezuelan citizenship, nor did he lose his French nationality, which, on the other hand, no one has ever disputed. This in itself is sufficient, no matter what the condition of the heirs might be, to submit the claim to the commission appointed to hear and decide on French claims. But I consider that if one takes account of the character of the heirs, the mixed commission remains with jurisdiction. In fact, Pierre Maninat and his sisters were born in Venezuela, but of French parents; they enjoyed then two nationalities at once — at their birth Frenchmen, according to French law, Venezuelans according to Venezuelan law. This is indisputable, but when the protocol mentions "claims for indemnities entered by Frenchmen," this means claims presented by persons whose protection the French Government endeavors to insure, because they are recognized as French citizens by the French laws. The protocol does not specify in any manner that the laws of Venezuela should also recognize such persons as French citizens. On the contrary, all the protocols signed in Washington last year between Venezuela and the foreign powers have expressly established that local legislation was not to be taken into consideration. Besides, two of the sisters of Jean Maninat have assuredly lost their Venezuelan nationality and are exclusively French, since they have married Frenchmen, Messrs. Cossé and Beguerisse. Mlle. Jeanne Maninat has been away from Venezuela since her childhood and lives in Peru. M. Pierre Maninat has never declared himself Venezuelan and has always maintained the title of a Frenchman. He left Valencia without intention of returning and has settled at Guatemala. Finally, he has fulfilled his military obligation according to the French law, and the French consular agents at Caracas and Valencia, at Puerto Cabello and at Guatemala, have already written him on their registers of matriculation of French citizens. In an analogous case, that of M. Piton, Doctor Paúl has recognized without difficulty the jurisdiction of the mixed commission and M. Piton has obtained a large indemnity. As for the fourth sister, Madame Saldías, she has married a Peruvian and she has not lost her French nationality unless the Peruvian law accords the nationality of her husband. In this case she has also lost her Venezuelan nationality; but even as to this last mentioned, the only one among the heirs of M. Maninat whose nationality may be doubtful, the commission of arbitration is competent to accord to her an indemnity, since she presents herself only as the heir of a claimant who enjoyed exclusively French nationality.

Finally, we ought not to forget that according to the terms of the protocol an indemnity ought to be paid in bonds of diplomatic debts and not in gold. Thanks to this concession granted to the Venezuelan Government by the French Government to permit her to pay her debts with greater ease, the figure of indemnities accorded to Frenchmen finds itself singularly reduced in reality while the indemnities of other foreigners are payable in gold and do not undergo any decrease on the fixed amount. The bonds issued by the Venezuelan Government sustain at this moment a depreciation of 60 per cent of their nominal value. The result would be then, if the umpire shares the sentiment of the French arbitrator and recognizes for those interested an indemnity of 500,000 bolivars, a sum of 200,000 bolivars in gold would be paid to the heirs of M. Jean Maninat by the Venezuelan Government.

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ADDITIONAL OPINION OF THE VENEZUELAN COMMISSIONER

The claim under discussion was made by M. Pedro Maninat on April 19, 1901, as shown in his communication from the city of Lima, bearing said date,

addressed to his excellency the minister of foreign affairs for France (Exhibit 3, document 59). Subsequent to this, in a letter dated at the said city of Lima on March 2, 1903, Justina Maninat, widow of Cossé, informed the French minister in Caracas, M. Wiener, that she was a sister of the deceased Juan Bautista Maninat, having an interest as such in the claim entered by Pedro Maninat, and that there were three other sisters, Clotilde Maninat de Saldías, resident in Lima; Juana Maninat, resident in the same city, and Josefina Maninat de Beguerisse, residing in Guatemala (Exhibit 3, document 62).

Among the documents delivered to the French commissioner subsequent to the meeting of May 19, 1903, when I rendered my opinion on the subject — documents which have now come to my notice — there are two letters dated at Lima on March 24 and April 22, 1903, bearing the signatures of Clotilde Maninat, wife of Saldías, and duly authorized by her husband, Eulogio S. Saldías; Justina Maninat, widow of Cossé, and Juana Maninat, who, of their own personal accord, and desirous of maintaining their legitimate rights, urge upon the French minister in Caracas the continuation to a successful issue of the claim entered by their brother, Pedro Maninat, now a resident of Guatemala, and formerly of Lima. Neither at the time of the meeting of May 19, 1903, nor in conjunction with the new documents produced, has any proof whatever been introduced showing that the aforesaid Josefina Maninat de Beguerisse, who, it is averred, resides in Guatemala, claims any sum whatever from the Venezuelan Government, nor that either the lady herself or her husband, Charles Beguerisse, may have given their consent and authority to introduce their names and persons in this claim, an indispensable requisite to become a party to the case.

It becomes necessary to point out the several grounds, growing out of facts of very different nature, advanced by Pedro Maninat and his sisters Clotilde, Justina, and Juana, upon which rest their claim for the sum of 2,000,000 francs. Some of these grounds are made to originate at the death of M. Juan Bautista Maninat, which took place in May, 1898, as it is averred that his death was the result of a wound received by him in the general headquarters of the Government troops, and because of the damages sustained thereby by the firm of "Maninat Brothers," which it is claimed was compelled to go into liquidation after the death of the head of the firm. Other grounds are based upon certain requisitions and seizures made upon the property of the firm by both the Government and the revolutionary troops and upon the persecutions and denial of justice of which Pedro Maninat claims to have been the victim in subsequent years and while he was engaged in defending his rights.

The French commissioner in his opinion deems an indemnity of 500,000 bolivars to be a fair compensation for the heirs of Juan Maninat, by reason of the death of a brother and because of the damages suffered before and after his death; and as regards the denials of justice of which Pedro Maninat complains as having occurred during the proceedings originating in the failure of "Maninat Brothers," the commissioner does not deem the claim sufficiently substantiated to affect the responsibility of the Venezuelan Government and to justify a demand for indemnification.

Therefore our opinions as commissioners differ on points relating to the several questions directly connected with the wounding and death of M. Juan Bautista Maninat; to the persons of the claimants Pedro, Clotilde, Justina and Juana Maninat, and in the matter of the liability of the Venezuelan Government. All these questions must be investigated and decided by the light of the principles and precedents established by international law, the Venezuelan laws applicable to the case, and the sound and just consideration of such facts as are fully verified.

The learned commissioner for France makes the following statement on page 8 of his opinion: <sup>1</sup>

The Venezuelan commissioner holds that the claim of Pedro Maninat and his sisters is not admissible, because they are Venezuelans by nationality, being born in Venezuela, but Juan Maninat, whose death and material losses are the exclusive grounds (*sujet*) of the indemnity to be awarded, was born in France of French parents and did never acquire Venezuelan citizenship, nor did he lose his French nationality, which, on the other hand, no one has ever disputed. *This in itself is sufficient, no matter what the condition of the heirs might be, to submit the claim to the commission appointed to hear and decide on "French claims."*

According to the sound principles of international law, it is impossible to admit the opinion held by my learned colleague that, no matter what the condition or nationality of the claimants or heirs might be, it suffices that the bonds of kinship exist between them and the person wronged and that such person be or might have been of French nationality for the case to come under the claims commission, whose duty it is to hear and decide on "French claims."

The jurisdiction of this claims commission, according to the plain and precise terms of the Paris protocol of February 17, 1902, to which it owes its existence, can not embrace other claims for indemnification beyond those "entered by Frenchmen," it being, therefore, indispensable to prove that the nationality of the claimant was solely and exclusively French.

It can not therefore be held under any circumstances whatever that, no matter what the nationality of the claimant might be, the condition of being heir to a person who was a Frenchman at the time of his death is enough to bring such claim under the jurisdiction of this commission. In support of my opinion the following quotations are pertinent:

Sir Edward Thornton, umpire for the commission of the United States and Mexico, under the convention of July 4, 1868, makes the following statement:

As therefore Mr. Lizardi's niece is not a citizen of the United States, and as she would be the beneficiary of whatever award the commissioners might make, the umpire is decidedly of the opinion that the case is not within the jurisdiction of the commission. Even if the uncle, Mr. Lizardi, had been a citizen of the United States, which the umpire does not admit, whatever may have been the merits of the case the jurisdiction of the commission would have ceased on the death of Mr. Lizardi. (Moore, *Int. Arb.*, Vol. 3, 2483.)

In the case of Elise Leuret before the Franco-American commission the counsel for the United States said:

When the treaty pledges compensation by France to citizens of the United States it refers to those persons *only whose citizenship in the United States is not qualified or compromised by allegiance to France*, and that when the treaty pledges compensation by the United States to citizens of France reference is made to those persons *only who are not only citizens of France, but who are also not included among the citizens of the United States.*

It can not be assumed of either government that it intended to compensate persons whom it claims as its own citizens, and that through the agency of another government. (Moore, Vol. 3, 2491; 48th Cong., 2d sess. Ex. Doc. 235 (Boutwell's Report), p. 129.)

It has been shown that there exist precedents of mixed commissions in which France was represented, when it was established that it does not matter whether the claim has been or may have been originally a French claim, if before or at the time the treaty was concluded it had ceased to be such, and that the holder of the claim can not invoke his government's mediation and protection.

<sup>1</sup> *Supra*, p. 62.

The following principles were established by the commission created by the protocol concluded between the United States and France July 4, 1831, as the rules governing the commission:

It was of course indispensable to the validity of a reclamation before the commissioners that it should be altogether American. This character was held by them to belong only to cases where *the individual in whose name the claim was preferred had been an American citizen at the time of the wrongful act and entitled as such to invoke the protection of the United States for the property which was the subject of the wrong, and where the claim up to the date of the convention had at all times belonged to American citizens.*

It was necessary for the claimant to show not only that his property was American when the claim originated, but that the ownership of the claim was still American when the convention went into effect. \* \* \* Nor could a claim that lost its American character ever resume it if it had heretofore passed into the possession of a foreigner or of one otherwise incapacitated to claim before the commission. (Moore, *Int. Arb.*, vol. 3, 2388; *Venezuelan Arbitrations of 1903*, p. 74.)

As a precedent bearing upon the personal circumstances of the claimants, Pedro Maninat and sisters, that of Julio Alvarez against Mexico, and the opinion of Sir Edward Thornton, umpire, rendered October 30, 1876, may be cited, as well as that of Herman F. Wulff against Mexico. (Moore, note pp. 1353-1354.)

\* \* \* the umpire can not acquiesce in the arguments put forward by the counsel for the claimant, *whoever that claimant may be.* He is of the opinion that not only must it be proved that the person to whom the injury was done was a citizen of the United States, *but also that the direct recipients of the award are citizens of the United States, whether these beneficiaries be heirs or in failure of them creditors.*

The principle governing the matter under discussion of the nationality of the claimant is stated by Moore, page 1353, as follows:

\* \* \* where the nationality of the owner of a claim, originally American or Mexican had for any cause changed, it was held that the claim could not be entertained. Thus, where the *ancestor*, who was the original owner, had died, it was held *that the heir could not appear as a claimant unless his nationality was the same as that of his ancestor.* The person who had the "right to the award" must, it was further held, be considered as "the real claimant" by the commission, and whoever he might be "*must prove himself to be a citizen*" of the Government by which the claim was presented.

Juan Maninat did not establish any claim against the Venezuelan Government because of his wound, nor because of damages to or seizure of his property. During the twenty-eight days which elapsed between his wounding and May 8, 1898, when he was taken with traumatic tetanus, it only appears from a long letter in his own handwriting, consisting of 7 pages, addressed from Valencia on April 26, 1898, to M. Quiévreux, the French consul in Caracas, that having recovered from the wound he was about to give him details of the attempt at assassination to which he was a victim on April 15, in the presence of General Vizcarrondo, chief of the general staff of General Crespo, and *that he might perhaps state* (without affirming the fact, however), at the instigation of said General Vizcarrondo. After a minute statement of the facts leading to the wound and of the wound itself, he asks the French consul for the mediation of the French Government, stating that the attack upon him was an insult and that the French colony of Valencia and the neighbouring towns suffering from the evils of war were indignant and demanded justice to be done.

"If such deed should go *unpunished* our interests and our lives would be forever jeopardized," Maninat states at the end of the aforementioned letter.

This letter, as shown by note No. 19, gave rise to the official communication sent by M. Quiévreux, vice-consul of France in Caracas, to the minister of

foreign affairs, transmitting the original letter of M. Juan Bautista Maninat; and somewhat later, May 24, the same consular officer wrote again to the above-mentioned minister, informing him of the death of M. Maninat, produced by the disease called traumatic tetanus. From that date to the day when the claim was entered by Pedro Maninat before the French minister, three years later, no other mention whatever was made of this matter.

From the documents submitted, it does not appear that Juan Bautista Maninat, the aggrieved party, who during his convalescence was able to personally enter a claim against the Venezuelan Government, did ever enter such claim, naming in money the compensation for the injury and the damages sustained by his person and his property; neither does it appear that the minister of foreign affairs of France had demanded from the Venezuelan Government an apology to the French nation as a nation, because of the wound received by Maninat, nor that it had been ever pretended to make the Government authorities responsible for a deed which the victim himself qualifies as an outrage to the French colony.

Moreover, it can not be claimed that because the wrong done to a citizen or subject of another nation involves a breach of international law, the nationality of the aggrieved party must be taken into consideration to maintain that the wrong survives, still preserving its original nature, and that it is a matter to be submitted to a court of the nature of the present court, even in the case that the aggrieved party be dead or has changed his nationality, or the right to indemnification is claimed by persons of a different nationality in the capacity of heirs or creditors.

Ralston, umpire for the Venezuelan and Italian Claims Commission created by the Washington protocol of February 13, 1903, in the case of Miliani against Venezuela, sets forth:

While it remains true that an offense to a citizen is an offense to the nation, nevertheless the claimant before an international tribunal is ordinarily the nation on behalf of its citizen. Rarely ever the nation can be said to have a right which survives when its citizen no longer belongs to it. (Venezuelan Arbitrations of 1903, Ralston's Report, p. 762.)

Dealing with the same subject, the honorable umpire, Mr. Plumley, in the case of Stevenson against Venezuela, before the Venezuelan and British Claims Commission, under the Washington protocol, February 13, 1903, makes the following statement:

While the position of the learned agent for Great Britain is undoubtedly correct, that underlying every claim for allowance before international tribunals, there is always the indignity to the nation through its national by the respondent Government, there is always in commissions of this character *an injured national capable of claiming and receiving money compensation from the offending and respondent Government.* \* \* \* To have measured in money by a third and different party the indignity put upon one's flag or brought upon one's country is something to which nations do not ordinarily consent.

Such values are ordinarily fixed by the offended party and declared in its own sovereign voice, and is ordinarily wholly punitive in its character, not remedial, not compensatory. (Ralston's Report, pp. 450, 451.)

Juan Bautista Maninat having died without having entered during his life any pecuniary claim whatever against the Venezuelan Government because of the wound and damages sustained by him, no actually existing property or vested rights which might be considered as having survived his death and capable of conveyance and continuation were transmitted to his heirs. The award in the case of Oscar Chopin against the United States under the convention of January 15, 1890, can not be applied to the present claim. The

Chopin claim was entered on behalf of Oscar Chopin himself and three other heirs to Jean Baptiste Chopin, formerly a French citizen, resident in Louisiana, and who died in 1870, leaving *as a portion of his estate the claim in question*. Boutwell's report refers to the award in favor of the claimants for a certain sum and makes the following comments:

It may, however, be assumed fairly that the commission were of opinion that the children of Jean Baptiste Chopin, although born in this country, were citizens of France, and that, inasmuch as the death of Oscar Chopin occurred *after the ratification of the treaty and after the presentation of the memorial*, his right to reclamation had become so vested that it descended to his children, independently of the question of their citizenship in France.<sup>1</sup>

The claim first made before the Government of France by Pedro Maninat, three years after the death of Juan Bautista Maninat, and subsequently supported by his sisters, does not constitute the exercise of any rights of inheritance which at the time of Maninat's death were a portion of the estate, which could have been transferred to his sisters as heirs independently of the question of citizenship. The claim originated three years after the death of the *de cuius* and is solely based, as the French commissioner says, on the death and material losses sustained before and after such death.

The origin, the nature, and the moment when the pretension of the claimants came into life being so clearly and precisely established, and leaving aside the question of their capacity as heirs, as no property or right belonging to the estate of the deceased Juan Bautista Maninat is involved, we have to deal in the first place with the question of the nationality of the plaintiffs who have entered the claim for indemnification, viz, Pedro, Juana, Justina, and Josefina Maninat, and later with the question of the right they may show as the wronged parties because of the death of their brother, and the liability such death may cause to the Venezuelan Government in view of the established facts only.

From the statements subscribed to by Pedro Maninat and by Clotilde Maninat de Saldías, by Justina Maninat, widow Cossé, and by Jeanne Maninat, marked with the numbers 5 and 8, which documents are a part of those submitted after the session of the commission on May 19, 1903, it appears from the confession of the deponents themselves that Pedro, Clotilde de Saldías, and Juana Maninat were born in Venezuelan territory, being, therefore, Venezuelans by birth according to Venezuelan laws.

As regards Josefina Maninat de Beguerisse, a resident of Guatemala, not only has the fact of her being born on French soil not been established because the proper entry in the respective registers of births has not been submitted as required, but she has not made any claim against the Venezuelan Government, nor does it appear that her husband has authorized the action which her sisters residing in Lima have taken in her behalf. A certificate signed by the chargé d'affaires of France in Guatemala has been produced to show that in the register of citizenship of the legation there exists an entry under No. 547, dated on July 24, 1903 — that is to say, after the investigation and opinion of the arbitrators on this claim had been closed, May 19, 1903 — to the effect that Charles Beguerisse was born in Puebla, a city of Mexico, in 1859, and was married in Panama to Josefina Maninat in 1886. Such entry does not in itself constitute a trustworthy proof of the French nationality of Charles Beguerisse, the husband of Josefina Maninat; but, on the contrary, the fact of Beguerisse's birth in a Mexican city shows *prima facie* that he is a Mexican citizen according to the principle *jure territorii* adopted by the Central and South American Republics.

<sup>1</sup> French and American Claims Commission, House of Representatives Ex. Doc. No. 235, Forty-eighth Cong., 2d sess. (Boutwell's Report), p. 83.

Justina Maninat, widow Cossé, has not established her French nationality and the authenticated copy of her certificate of marriage in the city of Panama to José Carlos Cossé, wherein it is stated that she is a native of Tarbes, France, is not the proof of such fact, but merely a reference made to it before the priest of the parish in Panama, and can not be substituted for the evidence afforded by the record of the certificate of birth in Tarbes, which the claimant could have well obtained since this claim was introduced, four years ago. In the absence of such document, which is the only evidence that could prove the fact of the birth in Tarbes, the presumption prevails of her birth in Venezuela, as well as that of all her sisters and brothers, except Juan Bautista, whose birth in Tarbes is shown by the certificate of the mayor of that town. This certificate is among the documents lately submitted. As the above-mentioned Justina is at present the widow of Cossé, and was his widow on March 2, 1903, when she joined issue in the claim entered by her brother, Pedro Maninat, she comes under the provision of the Venezuelan laws, establishing that a Venezuelan woman married to a foreigner recovers her lost nationality when she becomes a widow.

Besides the confessions of the parties themselves, upon whom devolves the duty of establishing the facts of their nationality, stating that three of them were born in Venezuela (Pedro, Juana, and Clotilde de Saldías), the Venezuelan Government has submitted to me the respective certificates which I append to this opinion, establishing the fact that Pedro and Clotilde Maninat were born within Venezuelan territory. Clotilde Maninat having married Don Eulogio S. Saldías, a lieutenant in the Peruvian navy, has acquired the nationality of her husband.

Pedro Maninat, besides being a Venezuelan by birth, according to the Venezuelan laws, has submitted a certificate issued by the vice-consul in charge of the French legation in Caracas, by which it appears that on March 23, 1899, almost a year after the death of his brother, Juan Bautista, he appeared before the French vice-consul in the same city and made a declaration to the effect that he regretted not having complied with the military service of the class of 1883, requesting that a certificate be issued to him showing that he had made such avowal in order to secure, if needed, his return to France, binding himself to place himself immediately after his arrival in France at the disposal of the proper authorities, by whose decision in the matter he would abide. This act and the subsequent declaration made by him in Guatemala at the French legation as a French citizen — the fact of his having returned to France and fulfilled his military obligations not being established — clearly show that they were performed for the purpose of making out a case against the Venezuelan Government and to arm himself with a sham French citizenship — for the want of a legitimate citizenship of long standing — to use it against the country within which he was born. The case of Charles Piton, quoted by M. de Peretti de la Rocca, is in no way similar to the one under consideration either from the standpoint of proofs shown by M. Piton to establish his French citizenship, which was never contested, or from the circumstances attending his claim.

The French commissioner is of the opinion that this commission is competent to hear this claim, because, although Pedro Maninat and his sisters were born in Venezuela, they are the issue of French parents and had two nationalities at the moment of their birth — French, according to the French laws, and Venezuelan in accordance with the laws of Venezuela.

My learned colleague states:

This is indisputable, but when the protocol mentions claims for indemnities entered by "Frenchmen," this means claims submitted by persons whose protection the French Government endeavors to insure, because they are recognized as French citizens by the French laws. The protocol does not specify in any manner

that the laws of Venezuela should also recognize such persons as French citizens. On the contrary, all the protocols signed in Washington last year between Venezuela and the foreign powers have expressly established that "local legislation" was not to be taken into consideration.<sup>1</sup>

Such is the opinion of my learned colleague. Now let us see what has been decided by the learned umpires upon whom has devolved the duty of determining the question of conflicting nationality at different times and in different commissions, decisions which, by reason of their uniformity and the enlightened doctrines they contain, have erected as principles of international law the ruling that, in case of conflicting laws creating a double citizenship; the law of the respondent nation controls, and also that, in cases of double citizenship, neither country can claim against the other nation, although it may claim against all other nations. Let me state at this juncture that there is no similarity between the Paris protocol of February 19, 1902, controlling this commission, and the protocols signed at Washington in 1903, quoted by my learned colleague in regard to the suppression of the "technicalities of local legislation." The Paris protocol does not deal with this question, and it is a well known fact that in the matter of authority or powers in themselves an exception to the general rules universally applied, such authority or powers must be expressly and formally stipulated, as was purposely done in the Washington protocols. The Paris protocol created a mixed arbitration court to hear and decide upon all claims for indemnification entered by French citizens, but did not except this commission from making its awards in strict accordance with the principles of international law generally admitted and with the local laws in such cases as they may properly apply. On the other hand — and this is merely a casual remark — the provision to which my learned colleague refers, stipulated in the Washington protocols, does not establish any distinctions between the local legislation of either of the contracting parties. Why should this discrimination in regard to local legislation be applicable only to Venezuela? What are the grounds for such strange interpretation?

In regard to conflicting citizenship the precedents and opinions quoted below may be submitted, deciding the point always in favor of the country against which the claim has been entered.

Commissioner Finlay in the case of Hammer et al. against Venezuela states the following:

Whatever rights the United States has in its power to bestow will unquestionably pass under the law establishing the status of citizenship in favor of nonresident aliens, including the right to take property by descent and succession and the right to prosecute any claim against the United States; but more than this cannot be done without interfering with the rights of other states and involving them and herself in conflicting claims of the most absurd character. (Moore, p. 2460.)

The reasons advanced by the American commissioner which were approved by the umpire, Count Corti, of the British-American Claims Commission, are *in toto* applicable to the question of a double citizenship. The opinion referred to is the following:

To treat his grievances (the claimant's grievances) against that other sovereign as subjects of international concern would be to claim a jurisdiction paramount to that of the other nation of which he is also a subject. Complications would inevitably result, for no Government would recognize the right of another to interfere thus in behalf of one whom it regarded as a subject of its own. It has certainly not been the practice of the British Government to interfere in such cases,

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<sup>1</sup> *Supra*, page 62.

and it is not easy to believe that either Government meant to provide for them by this treaty. (Alexander v. U. S. Moore, p. 2531)

The same rule is found in Cogordan (Citizenship, p. 39), who has called attention to the eminently practical spirit of the English Government, as shown in the correspondence between Lord Malmesbury and Lord Cowley, ambassador in Paris, when, under date of March 13, 1858, he states that, if England did recognize as British subjects the children born in England of foreign parents, she did not pretend to protect them as such against the authorities of the country of such parents claiming them, particularly when they had voluntarily returned to such country; or, in other words, Frenchmen born in England would be protected in Germany, Italy, or any other country except France, where they could be legally called to serve in the army.

Tchernoff (Protection des Nationaux Résidant à l'Étranger p. 470) says:

Any person having a double citizenship can enjoy but one within the territory of each of the states which hold him as a subject. Such is the practice in England and Switzerland.

The foregoing opinions agree with those of the commissioner of the United States in the case of Elise Lebrét before the Franco-American Commission, above mentioned. Notice should be taken of the opinions of Phillimore, Blackstone (Cooley's Vol. I, p. 369) 1, Hale's P.C., 68, Story's Conflict of Law, second edition, chapter III, section 48, and the Century Dictionary, all quoted by the Hon. Mr. Plumley in his learned decision as umpire in the case of Mathison against Venezuela before the British-Venezuelan Commission created by the Washington protocol of February 13, 1903 (Venezuelan Arbitrations, Ralston's Report, pages 433-434 and 435). See also the opinions of the above mentioned umpire in the case of Stevenson against Venezuela (Moore, p. 442 et seq.) and Ralston, umpire of the Italian-Venezuelan Commission, in the case of Brignone, Miliani, and Poggioli against Venezuela (Venezuelan Arbitrations of 1903, Ralston's Report, pp. 710, 754 and 847).

Thus the conflict of double citizenship has been solved by eminent authorities, establishing that in the cases where such double citizenship occurs the law of the respondent or defendant nation prevails.

In the event of conflict of laws creating double citizenship, that of respondent nation must control.<sup>1</sup>

In cases of double citizenship neither country can claim the person having the same as against the other nation, although it may as against all other countries.<sup>2</sup>

This condition of double citizenship occurs in Pedro Maninat, born in Venezuela of French parents, a resident of Venezuela until the date of the death of his brother Juan Bautista Maninat, a deserter from the military service of the class of 1883, in France; in Juana Maninat and Clotilde Maninat de Saldías, both born in Venezuela, according to their own confession and documents produced; in Justina Maninat, widow Cossé, and Josefina Maninat de Beguerisse, who have not established their birth in French territory, as it is indispensable to do before this commission. The presumption in the case of the two latter is, on the contrary, that they were born in Venezuela, and that the husband of Josefina Maninat, Charles Beguerisse, by reason of his birth in Puebla, a city in Mexico, is a Mexican citizen, as well as his wife. I beg to call the attention of the honorable umpire most especially to the fact already men-

<sup>1</sup> Brignone case, *infra*, p. 542.

<sup>2</sup> Miliani case, *infra*, p. 584.

tioned that from the documents submitted there does not appear that Josefina Maninat de Beguerisse, nor her husband Charles Beguerisse, for a long time residents of Guatemala, claim any sum whatever from the Venezuelan Government, nor that they authorized their brothers and sisters to do so.

Justina Maninat, widow of Cossé, has recovered her Venezuelan nationality since the death of her husband — under the supposition that he was a French citizen, which has not been established — in conformity with the Venezuelan laws, which control in case of conflict of double nationality, according to the opinions and decisions above cited.

In view of the foregoing, I hold that this commission has no jurisdiction to hear and decide the claim entered by Pedro Maninat and sisters, as their Venezuelan nationality controls in the conflict of double citizenship, Venezuela being the respondent nation.

The plaintiffs have no legal rights whatever to claim, by reason of the death of Juan Bautista Maninat, damages directly suffered by their persons and property. It has been further established that Pedro Maninat, as well as his sisters, all of whom are of age, three of the sisters being married and for some years absent with their respective husbands from Venezuelan territory, have not depended for their means of sustenance upon the person and life of Juan Bautista Maninat, but, on the contrary, each and every one of them has had and still has independent means of living. They might be entitled to claim damages for the death of a person, if there is a party responsible for such death, whether the party be a private individual, a corporation, or a state, in case the damages resulting from such death could be properly established. Such would be the case when a destitute wife or minors or other persons, either ascendants or brothers are concerned and the proof can be established that they are destitute and suffer material damages by reason of the wanton killing of a kinsman. These grounds for action are lacking in the present claim, and they are essential in order to warrant the indemnification sought, but such damages have not occurred, nor have the brothers and sisters of Juan Bautista Maninat established the facts beyond all reasonable doubt. Under the circumstances the present claim for indemnification lacks the essential basis of such claims, the *damnum emergens*, as a consequence of the death of Juan Bautista Maninat, and such claim can not exist, because it deals with brothers and sisters who did not depend for their living upon Juan Bautista Maninat, nor upon his business abilities or pecuniary means.

The indirect damages which the mercantile firm of Maninat Brothers might have sustained through such death do not affect the sisters, who were neither partners of the firm nor had any share or profits in the business. Whatever business Pedro Maninat might have had as an active partner did not suffer any damages because of his brother's death, as it appears from the papers submitted that at the time of the death the commercial firm was bankrupt and that the surviving partner was compelled to admit such bankruptcy in view of the state of complete insolvency in which the firm had been for some time previous. The French commissioner has acknowledged this to be a fact in his opinion.

Now, in regard to the liability which it has been the endeavor to establish against the Venezuelan Government for the wound — not a very serious wound — received by Juan Bautista Maninat at Tinaquillo, and his subsequent death, which took place twenty-eight days after, superinduced by the disease called *traumatic tetanus*, which is not necessarily the consequence of a wound, but may be contracted through several causes, generally through being exposed to the water and other sources of infection, I beg to submit again the arguments advanced by me in my opinion rendered at the session of the commission,

May 19, 1903, which I send herewith translated into English, and wherein I deny such liability as wholly unfounded, and entirely reject the merits of the claim for indemnification for 2,000,000 bolivars against the Venezuelan Government.

NORTHFIELD, VT., *February 3, 1905.*

ADDITIONAL OPINION OF THE FRENCH COMMISSIONER

After having read the additional memoir presented by my honorable colleague, I can only maintain the conclusions of the prior memoir. I will add, however, some observations which seem to me allow on my part certain consideration of this additional memoir.

In the first place Doctor Paúl remarks that one of the five heirs of the late Jean Maninat, Madame Josephine Beguerisse (née Maninat), has not presented any claim against Venezuela. I know this, but since the four other heirs have presented a claim the default of the fifth invalidates the claim in no wise. It will belong only to the French Government if the umpire accords an indemnity to the Maninat heirs to divide it conformably to French laws, among those of the latter who may have availed themselves of their rights at the proper time.

In the second place, my honorable colleague, returning to the question of nationality, declares that Mr. Pierre Maninat and his sisters, born in Venezuela, have not according to the protocol of 1902 a right to present a claim against the Venezuelan Government. With regard to this, I could only reproduce the argument already presented in my memoir. I request, moreover, the umpire to kindly revert to text of the aforesaid protocol, to which in section 1, page 4, of his additional memoir, Doctor Paúl gives an interpretation which I can not admit. Article 1 speaks in effect merely of claims presented "by the Frenchmen." This term is very comprehensive — "Frenchmen." It is not merely the "French citizens;" there are also French subjects, such as the Algerians or French protégés, such as the Tunisians — in a word, all those to whom the French Government extends its protection, because they are French according to French laws. The protocol says in no way that it is "indispensable to prove that the nationality of the claimants was solely and exclusively French." I have then been able to conclude with justice that it sufficed that the French Government consider an individual as French and deliver to him a certificate of French nationality that this individual be qualified to benefit from the provisions of the protocol of February 19, 1902. The precedents cited by my colleague prove only that there is not on this point any fixed rule and that international law is, as almost always, variable. I could call to mind many examples of a contrary jurisprudence without referring to distant date.

I have spoken of the case of Mr. Charles Piton. I maintain that the case is analogous to the present case. Mr. Piton was born in Venezuela of French parents, one of which was born there himself. Mr. Piton did not regularize his military position in France until long after the age required by the service. Mr. Piton has even exercised public Venezuelan functions at Venezuela and in foreign lands where he has been a Venezuelan consul, and yet my colleague has admitted that he was of French nationality and that there could be given to him a large indemnity.

In another analogous case — the Massiani affair — (claim presented by heirs, enjoying two nationalities, of a Frenchman who was exclusively French), the French-Venezuelan mixed commission constituted by the protocol of Washington and presided over in 1903 at Caracas by Mr. Filtz, umpire, accorded also the indemnity demanded.

I ought to call to the attention of the umpire the inconvenience which could be presented from the point of view of the fixity of international law, which seems to disturb my colleague so much, by the establishment of two different jurisprudences, not only by two commissions so analogous and so bound together, but even by the same commission.

Doctor Paúl seems to desire to refuse to Pierre Maninat the character of a Frenchman, but Pierre Maninat is French according to French law, and the competent French authorities having delivered to him the necessary certificate the commission can not deny French nationality to this claimant. I beg the umpire to take notice that I do not refuse in any way to admit that Pierre Maninat enjoys equally Venezuelan nationality according to the Venezuelan law. I am content to maintain that, being French (it makes no difference to me if he has two nationalities), he can profit from the provisions of the protocol of 19th of February, 1902.

In the third place my colleague relies, in order to reject the Maninat claim upon the fact that Jean Maninat has not made the claim in form against Venezuela. It will suffice for me to call the attention of the umpire again to the reading of the letter of Jean Maninat of April 26, 1898, in which the interested party declares that not only he but the whole French colony demands justice. I will add that his death coming quickly has alone prevented him from forming his dossier. Besides, this death itself making the principal subject of the claim, one will grant that Jean Maninat would with difficulty have been able to make his claim himself.

In the fourth place my colleague quotes decisions rendered within the English and Italian-Venezuelan commissions. I am not acquainted with the cases in question and consequently can not judge of their degree of analogy with that before us. In a general way I consider that in a matter of arbitration precedents have no value. Equity, good sense, and the terms of the protocol are the only rules for the conduct of an arbitrator, who is not bound to conform to the contradictory opinions of his predecessors any more than to the particular law of the States, as the protocols of Washington have expressly declared.

In the fifth place Doctor Paúl maintains that the heirs of Jean Maninat have no right to make a claim for the death of their brother, which would not have caused them direct damage. I will merely reply that Pierre Maninat was associated with his brother in the firm Maninat Brothers, and that the death of his elder brother will culminate the ruin of this house of commerce. Is not this a direct damage? Besides, is not the death alone under such conditions of a brother of whom one is the heir, even if one is not his partner, necessarily a cause of direct damage?

Finally, I maintain my opinion, supported by the declaration of the Venezuelan doctor, and upon the very sense of the words that the wound was indeed the cause of the death. It is evident that the infection would not have been produced and would not have brought on traumatic tetanus if there had not been any wound.

NORTHFIELD, *February 6, 1905.*

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OPINION OF THE UMPIRE

Juan Maninat was born at Tarbes, France, November 4, 1864, and died of traumatic tetanus May 13, 1898, at Valencia in Venezuela, unmarried, leaving as next of kin Rosa Clotilde Maninat, born at Valencia in Venezuela June 2, 1859, wife of Eulogo S. Saldías, a Peruvian, and now residing at Lima, Peru; Josefina Maninat, resident in Guatemala, said to have been born in France, the wife of Charles de Beguerisse, who was born in Mexico of parents having

French nationality; Justina Maninat, said to have been born in Tarbes, France, who was married in Panama to Charles Joseph Cossé, the latter having been born at Bois-Colombes, France, August 9, 1856, now deceased, the said Justina residing at Lima, Peru; Juan Pedro de Jesús Maninat, born at Valencia in Venezuela, December 29, 1863, also Juana Maninat, born in Valencia and now residing in Lima, Peru. The father and mother of these Maninat heirs were both of French nationality and are both deceased. Pedro resided in France from the time when he was a year old to his nineteenth year, since which time until recently he has resided and done business in Venezuela. Juan came to Venezuela at some time not important to this inquiry, and later entered into a mercantile relation with Pedro, and they established their principal house at Valencia and had branches at Tinaquillo and San Carlos. They were engaged in these enterprises at the time of the injury to Juan, hereinafter stated, but had suffered seriously from some compulsory loans to and requisitions by both the revolutionary party and the Government troops, and they also suffered much from theft and pillage and from injury to their property by the soldiers alike of the revolutionary forces and of the Government.

April 15, 1898, the Government troops stationed at Tinaquillo were under the command of General Vizcarrondo, chief of staff of General Crespo. An officer under General Vizcarrondo on that day demanded of Juan Maninat certain supplies for his army in the nature of a requisition. Maninat refused the requisition except on the terms that an order be signed by the general, and for the purpose of obtaining this order Maninat sent an employee to the general at his headquarters. This employee was badly treated and was sent back to Maninat without the order requested but with peremptory orders to Juan Maninat to present himself at once before General Vizcarrondo at his headquarters, which order he obeyed. While Maninat was at the headquarters of the general and in his presence he was struck several times with the back of a machete by officers of the national army, was placed under arrest by the general and while under arrest and on his way to the place of his confinement he was given a severe machete wound on the side of the cheek by one of the officers then present. He was kept in close confinement by the military authorities at Tinaquillo and as late as the 18th of the month had not been permitted to meet his brother or the other members of the family who had come from Valencia to see and to assist him.

The minister of foreign affairs for Venezuela was officially informed of this matter by the French legation at Caracas on April 18, and it was officially asked that he be released from confinement, that there be an immediate investigation, a proper reproof administered to General Vizcarrondo by the Venezuelan Government, and proper satisfaction made to the injured man.

On April 19 Maninat was released from confinement on intervention from Caracas. On April 24, in a letter from Maninat, he speaks of himself as "a little recovered of his wound" and able to write to Consul Quiévreux, chargé d'affaires of France, relating the occurrences of April 15 and those which followed. In this communication he named the officer who inflicted the machete wound. All the facts necessary to a complete history of the case were easily ascertainable at that time. No reproof was administered to General Vizcarrondo or to his officers and no action was taken by Venezuela in reference to the punishment of the officer who inflicted the machete wound and no reparation was offered to France or to Maninat.

Pedro endeavored for a while to maintain the business of the company, but it resulted in failure and bankruptcy, and, later, the imprisonment of Pedro, and his release on terms that he abandon, permanently, a residence in Venezuela. He is now in Guatemala.

There is no record proof that any of these heirs were born in France except in the case of Juan. In the certificate of marriage, or the record thereof, of Justina, there is a declaration that she was born in Tarbes, France. Neither Josefina nor her husband has appeared as claimant or in anyway asserted or presented any claim against Venezuela or any right to claim anything because of the injury to or death of Juan.

In the joint letter of Clotilde Saldías, Justina Maninat, widow Cossé, and Juana Maninat, of date 1903, indited for use before the arbitrators at Caracas, it is stated that Justina and Josefina were born in France. In the letter of Pedro to the minister of France at Caracas, of date July 24, 1903, he states that Justina and Josefina are French by birth and have married Frenchmen. The records of both countries are silent, so far as appears in this tribunal, concerning the birthplace of these two ladies.

There is no proof that any of the brothers or sisters of Juan, except Pedro, ever received any benefits from or were in anyway dependent upon or connected with Juan.

The honorable commissioners failing to agree as to some of the facts in this case, and likewise failing to agree upon the rule to be drawn from those facts and applied, joined in sending this claim to the umpire for his decision. They have aided the umpire by very able opinions, stating the reasons for their respective holdings, and they have also given valued assistance to the umpire in their answers to his written questions.

The umpire is met at the outset with the conflicting claims of the honorable commissioners concerning the nationality of the claimants and its importance as a determinative factor in the case. The honorable commissioner for France is of the opinion that it is only necessary to establish the French citizenship of Juan Maninat at the time of his death to give jurisdiction to this tribunal. The honorable commissioner for Venezuela is equally certain that there must be a French citizen *in esse*, and having a demand for indemnity because of damages suffered on account of the injury to and death of Juan, in order that this mixed commission can have competency to make an award in relation thereto; hence, to settle this jurisdictional question is of primary importance. It is first to be observed that Juan Maninat is dead. He is not. Therefore, a tribunal organized under and in virtue of the convention of February 19, 1902, that it "might examine demands for indemnity presented by Frenchmen for damages sustained in Venezuela," does not exist because of damages which have been suffered in Venezuela but only in reference to damages suffered in Venezuela by Frenchmen who, as such, are claimants before this tribunal. In other words, it is not the injury done to Juan Maninat alone, but also damages suffered by Frenchmen, if such there be, through and because of the injury to and death of Juan, which give place to a claim under this protocol.

This particular reclamation rests upon the right of the next of kin of Juan to present a claim. Their ability to do so will depend upon the character of their citizenship; if any be French the claim stands; if all be Venezuelan there is no jurisdiction.

The opinion of the umpire given in heirs of Stevenson *v.* Venezuela, found in Ralston's Venezuelan Arbitrations of 1903, 438, is referred to and the attention of the honorable commissioners to this opinion is respectfully requested. It is based on a protocol of similar character in this regard, although it might be held to present a greater latitude to the claimant than the one now under consideration. The authorities referred to therein are relied upon by the umpire as sustaining him in this decision.

The honorable commissioner for France urges that in default of Frenchmen lawfully entitled to the award, the national treasury is competent to receive the

same. Since this case is disposed of without reaching this proposition, the umpire does not stop to discuss it.

The language of the protocol is the work of skilled and erudite diplomatists. Every word is weighed and its force and significance are definite and certain. The language used in other protocols and its application by other tribunals are with them matters of common knowledge. The restrictive interpretation given by the umpire in this opinion follows a well-defined and quite generally constant line of decision by arbitral tribunals whenever the question has been raised and the terms of the convention were in spirit similar. It follows, that if a different rule had been desired by the high contracting parties, they would have employed words susceptible of a different interpretation. They certainly would not have made a different ruling impossible. To hold that any other than the national quality of the person presenting the claim is to determine the jurisdiction of this commission, is to declare that which is impossible under the language here used. Nothing is easier than to walk in the path so well defined by the able minds who planned and built it. Hence the rule here laid down that to be within the jurisdiction of this tribunal the claim must be presented by or for a Frenchman, *in esse*, who has sustained damages in Venezuela.

For the rules of construction and interpretation which have been of great service to the umpire, see Ralston's Venezuelan Arbitrations of 1903, pages 352 to 355, both inclusive.

It is agreed that Juan Maninat was of French nationality. His sisters Rosa Clotilde and Juana and his brother Juan Pedro were unquestionably of Venezuelan birth. Are Josefina Berguerisse and Justina, or is either of them, of undoubted French nationality? The umpire holds that the burden of establishing this essential fact is with the claimant; that such nationality is not to be assumed or conjectured, but proved. No authority needs to be quoted to sustain either of those propositions. They are elementary.

In this case there is no record proof concerning the place of birth of either Josefina or Justina, and there is no explanation made for its absence.

The case of Justina will first be considered.

In the record of her marriage she is set down as having been born in Tarbes, France. This is a declaration of fact essential to the record, made at a time when there could have been no ulterior purpose to subserve. In the joint written statement of Justina, Clotilde, and Juana, made in 1903 for the use of the arbitrators at Caracas, the birth of Justina is placed in France. In the letter of Pedro to the minister of France at Caracas, of date July 24, 1903, he states that Justina is by birth French.

Justina married Charles Joseph Cossé, who was unquestionably French, which fixed her nationality as French during his life, and by French law this nationality continued after the death of her husband, as she has done nothing since to divest her of such nationality. By Venezuelan law if she were of Venezuelan birth and Venezuelan at the time of her marriage to Cossé her Venezuelan nationality is restored to her after the death of her husband. But there is no proof that she ever was Venezuelan. There is incontestable proof that she was French by marriage and by origin, if not by birth. To strip her of her French nationality once attained by the law of both countries requires definite and satisfactory proof. If she were of Venezuelan birth, the respondent Government could easily have produced the record, as Valencia is near Caracas, and its records are easy of access.

In view of all the facts affirmative and negative the umpire has reached a conviction of moral certainty that Justina Maninat Cossé is of French nationality and competent to appear as a claimant before this tribunal.

Concerning Josefina Maninat Beguerisse, wife of Charles de Beguerisse, it

is sufficient to say that she has not presented any claim before this commission and is not in any sense by any act or authority of hers a party thereto. She has apparently refrained from asking the intervention of France in her behalf in this matter, and her right to do so is wholly academic, and therefore unimportant to this tribunal.

It remains to determine whether the other next of kin, being without question French by French law, and Venezuelan by Venezuelan law, have rightful place before this commission.

A treaty is a solemn compact between nations. It possesses in ordinary the same essential qualities as a contract between individuals, enhanced by the weightier quality of the parties and by the greater magnitude of the subject-matter. To be valid, it imports a mutual assent, and in order that there may be such mutual assent there must be a similar understanding of the several matters involved. It can never be what one party understands, but it always must be what both parties understood to be the matters agreed upon and what in fact was the agreement of the parties concerning the matters now in dispute. In this case did Venezuela agree in the protocol that France alone should name those who are Frenchmen, or did France agree in the protocol that Venezuela alone should make the selection; or does the protocol, being an agreement, imply that the word Frenchman as there used shall mean such only as are recognized by the laws of both countries? It is evident that the high contracting parties agreed on this point, and yet both parties knew that there was in fact a very essential difference in the holding of each country upon that question. How, then, could they reach a point of agreement? Only by meeting upon a ground common to both; and that common ground is the plain where by the laws of both countries the claimant is a Frenchman.

This process of reasoning seems to dispose of all genuine doubt as to what is meant by this term as used in the protocol; yet were there room for doubt the ordinary rules of interpretation would be efficient aids. Among others, there is the rule of interpretation that where the agreement is susceptible of two interpretations that interpretation is to be taken which is least onerous upon the party who must render the service or suffer the loss under the agreement.

(Woolsey, *Intro. Int. Law*, sec. 113. *Bouvier Law Dict.*, vol. 1, p. 124. *Ib.*, p. 1107; *ib.*, p. 429; *ib.*, 416. *Bouvier Law Dict.*, vol. 1, p. 1106, citing 71 *Wisconsin*, 177.)

In a conflict of laws as to nationality the law of the place of domicile should prevail. Such was the opinion of the umpire in the Mathison case found in *Ralston's Venezuelan Arbitrations of 1903*, page 429, wherein are found his reasons therefor and the authorities supporting them, to which he respectfully refers without further allusion. A similar holding by him is found in the Stephenson case, same volume, page 438, and to that case, his reasons there given and his authorities there quoted or cited, he respectfully invites attention. \* \* \* So far as they apply he adopts them to save unnecessary amplification here. He would add a quotation from *Bluntschli* in a note which he places in his *Droit Public Codifié*, sec. 374, wherein he says:

Contrary to my former opinions, I think to-day that in case of conflict of law one ought, in favor of the liberty of emigration, to accord the preference to the nationality of fact—that is to say, to that which unites itself to the domicile.<sup>1</sup>

When by the law of the respondent Government the claimant is a Venezuelan,

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<sup>1</sup> Contrairement à mes opinions antérieures, je pense aujourd'hui qu'en cas de collision on doit, en faveur de la liberté d'émigration, accorder la préférence à la nationalité de fait, c'est-à-dire à celle qui s'unit au domicile.

France may not intervene, as to do so would make her law superior to the law of Venezuela, which is not permissible as between two sovereign nations. The right of Venezuela, as the respondent Government, to regulate her own internal affairs and to determine who are her citizens, involving mutual protection and support, is too essential an attribute of sovereignty to be invaded or disturbed. If the treaty bore unmistakable evidence that this attribute of sovereignty had been abdicated, it would be the duty of this tribunal to act accordingly, but it bears no such evidence.

When the nation insists that one who is native to the land shall under ordinary circumstances be a citizen, it is such a reasonable requirement that all nations should rest content. To all the world but Venezuela, France may follow each succeeding generation born in Venezuela, but of French origin, so long as her affections dictate or her laws require or permit, but to Venezuela, where the father established his domicile, raised his roof-tree, and reared his family, the sons and daughters there born are Venezuelans to all the world, until by emigration and selection they have foresworn allegiance to their native land and sworn allegiance to some other.

In this protocol France is permitted to intervene only on behalf of Frenchmen who are recognized as such by the laws of Venezuela, and whatever equities may exist between the claimants and Venezuela, none can be considered by this tribunal except those which are thus presented.

Pedro Maninat was born in Venezuela, passed a portion of his minority in France, attained his majority in Venezuela, and there remained by choice until several years after the happening of the events giving rise to this reclamation. Nothing which he has done since in the way of asserting French nationality affects his national quality at the time when this claim had its inception, since his right to appear in this tribunal is dependent upon the fact that he was a Frenchman when the injury was suffered of which he complains, and a Frenchman when this treaty was perfected.

Rosa Clotilde and Juana are either Venezuelans or Peruvians. They are not French in the meaning ascribed to that term by the umpire.

In the opinion of the umpire, therefore, Justina Maninat Cossé is the only next of kin of Juan who under the protocol of February 19, 1902, has that quality of French nationality which permits a claim for indemnity before this commission because of the injury to and death of her brother Juan.

Although alien born, Juan Maninat had a right under the laws of Venezuela to the same protection as is granted to its nationals. He had promptly complied with the several military exactions consequent upon the disturbed condition of the nation, and in requiring the production of an order before complying with the requisition made upon him at this particular time he was taking only a proper precaution. When he entered the presence of the Venezuelan general it was the duty of that general to throw around him the protection of the Government and to make his person while there safe — absolutely safe. When he was wounded under the eye and within the power of this general a gross outrage had been permitted, the office of the commanding general had been perverted or set at naught, and the respondent Government having intrusted this general to hold that office and stand in its stead in that community is responsible for the unlawful deeds done or suffered to be done by him. The presence of the national army and of an officer high in command should have brought to that village and to all of its inhabitants a sense of perfect security; that instead it brought to Juan Maninat threats, harsh treatment, imprisonment, and wounds, is clearly established. There results unquestioned, undebatable responsibility in the respondent Government. The extent of that responsibility alone remains to be determined.

Notwithstanding the apparent convalescence of Juan from his wound of May 15, the joint certificate of his two attending physicians, asserting his death from traumatic tetanus is proof that the convalescence was apparent only. The honorable commissioner for Venezuela speaks correctly of many causes for tetanus especially existing in torrid countries, but he has named no instance where traumatic tetanus has been certified by reputable physicians, except the primary cause was a wound or an external injury of the nature of a wound. The very name *traumatic* forbids. It is the adjective form of the noun *trauma*. Of *trauma* the Century Dictionary has this definition:

1. An abnormal condition of the living body produced by external violence, as distinguished from that produced by poisons, zymotic infections, bad habits, and other less evident causes; traumatism; an accidental wound as distinguished from a wound caused by the surgeon's knife while in operation. 2. External violence producing bodily injury; the act of wounding, or infliction of a wound.

*Traumatic*.—(1) Of or pertaining to wounds: as traumatic inflammation. (2) Adapted to the cure of wounds; vulnerary: as traumatic balsam. (3) Produced by wounds: as traumatic tetanus, etc.

*Traumatism*.—Any morbid conditions produced by wound, \* \* \*

*Tetanus*.—It is occasioned either by exposure to cold or by some irritation of the nerves in consequence of local injury by puncture, incision, or laceration; hence the distinction of tetanus into idiopathic and traumatic.

Lacerated wounds of tendinous parts prove in warm climates a very frequent source of these complaints. In cold climates, as well as in warm, lockjaw (in which the spasms are confined to the muscles of the jaw or throat) sometimes arises in consequence of the amputation of a limb or from lacerated wounds.

Tetanic affections which follow the receipt of a wound or local injury usually prove fatal. \* \* \* It is usually the sequel of wounds and injuries.

Witthaus and Becker, in their *Medical Jurisprudence of Forensic Medicine, Toxicology*, vol. 1, page 513, say that —

Tetanus is an infective bacterial disease, affecting chiefly the central nervous system and almost always, if not always, originating from a wound.

Tetanus, like erysipelas, is probably always traumatic and never strictly idiopathic. The wound may be so slight as to escape notice. When it follows such injuries as simple fracture, internal infection probably occurs, though such causes are extremely rare. It is said that the weather influences the development of tetanus, and that it is more common in the tropics. There are also certain sections where tetanus is much more common than elsewhere and where it may be said to be almost endemic. \* \* \* Tetanus usually appears about the end of the first week after a wound has been received, but it may not appear for a longer period, even three or four weeks, so that the wound may have been sometime healed. To connect tetanus with a particular wound, note (1) if there were any symptoms of it before the wound or injury, (2) whether any other cause intervened after the wound or injury which would be likely to produce it, and (3) whether the deceased ever rallied from the effects of the injury.

In the work of Allan McLane Hamilton and others, entitled "A System of Legal Medicine," Vol. II, page 585, it is said that —

Tetanus occurs most frequently in wounds accidentally inflicted, particularly in punctured and penetrating wounds, and in those in which a foreign body remains behind. Its existence is now believed to depend upon the presence of a special organism, the *Bacillus tetani*. A variable length of time is occupied in the period of incubation, according to the number of bacilli introduced (Watson Cheyne), the location of the point of infection, the anatomical characteristics of the surrounding tissues, and the capacity of the different tissues to yield the ptomaines under the influence of the bacillus. It is also probable that the degree of virulence governs, to a certain extent, both the duration of the stage of incubation

and the severity of the attack. \* \* \* and as the bacillus of tetanus requires the exclusion of oxygen in order to grow, it is evident that a punctured wound quickly closed offers just the conditions appropriate for the reproduction of the germ, if it has been introduced into the depths of the wound.

*Trauma* means, strictly speaking, a wound. The term is used justly as synonymous with an injury. *Ib.*, 298.

When it comes to the actual trial of actions for personal injuries, there are two difficult questions, to the solution of which the testimony of the medical expert may be directed. One of these is how far the defendant's negligence is responsible for some subsequently developed infirmity or disease or, in other words, how far a given injury may be said to be the natural and proximate cause of a subsequently developed condition and therefore render the defendant liable for that condition.

The general rule is easily stated, to wit: if the subsequent disease or infirmity is one which would occur as the natural result of the injury, and it is not shown that any other independent cause existed of which it might have been the result, then the author of the original injury is liable for the subsequent disease or infirmity. *Ib.*, 379.

From the foregoing authorities it easily develops that tetanus usually follows trauma, that it is a natural sequence of it, and that neither the severity of the laceration nor the length of time which had elapsed in this case after the wound was given, nor the apparent partial recovery have any significance in determining whether the traumatic tetanus stated by the physicians to be the cause of Juan's death was the result of the wound received on the 15th of May preceding. Tetanus from that wound was a natural result within the period which in fact elapsed between May 15 and the beginning of the tetanic attack. An early healing of the lacerated wound was an apt aid to tetanus. When the physicians in attendance ascribed Juan's death to traumatic tetanus, they said, in effect, that it was tetanus arising from wounds or external injuries. As no other wound or injury is even suggested, they also said, in effect, that the tetanus related back to the trauma inflicted by the machete of the officer upon Juan when he was under the care of the Government troops and in the presence of the commanding general. Since his death resulted through a line of natural sequences from a wound inflicted under the circumstances named, the responsibility of the respondent Government is the same as though death had been the immediate result of the machete stroke.

Whether the physicians who gave the certificate were intelligent and trustworthy is of course a proper inquiry. There is no question made by the respondent Government, and there is no indication in anything connected with the facts of this case which suggests the contrary.

It becomes, then, the duty of the umpire to hold that Juan Maninat came to his death because of a wound inflicted upon him under such circumstances as to impose responsibility upon the respondent Government.

In this case, unlike that of Jules Brun, there are other considerations than the loss which Justina de Cossé has suffered through the death of her brother Juan. There is no evidence that she was ever dependent upon him for care or support, or that he ever rendered either, or that she was so circumstanced as to need either, or that he was of ability or disposition to accord either. Therefore it is difficult to measure her exact pecuniary loss. There exists only the ordinary presumptions attending the facts of a widowed sister and a brother of ordinary ability and affection. Some pecuniary loss may well be predicated on such conditions. For this she may have recompense. But the more important feature of this case is the unatoned indignity to a sister Republic through this

inexcusable outrage upon one of her nationals who had established his domicile in the domain of the respondent Government.

There was abundant reason, which France may well appreciate, why the respondent Government could not censure or punish the general in command or the officer who, in fact, made the attack upon Juan. The country was in the throes of a strong revolution, the supporting hand of every one loyal to the titular government was essential to its support. It could not meet successfully the possible results if it had undertaken to censure or punish the guilty parties. Silence and tacit acquiescence was the only position then open to the titular government. Since that period and prior to the sitting at Caracas of this mixed commission there had been no real opportunity for the two governments diplomatically to consider or pass upon the merits of this case, and it remained practically for this tribunal to speak the voice of regret and to tender atonement for a sad result. Justina de Cossé can be the medium of transmission of this atonement from the respondent Government to France and by a payment of money honorably answer the just demands of the claimants and assure to the intervening Government the constant willingness of Venezuela to atone for this wrong by the only means now in her power.

The honorable commissioner for France disclaims all right to an award based upon the injuries directly attributable to the failure of Maninat Brothers as a claim consequent upon the death of Juan for reasons which he succinctly states; but he holds that some disastrous results following his death and the pillages and requisitions preceding his injury may properly move the generous impulses of the umpire when he comes to make up his award.

It is probable that the honorable commissioner for France and the umpire do not, in fact, really differ in their conception of what is equity in such a matter. But to plant an equity always requires the basic quality of a right in the party receiving, because of a wrong moving from the party to be charged with the onerous conditions of the equitable conclusion. Generosity is not equity; equity has no part in generosity. Equity exists when exactly the right thing is done between the parties. Neither more nor less than this is equity. A just conclusion only opens the door to equity. So far as the respondent Government is responsible for the wrongs suffered by the next of kin of Juan who have a right to the intervention of France because of their nationality, so far and so far only does equity require or permit action on the part of the umpire. In every respect other than this, he has no right either to add to nor subtract from. To act at all, he must find a right to claim on the part of the claimant, and a wrong to be redressed on the part of the respondent Government. Within those circumscribed limits he has liberty of and necessity for action; outside of those limits he is a trespasser. He can not be generous; he can only deal justly and equitably.

So far as the injuries to the Society of Maninat Brothers is concerned, the interest of Juan in the requisitions and pillages mentioned, which occurred prior to his death, it is sufficient to say that the claimants have had the preparation of this cause for presentation before this tribunal. No reason is given why this reclamation did not include a definite and precise statement under that head, if reimbursement was sought. It was surely capable of some degree of exactness in the statement and some degree of certainty in the proof. Neither has been attempted. By their own inattention and inaction they have deprived the umpire of all opportunity to know anything of this branch of their alleged injuries, and they must not ask him to conjecture and estimate when they might have permitted him a settled judgment, nor can they at all expect that he will add aught to his award because of these probable, but vaguely uncertain, losses which they project into this reclamation.

Because of the holding by the umpire that Pedro Maninat is a Venezuelan, it results necessarily that nothing can be considered in his behalf on account of failure of justice or denials of justice, if such occurred, succeeding the death of Juan and personal to him or to the mother of his wife, who attempted to assist him.

In naming one only of the Maninat heirs as competent to present a claim under the protocol of February 19, 1902, no inequity is done the other heirs. It does them no harm that she is not a Venezuelan, but of French nationality only. The laws of France governing the distribution of estates are not involved in this decision, neither are they invaded nor disturbed. This tribunal has no part in the final allotment or distribution of the sum which by the award herein is made payable to France, through the personality of Justina de Cossé, for whom that country has right of intervention. Over the proceeds of the award here made France has absolute dominion, so far as this tribunal is concerned, and in the perfect justice and equity of her procedure there can be complete content.

It is the judgment of the umpire that a just compensation which covers both aspects of this case is 100,000 francs, and the award will be prepared for that amount.

NORTHFIELD, *July 31, 1905.*

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#### ANTOINE FABIANI CASE <sup>1</sup>

This claim came to the umpire after having been once heard and determined by the honorable President of the Swiss Federation, being submitted to him under the protocol of February 19, 1891, the first paragraph of which reads:

“The Government of the United States of Venezuela and the Government of the French Republic have agreed to submit to an arbitrator the claims of M. Antonio Fabiani against the Venezuelan Government.”

Against the proposition that such an arbitrament and award is conclusive upon all parties the claimant urges that the Swiss arbitrator held that he had not jurisdiction over a large part of the claims and therefore was incompetent to consider and to pass upon them; that the Swiss arbitrator in fact extracted and subtracted from those claims such as he held were without his jurisdiction and only awarded concerning the rest.

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<sup>1</sup> EXTRACT FROM THE MINUTES OF THE SESSION OF MAY 30, 1903.

The claim of Antoine Fabiani was then taken up.

Doctor Paúl rejects it as having already been judged by the arbitral court of Berne, the award of which, in his opinion, has decided definitely on all the points of indemnity presented by M. Fabiani.

M. de Peretti, on the other hand, claims that the Swiss arbitrator has brushed aside all the points represented to-day by M. Fabiani as not being covered by the agreement of arbitration signed the 24th of February, 1891, by the two Governments. The President of the Swiss Confederation has, then, declared himself incompetent to examine the aforesaid points, which by this very fact have found themselves reserved for the examination of the commission instituted by the protocol of Paris. Consequently M. de Peretti admits the demand of M. Fabiani, which he recognizes to be well founded, and accords to him the sum which he claims.

Doctor Paúl declares that the decision taken by M. de Peretti, according to M. Fabiani the sum which he claims, has not been preceded by any discussion between the arbitrators upon the amount of the claim, which Doctor Paúl rejects for the reason already expressed—namely, that all the claims newly presented by M. Fabiani have become *res judicata*.

This claim will then be submitted to the examination of the umpire.

- The umpire holds, however, that no jurisdictional questions were before the Swiss arbitrator, none, were urged by either party, and none in fact were determined; that all claims of Fabiani were in fact submitted by the protocol to the decision of the Swiss arbitrator and all were in fact decided by him.
- That there were certain restrictions placed upon the Swiss arbitrator in the protocol which had the effect to limit the scope of the claims left undisposed of by the two Governments for decision by the Swiss arbitrator.
- That under the protocol the Swiss arbitrator must first determine whether the Venezuelan Government was responsible for any damages to Fabiani; that this responsibility must be determined in view of the limitations of the protocol which were to the Swiss arbitrator his supreme law. These limitations were essentially that the decision was to be reached in accordance with "the laws of Venezuela, the general principles of the law of nations, and the convention in force between the two contracting powers."
- The convention then in force between the two nations was that of November 26, 1885, and had especial reference to article 5 thereof. The force and effect of article 5 of said treaty was considered and determined by the Swiss arbitrator, and his interpretation thereof is conclusive, so far as the claim of Fabiani is concerned.
- In order to determine the scope, depth, and breadth of that treaty, the Swiss arbitrator had to define the meaning of the expression "denials of justice" found in said treaty. His definition is conclusive upon the claim of Fabiani.
- When the Swiss arbitrator decided the principles governing the claim submitted to him, he had decided affirmatively or negatively the different claims made in Fabiani's behalf, not in detail but in principle.
- When France intervened in behalf of her national, his claim was no longer individual and private, but national.
- Thenceforward it was national interests, not private interests, that were to be safeguarded. It was the national welfare and national honor which were to be considered. Should the general good of France at any time during the negotiations with Venezuela require a surrender of all of Fabiani's claims, France may make such surrender, or it may surrender a part thereof, and for such surrender Fabiani, if he has a claim anywhere, has it against his own Government.
- When a nation intervenes in behalf of her national and finally consents to arbitration of the difference, the primary purpose of such arbitration is to remove the vexed question from the arena of diplomatic dissension and controversy. It is not to be considered that France would consent to submit to arbitration a part only of her national's claim, leaving large and important parts of it undisposed of, and to remain as vexatious questions between the two Governments.
- Neither is it to be considered that Venezuela intelligently entered upon an arbitration of a question in dispute between the two Governments understanding that the effect of the agreement to arbitrate would be to hold her to make reparation for such an amount as might be held to be denials of justice by the arbitrator, while for all not so held she would later be compelled to again oppose them or to pay them or to arbitrate them.
- Venezuela did not enter this arbitration by the Swiss arbitrator with the understanding that if he decided everything against Fabiani all that had originally been claimed would be left unsettled by his decision, and be restored to their primal state of existing claims for which the Government of France could intervene. Equally certain is it that she did not enter into the arbitration with the understanding that if any part of the claim were decided in her favor that part might yet be brought before another arbitral tribunal.

In that and in every similar international controversy the two Governments seeking an agreement look well for a common meeting point which is usually to be gained only by mutual concession and mutual remission of matters which *can yield* and when that common meeting point is reached to submit it to the arbitrator as the whole controversy; or as being all that which both parties will admit is the controverted question. Which mutual point of agreement is as much a matter of agreement between the high contracting parties as is the covenant to arbitrate itself and is an integral part of that covenant.

Each concession so made by one party cancels the one made by the other, so that outside the terms of the convention there is nothing left of the original contention. All which is excluded is concluded by the high contracting parties themselves. What is not found of the original controversy to be resting in the compromise is in oblivion.

Just how much is conceded and how much is retained is left for the determination of the arbitrator. It may be contended on the one hand there is nothing conceded, on the other hand that nothing is left, but the arbitrator is to decide how much is included and how much is excluded, and, when he decides, that decision is *final and conclusive upon the whole of the original controversy*.

That which Fabiani claims to have been a subtraction by the Swiss arbitrator is in fact merely designating the different elements of his controversy which in effect the high contracting parties had agreed to eliminate and subtract in order to reach an agreement of arbitration.

So far as these concessions approaching and permitting an agreement to arbitrate finally affected the pecuniary interests of Fabiani they were in effect the especial tribute required of him by his Government to conserve its general good.

The honorable arbitrator of Berne on his own initiative eliminated nothing, subtracted nothing, and there was left for him nothing except to settle the meaning of the protocol and then to observe its effect and to point out which of the claims came within and which without the action of the rule agreed upon and prescribed to him by the two honorable Governments, settle the damages on what remained, and make award accordingly.

It follows that the protocol arranged between the honorable Governments of France and Venezuela February 24, 1891, succeeded by the award of the honorable President of the Swiss Federation December 15, 1896, were, acting together, a complete, final, and conclusive disposition of the entire controversy on behalf of Fabiani.

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#### OPINION OF THE VENEZUELAN COMMISSIONER

Antonio Fabiani has presented before this commission a demand of indemnity amounting to 9,509,728.30 bolivars, for losses and damages comprised in the items which, he says, were eliminated by the Swiss arbitrator in his award rendered in the French-Venezuelan suit called the "Fabiani controversy," on the 30th of December, 1896, and by which award the Government of the United States of Venezuela was condemned to pay to Fabiani, by way of indemnity, in the terms of the protocol of the 24th of February, 1891, including all expenses, the total sum of 4,346,656.57 bolivars, with interest at the rate of 5 per cent a year from the date of the award.

Fabiani argues that the Swiss arbitrator deliberately subtracted from his decision, because they were not comprised in the terms of the protocol, certain sums demanded by him in his claim presented to said arbitrator and partly contained in seven separate tables, under the letters A, B, C, D, E, F, and G,

which he presented to the arbitrator when the demand was formulated. These tables, as said by Fabiani himself, in his statement, page 629, had for their object to facilitate the investigations of the arbitrator and corresponded to the situation that had been created to him in Venezuela by the series of prejudicial acts on which he based his claim, and he adds, on that account, the following consideration:

Although the whole links together without solution of continuity, we have thought that it was convenient to keep a certain chronological order and take into consideration the time when the damages were caused and when they exercised their influence on our fate and on the destinies of our commercial establishments.

The demand entered by the Government of the French Republic, plaintiff, against the Government of Venezuela, defendant, before the President of the Swiss Confederation, appointed arbitrator by a protocol signed in Caracas on the 24th of February, 1891, referred to the decision of said arbitrator the question as to whether —

according to the laws of Venezuela the general principles of the law of nations and the convention (of the 26th November, 1885) in force between the two contracting powers *the Venezuelan Government was responsible for the damages which Fabiani claimed he sustained through denials of justice,*

and the arbitrator was also charged with the duty of determining —

in case this responsibility was recognized, *as to all or part of the claims in question,* the amount of the pecuniary indemnity that the Venezuelan Government ought to pay into the hands of M. Fabiani, which payment would be made in funds of the Venezuelan 3 per cent diplomatic debt. (Arbitration protocol of 1891.)

The demand was entered to obtain the reparation of damages caused by denials of justice through acts imputed to the administrative and judicial authorities of the Republic of Venezuela, for which damages the state ought to be responsible and which comprised:

- First. The reparation of the damage sustained;
- Second. The gain frustrated;
- Third. The interest calculated from the date of the damageable acts;
- Fourth. The compound interest;
- Fifth. The sacrifices made by the injured party for the maintenance of his industry;
- Sixth. The prejudice deriving from the expense made and from the time lost to arrive at the execution of the sentences;
- Seventh. The damages to be considered as the necessary consequence of the offenses;
- Eighth. The damage done by the privation of work in the future; and
- Ninth. The reparation of the moral prejudice.

The demonstrative table of the claims of Fabiani was annexed to the demand with determination of the several items for capital and capitalized interest, amounting to the total sum of 46,944,563.17 francs.

The Swiss arbitrator, in determining the object of the demand referred to his decision, fixed the reach that he considered necessary to attribute to the words "denial of justice," construing that the powers which signed the compromise had given to said words their widest meaning and had meant by them —

*all the acts of judicial authorities which might imply a direct or disguised refusal to do justice*

Said arbitrator determinately says in the award in question: The duty of the arbitrator precisely consists in deciding whether Venezuela —

is responsible for the damages which Fabiani says to have sustained through denials of justice. \* \* \* Thus the *object of the controversy* and its origin are acknowledged by the parties; it was on account of the refusal of the execution of the award of the 15th December, 1880, which Fabiani possessed against two debtors domiciled in Venezuela or on account of the default of execution owing to the admission of illegal recourses that France took the interests of her native into her hands.

The Swiss arbitrator also declares that —

Venezuela does *not incur any responsibility* according to the protocol, on account of facts foreign to the judicial authorities of the respondent Government.

Fabiani now maintains, more than six years after the sentence of Berne became affirmed, that the Swiss arbitrator deliberately eliminated the *faits du prince*, because he considered them excluded from the terms of the protocol. It does not appear from the careful examination of that sentence that the arbitrator had eliminated any fact directly or indirectly connected with the fundamental *cause* of the suit and with *its object*, namely, *the denials of justice and the claims that Fabiani had presented*, pretending that the Government of the Republic was responsible for all of them. The arbitrator eliminated some of those claims, because the facts on which they were based did not make Venezuela incur any responsibility, as they were strange to the judicial authorities of the respondent state. The arbitrator expressly declares that some —

of those claims based on *faits du prince*, which are either changes of legislation or arbitrary acts of the executive power, are absolutely subtracted from his decision, wherefore he eliminates from the procedure all the allegations and means of proof relating thereto, as long as he can not reserve them to establish other concluding and connected facts relating to the denials of justice.

And the Swiss arbitrator adds thereupon, in the motives of the sentence, the following declaration:

It is certainly the denials of justice committed in the course of the proceeding for the execution of the award of the 15th of December, 1880, and the eventual appreciation of their pecuniary consequences that form the object of the present litigation. It is, however, necessary to remove another objection of the petition.

The judicial position of Fabiani in Venezuela was first liquidated by the compromise of the 31st of January, 1873. After a series of incidents Fabiani renounced the benefit of this act and signed the compromise that gave birth to the award of 1880. The plaintiff has stated that he adhered to this compromise under the empire of main force and that it did not cover *the prior denials of justice*. But he (the plaintiff) recognizes without hesitation (petition, p. 142, et seq) that Fabiani, who could have had the compromise annulled by the French courts, preferred to reserve the future of his commerce in Venezuela by exhausting all means of conciliation. Fabiani thus contented himself with the state of things created by the acceptance of the arbitrators' jurisdiction, and, besides, from that moment his judicial efforts in Venezuela only tended to the execution of the judgment of the 15th of December, 1880. The motive drawn from the *vis major*, which would have affected the compromise of 1880 and would remove farther back the starting point of the *denials of justice* comprised in the present instance can not be taken, therefore, into consideration. Denials of justice in virtue of which it would be possible to proceed against Venezuela for responsibility before the arbitrator could not have taken place before the introduction of the proceeding for the execution of the award of the 15th of December, 1880, or before the 7th of June, 1881, the date of the petition for the *exequatur* entered before the high federal court.

The arbitrator has not, therefore, admitted besides the *faits du prince* any of the facts foreign to the nonexecution and to the effects of the nonexecution of the sentence above referred to to be proved.

It is seen from the foregoing insertion that the arbitrator, exercising his wide

powers of appreciation, left out of consideration any fact, whether a denial of justice, prior to the 7th of June, 1881, when the demand of execution of the sentence of Marseilles was entered before the high federal court, or those called *faits du prince*, that he could not reserve with a view to prove other concluding and connected facts relating to denials of justice. That elimination of proofs and allegations concerning facts entirely strange to the mission of the arbitrator, which precisely consisted in deciding —

whether Venezuela was responsible for the damages which Fabiani claimed he sustained through denials of justice,

does not constitute, on any reason of law or of procedure, a declaration of incompetence or of want of jurisdiction on the part of the arbitrator, with regard to some particulars of the demand, but only establishes that some of those particulars or the facts upon which they rested, were destitute of the conditions necessary for their being accepted *as the consequence of denials of justice*, and, therefore, for their being admitted by the arbitrator as elements of appreciation tending to cause Venezuela to be declared responsible for the damages that Fabiani claimed as the consequence thereof and as the object of the demand.

The Swiss arbitrator did not fail to appreciate some of those *faits du prince* which, while not establishing an intimate connection with the acts of denial of justice, contributed in the mind of the arbitrators to form appreciations as to the extent of the guilt and the amount of the damages recognized in favor of Fabiani. Such is collected from the motives of the sentence of the arbitrator, contained in page 30:

Different indications make one believe that the respondent Government openly hostile to Fabiani and that this position might incite or encourage the judicial authority, at least in the provinces distant from the capital and without the control of a watchful public opinion, *to ignore the rights of a foreign plaintiff*, to whom influential persons of the state would not conceal their hostility. Such is the official approval of the 21st August, 1883, given to the cession, consented by B. Roncayolo, of the contract of the La Ceiba Railway, *although it was notorious in Venezuela that that cession had for its object to diminish or annihilate the pledges of a creditor (faits du prince)*. Such appears also to be the modification adopted by the legislation of the state of Falcón in articles 5 and 7 of the organic law of the judicial power in January, 1883 (*faits du prince*); *such was* also the withdrawal of the towing service which under the circumstances and at the time it was decided had to be interpreted as an act of reprisal directed against Fabiani (*faits du prince*).

It is not possible to fail to recognize, according to a sound logic, that the Swiss arbitrator gave those *faits du prince* all the importance that he was permitted to give them within the terms of the arbitration compromise; that he consciously appreciated them, inferring from them serious consequences to the extent of considering them as a *manifestation of the fact that the government openly antagonized Fabiani; encouraging and inciting the judicial authority to perform the acts considered by the arbitrator as denials of justice, and finally that they (the faits du prince) under the circumstances they occurred had to be considered as acts of reprisal directed against Fabiani.*

In virtue of that appreciation the Swiss arbitrator established that the responsibility of Venezuela for the acts properly called of denial of justice was tantamount to, at least, the one deriving from "offenses and *quasi delicts*" and that it obliged Venezuela to compensate all the damage that might reasonably be considered as a direct or indirect consequence (*damnum emergens et lucrum cessans*); and it was in virtue of that appreciation that the arbitrator, when declaring the respondent Government responsible for all the consequences of denials of justice imputable to the judicial authorities of Venezuela, determined

the extent of those consequences in the widest manner, liquidating the return of damages and prejudices presented by the claiming government in the manner determined by chapter 6 of the award, page 42, estimating the direct damage and the moral prejudice, the indirect damage, the compound interest, the gain frustrated, the execution expenses, and the costs of the instance.

To prove, furthermore, with the very arguments of Fabiani that the actual purpose of the arbitration process at Berne, determined by the general terms of the compromise of the 24th of February, entered into between France and Venezuela, was to have the question decided as to *whether there had been any denial of justice*, for which decision the arbitrator had to appreciate *all the facts and all the incidents connected* with the suit, and, if there had been any, to fix the amount of the pecuniary indemnity corresponding to all or some of the claims presented by Fabiani, it suffices to reproduce the very statement presented by the claimant to the Swiss arbitrator, most properly determining the object of the suit. In page 4 of the *réplique* to the answer of the Government of Venezuela, Fabiani copies the statement of motives presented by the French Government concerning the demand of indemnity. Said insertion, taken from the note addressed by the legation of France in Caracas to the Government of Venezuela, runs as follows:

In the opinion of the French Government, the reparation ought to comprise<sup>9</sup> at least, in the first place, the amount of the sums, in capital and interest, the collection of which would have been assured by the execution in due time of the sentences and, besides, the restitutions ordered by the judges and which would represent about one million five hundred thousand francs (1,500,000 francs), and, in the second place, damages and prejudices, *the figure of which would have to be discussed, for the damage caused to Fabiani in his credit and in his commerce.*

These three points are those comprised in Tables A, B, C, D. and E of the petition (pages 644, 747, 797, and 817 of the statement).

The French note adds (page 3 of the defense):

As to the rest of his pretensions, a serious contradictory examination ought to determine in what measure they are grounded.

What are these pretensions? Fabiani proceeds. The affairs of the tugboats and of the La Ceiba Railway:

What was the reason of so much reserved a formula? Why those reticences? The explanation thereof will be found in the last paragraph of page 527 of our report. \* \* \* That as to the object of the litigation—that is to say, the claims of M. A. Fabiani that the Government of the United States of Venezuela and the Government of France have agreed to refer to an arbitrator. (Treaty of Caracas of the 24th of February, 1891.)

In page 6 of the *Réplique* Fabiani says:

We shall only point out, 1st, that the note on the opening of the negotiations designates *all the commercial prejudices* that are now the object of Tables A, B, D, and E of the Report; 2d, that the same note makes known that the *rest of the pretensions* of Fabiani must be submitted to a serious and contradictory examination; 3d, that the amounts are *undetermined for all our claims* except for account A, the amount of which indicated under the reservation of the word “approximately” has not undergone other modifications than the increase of interest, the reparation of an omission (No. 7 of Table A), and the incorporation of dotal annuities.

In page 11 of the same *Réplique*:

It is important to observe that the word *claims*, twice enunciated in the protocol, applies to the pecuniary claims and only to them.

In page 13:

They shall have to decide, 1st, whether, according to the laws of Venezuela, the general principles of the law of nations and the convention in force between the two contracting powers, the Venezuelan Government is *responsible for the damages which Fabiani says to have sustained* through denial of justice; 2d, to fix, in case this responsibility should be recognized *for all or part of the claims in question*, the amount of the pecuniary indemnity which the Government of Venezuela ought to pay into the hands of M. Fabiani, which payment will be made in bonds of the Venezuelan 3 per cent diplomatic debt.

Such are the terms of the protocol. They are so clear and precise that they require no interpretation. They give the arbitrator the right to search out the denial of justice, *to point out to it where he may find it and disallow our demand*, if the denial of justice does not exist. *There is no more tedious a task than to have at every moment to demonstrate what is evident.*

In the same page:

Certainly the refusal of execution of the sentence exists in the process *as an important element among the numerous denials of justice that we denounce against Venezuela*; but the resistances of the Cabinet of Caracas, unwarranted both as to their form and reasons, its absolute refusal to agree to friendly negotiations, have led our Government not to sacrifice anything for the sake of peace and to demand *an express compromise conceived in general terms in order to protect all the rights, all the interests of the French citizen who asked for its protection.*

In page 16:

In our judgment the question may be considered from another point of view, that of the terms of the protocol, general terms which authorize the arbitrator to appreciate any denial of justice duly proved, and permit Fabiani to *present all the pecuniary claims relative to damages sustained through denials of justice.*

(The pecuniary reparation is the effect, the denial of justice is the cause.)

If Fabiani formulates *claims having another cause than the denial of justice, or if it should not clearly appear that they are imputable to a denial of justice, the arbitrator shall purely and simply disallow them, because they will be without the limits of the protocol,*

that is to say, without the law and not without his competence; the protocol was the law);

and, if he recognizes the responsibility of Venezuela he will point out, in the proportions *his conscience may suggest him*, all the damages he may judge to be the direct and immediate consequence of the infractions committed by Venezuela.

It will be permitted to us to add that, even if the protocol instead of being conceived in general terms should have established *all the details of the litigious points*, it would not be necessarily inferred therefrom that every motive or claim that was not expressly enunciated in the protocol should be set aside, without any discussion, as being without the terms of that protocol.

If no other difference is the question, *or if the question is a difference posteriorly occurred between the parties*; if the new motives of demand, although they are not expressly specified in the protocol, *are found therein, however, virtually comprised, whether as an integral part of the litigious points designated, or as a consequence thereof*; if the source of those motives is found in the compromise; if the demand *is not different from those which the compromise has foreseen and the settlement of which it has had in view*; and, finally, if the motives they pretended to have set aside might later give place to the *same debates* as those enunciated in the protocol, *the arbiter may appreciate the merits of those motives and include them in his decision.*

The new Denizart arbitration No. 10 is not less precise. The arbitrators may take cognizance of the accessories of the instance and of all those incidents in such a manner connected with the case, that it would happen, if the judgment thereof were omitted, that the parties would always be divided by the *same question* that had been the object of the protocol.

Therefore, when *motives* of demand not expressly enunciated in the protocol are connected with the case itself in such a manner, that, if the judgment thereof were omitted, the parties would be left *in the presence of the same* litigation, the arbitrators are competent to take cognizance thereof. Might it not be added that, if they were openly set aside, the decision might be considered as rendered without the terms of the protocol?

It appears to us to be very difficult to imagine an arbitration in which *the motives* of demand, which they *pretend to have set aside under the pretext that the same are without the protocol*, may exhibit a greater connection with the facts that are found expressly enunciated therein. Not only they would be supported in this judgment on the same means and would require the same debates *as the motives*, the admissibility of which is not discussed, but it could not be ignored that *it would be impossible to soundly appreciate the merits of the other motives*, if the first denials of justice, *the causes which have been the motive and the purpose of the denials of justice and are, therefore, the essential part*, the ground of the suit, were not, after having constantly drawn the attention of the judge, to be considered as one of the litigious points submitted to his decision.

The evident purpose of the arbitration, which purpose is justified by the general terms of the treaty of the 24th of February, 1891, has been to decide *whether there has been denials of justice; to fix, if there has been any, the damages imputable to the denial of justice, not some damages, but all the damages that Fabiani claims to have sustained; to determine the amount of the reparation and to put a definitive end to the difference arisen between France and Venezuela.*

It is important that the decision to be rendered may, conformably to the noble and pacific formula of the peace tribunals, declare any new claim of Fabiani for denial of justice *inadmissible.*

Everything tends, therefore, to prove that the identity of the nature of the demand, the absolute similitude of the motives invoked, the links of absolute connection uniting the alleged new motives with all the others would recommend, if the protocol offered any obscurity, *that questions the inadmissibility of which appears proved by all the circumstances of the suit should not be separated.*

In the statement of Fabiani, he says, in page 615, when dealing with the extent and justification of the damages and losses, the following:

If the arbitrator, after having examined and analyzed *our different motives of claim*, should be induced to recognize *that all those motives are justified* and that we have valued our damages without any exaggeration, Venezuela could congratulate itself at its insistence in having a little equitable mode of payment accepted, since the sums it would be obligated to deliver to us would not represent the actual amount of the indemnity that may be adjudged to us by the award; so that it would not be exact to say that the author of the infraction has paid and we have obtained the amount of the damage fixed by the arbitrator. And if it should be admitted that the judge, acting *either by way of elimination or by way of reduction*, should find that there is a reason *to restrict the measure of our damages*, valued in specie, when taking into consideration its conversion into 3 per cent bonds, at the price of those values, he could not, even if he should allow to us the whole of our demand in bonds, assure to us an integral restitution unless his valuations, *determined absolutely according to his conscience*, cause our claims to undergo a strong reduction.

Now, therefore, in short, if the arbitrator finds that our valuations have been made justly, measuring the damage sustained, he will regret when rendering his sentence not to be able to assure to us a restitution *in integrum.* And if he considers it equitable to make us sustain a reduction *in some of our claims, or even if he holds that some of them must be set aside*, he will find himself, despite of his taking into consideration the quotation of the bonds, in the presence of a true lesion, unless he considers himself to be in the case of reducing, *in a notable proportion*, the amount of our claim.

In page 622 of his statement, Fabiani, as if he prejudged the decision of the Swiss arbitrator, and as if he himself were dictating the award that this commission of arbitration must render upon his present claim, states the following:

The arbitrator being, as every tribunal, vested with a sovereign right of appreciation, with a real discretionary power to fix the amount of the reparation without the obligation of expressing the motives that may induce him to give this sum instead of another, the arbitrator, we say, in allowing a lump sum is not obligated to render his award in accordance with the proofs furnished by the parties or to indicate the details of the various elements serving to determine the just measure of the damage. The compromise purely and simply vests him with the duty of *fixing the amount of the indemnity, if the responsibility of Venezuela is found to be grounded.*

The arbitrator acts with the plenitude of his independence, having no other guide than his lights and his love for justice, *he inquires; whether such a prejudice or such a damage has been the direct and necessary consequence of the infractions that have engaged the responsibility of the defendant; from the moment his judgment and his conscience give him the conviction that the prejudices and damages can not be separated from the reproached infractions, that they can not have had other causes, he is dispensed with deviating into the labyrinth of more or less immediate or more or less remote consequences, and especially in our affair it will be easy for him to convince himself that no intermediate fact has come to divide responsibilities; that no occurrences alienate from the reproachable facts imputed to the author of the infraction can have exercised or has exercised any influence, however small it may be, on the disastrous consequences of the facts charged.* It is those acts, namely, the illegal obstacles *opposed to the exercise of our rights, the faits du prince, in the most brutal acceptation of this word, that constitute the only cause of the losses we have sustained, and it is impossible even to suggest that other causes would have produced the same losses and the same disastrous effects, if those obstacles and those faits du prince had not existed.*

It may be that *the study of our affair, and the detailed examination of the numerous items of our claims suggest to the arbitrator either the opinion that some of our claims have no direct and immediate connection with the infractions denounced, or the opinion that certain damages indicated by us must be fixed at a less high figure. That is the right of the arbitrator, and the exercise of that right is subordinated only to the inspirations of his conscience.*

After these clear avowals and clear statement made by Fabiani of the object of the demand decided by the Swiss arbitrator, of the connection of all the points of the claim, of the possibility that some of those items of the claim might not have a direct or indirect connection with the infractions constituting denials of justice, of the power recognized in the arbitrator to proceed, by *elimination or reduction, to fix the amount that Venezuela was to pay, in case its responsibility were established, setting aside everything that might not be considered as grounded within the general terms of the protocol, in order to arrive, by accepting all or part of the claims in question, at an end of the difference or demand between France and Venezuela, we can only regard as a chimera the pretention that the award of Berne left without a definitive decision any of the claims of Fabiani against Venezuela that were the subject of the suit.* The grand total of the claim that Fabiani made amount to the sum of 46,944,563.17 francs, and the Swiss arbitrator fixed at the sum of 4,346,656.51 francs, was the object of the suit, the subject-matter of the analysis, the proofs and debates, as to what the arbitrator was to allow for denials of justice, if these were proved. *The facts debated were all those that Fabiani alleged as the grounds of the different items of the claim; the powers of the arbitrator to judge and decide, those that the arbitration protocol of the 24th of February, 1891, conferred upon him, without limitations of appreciation; the law or norm to which he was to conform his judgment and the decisions of his conscience, the denial of justice on the part of Venezuela, duly established; the effect or result of that judgment and of that sentence being the object of the demand, the determination of the amount of the indemnity, recognizing all or part of the claims in question or declaring Venezuela exempted from responsibilities.*

The arbitrator, exercising his sovereign powers of appreciation, eliminated,

when fixing the amount of the indemnity, *points* or sums of the claim of Fabiani, because he considered them as absolutely excluded from his decision, as they rested on facts alien to the denial of justice. In making this elimination, *he judged, rejected, eliminated or disallowed them* (these are synonymous words), because they did not represent effects or consequences of denials of justice, *the only cause which, according to the protocol, made Venezuela incur responsibilities.*

Amplly exercising also his powers of appreciation, he considered some facts as denials of justice, he considered the responsibility of Venezuela aggravated by the existence of certain *faits du prince*, as indications of the hostile attitude of Venezuela against Fabiani and motives of incitation for the judicial authorities to the denial of justice; and he made use of the means of proofs and allegations with the purpose to establish the existence of other concluding and connected facts relating to the denials of justice.

By the proceeding of elimination and reduction of the several sums to which Fabiani made his claim amount, the arbitrator fixed, as the total indemnity that Venezuela was to deliver to Fabiani, the sum of 4,346,656.51 francs for the following respects:

	<i>Francs</i>
1. Roncayolo's debt . . . . .	424,177.55
2. Income for pilot service for December, 1877, to the 15th of July, 1882 . . . . .	68,312.45
3. Income for towing service from 1880, 1881, to the 15th of July, 1882 . . . . .	254,166.51
4. Expenses for the execution of the sentences, including interest . . . . .	200,000.00
5. Material and moral damage caused Fabiani by his bankruptcy . . . . .	1,800,000.00
6. Indirect damage, compound interest, and an indemnity for the profit that Fabiani might have derived in his business from the investment of the sums 2 and 3, taking into consideration the realization of a mortgage for 120,000 francs . . . . .	1,500,000.00
7. Costs of the international instance . . . . .	100,000.00
Total . . . . .	4,346,656.51

It is evidenced by the foregoing demonstration that the Swiss arbitrator decided all the connected points of the claim of Fabiani that are minutely determined in the nine paragraphs comprising the object of the demand, according to the classification made by the arbitrator in page 11 of the sentence, namely:

First, the reparation of the damage sustained;

Second, the gain frustrated;

Third, the interest calculated from the date of the damageable acts;

Fourth, the compound interest;

Fifth, the sacrifices made by the injured party for the maintenance of his industry;

Sixth, the prejudice deriving from the expense made and from the time lost to arrive at the execution of the sentences;

Seventh, the damages to be considered as the necessary consequences of the offenses;

Eighth, the damage done by the privation of work in the future, and

Ninth, the reparation of the moral prejudice.

The sentence of the Berne tribunal fixes the amount of the indemnity for all the aforesaid causes in a less sum than that established by Fabiani, the arbitrator using in this point his free power of appreciation, but admitting in principle all the conclusions of the demand.

Such is expressly declared by the sentence in its final paragraph C, Part VI, page 47, running as follows:

As to the cost of the present instance, the arbitrator, making it to appear that

the conclusions of the petition are adjudged in principle, but that the exaggeration of the claims put forward has occasioned useless expense, charges the respondent Government with the expense of the claiming government, liquidated at the sum of 100,000 francs, and compensates between the parties the expense of the arbitration.

For all the reasons above expressed the arbitrator for Venezuela is of opinion that, as there exists an award passed and affirmed on all and every one of the points comprised in the demand decided by the Swiss arbitrator, and originated by the claims of Antonio Fabiani against the Government of Venezuela, in accordance with the compromise entered into between said Government and the Government of France, on the 24th of February, 1891, every new demand of indemnity on the part of Fabiani referring or confined to the same claims that were the object of that protocol and of the subsequent suit and sentence, tried and rendered by the tribunal of arbitration at Berne, is inadmissible.

He, therefore, absolutely rejects the demand of indemnity which has given a motive for this opinion.

CARACAS, *May 30, 1903.*

NOTE BY THE VENEZUELAN COMMISSIONER

The French arbitrator was of opinion that, as there was no sentence passed and affirmed on the points of this claim, he admitted it for its integral amount, and consequently, as appears from the records of the proceedings, it was referred to the decision of the umpire.

OPINION OF THE FRENCH COMMISSIONER

Doctor Paúl has, without examining it deeply nor discussing the figures submitted by the claimant, rejected the claim presented by M. Antoine Fabiani as

having already been decided by the court of arbitration of Berne, the sentence of which has, in his opinion, passed definitely upon all the leading points of the indemnity presented by M. Fabiani.

The Venezuelan arbitrator considers that the President of the Swiss Confederation has eliminated a certain number of the points of the claim because the facts upon which these are founded, being foreign to the judicial authorities of the respondent State, do not make Venezuela responsible. This elimination does not constitute in his eyes a declaration of want of jurisdiction based upon the terms of the agreement of the 24th of February, 1891, but it would establish that these facts are not of a nature to justify the demands for indemnity. It is upon this theory that M. Lachenal would have definitely put them aside. Consequently M. Fabiani could not, according to Doctor Paúl, be admitted to present before the court of arbitration appointed by the protocol of the 19th of February, 1902, a new claim, his cause having been already entirely and definitely settled. Finally, my honorable colleague observes incidentally that M. Fabiani has waited six years since the award of Berne has been effective for setting up his new claim. On the contrary, from the reading of the award rendered the 30th of December, 1896, by the President of the Swiss Confederation, I have concluded that the arbitrator had set aside all the points renewed to-day by M. Fabiani, not because they could not in anyway place the responsibility upon Venezuela, but only because they are not in accord with the agreement of arbitration signed the 24th of February, 1891, by the two Governments. M. Lachenal has then contended himself, in my opinion, to declare himself incompetent to examine the said claims, which by this very fact find themselves reserved for the examination of the court of arbitration instituted by the proto-

col of February 19, 1902. He has in no way decided that these main points, upon which he has refused to render a decision, could not form the object of any demand for indemnity. After having said in fact, on page 22 of the award:

It results, from the evidence of the very text of the agreement and from the *ensemble* of the facts of the case, that the respondent Government is sued solely by reason of the nonexecution by the Venezuelan authorities of the arbitral award rendered at Marseilles on the date of the 15th December, 1880, between Antoine Fabiani on one part, Benoit and André Roncayolo on the other part.

M. Lachenal adds, on page 25:

In return Venezuela does not incur any responsibility, according to the agreement, on account of facts foreign to the judicial authority of the defendant State. The claims which the petition bases upon *faits du prince*, which are either changes of legislation or arbitrary acts of the executive power, are absolutely withdrawn from the decision of the arbitrator, who eliminates from the procedure all the allegations and means of proof relating thereto, as long as he could not reserve them to establish other concluding and connected facts relative to the denials of justice

In his desire to state very precisely the object of the litigation following the agreement, M. Lachenal even fixed the date (June 7, 1881) after which the denials of justice ought to be produced in order that by their act it might be possible according to the agreement to again hold Venezuela to responsibility. Is this to say that for every denial of justice previous to this date M. Fabiani would not have been able to demand indemnity from the Venezuelan Government before any tribunal had it, like this one, the most extended jurisdiction? It would not be more unreasonable and more unjust to pretend that to refuse to M. Fabiani the right of a compensation from the fact of the main point of the claim which he raises again before this new court. The declaration of want of jurisdiction of the arbitrator is clear, but it does not constitute in any way a patent of irresponsibility for Venezuela because of arbitrary acts of its government prejudicial to M. Fabiani, who remained free to demand reparation before a court of which the jurisdiction would not be limited, as that of the court of Berne, by the terms of a restrictive compromise. Such is the case of the court of arbitration instituted by the protocol of the 19th of February, 1902, which regards in a general way, of whatever nature they may be, all the demands for indemnities presented by Frenchmen and founded on acts anterior to May 23, 1899.

This time the Venezuelan Government can not maintain, as in 1891, that only denials of justice of a special character can fix the responsibility upon Venezuela. Besides, a great number of claims presented to the courts of arbitration which sat last year at Caracas had precisely for a foundation, not denials of justice chargeable to the judicial power, but to *faits du prince* analogous to those of which M. Fabiani has been the victim, and there resulted for the Venezuelan Government condemnations to very extensive pecuniary reparations. Besides, one can not allege a grievance against M. Fabiani for having waited to present his new claim until a court of arbitration should have been formed to judge it. One knows, in fact, that the decision of the arbitrator of Berne, on the one hand, bears the date of the 30th of December, 1896, and, on the other, from 1895 to 1903 all the claims of the French against the Venezuelan Government have remained in suspense, the diplomatic relations between these two countries being themselves suspended. I consider in consequence that the plea of *res judicata* can not reasonably be invoked.

The main points of the claim presented by M. Fabiani have not been adjudged by the arbitrator of Berne. He has not been able then to declare that they did not permit absolutely any demands for indemnity. M. Lachenal has not raised

the facts by reason of which M. Fabiani demands to-day some indemnities except as indications of the ill will of the executive power. He has thereby recognized their existence and established their injurious character. M. Fabiani then only uses a legitimate right in reclaiming before this new jurisdiction with unlimited power in whatever concerns the French claims previous to the 23d of May, 1899, an equitable reparation for the large damages which these acts have caused him.

In referring to the memoirs prepared by the interested party one is seized with astonishment at the multitude of arbitrary acts of every kind which M. Fabiani proves by his invincible arguments and authentic documents he has had to suffer since his establishment at Venezuela. During my sojourn in this country I have found, whether at Caracas or at Maracaibo, among established foreigners and the Venezuelans that no attachment with the Government prevents from being impartial, a unanimous agreement in recognizing that M. Fabiani had been pursued for long years by the hatred of the executive power of which the evident end was to strip him of his capital and the fruits of his labors without anything in the conduct and attitude of this foreigner justifying or even explaining such animosity. I have read with attention the memoir and the conclusions remitted by M. Fabiani. I have not found therein any inaccuracy nor any exaggeration. I have found to the contrary, as in the dossier of the proofs furnished in support, the constant care to be minutely precise. As moreover none of his demands have been contested in the foundation and in the figures by the respondent Government, it has not appeared possible to me to put them aside or to reduce the amount. I have consequently accorded to M. Fabiani the indemnity which he claims.

Doctor Paül has insisted on having stated in the minutes of the meetings of the commission that my decision had not been preceded by any discussion between the arbitrators upon the amount of the claim which he rejected for an interlocutory reason. It is really because my colleague has not discussed the figures presented by M. Fabiani that I have been under the obligation of accepting them as a whole. They have not seemed to me exaggerated, and the interested party has naturally not furnished me with the means of contesting them. I am, moreover, far from believing, if I may judge by the defense remitted to the arbitrator of Berne, that the Venezuelan Government has not been sorry to trench itself behind the plea of *res judicata* by means of an interpretation of the award which seems to me inadmissible. Conscientiously, then, I judge that the Venezuelan Government ought to turn over to M. Fabiani as an indemnity a sum of 9,509,728.30 francs.

In conclusion, I think I ought to submit two considerations to the particular attention of the umpire.

First, one can notice in running through the memoir presented by M. Fabiani to the arbitrator of Berne and the award of M. Lachenal that all the figures asked by the claimant and retained by the arbitrator as comprised in or receiving their source in the award of Marseilles have been recognized as exact and admitted by M. Lachenal without any reduction. This observation is not without value and ought to remain present in the mind while one examines the figures presented in course of this claim. It is honorable for M. Fabiani, whose example in this is very rarely followed by foreigners who enter complaint against Venezuela.

Moreover, it is to be considered that according to the terms of the protocol indemnity ought to be paid in bonds of the diplomatic debt and not in gold. Thanks to this concession, granted by the French Government to the Venezuelan Government in order to allow it to pay its debts with greater ease, the amount of the indemnity becomes singularly reduced in reality. The bonds

issued by the Government of Caracas have a real value, which is always very much less than their nominal value. In May, 1903, they reached a depreciation of 30 per cent. In December, 1903, they sank to 70 per cent of their value. For some months their real value seems to have stopped at 40 per cent of the nominal value. It would be, then, if the umpire should partake of the sentiment of the French arbitrator, a little less than 4,000,000 bolivars in gold which Fabiani would receive and the Government of Venezuela would have to remit.

*August 2, 1904.*

ADDITIONAL OPINION OF THE VENEZUELAN COMMISSIONER

Before preparing the opinion I submitted at the sitting of May 30, 1903, which I submit herewith, translated into English, rejecting the claim filed by A. Fabiani against the Government of Venezuela for the amount of 9,509,728.30 francs, I made a complete investigation of the facts upon which the claimant bases his contention. It was after becoming thoroughly acquainted with the peculiar circumstances of the case and based on the reason contained in my opinion as aforesaid that I rendered the following decision:

That because there existed a condition of *res judicata* covering each and every one of the points contained in the case decided by the Swiss arbitrator, originating in the claims of Antoine Fabiani against the Government of Venezuela, in accordance with the convention made between the latter Government and that of France on February 24, 1891, any new claim for indemnification made by Fabiani is inadmissible if referring to or containing the same contentions which originated said agreement and the subsequent hearing of the case and sentence passed by the Arbitration Court of Berne.

The French commissioner, at the session above referred to, did not go beyond stating his opinion that the Swiss commissioner had laid aside all the points originating the claim entered anew by Fabiani as not included in the arbitration agreement signed on February 24, 1891, by the two Governments, and that the President of the Swiss Confederation having declared himself disqualified to examine the several complaints on the same grounds above mentioned, such contentions were therefore a proper subject of investigation by the commission created by the Paris protocol. M. de Peretti ended by admitting Fabiani's claim, acknowledging its sound basis, and granting the full amount of the claim.

In order to be able to fully understand the points relating to the convention made on February 24, 1891, between the French and the Venezuelan Governments, the object of said convention, the ends both Governments endeavored to attain, the extent of the arbitration agreement entered into, the claims that were to be properly admitted to the examination and decision of the umpire at Berne, and in order to properly establish if M. Fabiani may or may not introduce before this commission a new claim embracing facts and circumstances antedating said convention, but included in the arbitration agreement and submitted to examination and decision at Berne in compliance with the protocol of 1891, it becomes necessary to bring before us the precise language of said convention and the antecedents or official communications passed through diplomatic channels preceding such convention and which sufficiently explain the causes originating the arbitration agreement, the nature and circumstances of the facts or claims entered by M. Fabiani, and the action the French Government deemed proper to enter against the Government of Venezuela *in order to safeguard all the rights and all the interests* of the French citizen who had invoked its protection.

I beg to submit herewith Spanish and English copies of the convention made

in Caracas on February 24, 1891, between the representatives of the French and the Venezuelan Governments, the first paragraph of which contains the following language:

The Government of the United States of Venezuela and the Government of the French Republic have agreed to submit to an umpire *the claims* of M. Antonio Fabiani against the Venezuelan Government.

It is not possible to find in any convention of like nature a clearer exposition or a wider scope as regards the object of the arbitration. The agreement was to submit to an umpire the claims of M. Antonio Fabiani — that is, the claims of M. Fabiani against the Government of Venezuela up to the date of the convention — and no doubt whatever can exist as regards this conclusion, as otherwise the object for which the convention was made would be defeated.

No limitation was placed upon any claims M. Fabiani might have had against the Venezuelan Government, nor can it be supposed that, the object of the convention being to finally close a long diplomatic process during which France had most energetically maintained the necessity of Venezuela submitting to arbitration Fabiani's claims, a protocol should be concluded between both countries, the terms of which, while agreeing to arbitration proceedings, should except certain portions of claims which kept their friendly relations disturbed. A foreign office as important and enlightened as that of France can not father such absurdities.

The first paragraph of the convention of February 24, 1891, having determined the original object of the arbitration — i.e., *Fabiani's claims* — Article I, which immediately follows, makes the following stipulation:

The umpire shall \* \* \* determine if in conformity with the laws of Venezuela, the general principles of the law of nations, and the convention in force between the two contracting powers, the Venezuelan Government is responsible for *the damages* which M. Fabiani *alleges to have suffered because of denial of justice*.

The clear and precise language of this article shows how far did both Governments consider it necessary to impress upon the umpire's mind in unequivocal terms that *the claims or damages* — that is, those to be submitted for his investigation — which M. Fabiani *alleged* to have suffered through denial of justice, were to be determined in conformity with the laws of Venezuela, the general principles of the law of nations, and the convention in force between the two contracting powers, in order to *fix the responsibility of the Venezuelan Government* according to such laws, principles, and convention.

“*The damages which M. Fabiani alleges to have suffered.*” According to such language, what is that which Fabiani alleges to have suffered? Common sense will say “the damages.” For what cause does Fabiani allege to have suffered such damages? Because of the denial of justice. How is the umpire to view the denials of justice which Fabiani alleges have originated the damages suffered, now submitted to the umpire's decision? According to the laws of Venezuela, the general principles of the law of nations, and the convention in force between the two powers. It is thus seen that the above-quoted article clearly specifies the three elements which constitute the object of the arbitration — i.e., the damages suffered by Fabiani in Venezuela, submitted to the umpire in the shape of claims, the cause of such claims or damages which Fabiani made solely dependent upon the denials of justice, and the standard which the umpire must follow to find out whether or not there has been a denial of justice as the fundamental and only basis of the claims or damages alleged by Fabiani at the time of the convention.

Article II of the convention reads as follows:

To fix, should such liability be found, for *the whole of the claims in question or any portion thereof*, the amount of the pecuniary indemnification that the Venezuelan Government must make to M. Fabiani, which shall be paid in 3 per cent bonds of the diplomatic debt.

According to this article, the Berne umpire was to fix at a certain sum the amount of the pecuniary indemnification should it be found that Venezuela was liable for the *whole of the claims or any portion thereof* entered by Fabiani. That portion of the claim for which the umpire found Venezuela to be responsible, fixing the amount at 4,346,656.57 francs, was delivered to M. Fabiani in compliance with said Article II in 3 per cent bonds of the diplomatic debt. That portion of the claim for which the umpire found that Venezuela was not liable was rejected; and he also adjudged that there was no denial of justice as alleged by Fabiani to be the cause of damages of that portion of the claim rejected, and also declared that the amounts claimed for the justified damages were grossly exaggerated. He so declares in a conclusive manner in final Paragraph C, Part VI, page 47 of the original award, which reads as follows:

As regards the expenses in this appeal, the umpire, *while declaring that the conclusions in the case are admitted in principle*, but that *the exaggeration of the claims made* has caused unnecessary expenses, estimates the liquidated expenses of the claimant Government against the respondent Government in the sum of 100,000 francs and divides between the two the arbitration expenses.

Such declaration, which the Berne umpire found indispensable to make, irrevocably fixes the true condition of Fabiani's claims, which were the subject of arbitration, in respect to the Government of Venezuela. The conclusions in the case were admitted in principle, but there was exaggeration in the claims made. Fabiani won the case, obtained a *gain de cause* as regards the liability of Venezuela as found by the umpire growing out of denials of justice which constituted the main cause of the claims Fabiani endeavored to establish against Venezuela, but the claims made were found by the umpire to be exaggerated, so he reduced them to the amount given in the award.

The claims Fabiani has again presented to have examined by this commission are the same as those submitted to the Berne tribunal, the umpire then accepting in principle the conclusions in the case, but finding that *the claims were exaggerated*. My argument in regard to this issue is more fully expressed in my opinion of May 30, 1903.

I also beg to submit with this additional opinion copy of the diplomatic correspondence passed between the Governments signatory to the convention of February 24, 1891, in the years 1889 and 1890, preceding such convention, wherein it is shown that both Governments were animated by the purpose of definitively settling Fabiani's claims by means of the arbitration agreement made in 1891. I beg to call the honorable umpire's attention to the following paragraphs:

His excellency M. Blanchard de Farges, minister of France in Caracas, to Mr. P. Casanova, minister of foreign relations, note of December 31, 1889:

To judge from the very particular interest taken in France to settle this matter (Fabiani's claim) and the regrettable turn which unhappily has been formerly given to your excellency's administration and my arrival in Caracas, I hold the certainty that my Government would see in the manifestation of more favorable dispositions *as regards said claim* the clearest evidence of the desire of the eminent President of the Republic of Venezuela and of yourself to establish between the two countries a cordiality toward which all my efforts are bent.

Mr. P. Casanova, minister of foreign relations to his excellency M. Blanchard de Farges, note of January 14, 1890:

After the consideration of your excellency's note of December 31, ultimo, wherein, while referring to the interviews we have held in regard to several pending matters between the two Governments, but without expressing the grounds the French Republic may have to insist upon the *Fabiani claim*, rejected from its origin by Venezuela, your excellency proposes to have it submitted to arbitration, the President, desirous of exhausting all efforts in behalf of the desired good harmony between both countries, has directed me to state to your excellency that he is willing to accept such in principle, providing the umpire chosen be selected from the Presidents of the Latin-American Republics; that the question to be decided be "if this is the case provided for in article 5 of the French-Venezuelan convention of November 26, 1885;" and that in case Venezuela *should be condemned to pay any indemnification, in view of the legal proofs adduced in favor of the claimant*, such agreement to be submitted to the National Congress as provided by law, such indemnity to be paid in 3 per cent bonds of the diplomatic debt.

M. Blanchard de Farges to M. Marco Antonio Saluzzo, minister of foreign relations, note of May 20, 1890:

I have the honor to acknowledge receipt of your note dated on the 14th instant in reply to the one I delivered to your excellency on the 1st, regarding *Fabiani's claim*. \* \* \*

As regards the second part of the communication I now have the pleasure to answer. I notice with pleasure that the Venezuelan Government does not further insist upon the condition that the election of the umpire to be appointed could not be made but in the person of the President of one of the Latin-American Republics.

In the matter of your refusal to agree in the condition which my Government now proposes through me asking *that the umpire's award shall deal only with the amount of the indemnity to be fixed for M. Fabiani*, I can not but earnestly deplore that you do not think you can grant us this point, and that you should permit that in this manner there should be perpetuated between the two countries an *element of dissension* to the obliteration of which I am satisfied I have done everything in my power.

Dr. Modesto Urbaneja, minister of Venezuela in Paris, to the minister of foreign relations of Venezuela, note of July 22, 1890:

Consequently, for greater clarity and to prevent that M. Fabiani should misconstrue the agreement, thus creating new difficulties, I told the minister (M. Ribot) that I was going to inform the Venezuelan Government of the agreement precisely in the following language:

That the French Government is willing to accept *that the question relative to M. Fabiani* be submitted to the President of the Federal Council of Switzerland as *arbitro juris*; first, to decide if this be the case provided for in article 5 of the French-Venezuelan convention of November 26, 1885; and, second, should the umpire decide that such is the case provided for in article 5, then the umpire is to *fix the sum that must be paid to M. Fabiani* in 3 per cent bonds of the diplomatic debt.

I have discussed the matter with the director of the cabinet, who has told me that, although the French Government agrees in the substance of the two points mentioned, it is not desired that they should be stated in such terms, because these would, to a certain extent, be little satisfactory to the French Government, *which has decidedly supported M. Fabiani's claim, entering it energetically* through diplomatic channels.

M. Blanchard de Farges to the minister of foreign relations of Venezuela, note of August 12, 1890:

Referring to the last communications passed between us dated May 14 and 20, ultimo, relating to the Fabiani matter, I have the honor to submit to your approval the inclosed draft of a statement which I have just received from the minister of foreign relations of the French Republic to serve as a basis to the arbitration already agreed upon "in principle" between the Venezuelan and French Governments.

In the event this draft, which is entirely in conformity, as I believe, with the last

statements your excellency has made me in the name of your Government, should, as I have reasons to expect, be favorably accepted and that *forthwith an agreement should be entered definitively establishing arbitration under the terms which both parties should deem proper*, I have the pleasure to inform your excellency that I am authorized to withdraw the note M. St. Chaffray addressed to the Caracas cabinet as a consequence of the instructions sent him under date of December 24, 1888.

The draft mentioned in the foregoing note is couched in the same language as paragraph 1 and articles 1 and 2 of the convention signed by France and Venezuela on February 24, 1891. See the draft of statement at the foot of the note of M. de Farges.

The minister of foreign relations of Venezuela to M. de Farges, note of August 14, 1890:

I had the honor to receive your excellency's communication, dated day before yesterday, wherein, in reference to the *claim of M. Fabiani*, a draft of a statement which the Government of the French Republic has transmitted to you is submitted to the Government of Venezuela.

It is very satisfactory to the President of the Republic to learn that the Government of France, as was to be expected from its enlightened views and good will, accepts the employment of arbitration *to decide upon the foundation of such claim* and has authorized your excellency to withdraw the note of M. St. Chaffray, as Venezuela has urged as earnestly as was consistent with its desire to clear the relations of both countries of the embarrassing position created by the purport of its contents.

The Government of Venezuela, on the other hand, has no difficulty in subscribing to the statement transmitted, with the understanding, however, that the final agreement resulting therefrom shall express, according to the proposition of Venezuela, *that to fix the amount of the indemnity*, should there be any, the umpire will rest his decision on the legal proofs *of the damages M. Fabiani claims to have suffered*: that such payment is to be made in the 3 per cent bonds of the diplomatic debt, as promised, and that the agreement is to be subject to the approval of the Congress of Venezuela.

Finally, your excellency can not fail to admit the necessity *to indemnify M. Fabiani, not for the damages he avers to have sustained and which he estimates at an extravagant figure, but for such damages as he has actually suffered*, the estimation of which does not depend upon his word devoid of all proof. The burden of the proof rests on him as the claimant.

As a complement to such important notes which give sufficient light on the question of the agreement for arbitration, showing besides that such agreement embodied all the claims of M. Fabiani existing at the time it was concluded, as it did not have any other original grounds except the so-called Fabiani claim, that the owner thereof made to the amount of an extravagant figure which was reduced to about one-tenth by the award of the Swiss umpire, I reproduce herebelow the argument (*exposición de motivos*) made by the French Government in regard to the claim for indemnification entered in behalf of Fabiani, addressed on August 3, 1887, by the French legation in Caracas to the Venezuelan Government (Answer of A. Fabiani before the Swiss umpire, page 4):

It is the opinion of the French Government that the indemnity must embrace, at least in the first place, the amount of the sums, both principal and interest, the collection of which would have been insured by the execution of the sentence in due and proper time, besides the restitutions ordered by the judges, amounting to about one million and three hundred thousand francs, and, in the second place, damages and interest, *the amount of which is to be discussed, for the wrongs made to Fabiani in his credit and in his business*.

As regards his other pretensions, a searching investigation and discussion should determine how far they are well founded.

The foregoing suffices to convince that the only and actual object of the arbitration agreement and of the subsequent investigation and sentence was no other than the claims of M. A. Fabiani, existing at the time of the agreement, which the Government of Venezuela and the Government of France agreed to submit to the Berne umpire for him to fix, should he find Venezuela's liability for the whole of the claims or any portion thereof, the amount of the pecuniary indemnity.

I do not deem it necessary to further dwell in this additional opinion on points so clearly and so well supported by evidence on the part of both Governments, that it is really inconceivable that M. Antoine Fabiani should pretend, after due execution of the award made by the Berne tribunal, by means of the payment made by Venezuela of 4,346,656.57 bolivars, since 1896 in bonds of the diplomatic debt, and its interest at the rate fixed of 3 per cent per annum, not to be compensated for the damages which in 1891 he claimed the Venezuelan authorities had caused him to suffer, and which since 1888 gave rise to the active diplomatic correspondence passed between the two Governments and finally ending in the convention of February 24, 1891.

I close these statements reaffirming in all its particulars my opinion of May 30, 1903, by which I rejected the claim entered anew by M. A. Fabiani, based upon the same grounds originating the claim for indemnification which produced the arbitration agreement between France and Venezuela in the year 1891.

#### ADDENDUM

I submit herewith the English translation of the award of the President of the Swiss Confederation in the claims of A. Fabiani, made by Dr. Delicio Abzueta, sworn interpreter in Venezuela, whose competency is well known to the honorable umpire.<sup>1</sup>

NORTHFIELD, VT., February 6, 1905.

#### ADDITIONAL OPINION OF THE FRENCH COMMISSIONER

After having read the additional memoir presented by my honorable colleague, I can only maintain the conclusions of the prior memoir, which sums up the proper conclusions of the claimant in that which concerns the plea of the *res judicata*. They are based upon this precise declaration of the arbitrator of Berne, of which my colleague presents an exact translation:

In return Venezuela does not incur any responsibility according to the compromise (agreement) on account of facts strange to the judicial authorities of the respondent State. The claims that the petition bases on *faits du prince*, which are either changes of legislation or arbitrary acts of the executive power, are absolutely subtracted from the decision of the arbitrator, who eliminates from the procedure all the allegations and means of proofs relating thereto as long as he can not reserve them to establish other concluding and connected facts relating to the denials of justice.

I think I ought to formulate, however, some observations which are suggested to me by the considerations set forth in this additional memoir.

In the first place, Doctor Paúl supports himself upon the text of the convention of the 24th of February, 1891, which is the agreement of arbitration, and upon the exchange of diplomatic correspondence which preceded this, in order to demonstrate that the intention of the two Governments was really to deter-

<sup>1</sup> A copy of the original text of the award appears on pp. 4878-4915, vol. 5, *Moore's History and Digest of International Arbitrations*.

mine definitely all the claims of M. Fabiani against Venezuela. I do not deny this. I even add that the French Government, faithful to the spirit which had inspired the negotiations, did not cease to maintain this interpretation of the agreement in the course of the discussions which were engaged in before the Swiss arbitrator. It was, to the contrary, the representative of the Venezuelan Government at Berne who, hoping to find in the terms of the convention, unfortunately ambiguous, the possibility for Venezuela eluding a part of her responsibilities, combatted this broad interpretation in several instances, and substituted for it a restrictive interpretation. In fact, while the conclusions of M. Fabiani, supported by the representative of the French Government — conclusions having in mind the denials of justice of the Venezuelan magistrates and, above all, the arbitrary acts (*faits du prince*) and the denials of justice imputable to the Federal executive — comprehended all the losses and all the injuries which had been caused him by the political, administrative, and judicial powers of Venezuela, the cabinet of Caracas in its "defense" presented a plea tending to restrict the sense and scope of the agreement, and develop this plea in bar on pages 1, 2, 3, 4, 5, 17, 86, 85, 101, and 102. Also to the precise conclusions of the *réplique* of M. Fabiani on the *faits du prince* the cabinet of Caracas opposed anew its plea in its rejoinder.

It is absurd and monstrous, from a judicial point of view, to maintain that the party signatory of an agreement, or one of them, have had in view to settle a question outside of the agreement. The arbitrator can examine and retain only that which forms the object of the agreement.

Further:

As long as the signers of the agreement have not given to this accord a more extended scope, the only denial of justice that the arbitrator ought to examine is that which the cabinet at Paris says was committed after the 6th of June, 1882, mentioned in article I of the protocol. Every other question is foreign to the agreement, and it can have no discussion upon the point of the departure of the litigation submitted to arbitration.

Can he who interpreted the agreement thus now pretend that all the claims of M. Fabiani have been definitely settled, seeing that it is precisely this restrictive interpretation which the arbitrator of Berne adopted? Consequently M. Lachenal has declared briefly in the quotation cited above, that he is incompetent according to the agreement to judge all the points which M. Fabiani submits to-day to the examination of this commission. The French Government had only to submit, since the sentence of the sovereign arbitrator, although one might consider it as not having been inspired by the spirit which had presided over the diplomatic negotiations, could not, however, be attacked as contrary to the letter of the protocol. But in execution of the arbitral award itself, M. Fabiani conserved the faculty of representing the leading points thus laid aside for want of jurisdiction, and not adjudicated before every new court of arbitration instituted by a protocol "more extended," to use the term employed by the cabinet of Caracas itself. This protocol with a more extended scope is exactly the protocol of the 19th of February, 1902, of which M. Fabiani has been obliged, in the absence of diplomatic relations between France and Venezuela, to await the signing in order to present his new claim.

In the second place, Doctor Paül has thought he ought, in order to make plain the sense of the protocol of the 24th of February, 1891, to present the diplomatic correspondence exchanged before the signing by the two Governments. I receive a double impression from the reading of these documents: First, I should be much astonished to judge them by the interpretation which he has given to the protocol, that M. Lachenal knew about this correspondence

which did not form a part of the dossier, since I had not read it myself, then I state that the only necessity of recourse to this correspondence, to make plain the text of the compromise, determines clearly that this text was not sufficiently plain, and that from its ambiguous terms one could reasonably draw two different interpretations. I note, besides, anew that it is the Venezuelan Government which has not remained faithful to the spirit which presided over the negotiation, and that upon this point it received an advantage with the Swiss arbitrator. The same Government is desirous of pushing aside now the natural consequences of this restrictive interpretation of the protocol.

In the third place, my honorable colleague concluded with a quotation from the sentence of arbitration that, concerning the "exaggeration of the claims formulated," all the claims of M. Fabiani outside the main points recognized as admitting of indemnities have been definitely rejected by M. Lachenal. It suffices to read this phrase in order to notice that it concerns only the expenses of the proceeding. One could not rest himself upon an incidental expression, the sole end of which is to explain that useless expenses have been engaged in by demands arising from the framework of the protocol to try to reveal in the mind of the arbitrator intentions contrary to those which he has clearly expressed in the preamble of his award. Finally, Doctor Paul thinks to find a last argument against the demand of M. Fabiani in the text of a letter written the 3d of August, 1887, three years and a half before the signing of the protocol by the legation of France at the ministry of foreign affairs of Venezuela. M. Fabiani has addressed to me on this subject a note, herewith attached, which I received at New York the 30th of last January, the conclusions of which I approve, and which I beg the umpire to kindly take into consideration.<sup>1</sup>

The affair Fabiani, such as it now exists, rests entirely upon arbitrary acts, denials of justice, and the fraudulent resolutions of the executive power of Venezuela which have caused injury to the plaintiff or created by the complete destruction of his only lien insurmountable obstacles to the collection of his enormous debts. The Swiss arbitrator, interpreting the convention of arbitration of February 24, 1891, has limited his jurisdiction to the denials of justice imputable to the judicial authorities of Venezuela on account of the nonexecution by said authorities of the award rendered at Marseilles December 15, 1880. He has consequently eliminated from the procedure as being outside the protocol and he has not admitted proof of the arbitrary *faits du prince*, as also all the acts foreign to the inexecution and to the effects of the inexecution of the sentence before mentioned, acts and deeds which the claimant government had considered as coming within the terms of the protocol above cited. This decision of the arbitrator, rendered contrary to the conclusions of the French Government and conformable to the conclusions of the United States of Venezuela, is of a startling clearness as to everything leading to the determination of the object of the litigation and consequently of the object of the judgment. We have besides been able to observe the precautions taken by the judge in order to anticipate every equivocation and to reserve the rights of the claimant party for all the matters and points subtracted from his cognizance by his interpretation of the terms of the protocol. The conclusions of Fabiani upon the plea of *res judicata* have superabundantly demonstrated that these matters and points, founded upon facts foreign to the judicial authorities of the respondent state and to the nonexecution by the said authorities of the arbitral award of Marseilles, form the only object of the present litigation, and that they all refer to arbitrary *faits du prince* and to the losses and injuries which

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<sup>1</sup> Exhibit to memoir of the French commissioner. --Letter from M. Fabiani.

have been the consequence. But in the support of his restrictive interpretation of the agreement the Swiss arbitrator makes mention of a note from the French legation of August 3, 1887, cited by the respondent state, and that he has considered, right or wrong, as being able to give the measure of the points included by the protocol of 1891, although this may be anterior to this protocol by three and a half years. But this note of 1887, in reserving the surplus of the claims of Fabiani, would suffice to have the exception of the plea *res judicata* rejected if the decisive conclusions of the plaintiff could allow the least doubt in this regard to subsist. In fact, not only has the Swiss arbitrator abstained from passing upon the surplus reserved by the note of the 3d of August, 1887, and of which Fabiani, who attributed to the agreement of 1891 a much larger scope, had made the principal object of his memoir, but he has expressly eliminated it from the procedure and not offered proof, for reason that the said agreement had submitted to arbitration only the denials of justice imputable to the judicial authorities of Venezuela and the nonexecution by these authorities of the arbitral sentence of Marseilles.

To appreciate all the value of the reserves contained in the note of the French legation of August 3, 1887, it is sufficient to notice that these reserves concern the *faits du prince* and that at this time the President of Venezuela was still Gen. Guzmán Blanco, the responsible author of the ruin of Fabiani. If we add that his minister of foreign affairs was the too celebrated Diego Bautista Urbaneja, the advocate and accomplice of the adversaries of the plaintiff, we shall understand that, in taking care, in view of an amiable agreement, to indicate the *ensemble* of the credits of Fabiani against the Roncayolos, the note of the 3d of August, 1887, may have correctly reserved in the following terms the rights of the plaintiff:

As for the surplus of his claims (which the dictamen translated thus: *exceso de pretensiones*, p. 106) a serious and analytical examination will alone determine just on what points they are founded.

What were the claims? Here is the reply of Fabiani in his *réplique*. The Venezuelan arbitrator having omitted in his mutilated citation the essential passages of the said response, one may judge it useful to reproduce them as a whole, *italicizing* that which has been cut out — that is to say, almost all:

What are these claims of Fabiani? The affair of the towage and that of the railroad. What was the cause of such a reserved formula? Why this reticence? One will find the explanation of it in the last paragraph of page 527 of our memoir. *The affairs of the towage and that of the railroad (that is to say, all the arbitrary acts—the denials of justice and faits du prince which these two affairs have created) could not even be indicated, Guzmán Blanco ruling. But our Government, anxious to reconcile the duty of protecting its nationals, with its eager desire to avoid a new rupture and grave complication, had forbidden, with our loyal assent, making allusion to denials of justice imputable to the chief of the executive power, reserving to us the free exercise of our rights if the propositions of an amiable settlement were repulsed. These reserves result from the paragraph quoted as to the surplus of the claims, etc.*

All the passage *italicized* has been omitted in the dictamen of the Venezuelan arbitrator. This suppression has had for a result to conceal that it was a question of arbitrary acts or *faits du prince* and to allow to be ignored the serious motive, which, for facilitating an amiable settlement, had caused in 1887 the reserving of the surplus, of which the Swiss arbitrator has refused to take note, because he was deeply possessed with the idea that the protocol of 1891 was affected by the same reservation.

These elisions once indulged in, the dictamen is restrained to reproduce the phrase which begins thus:

There is for the object of the litigation, etc.

It is without any practical utility in the present affair, since, like all declarations relative to the losses and injuries of Fabiani, it expressed the opinion of the demandant Government on the sense and extent of the words *denials of justice* inserted in the agreement of February 24, 1891. But one is not ignorant that, upon the formal reply of Venezuela, these conclusions of the demand were put aside by the arbitrator of Berne, who, after having determined the *object of the litigation* and fixed the matter really submitted to his jurisdiction by the agreement cited, has eliminated from the procedure and has not admitted proof of as being outside the terms of the protocol just this *surplus of claims of Fabiani*, which comprehended the arbitrary acts and the denials of justice or "*faits du prince*" upon which the present examination is founded; that is to say, all the facts foreign to the *judicial* authorities of Venezuela and to the non-execution by the said authorities of the arbitral award of Marseilles. The State of Venezuela had itself twice proclaimed in its answer that these main points of the claim did not constitute the *matter of the litigation* remitted to the decision of the Swiss arbitrator, and in its rejoinder, that these same points foreign to the protocol, might form the object of a later examination, whenever the two Governments would sign a more extended protocol, which was realized on February 19, 1902. It is this reasoning which has convinced the arbitrator of Berne and which has led him to pronounce upon the above-mentioned points a declaration of want of jurisdiction, by which the rights now under discussion were safeguarded. It is not without interest to fill in another gap in the dictamen and to call, respectfully, the attention of the arbitrators to the last paragraph of page 527 of the memoir, which the Venezuelan arbitrator has not deigned to reproduce, although page 5 of the *réplique* has signalized it as being necessary to furnish explanation of the reserve made, as to the surplus of the claims of Fabiani. Here is the paragraph:

Our exposé has made known our complaints; the questions already so grave and so clear of denials of justice, of the refusal of execution of award, of the violent acts of agents of all classes, turn pale beside the acts, perfidious, malevolent, interested and contrary to all the principles of international law, of which we make with good right the whole responsibility to rest upon Gen. Guzmán Blanco, President of the United States of Venezuela. These numerous successive acts which did not spring from civil or penal justice and which for this same reason remain without the provisions of article 5 of the convention of 1885 — these acts which constitute bold denials of justice ought we to pass them by in silence at the risk of compromising the sacred interests which we have the mission of safeguarding? Who would have dared to counsel us thus? It was then necessary to speak, to set forth the facts, to make them precise, above all to characterize them, to demonstrate the intention to injure. It was necessary to put in relief the interested passion, the blind hatred, the *faits du prince*, the culpable reticence which ought, following the theory and practice of the retaliation of faults caused us, to allow some vindictive interest. Very well! But here one sees the Venezuelan delegate jump; we see him compelled to squander the proofs of his loyalty for the name of the chief of state is Guzmán Blanco, and his minister of foreign affairs, specially chosen *ad hoc*, is no other than his famous uncle Diego Bautista Urbaneja!

This passage of the exposé explains clearly the surplus of claims of Fabiani. It has been explained since that the dictamen has passed it over in silence, because this surplus relative to the *faits du prince* was formally eliminated from the procedure by the Swiss arbitrator as foreign to the judicial authorities of the respondent State, and that the *ensemble* of the sentence of Berne, by the precautions taken in order to leave no doubt as to what was really judged, demonstrates that the said sentence has considered this surplus reserved as

capable of forming and bound to form the object of a new litigation. The surplus of the claims of Fabiani, as page 527 of the memoir demonstrates, has reference to the *faits du prince*, and, more particularly, to the arbitrary acts which have so sadly marked the two grave affairs of the towage and the railroad. This surplus then included all the arbitrary acts, all the denials of justice, and the fraudulent resolutions "*du prince*" — that is to say, all that comprises the object of the present examination. Pages 49 to 67 of the conclusions of the plaintiff prove this beyond peradventure. This long series of civil wrongs, intentionally injurious, has created insurmountable obstacles and of the nature of *force majeure* to the recovery of the credits of Fabiani. Independent of the arbitral award of Marseilles this unhappy work has been completed by the fraudulent annihilation of the strong and only lien of the creditor, and by the withdrawal of the service of the towage, by this abuse of right, veritable act of reprisal of a venal and passionate chief of state against a mandate of justice. These unheard of and wrongful deeds call for a restitution proportionate to the gravity of all these infractions.

In these conditions, in presence of the demonstration that the main point of the demand, eliminated from the procedure of Berne, as outside the terms of the protocol, concern the arbitrary acts, the denials of justice, *lato sensu*, or the *faits du prince*, which are the peculiar object of the present litigation; and finally, in presence of the decision of the Swiss arbitrator, so clearly ordered to the manifest end of preventing every equivocation, as to the object of the litigation and as to what was really adjudged, one is led to recognize once more that the plea of *res judicata* is no less inadmissible than badly founded.

Convinced, moreover, that in order to know what was really adjudged by the arbitrator of Berne, it is necessary, first of all, to possess one's self of the contestation, such as the plea of the defendant determined it, confirmed by the judgment, then to consult the judgment which has sustained the plea, and which, by the interpretation of the protocol, has limited the object of the litigation and the jurisdiction of the judge, following the conclusions of the respondent State (denial of justice, committed since the 6th of June, 1882, by the judicial authorities of Venezuela) Fabiani can in all confidence rely upon his conclusions of the 24th of June, 1904, which have demonstrated indubitably that the object of the litigation determined by the arbitrator, conformably to the conclusions of the defendant and contrary to the conclusions of the prosecutor, and the decisions so clear and so precise of the Berne award, touching the matter of litigation thus determined, have refuted, in advance, for all and for each of the leading points of the present contest the plea of *res judicata* developed in the dictamen of the Venezuelan arbitrator.

The arbitrator of Berne has passed judgment upon the acts imputable to the judicial authorities of Venezuela in the course of the procedure of execution of the arbitral decision of Marseilles, and upon these acts only. It belongs, then, to the arbitrators to decide in their turn upon the arbitrary acts, the denials of justice, the *faits du prince*, and upon the losses and damages which have resulted therefrom.

#### OPINION OF THE UMPIRE

The case of Antoine Fabiani came to the umpire because of the inability of the honorable commissioners for France and Venezuela to agree, as herein-after stated more in detail.

His claim had been presented by the concerted action of these two Governments to the arbitrament and award of the honorable President of the Swiss Federation by virtue of and according to the terms of a compromise

had by and between these honorable Governments, which was concluded February 24, 1891, and is of the language following:

*Re* Fabiani's claims:

The Government of the United States of Venezuela and the Government of the French Republic have agreed to submit to an arbitrator the claims of M. Antonio Fabiani against the Venezuelan Government.

It will be the duty of the arbitrator:

First, to decide whether, according to the laws of Venezuela, the general principles of the law of nations and the convention in force between the two contracting powers, the Venezuelan Government is responsible for the damages which M. Fabiani says to have sustained through denial of justice.

Second, to fix, in case such responsibility is recognized, as to all or part of the claims in question, the amount of the pecuniary reparation that the Venezuelan Government must deliver to M. Fabiani, and which will be paid in bonds of the 3 per cent diplomatic debt of Venezuela.

The two Governments have agreed to request the President of the Swiss Confederation to kindly take charge of this arbitration.

The present declaration will be submitted to the approval of the Congress of Venezuela.

Done in duplicate at Caracas, the 24th of February, one thousand eight hundred and ninety-one.

The "convention in force between the two contracting powers" was the treaty of November 25, 1885, by and between these two Governments; and, so far as the same has bearing or value in aid of the compromise above set forth, is here set out as follows:

#### CONVENTION

The Government of Venezuela and the Government of the French Republic, being desirous of reestablishing between the two countries the friendly relations interrupted since 1881, have appointed to be their respective plenipotentiaries the following:

The President of the United States of Venezuela, Gen. Guzmán Blanco, envoy extraordinary in Paris, etc.

The President of the French Republic, the Count Tristan de Montholon, minister plenipotentiary of the second class in charge *ad int.* of the duties of the director of political affairs in the ministry of foreign affairs, etc.

Who, after having exchanged their respective powers, found in good and due form, have agreed upon the following articles: \* \* \*

#### ARTICLE 5TH

In order to avoid in future everything that might interfere with their friendly relations the high contracting parties agree that their diplomatic representatives will not interfere in the matter of claims or complaints of private individuals or on affairs cognizable by the civil or penal justice, according to the local laws, unless the question is a denial of justice or judicial delays contrary to use or to law, the noncompliance with a definitive sentence, or, finally, cases in which in spite of the exhaustion of legal remedies there is an evident infraction of the treaties or of the rules of the law of nations.

The claims presented before the honorable arbitrator of Berne on behalf of M. Fabiani aggregated 46,994,563.17 francs, extended over the years from 1878 to 1893, were assembled under the general term of denial of justice and included such as were imputable to the judicial authorities of Venezuela, its administrative authorities, and to damages suffered by him through the fault of its public powers, claiming for him both the direct and indirect damages under each head.

December 30, 1896, the award was made for 4,346,656.51 francs with interest at the rate of 5 per cent per annum from that date. The honorable arbitrator arrives at this sum in the manner hereinafter set forth.

The decision of the honorable arbitrator, together with his reasons therefor, was rendered in writing, which award reciting the essential facts, as well as the reasons of the honorable arbitrator, appears on pages 4878-4915, volume 5, Moore's History and Digest of International Arbitration.

The sum of 42,647,906.66 francs represents that part of the total claim of M. Fabiani which was not allowed by the honorable arbitrator of Berne, and which was denied for the reasons given in his award.

It is claimed by M. Fabiani before this commission that of the sums denied allowance by the honorable arbitrator of Berne there are certain portions so disposed of by him as to be still in force against the respondent Government under the general terms of the protocol constituting this commission, aggregating 9,509,728.30 francs.

The reasons given by Fabiani before this present commission for ascribing present vitality to the claims now before this commission are, in substance, as follows:

The decision of the arbitral statement of Berne is, in effect, that all the chief points of the actual demands and the arbitrary acts "*faits du prince*" have been expressly formally eliminated by the Swiss arbitrator as subtracted from his decision by his interpretation of the terms of the protocol passed between the Government of the French Republic and the Government of Venezuela;

That the interpretation of the treaty of February 24, 1891, given by the said arbitrator, has placed the limit of the questions which the judge had the power to resolve, upon which he was authorized to decide, and which alone ought to make and which has made the object of his judgment;

That by the formal decision which has eliminated the cause and the object of the actual demand as not being included in the matter submitted to his jurisdiction the arbitrator [of Berne] has recognized that he had not the right to pass judgment upon the "*faits du prince*" and upon all the points by him eliminated from the procedure as not included in the terms of the protocol;

That in declaring them subtracted from his decision according to the protocol the arbitrator has passed judgment upon his own jurisdiction and has determined its limit;

That the doctrine and jurisprudence are for a long time unanimous upon this incontestable principle that a declaration of incompetency can never produce the effect of *res judicata* upon the foundation of the law;

That the "*faits du prince*" and all the points of the present instance [have] been expressly eliminated from the procedure by the decision of the arbitrator of Berne, because they were not included by the terms of the protocol, and consequently were subtracted from its competence; \* \* \*

That he has eliminated it as not making a part of the matter remitted to his decision, and that he would not have been able to retain it without violating his own interpretation of the treaty of February 24, 1891; \* \* \* The most scrupulous examination of the arbitral decision of December 31, 1896, determines that the arbitrator has strictly conformed to his interpretation of the protocol, and that he has not passed judgment by way of the declaration of right and responsibility upon any of the matters eliminated by him as subtracted from his right to judge by the terms of the protocol;

That consequently these matters not having been, and not having been able to be, the object of a decision upon the bases of law one could not pretend that

they are

*res judicata*;

That to be convinced of it it is sufficient to refer to the procedure before the President of the Swiss Confederation to the plea proposed by the defendant party

against the actual demand as arises from the terms of the protocol, then to the former and reiterated decision which the arbitrator [of Berne] had rendered in giving to the protocol of February 24, 1891, the sense claimed by the United States of Venezuela and in eliminating from the procedure as subtracted from his decision — that is to say, from his jurisdiction — the “*faits du prince*” and all the points foreign to the inexecution and of the effects of the inexecution by the tribunals of Venezuela of the arbitral sentence of Marseilles of December 15, 1880 — that is to say, precisely all the points upon which the arbitrators authorized by the treaty of February 19, 1902, are called upon to decide,

In execution of the protocol, whose terms gave, in Fabiani’s opinion, plenitude of jurisdiction to the arbitrator [of Berne] and conferred upon him the right to decide upon all the denials of justice, whether they were imputable to the judicial authorities or to the administrative authorities of Venezuela (these latter naturally including the arbitrary acts or “*faits du prince*” attributable to the Federal executive) and upon all the damages which Fabiani *says* to have suffered through the fault of the public powers of this country, the French Government charges the claimant to present the demand before the President of the Swiss Confederation.

Fabiani established the general table of losses and prejudices of damages and interests, the responsibility of which he imputed to the public powers of Venezuela; but the defendant party, for reasons easy to suspect, preferred a solution which would leave the parties always divided by the difference which the French Republic had proposed to avoid in a complete fashion.

Fabiani, as results from the *ensemble* of his exposé before the arbitrator of Berne, had always considered the arbitrary acts and the denials of justice “*faits du prince*” imputable to the administrative authorities as the principal cause of his misfortunes in Venezuela.

Of the 505 pages of the said exposé of facts, more than two-thirds treated of the direct interference of the Federal executive in a conflict between foreigners, notably the following pages: 41 to 50, 52 to 55, 57 to 60, 69, 92 to 98, 100 to 103, 108 to 115, 123 to 124, 129, 131 to 139, 158 to 165, 174 to 178, 181, 183, 199 to 204, 206, 207, 242, 255, 259, 261 to 267, 272 to 274, 276, 284 to 290, 294, 297, 298, 300, 304, 305, 312 to 320.

It is Fabiani’s — conviction that the term “denial of justice,” employed in the protocol included all denials of justice, those of the judicial authorities, and, above all, those imputable to the administrative and political authorities of Venezuela.

The Swiss arbitrator —

has given his interpretation of the terms of the protocol, determined exactly the object of the difference submitted to arbitration, and has expressly eliminated from the procedure, as subtracted from his decision, and consequently from his competency, all of the allegations and means of proof relative to claims founded upon the arbitrary acts of the executive powers or upon the “*faits du prince*” and upon all the *faits* foreign to the inexecution of the arbitral sentence of Marseilles of December 15, 1880.

In further support of his contention that the claims specified by him are still of vitality and force and competent to be passed upon by this commission, he quotes several passages from his exposé.

Page 542:

If we do not possess the formal and written avowal of our implacable enemy, we have, aside from his official acts, which bring prejudice to us, the acts, also official, perfidiously calculated to strangle us between two doors, if, trusting to false appearances of justice, we thought to make our rights of value.

The executive power coming to the aid of the judicial power to condemn us to powerlessness by the aid of fraudulent maneuvers, which resulted in the spoliation of October 26, 1885, is an undeniable fact which will not escape the scrutinizing eye of the judge.

Page 545:

The *ensemble* of our grievances against Venezuela engages the responsibility of the judges and of the public powers of this country. The judges have been guilty; they have surpassed themselves in the art of adapting the laws to the annulment of justice; the public powers have been unworthy; in any civilized country they would not have been able to escape chastisement; but in the long run we would have been able, perhaps, to triumph over their venality and ill-will if we had not been forced to struggle against the personal and interested hostility of the chief of state. This personal hostility, a veritable "*fait du prince*," has established before us the case of *force majeure*.

Page 552:

The acts for which we reproach Gen. Guzmán Blanco are of the resort neither of the civil justice nor of penal justice of his country. These acts, veritable denials of justice, have been committed by the President of the Republic in this quality.

The laws of Venezuela, conformable, moreover, to the general principles of public law, authorize no action against the chief of state save in one of the three cases provided for by the constitution. But if these acts escape all civil or penal jurisdiction, this does not signify in any way that they engender no responsibility and that this responsibility can never produce its results. According to the law of nations, there is a responsibility which substitutes itself for the personal responsibility of the chief of state; it is that of the country which he represents, when the acts of the executive power constitute with regard to a foreign nation or its dependents, violations of the principles of public international law.

Pages 553 to 554:

But in our unfortunate affair, the "*faits du prince*," which have constituted denials of justice, are well established. We have no need to refer to them, nor even to group them, in order to enlighten the conscience of the arbitrator. Our general exposé relieves us from insisting. All these facts, taken together or separately, establish the direct intervention of the chief of state in a conflict between individuals to prepare, to consummate, a great injustice. If these considerations, which we believe in perfect harmony with the theory and practice of the law of nations among civilized countries, are accepted by the arbitrator, the iniquity of the judges, their denials of justice, and the question of retroactivity, relegated to the second place, will no longer offer anything but a secondary interest.

We have furnished all the proofs of the malevolent action of the chief of state, now direct, now indirect, continued for more than six years, striking us in front and behind, raising themselves before us as an insurmountable obstacle to paralyse us, when, in spite of his venality, justice was impressed for continuing his guilty work. If the arbitrator retains the "*faits du prince*," as these *faits* have had, as a consequence, a series of denials of justice, he will find, in these evident violations of the principles of the law of nations, the direct reply to the arguments of the cabinet of Caracas and the juridical elements of a decision which will retain the responsibility of Venezuela without its being even necessary to refer to the complicity of the judicial and administrative authorities of the country. And we are persuaded that this decision, having reference to all the *faits* since the origin of our troubles, and retaining all the violences of which we have been the object, will proportion the reparation of the prejudice caused to the premeditation, to the gravity, to the tenacity, and to the extent of the offense. However, need we insist upon the infractions and upon the denials of justice which, exclusive of the "*faits du prince*," might be of the resort of the civil or penal justice?

Fabiani follows these quotations with the statement that —

these extracts offer the advantage of determining the sense which he attaches to the words "denials of justice" according to the protocol, which in his opinion, included not only denials of justice imputable to the judicial authorities, but still, and above all, denials of justice imputable to the Federal executive and all the arbitrary acts connected. That, in effect, if the plaintiff (Fabiani) recognized,

as he still recognizes, the right of the sovereign appreciation of the judge, he counted that this right would be exercised upon the *ensemble* of his demand, and more especially upon the arbitrary acts of "*faits du prince*," denials of justice imputable to the Federal executive; that if the arbitrator (of Berne) has disposed of them otherwise, if he has interpreted the protocol in a way to limit and determine the object of the difference submitted to his decision, he has thereby still reserved the rights of the plaintiff (Fabiani) for all the matters which he has declared stranger to the object of the litigation and which he has eliminated from the procedure as subtracted, etc.

In signaling the denials of justice of the magistrates of Venezuela in all that which had reference to the inexecution of the sentence of Marseilles, the demand for damage, and interest was founded especially upon the injurious results of the arbitrary acts and denials of justice of the Federal executive.

In these conditions it is natural that the plaintiff (Fabiani) should have anticipated an adjudication *en bloc*.

Fabiani urges that the honorable arbitrator of Berne, in proceeding to set forth his reasons and to separate the claims allowed from those disallowed, has "in effect" proceeded "contrary to custom, not to an adjudication *en bloc*, but to a detailed adjudication clear and precise," and —

has evidently held to anticipate every equivocation, to cut short all chicanery, and to reserve to the demandant party the free exercise of all his rights for all the matters and for all sums which he had just declared subtracted from his decision.

To elucidate the meaning, force, and effect of the acts of the honorable arbitrator of Berne and to bring out more clearly, as he would contend, the elimination and subtraction suggested, and to show that the reason therefor is as claimed by Fabiani, he quotes from the defense of the respondent Government made before the honorable President of the Swiss Federation, stating that such defense begins as follows:

The demandant party gives itself up continually from the beginning of its exposé to the interminable digressions which have no relation to the affair under discussion, in the diplomatic discussion maintained by the cabinets of Caracas and Paris upon the subject of the Fabiani claim. The object of this claim and its points of departure have been determined. The object is the denial of justice alleged by Fabiani for the nonexecution, according to him, of the arbitral sentence rendered in his favor at Marseilles December 15, 1880, analogous to the civil tribunal of the first instance and confirmed by the court of appeal of Aix, and the point of departure can not be any other than the decree by which on the date of June 6, 1882, the high Federal court of Venezuela gave executory force in the country to the sentence of the court of appeal of Aix.

Page 4:

That which is important to fix now is that all which is anterior to the decision of the high Federal court of the date of June 6, 1882, and the other digressions which the plaintiff has added to his exposé, do not constitute the matter of actual litigation. \* \* \*

Moreover, the diplomatic discussion having determined that the Fabiani claim, which was about to be submitted to arbitration, was the claim presented and supported by the French Government, and not the claims which Fabiani should present ulteriorly, the compromise between the two Governments has for an end only the facts relating to the pretended denials of justice beginning from 1882.

In Fabiani's *réplique* to the defense of Venezuela, from which the following quotations are taken, he vigorously opposed this claim of Venezuela, and again explained the sense which he attached to the words "denials of justice."

Page 62:

Our voluminous memoir is occupied principally with Mr. Guzmán Blanco, whose name finds itself repeated on each page several times. The denials of justice, the violences, excesses, by us denounced in the memoir, are attributed to this cause almost exclusively — the passionate and interested hostility of Mr. Guzmán Blanco.

The judges who receive the price of their venality, the officials who harass us without ceasing, are represented by us as mere instruments of the chief of executive power.

On almost every page our accusations are very precise. We explain the numerous and grievous facts. We make known the prime mover, his financial dickerings with our adversaries, his acts of direct hostility, his fraudulent manœuvres to injure us, his odious outrages, his repeated denials of justice to conserve for his associates and himself the profits of the railroad. Guzmán Blanco (ex-Ceiba) and the cabinet of Caracas maintains a religious silence. Save in two citations, from our memoir it does not pronounce even once the name of Mr. Guzmán Blanco.

Page 63:

We understand the embarrassment of the cabinet of Caracas. The subject was rugged and the way very slippery. \* \* \*

We retain in this debate not certainly Mr. Guzmán Blanco, whom international law defends against our investigations, but the chief of the executive power whose acts have engaged the responsibility of his country.

Venezuela ought to take account of the "*faits du prince*" and denials of justice imputable to its former master, as well as the denials of justice anticipated by the convention of November 26, 1885, in the affairs which are the resorts of the civil or penal justice.

The personal acts of the chief of executive power are, moreover, grave as the denials of justice imputable to a district judge, and even to a court of cassation.

The flagrant violation of the law of nations by the chief executive power of a country offers another interest for the peace of nations than the injury brought to the rules of international law by the brutality or the venality of some graduates of the University of Caracas.

Page 65:

The faithful executor of the constitution was held to demand without delay the respect of the Federal compact, and his calculated inaction constituted a denial of justice. In refusing to intervene and in shifting upon the high Federal court the obligation which was strictly incumbent upon him the executive power committed knowingly and with premeditation a denial of justice, the consequences of which have been decisive, and this denial of justice has had for an end to safeguard the personal interests of the chief of state.

Page 78:

If the denial of justice which we impute to the chief of executive power of Venezuela is established, the gravity of this infraction will occupy with good right the attention of the arbitrator. In fact more than half our memoir concerns the acts and deeds of Mr. Guzmán Blanco.

From these copious excerpts it is easily seen that the demandant, Fabiani, came before the Mixed Commission, sitting at Caracas in 1903, under the convention of February 19, 1902, with the claim that the act of the honorable arbitrator of Berne in dismissing the greater part of his case, was solely a jurisdictional decision, leaving unaffected, as though never presented to him, the claims thus dismissed.

The honorable commissioner for Venezuela rejected the case as presented in all and every part, for the reason that, in effect, the entire Fabiani controversy was submitted to the final and conclusive arbitrament and award of the honor-

able arbitrator of Berne by the high contracting parties in their protocol at Caracas of date February 24, 1891, and that when the controversy was submitted under said protocol and the honorable arbitrator of Berne had assumed and accomplished his important trust the entire Fabiani contention was at an end.

Since the honorable commissioner for Venezuela had not consented to discuss the figures presented by M. Fabiani, the honorable commissioner for France has regarded himself as "under the obligation of accepting them as a whole." The honorable commissioner for France also states:

As, moreover, none of his (Fabiani's) demands have been contested in the foundation and in the figures by the respondent Government, it has not appeared possible to me to put them aside or to reduce the amount. I have consequently accorded to M. Fabiani the indemnity which he claims.<sup>1</sup>

The honorable commissioners, finding themselves hopelessly in disagreement, reserve this claim for the consideration and determination of the umpire, to whom it has been submitted with the very helpful opinions rendered by each, setting forth very clearly the points for and against the claims of Fabiani and his right thereon to be heard again before an arbitral tribunal.

First to be determined is the issue whether there is or is not ought to be produced before this tribunal of the matters once submitted to the arbitrament and award of the honorable arbitrator of Berne under the protocol effected by the two nations at Caracas, February 24, 1891.

An analysis of this treaty discloses, in its first paragraph, that —

the Government of the United States of Venezuela and the Government of the French Republic have agreed to submit to an arbitrator the claims of M. Antonio Fabiani against the Venezuelan Government.

It will be observed, then, that the matter to be submitted for arbitration is the "claims" of Fabiani — not certain claims of Fabiani, not a *part* of his claims, but his *claims*, which clearly and definitely includes *all his claims* against the respondent Government. It would not be more sure, more precise, had it been written "all of the claims of M. Antonio Fabiani," etc. This is the position taken by M. Fabiani himself, who presented all of his claims against the respondent Government to the honorable arbitrator of Berne, and urged upon him that it was his right and duty to consider, pass upon, and allow them as all coming within the terms of the protocol; and who, consistent with his former position, but respectful to an adverse decision, still insists that such was its true scope and spirit. Had nothing posterior to this first paragraph been written, the way of the claimant would have been easy and the hearing unrestricted. Such, however, was not the agreement of the two honorable Governments. Restrictions are imposed and must be heeded. When understood they must be respected and obeyed, for they are to the honorable arbitrator of Berne and to all who come after him the supreme law of his tribunal.

Two principal duties were presented to the arbitrator by the protocol of February 24, 1891.

He was, first, to decide under certain limitations, hereinafter to be stated, whether the Venezuelan Government was responsible for the damages which Fabiani claims to have sustained at its hands.

This was the logical course of procedure had no direction been given, but it is made obligatory and imperative by the terms of the convention. It is not permitted that the honorable arbitrator shall make his decision without the definitive aid of the high contracting powers. They do not consent that he pursue his own course and use his own tests in arriving at his conclusions upon

<sup>1</sup> *Supra*, page 96.

the question thus submitted; neither do they admit that the honorable arbitrator may classify and designate the quality and character of the claims which are submitted to his decision; on the contrary, they assume positively and finally to make for themselves and for him a definition which shall cover and include the claims of Fabiani, which, by agreement of the two parties, had been and then were before them, and were by this protocol to be passed into the hands of the honorable President of the Swiss Federation as arbitrator, and the phrase thus used by them for his guidance was neither obscure nor indefinite, but was one common to the tongues of nations, viz., "denials of justice". It did not comport with the wishes and purposes of these two Governments nor with the treaty relations then existing between them that this phrase should be interpreted and applied unaided by the terms of the convention constituting the tribunal. The arbitrator was directed to call to his aid and submit himself to the government and control of and was to render his decisions thereon according to — the laws of Venezuela, the general principles of the law of nations, and the convention in force between the two contracting powers.

Through these three sources of information the arbitrator was to determine the responsibility of the respondent Government in the Fabiani controversy. This compelled an interpretation by the arbitrator of article 5 of the convention of November 26, 1885, which was the treaty then in force between the two contracting powers. When thus interpreted it settle its meaning finally and conclusively, as applied to the Fabiani controversy, and in that respect and to that extent, at least, it has conclusive and final force upon the question pending before the umpire. This is true because he was expressly directed and empowered to make this interpretation by the two powers whose treaty it was. His interpretation, thus made, determined for this case the scope and depth, the spirit and purpose, the meaning and effect of the limitations self-imposed by these two nations in their high compact regulating and defining the right of diplomatic intervention. It also effected a similar decision concerning the term "denials of justice," which term was employed in said treaty in connection with the limitation, by their own agreement, placed upon their future action in reference to the claims and claimants of each nation. This limitation upon diplomatic action was stated by the high contracting parties to be in the interest of peace, harmony, and concord between them, evidently believing, on their part, that such injuries and damages as might befall their respective nationals in the land of the other, which were not included in the terms of the convention were better ignored than pursued; that the general and common welfare of the two nations was of chief importance, and could not wisely be jeopardized through international differences and diplomatic contentions not resting upon or growing out of the causes specifically assigned. For these laudable reasons and motives this restriction was solemnly declared to be the settled conviction, purpose, and future policy of these two nations.

The protocol of February 24, 1891, was made not only in view of the existing treaty, but that there might be no question in the mind of the honorable arbitrator as to their purpose scrupulously to regard and be governed by its provisions in its application to the case in hand, the compromise incorporated its terms and made them fast to his conscience and judgment. Examination of his award and a careful review of his reasons therefor indicate clearly his thorough appreciation of the language and spirit of the compromise and the scope and purview of his trust.

Coincident with his interpretation of article 5 of the convention of November 26, 1885, correlated thereto and commingled therewith, there came the duty to interpret the meaning of the protocol of February 24, 1891, when it defined his

limit of action to be within such circumscribed bounds as are contained in the laws of Venezuela and the general principles of the law of nations, as well as in the terms of article 5, above alluded to. He must determine whether the denials of justice, to be operative in the case before him, must be such as respond to each one of these tests; in other words, such as are not contrary to any one of them, or if responsive to any one, although opposed to the others, it is sufficient. He must determine the breadth of the reference to the laws of Venezuela, and, giving the reference its proper significance and limitations, must seek out and apply to the case before him the Venezuelan laws which he has held to be within the meaning of the reference, and he must summon before him and apply to the elucidation of the question so much of the law of nations as he deems applicable thereto.

The second line of action assigned him necessarily followed, depended upon, and was limited by his disposition of the first duty placed in his charge. If he found no responsibility in Venezuela for the damages claimed by Fabiani because of denials of justice, then his duty was done and the arbitration was closed when he made his declaration of such finding.

He can arrive at this conclusion by one of two ways, or by the meeting of both. It is one way if he finds there have been in fact no denials of justice. It is the other way if he finds denials of justice, but also finds that they are not such as attached responsibility to Venezuela. Either finding absolves Venezuela. If he holds Venezuela responsible in any part, it must be upon the bases that in his sound judgment there are denials of justice and that they are of a character to fix responsibility upon Venezuela. A concurrence of these two conditions must exist or the award must always be for Venezuela, and to the extent that there is nonconcurrence the award must be for Venezuela.

Examination of the award of the honorable arbitrator of Berne, and a study of the reasons he sets forth to justify his findings, discloses that he entered upon the discharge of his high duty with thorough appreciation of the character and the importance of his trust.

On page 22 of his award he said:

In the very first place it is important exactly to determine *the object of the controversy* submitted for arbitration. According to the compromise of the 24th of February, 1891, the question at issue is that of knowing whether, according to the laws of Venezuela, the principles of the law of nations and the convention of the 26th of November, 1885, in force between the two contracting powers, the Venezuelan Government is responsible for the damages which Fabiani says to have sustained for denials of justice. Even independently of the intention of the parties manifested during the negotiations to which the Franco-Venezuelan Convention of 1885 gave rise it evidently appears from the very text of the compromise and from the union of the facts of the case that the respondent Government is proceeded against only on account of the nonexecution by the Venezuelan authorities of the award rendered at Marseilles on the 15th of December, 1880, between Antonio Fabiani on the one hand and B. and A. Roncayolo on the other. The claimant Government even appears to acknowledge that the initial denial of justice is the decision of the 11th of November, 1881 (*réplique*, p. 2); and, as will hereinafter be seen, it is useless to investigate whether one must consider the decision of the 11th of November, 1881, rather than that of the 6th of June, 1882, as the starting point of the eventual responsibilities incurred in the sense of the compromise.

He decides that the act must be considered a denial of justice if it be such under the laws of Venezuela, the law of nations, or the convention of the 26th of November, 1885. He holds that the "absolute concordance of these juridical sources" is not necessary. This is a liberal construction and is very favorable to the claimant Government. After a careful study and an assembling of the laws of Venezuela, which he considers in point, and as a result of his study of

them he holds that there is no essential or even notable difference between any of the three juridical sources and the others on this subject. He further holds that the convention of 1885 settles the right of diplomatic intervention between the two nations; that —

in fact an international act substituted on this point a purely national law (see Article X of the Venezuelan Constitution of 1881); and although the compromise reserves the application of the Venezuelan laws it only refers to such of those laws as are opposable to the claimant Government; now that of 1873 was modified for the French citizens in its Article V, at least, by a posterior convention, binding for the two States that sign a compromise.

His study of this branch of the case leads him to conclude and to hold that —

the only definition which it is possible to take into consideration in the Venezuelan law is that of articles 282 and 288 of the penal code of 1873, which assimilate with the denial of justice any act of a *judicial authority* constituting a refusal to execute a sentence rendered executory, an illegal delay in the dispatch of business, a default to render orders and sentences within the terms established, an undue extension or reduction of the terms established by the law or any delay in the determination of a process. The refusals of execution, the inobservance of peremptory terms, and the illegal delays with which the judges may be reproached in the exercise of their duties are therefore the three orders of facts characterizing the denial of justice in the legislation of Venezuela.

He then proceeds to consider and define the meaning of the phrase “denials of justice” and in that connection employs the language and reaches the decision which appears in a quotation taken from page 24 of his printed award, viz:

A direct definition of the denial of justice is not given by Article V of the French-Venezuelan convention. This text points it out only among the causes for diplomatic intervention, and one might even believe that it distinguishes it, in a certain way, from the other causes of intervention — delays, nonexecution of a definitive sentence, etc., or that it distinctly separates it from them. But without any necessity for examining whether the parties employed in the compromise the expression “*dénégation de justice*” as the exact equivalent of the expression “*déni de justice*,” which is generally adopted by legislation, jurisprudence, and doctrine, it is permitted to affirm that Article V above mentioned fully assimilates with the “*déni de justice*” as to their effects, the illegal delays of the proceeding, the nonexecution of definitive sentences, the flagrant violations of the law committed under the appearance of legality. In all these cases the diplomatic intervention is declared admissible, provided the question may be any affair falling within the “competence of the civil or penal justice”. The condition established by the decree of 1873, of the exhaustion of the legal resources before the courts, is not recalled in the convention of 1885, and it would be excessive to say that Article V *in fine* of this international act (“notwithstanding the compliance with all the legal formalities”) refers to the actions for responsibility directed against the guilty authorities; these “legal formalities” mean those to the observation of which is subjected the performance of the judicial act that may have determined a denial of justice or one of the other causes for the diplomatic intervention; they are, therefore, prior to the denial of justice itself.

By reference to the general principles of the law of nations on the denial of justice, i.e., to the rules common to most legislations or taught by doctrines, one comes to decide the denial of justice comprises not only the refusal of a judicial authority to exercise its duties, and especially to render a decision on the petitions submitted to it, but also the obstinate delays on its part in rendering its sentences.

After citing numerous authorities to sustain his position the honorable arbitrator proceeds to say further concerning this same subject-matter, as found on pages 24 and 25, as follows:

In truth, the compromising powers appear to have desired to give the words "dénégations de justice" their widest extent (*justitia denegata vel protracta*) and include therein all the acts of judicial authorities implying a direct or disguised refusal to administer justice. Instead of textually reproducing the terms of the convention of 1885, they chose a general formula comprising within the limits of said convention the complaints for judicial grievances of Fabiani against Venezuela, which complaints, if they are valid, have, partially, at least, the extent of denials of justice, both according to Article V of this international act and according to the Venezuelan law and the law of nations. It was, in effect, the claims of Fabiani, communicated to his government, that must have inspired the wording of the compromise, and the duty of the arbitrator precisely consists in deciding whether Venezuela "is responsible for the damages which Fabiani says to have sustained for denials of justice".

It is not doubtful that at the time the compromise was signed the claims of Fabiani rested, i.e., both upon denials of justice *sensu stricto* and upon other facts, such as the denials of justice *sensu lato*, indicated in the convention of 1885.

In all of these findings he accepts and adopts the broadest and most liberal construction permissible under either of the juridical sources given him for guidance. In all this his holdings are very favorable to the claimant government and give the controversy of Fabiani its widest possible application within the terms of the convention.

On page 25 the honorable arbitrator discusses, determines, and settles once for all the origin and the object of the Fabiani controversy, and he bases his decision upon the fact found by him that the object and origin were acknowledged by the parties — i.e., by "France and Venezuela" — to be as held by him. This is the finding referred to:

Thus, the object of the controversy and its origin are acknowledged by the parties. It was on account of the refusal of the execution of the award of the 15th of December, 1880, which Fabiani possessed against the two debtors domiciled in Venezuela, or on account of the default of execution owing to the admission of illegal means, that France took the interests of her native into her hands. The Venezuelan Government contests the right of its adversary to proceed against it for responsibility, not because it did not regard the judicial facts alleged by Fabiani, if they were true, as implying denials of justice, but because it sees the absence of denials of justice in the inaccuracy of these facts or in the desertion of the proceeding before the exhaustion of the legal resources. The parties, supporting themselves in the treaty of arbitration on the convention of 1885, have considered, although they only spoke, in the protocol, of "denials of justice," that the arbitrator could reserve as elements of the suit the facts falling within the scope of the above-mentioned convention and constituting denials of justice both according to the Venezuelan law and to the law of nations. In the judgment of the parties concerned, therefore, and according to the applicable texts, "denials of justice," in the sense of the protocol, mean all the direct or disguised refusals to judge, all illegal delays in the proceedings and nonexecutions of definitive sentences, provided the facts concern *affairs of the civil or penal justice*, are imputable to judicial authorities of Venezuela, and have taken place in spite of the compliance with all the legal formalities by the prejudiced party.

On page 26 of his award, he says:

It is certainly the denials of justice, committed in the course of the proceeding for the execution of the award of the 15th of December, 1880, and the eventual appreciation of their pecuniary consequences that form the object of the present litigation.

The claimant contended before the honorable arbitrator of Berne that Fabiani might go back of the award of December 15, 1880, to marshal his demands for indemnity, because, it was urged, he signed the compromise at Caracas under the dominion of *force majeure* and that it did not cover the prior

denials of justice. But the honorable arbitrator considers this contention ill founded, holding, on page 26 of his award, that —

Fabiani, who could have had the compromise annulled by the French courts, preferred to conserve the future of his commerce in Venezuela by exhausting all means of conciliation. Fabiani contented himself with the state of things created by the acceptance of the arbitrator's jurisdiction, and, besides, from that moment, his judicial efforts in Venezuela only tended to the execution of the judgment of the 15th of December, 1880. The motives drawn from the *vis major*, which would have affected the compromise of 1880, and would remove further back the starting point of the denials of justice comprised in the present instance, can not be taken, therefore, into consideration. Denials of justice, in virtue of which it would be possible to proceed against Venezuela for responsibility before the arbitrator, can not have taken place before the introduction of the proceeding for the execution of the award of the 15th of December, 1880, or before the 7th of June, 1881, the date of the petition for *exequatur*, entered before the high federal court.

Similarly, the honorable arbitrator proceeds to dispose of the contention that there were denials of justice in reference to the award of December 15, 1880, and its execution from, substantially, June 18, 1881, and determines, after all, from the proper union of the facts and law, that there were no denials of justice until after June 6, 1882, the day on which such award was made executory in Venezuela by the decision of the high federal court of that country.

In regard to this he says:

The series of denials of justice begins almost from the very moment Fabiani endeavored to obtain at Maracaibo the execution of the award provided thenceforward by an order of *exequatur* in due form.

Notwithstanding the terms of the convention of February 24, 1891, wherein and whereby the high contracting parties invoked as an aid to the arbitrator the provisions of the convention then in force between them, the claimant Government raised before the honorable arbitrator of Berne the claim that Article V of said convention was not applicable to the Fabiani controversy, because all of his claims for indemnity had arisen before November 26, 1885, and that to apply it in such a case would be to give it retroactive effect, which is contrary to fundamental principles in the administration of justice. This contention the honorable arbitrator held to be ineffective for the reasons stated by him on pages 23 and 24 of his award, viz:

But in the present instance it is not Fabiani personally who is a party in the issue. The arbitration was concluded not between him, but between the French Republic and Venezuela. The claimant state is bound by the above-mentioned international act for all the international interventions to come. For the rest, it is expressly acknowledged that the convention is applicable to the present contestation by the compromise of the 24th of February, 1891; it is a law as between the two countries.

The nonresponsibility of Venezuela, as established by the honorable arbitrator of Berne, so far as and to the extent which he found such nonresponsibility, is clearly set forth by him on pages 25 and 26 of his award, viz:

In return Venezuela does not incur any responsibility, according to the compromise, on account of facts strange to the judicial authorities of the respondent State. The claims that the petition bases on "*faits du prince*," which are either changes of legislation or arbitrary acts of the executive power, are absolutely subtracted from the decision of the arbitrator, who eliminates from the procedure all the allegations and means of proof relating thereto, as long as he can not reserve them to establish other concluding and connected facts relating to the denials of justice.

In another place, on page 26, after having set the earliest limit when denials of justice could have place before him, as against the respondent Government, he says:

The arbitrator has not, therefore, admitted, besides the "*faits du prince*," all of the facts strange to the nonexecution and to the effects of nonexecution of the sentence above referred to, to be proved.

Having determined in his award in what particulars denials of justice consisted, and when they began, and how they arose, he proceeds to fix the measure of responsibility attaching to Venezuela therefor; and then to measure and assess the damages which had occurred because of such denials of justice.

On the 30th day of December, 1896, the honorable arbitrator of Berne renders his award and delivers the same in writing, with his reasons therefor, to the respective representatives of the claimant and the respondent Governments.

Following the award and its publication, the respondent Government entered upon the discharge of the requirements thereof and has fully complied therewith. The amounts so awarded and so paid have been accepted by M. Fabiani under the implied consent and approval of his government. No evidence is adduced, no suggestion is made, that, following the award, the Government of France, on its part, has filed with the Government of Venezuela any dissent to or protest against the decision of the honorable arbitrator, or has in any manner addressed itself to the respondent Government to ask a rehearing, a further hearing, or the opening of said cause in whole or in any part, or to manifest the unacceptability of the award as made or to express or to intimate any dissatisfaction therewith, or any purpose or desire on its part to have the Fabiani controversy regarded by the two governments as a pending and open question in any particular or in any part. In all respects, and in every respect, so far as appeared before the umpire, there has been apparent assent to, acceptance of, and acquiescence in the award on the part of the Government of France, and, on its part, an apparent treatment of the Fabiani incident and controversy as satisfactorily, finally, and conclusively closed. Such, also, has appeared to be the position of the Government of Venezuela in relation thereto. Neither does it appear before the umpire that Fabiani, prior to the sitting of the honorable commission at Caracas, had evidenced to the Government of Venezuela through his own Government or otherwise, that he regarded the decision at Berne as setting at rest a part only of his claim or that he asked of his Government or expected of his Government further intervention on his behalf in reference to the same. Nothing appears in the case to indicate that the Fabiani controversy has been treated or considered diplomatically between the two governments, as to any phase thereof, since the award at Berne, nor that the same was referred to as such when the convention of February 19, 1902, was in progress or under consideration; and the umpire understands the claim to be that it is within the terms of that convention solely because, and only because, of the unrestricted character of those terms; because, and only because, this commission is said to be open to the claims of Frenchmen, without having any words of definition or restriction other than the nationality of the claimant and the time of its origin.

The umpire is compelled respectfully to dissent from the proposition made by Fabiani that such parts of his claims as were not allowed by the honorable arbitrator were not allowed through the lack of competency to dispose of them through lack of jurisdiction over them. It is the opinion of the umpire that the honorable arbitrator had complete and absolute dominion over the whole Fabiani controversy; that it was given him by the purposed and carefully

considered concordant action of the two Governments by their compromise of February 24, 1891, in order that a matter which for some years had vexed and troubled them might thereby attain eternal rest and be no longer a disturbing element, a serious cause of dissension between them.

Concerning this the honorable commissioner for France in his supplementary opinion has said: <sup>1</sup>

In the first place Doctor Paül supports himself upon the text of the convention of the 24th of February, 1891, which is the agreement of arbitration, and upon the exchange of diplomatic correspondence which has preceded this, in order to demonstrate that the intention of the two Governments was really to determine definitely all the claims of M. Fabiani against Venezuela. I do not deny this. I even add that the French Government, faithful to the spirit which had inspired the negotiations, did not cease to maintain this interpretation of the agreement in the course of the discussions which were engaged in before the Swiss arbitrator. It was, to the contrary, the representatives of the Venezuelan Government at Berne who, hoping to find in the terms of the convention unfortunately "ambiguous," the possibility for Venezuela of eluding a part of her responsibilities, combated this broad interpretation in several instances and substituted for it a restrictive interpretation.

There is, then, no disagreement between the parties that the purpose of the compromise of February 24, 1891, was to settle the whole matter contained in the Fabiani controversy. The contention before the umpire rests upon a different basis. The respondent Government claims that not only was the purpose of the compromise as stated, but also that this purpose was effected and the Fabiani incident closed.

Fabiani claims that because of the holding of the honorable arbitrator of Berne that denials of justice as such applied to matters judicial; that in the case before him denials of justice were only found in the nonexecution of the sentence of Marseilles; that they began after June 6, 1882; that there was no recourse by Fabiani to judicial tribunals other than those connected with this sentence, and hence no other opportunity for denials of justice; that such "*faits du prince*" as bore so immediately or approximately upon the execution of said sentence as to have an appreciable effect thereon, were the only "*faits du prince*" to be considered under the compromise; that because of these decisions the purpose entertained by the two Governments at the time of their convention of February 24, 1891, to thereby settle through the arbitration there provided for all of the Fabiani controversy was frustrated, and that the honorable arbitrator, in effect, at least, eliminated and subtracted all else as not being within his competency under the protocol, and thereby especially reserved all these for the use of Fabiani under some later convention, the terms of which should be more liberal.

To the contrary, the honorable commissioner for Venezuela holds the opinion that in making the decisions referred to the honorable arbitrator proceeded strictly in accordance with the terms of the protocol, which, while submitting all the claims of Fabiani to his conclusive and final determination, required and permitted an award against the Government of Venezuela for such of those claims only as resulted from or grew out of the denials of justice, and for such of these only as found responsibility in such Government. He alleges as truth that the claimant Government before the Swiss arbitrator pressed with vigor and to the end that every item presented in Fabiani's tables of claims was properly classed as a denial of justice and was a just demand against the re-

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<sup>1</sup> *Supra*, page 102.

spondent Government under the terms of the protocol, and in general that the reparation to be made by the responding Government should be found by the arbitrator to comprise —

all the denials of justice, whether they were imputable to the judicial authorities or to the administrative authorities of Venezuela (these latter naturally including the arbitrary acts of *faits du prince* attributable to the Federal executive), and all the damages which Fabiani says to have suffered through the fault of the public powers of Venezuela,

and strenuously urges upon the arbitrator that he was given “plenitude of jurisdiction” to determine all of these questions. He also admits as truth that the responding Government, while insisting that the whole controversy of Fabiani was before the arbitrator for his final disposition and while denying emphatically that there had been “any denial of justice or any cause of resort to diplomatic intervention,” asserts affirmatively that denials of justice are limited to judicial proceedings and do not at all include administrative, legislative, or executive acts.

It is thus the two Governments clash; it is thus they contend before the honorable arbitrator of Berne. But it is not over the question of jurisdiction; it is not over the question of his competency. Both admit his jurisdiction; both adhere to his competency. The contest is, first, over the right of the claimant Government to demand any sum in damages of the respondent Government on behalf of Fabiani under the protocol which involved two inquiries — first, the inclusiveness of the term “denial of justice” chosen concordantly to define the claims which are in dispute; second, the responsibility of the respondent Government. When this question of right was decided then the measure of damages came to be allowed, if any.

When in the course of his decision the honorable arbitrator of Berne sets aside a claim of Fabiani or eliminates it, it is because in principle and in law the arbitrator has first disallowed it and adjudged against it, through his sovereign power to decide the basic question submitted to him and over which the contest has been made. When he decides this basic question he settles the fate of and effectually determines a large part of the claims of Fabiani. He did not extract them from the *case*, he did not subtract them; he decided against them and disposed of them adversely, not in detail, but as not being claims for which, in principle, Venezuela was responsible under the terms of the protocol. He eliminated them from his consideration only when he reached the question of damages. Up to that point they had been before him and had been passed upon by him. Examination of the arbitrator’s award shows that nothing escaped his attention, that everything submitted was carefully considered and adjudged. He allowed some things and disallowed others, over all of which he had rightful and exclusive dominion and sovereignty. He did just what Fabiani assured him he ought to do, and to the doing of which Fabiani, in advance of the arbitrator’s action, bowed in assent.

That he may do Fabiani no injustice by this statement, the umpire will present a few excerpts from the *réplique* of Fabiani before the honorable arbitrator of Berne, and later from his *exposé* before the same person, and first from page 16 of his *réplique*:

In our opinion the question can be considered under another aspect, that of the terms of the protocol — general terms which authorize the arbitrator to retain all denials of justice *duly established*, and which permit Fabiani to present all pecuniary claims relative to damages sustained for *denial of justice*.

If Fabiani formulates claims *which have another cause than the denial of justice* or the *imputability of which to the denial of justice should not appear certain*, the arbitrator will reject them, *purely and simply as proceeding from the terms of the protocol*, the same as if he

recognizes the responsibility of Venezuela he will retain in the proportions which his conscience shall dictate to him, all the damages which he shall judge to be a direct and immediate result of infractions committed by Venezuela.

It will be permitted us to add that even if the protocol, instead of being conceived in general terms, had given the full detail of all the litigious points, it would not be necessary to conclude from it that the whole motive of the claim not expressly enumerated in the compromise ought to have been brushed aside without discussion as being found outside the terms of the protocol.

If it is not a question of another difference, or of a difference arising posteriorly between the parties; if the new motives of claim although they may not be expressly specified in the protocol, find themselves, nevertheless, virtually included in it, whether as an integral part of the litigious points designated, or, as a consequence, if some of these motives of demand are found in the protocol; if the demand is no other than that which the protocol has foreseen and has had for a purpose to settle, and, finally, if the motives which one would wish to have set aside should later give place to the same debates as the motives set forth in the protocol, the arbitrator can appreciate the merit of these new motives and include them in his decision.

On page 615 of Fabiani's exposé he says:

In this situation if the arbitrator, after having examined and analyzed our different motives of claims, were led to recognize that all these motives are justified and that we have estimated our damages without any exaggeration, Venezuela would be able to felicitate herself upon her insistency in causing a mode of payment hardly equitable to be accepted, etc.

And if it should be admitted that the judge, proceeding *either by way of elimination* or by way of reduction, considers that there is reason to restrain the measure of our damages estimated by him upon the usual but converted monetary basis, etc.

On pages 616 and 617 of his exposé Fabiani says in part:

And if he considered it equitable to make a reduction in any of our claims *or if he considers that certain of them ought to be laid aside*, he will find himself, in spite of the taking into consideration the course of the bonds in the presence of a certain lesion, unless he is led to diminish in notable proportions the total amount of our claims.

On page 622 of his exposé Fabiani says in part:

The compromise confers upon him purely and simply the mission of fixing the amount of the *indemnity if he considers Venezuela responsible*. The arbitrator acts in the plenitude of his independence, having no other guide than his intelligence and his love for justice. He asks himself if such a prejudice or such a damage has been the direct and necessary consequence of the infractions which have engaged the responsibility of the defendant party.

On page 624 of his exposé Fabiani says:

It may be, however, that the study of our affair and the detailed examination of the numerous items of our claims suggest to the arbitrator either the opinion *that some of our claims have no direct and immediate connection with the infractions set forth* or the opinion that certain prejudices declared by us ought to be reduced to a lower figure. That is the right of the arbitrator, a right whose exercise is subordinate only to the inspirations of his conscience. We have not to prejudge his decision. We know that it will be conformable to justice and equity, but we are convinced that if some of our demands appear to him subject to a reduction the arbitrator, taking account both of the manner of payment and of the circumstances of the case, will accord to us by title of supplement of indemnity exemplary damages.

Fabiani urges the nonretroactivity of the treaty of 1885 through many pages of his exposé and claims that this date is thirty days after the last of the acts of violence upon which his claims rest. On page 522 of his exposé he declares that Article V of the convention of 1885 governs the future only; that Article

III of the same convention is the one governing the past. In the course of this discussion Fabiani is appreciative of the magnitude and persistency with which Venezuela had opposed his claim, and of the possibility that if he had pressed his claim through the treaty of 1885 it might have been an insurmountable obstacle to the reestablishment of the good relations between the two countries and that therefore no treaty could have been consummated.

On page 526 of his exposé he begins a discussion of his claims in reference to the mixed commission which was provided for by the convention of November 26, 1885, to determine the liability of Venezuela for acts posterior to 1867-68 and anterior to the date of the convention, and in this communication he uses the following language:

Our claim having reference to acts posterior to 1867-68 and anterior to November 26, 1885, we evidently had the right to appear before the mixed commission. Why did we not do so? And, moreover, why did not the Venezuelan Government in the presence of the intervention of the minister of foreign affairs of the French Republic itself demand the sending to this mixed commission, which did not begin to do business until two years after? Let us examine the first and latter point. Venezuela, represented by Guzmán Blanco opposed an absolute non possumus. It denied formally the possibility of a claim on our part, and it contested even the existence of our right, pushed it aside without examination and with the most remarkable bad faith. The mixed commission, then, would not have been able to occupy itself with our affair. There is then arbitracio, because the discussion bears upon the admissibility, the extent, or the reality of the damages. When the right is litigable, and, above all, when it is absolutely contested, there is arbitrium. It is a case of arbitration, properly called, or of mediation.

In the matter of damages the mediator generally takes upon himself to give his opinion upon the question of right and leaves to the mixed commission the care of deciding upon the extent of damage. The mission of the arbitrator is determined by the protocol, and more often he is charged with the pronouncing upon the right and upon the act. We do not suppose that these rules can be seriously contested.

In discussing on page 529 of his exposé the convention of November 26, 1885, and in insisting upon the nonretroactivity of the terms of Article V, he says:

If, finally, the words and the intention did not lend to each other a mutual assistance for protesting against the idea of retroactivity, one would find himself in a strange situation. On the one hand a Government which stipulates in good faith and which for causes which are useless to refer to ignores that, during the rupture of international relations one of its nationals has been on a large scale the unfortunate victim of the hostility of the public powers of Venezuela, the Turk's head of an incensed chief of state, \* \* \* is it necessary to recall that mental reservations ought to be energetically laid aside? In that which concerns us we have suffered too much in Venezuela not to protest against this attempt to make an attack upon the principle of the nonretroactivity of the laws. We hold essentially to prove to Mr. Blanco that his last blow has not succeeded. He has failed in discernment when he has not considered the convention of November 26, 1885, as his supreme work, destined to serve his anger and to create for us new difficulties. The conscientious study of our affair leaves no doubt upon the intention; \* \* \* personal interest made him lose all interest in truth and justice. His diplomatic instrument came thirty days too late. And, besides, even had he signed it earlier our sad and venal enemy would not have been able to get any profit out of it. Our affair entered into all the cases reserved, and there is not a single one of our grievances which is outside the provision of Article V, as one may be convinced by the study of our exposé of facts.

On page 559 Fabiani says:

We believe that we have sufficiently demonstrated in our general exposé whether by "*faits du prince*" or by insurmountable obstacles opposed by the judge

and the public power to the execution of our sentences or by the successive denials of justice or by the numerous acts contrary to the right of nations, the responsibility of Venezuela finds itself directly engaged. There can be no divergences upon the *extent* of the power of the arbitrator in respect to all that which has reference to the appreciation of the circumstances and of the facts which ought to determine his conviction in favor of one or the other party. In that which concerns us we recognize this sovereign faculty, submitting ourselves without mental reservations to the intelligence, the prudence, and the conscience of our judge. We have full faith in the justice of our cause, in the reality and exactness of the facts which we have maintained, but we shall hold for true and just that which the judge shall recognize as true and just.

We leave, then, to the arbitrator to consider the facts which are submitted to him, according to the light of reason and justice, aided by the knowledge of the right and general duties of administration which his long practice in public or international affairs has given him. He knows that in virtue of principles admitted by doctrine and jurisprudence of all people he must in such a matter move in the plenitude of the independence of the judge who conforms only to his conscience.

In another part he says:

This part of our work being exclusively reserved for juridical development we are forbidden from entering into a discussion or even an indication of figures. We place the principles; if the arbitrator accepts them his experience and his proud intelligence in affairs will suggest to him the application which he ought to make to the different points of our pecuniary claim.

On page 575 of his exposé Fabiani says:

It will belong to the arbitrator to extend his judgment upon what shall appear to him legitimate or illegitimate, just or excessive, in the claims which we produce. \* \* \* His intelligence, his prudence, his conscience will be the most sure guide for him, a guide formally provided for and authorized by the legislation of the two countries.

We know well that the party of which we demand the damages and interest will endeavor to diminish the amount of them. We see no inconvenience in accepting the discussion. We are, on the contrary, persuaded that in going to the depths of things we shall win ground instead of losing it. The essential thing was to localize this discussion, to avoid theoretical controversies on the kind of damage, to prescribe in this affair at the beginning a distinction between direct and indirect damages, and to constrain the adverse party to confine itself exclusively to proving the exaggeration of our demand. It does not enter into our intention to examine here the different points of our claim. We have made in this regard a separate work, which will come before the eyes of the arbitrator. No figures ought to disturb a discussion of right already too long and which we are in haste to terminate. It is evident that *if the responsibility of Venezuela be retained* no doubt could be raised as to the absolute legitimacy of our claims in that which concerns the liquidation of our sentences in the sums of which the instance formed before the French tribunals ought to assure the recovery. \* \* \* The *principle of the responsibility once admitted* it will belong to the arbitrator to scrutinize, to analyse our claims upon these three points *and to retain only the losses or the damages which shall appear to be justified.*

On page 794 of his exposé Fabiani says:

The arbitrator has the right of *sovereign appreciation*. We do not suppose that this principle can be contested. Without doubt an impartial and intelligent judge admits only that which appears to him legitimate; he *rejects the damages* which in his opinion have not a *direct lien* with the incriminating facts.

The intervention of France on behalf of Fabiani began not long after the treaty of 1885, and the first reference which is of importance, perhaps, contains the following statement by the French Government in regard to its claims for indemnification on account of Fabiani, addressed by the French legation in Caracas to the Venezuelan Government, on August 3, 1887:

It is the opinion of the French Government that the indemnity must embrace, at least in the first place, the amount of the sum, both principal and interest, the collection of which would have insured the execution of the sentence in due form and proper time, besides the restitutions ordered by the judges, amounting to about 1,300,000 francs; and, in the second place, damages and interest, the amount of which is to be discussed, for the wrongs done to Fabiani in his credit and in his business.

*As regards his other pretensions, a searching investigation and discussion should determine how far they are well founded.*

Perhaps the first explicit reference thereto on the part of Venezuela is found in the letter of Gen. Guzmán Blanco to his Government, of date November 14, 1889, in which, after referring to other matters with which he had been employed in his office as plenipotentiary, he says:

In that which has reference to the Fabiani claim, with which the Government has charged me recently, I have been able to do nothing to the day of my resignation, because I had not yet received the information which is necessary to the defense of our rights. The point is so grave that it implies *almost the annulment* of the treaty of 1885. The French Government demands that Fabiani be indemnified for something which remains due to him from his father-in-law, Roncayolo, in the liquidation of personal affairs in which they were associated. *Having opened thus the breach in the treaty, we shall lose all the progress which we have made with it.*

By his statement that the point is so grave that it almost implies the annulment of the treaty of 1885, and by the further statement that —

a breach being thus opened in the treaty, we shall lose all the progress which we have made with it —

it is quite evident that the claims presented covered more than denials of justice as understood by him, because these were recognized in the treaty referred to.

Reference to this claim next appears in the correspondence between the two Governments, beginning December 31, 1889, and continuing to August 14, 1890, which is set out in the additional memorandum of the honorable commissioner for Venezuela, accompanying his opinion to the umpire, from which it is learned that the Government of France had particular interest to settle the claim; that —

my Government would see, in the manifestation of *more favorable dispositions as regard said claim*, the clearest evidence of the desire of the eminent President of the Republic of Venezuela and of yourself to establish between the two countries a cordiality toward which all my efforts are bent.

This is from a communication from His Excellency, Mr. Blanchard de Farjes, minister of France in Caracas, to Mr. P. Cassanova, minister of foreign relations for Venezuela, of date December 31, 1889. It is further learned, from a study of the correspondence referred to, that France proposed arbitration; that Venezuela declared to France that it *rejected the Fabiani claim from its origin*, but that the President was desirous of exercising all efforts in behalf of the *desired good harmony* between both countries, and therefore accepted the proposal to arbitrate. *in principle*, providing the umpire be one of the Presidents of the South American Republics and that the question to be decided be —

if this is the case provided for in Article V of the French-Venezuelan convention of November 26, 1885, and that, in case Venezuela should be condemned to pay any indemnification, in view of the legal proofs adduced in favor of the claimant, \* \* \* such indemnity to be paid in 3 per cent bonds of the diplomatic debt.

Subsequently the President receded from his requirement that the arbitrator be a President of the Latin-American Republics. France asked that the award of the umpire deal only with the amount of indemnity to be fixed for M. Fabiani; in other words, that Venezuela concede the right to some indemnity, and urged upon Venezuela, inferentially, that by her refusing to consent to this proposition Venezuela was perpetuating an element of dissension between the two countries. This was the status in May, 1890. In July of the same year the minister of Venezuela in France informed the minister of foreign relations in Venezuela as follows:

Consequently, for greater clarity and to prevent M. Fabiani from misconstruing the agreement, thus creating new difficulties, I told the minister (M. Ribot) that I was going to inform the Venezuelan Government of the agreement precisely in the following language:

"That the French Government is willing to accept *that the question relative to M. Fabiani* be submitted to the President of the Federal Council of Switzerland as *arbitro juris*, first, to decide if this be the case provided for in Article V of the Franco-Venezuelan convention of November 26, 1885, and, second, should the umpire decide that such is the case provided for in Article V, then the umpire is to *fix the sum that must be paid to M. Fabiani* in the 3 per cent bonds of the diplomatic debt. I have discussed the matter with the director of the cabinet, who has told me that, although the French Government agrees to the substance of the two points mentioned, it is not desired that they should be stated in such terms, because these would to a certain extent be little satisfactory to the French Government, *which has decidedly supported M. Fabiani's claim, entering it energetically through diplomatic channels.*"

It will be especially noted that, according to this communication, France agreed in substance to the two propositions as stated, but opposed their being submitted in the language suggested.

August 12, 1890, the minister of France at Caracas forwarded to the minister of foreign relations for Venezuela a draft of the protocol —

to serve as the basis of the arbitration already agreed upon "in principle" between the Venezuelan and French Governments —

which draft, in the language chosen by France, the umpire is assured by the honorable commissioner for Venezuela, is Articles I and II of the convention of February 24, 1891, as finally accepted by the two Governments.

Having thus brought upon the record the matters essential to the development of this claim, it is now ready to be considered in all its bearings for the final determination of the umpire upon its merits.

In the judgment of the umpire, the case may properly turn upon the answer to be given the inquiry, Was it the intent and purpose of the high contracting parties, in their agreement of February 24, 1891, by and through its terms to submit to the honorable arbitrator of Berne the entire Fabiani controversy?

When France intervened in behalf of her national, the claims of Fabiani were no longer individual and private claims; they became national. The right to intervene exists in the indignity to France through her national. Therefore forward it is national interests, not private interests, that are to be safeguarded. It is the national honor which is to be sustained. It is the national welfare also which must be considered. In protecting Fabiani and his interests the general welfare must be kept in the foreground. To the extent that his interests and the common welfare of France are in accord his particular claims can be pressed, but no further. If at any time the general good of France requires a surrender of all his claims, such surrender it is expected France will make, and after that if Fabiani has a claim it is against his own Government, not against Venezuela. From the time her intervention began it was undoubtedly

the constant purpose of France to remove as quickly and as effectually as possible this occasion of international dissension. It is not to be believed that France would consent to submit to arbitration a part only of a national's claim, leaving large and important portions of it undisposed of and to be still matters of international intervention. Nothing, nationally, is gained thereby. The dignity of the tribunal thus invoked, the eminent character of the parties litigant, the importance to these countries, greater than any possible interests of the national, that peace and harmony be the assured result of their action — all these considerations forbid the contemplation even of such a thought. Such is the approach to this question through the medium of general considerations. When view is had of this particular contention, the parties and the protocol, there is added light. Both of the high contracting parties affirm it to be their purpose to close the controversy by the arbitration. The protocol in effect so states. As it seems to the umpire, the honorable arbitrator so understood the scope, purpose, and intent of the protocol. The text of his award charged him with the duty —

first, to decide whether, according to the laws of Venezuela, the general principles of the law of nations, and the convention in force between the two contracting powers, the Venezuelan Government is responsible for the damages which M. Fabiani claims he sustained through denial of justice.

This duty was placed upon the honorable arbitrator for one of two reasons — either that his determination might end the controversy or simply as an academic proposition. The latter reason needs only to be stated to be denied.

It is also impossible for the umpire to accredit the two nations with the purpose and intent to consider such of the claims as the honorable arbitrator fails to recognize responsibility for in Venezuela as simply eliminated, subtracted, and reserved from the effect of the protocol, to remain as vital claims in the hands of France as a continuing cause of discussion and dissension between the two Governments, or to believe that Venezuela should have consented to arbitrate these points of difference, knowing that when the award was made all of Fabiani's claims not held to be well founded were to be pending against her; knowing that for such as were held to be denials of justice she must make reparation *then* and for all such as were not so held she must oppose, or pay, or arbitrate at some later time.

It is impossible for the umpire to appreciate the reason for the prolonged diplomatic controversy over the terms of the protocol, the anxiety of France, on the one hand, that Venezuela should admit her liability in principle and arbitrate only the damages to be assessed, and, on the other hand, the tenacity with which Venezuela clung to her early offer to submit first this question — if this is the case provided for in Article V of the French-Venezuelan convention of November 26, 1885 —

had either of these Governments understood that the arbitration proposed was only a preliminary skirmish to feel the enemy's lines in order to prepare the way for the real battle which was to come after, or if both these Governments had not been controlled by a settled conviction that the award to be rendered was the end of the Fabiani controversy.

It can not be gainsaid that if the honorable arbitrator of Berne had accepted as correct the full contention of France before him he would have amerced the Government of Venezuela in the sum of 46,994,563.17 francs. This was her hazard when she trusted her cause to the arbitrator. If such had been his award, there was for Venezuela no redress. It can not be claimed that if the honorable arbitrator had included every item to the extent demanded that Venezuela had relief before any tribunal or that for her there could have been

by any tribunal subtracted from the sum total a single figure or a single centime. If the present contention of Fabiani is correct, that there is a relief for him before this tribunal, then the respondent Government in an arbitration takes a hazard peculiar to itself of paying the award to the extent of the entire demand of the claimant Government, if such be the award, or a part thereof if successful in preventing an award for all, and then resisting at some later day or paying or arbitrating such elements of the claims as it had been successful in opposing before the first tribunal; while the claimant Government enjoys the privilege, peculiar to itself of consenting to such restrictions in the protocol as it can not avoid if it is to obtain arbitration, and later presenting to a tribunal not hampered by such restrictions the elements of its claim refused, because of the restrictions in the protocol at the first hearing.

If the judgment of the honorable arbitrator of Berne had been that under the protocol the Government of Venezuela had no responsibility, would it have resulted *that all the claims of Fabiani were left unsettled by his decision* and were restored to their primal state of existing claims for which the Government of France could intervene? If not, then what claims would be held to be settled and what still pending? If the position of Fabiani is correct, which is the better result for the respondent Government in an arbitration, to defend successfully in part or in all or to lose in all or in part? Rather, which makes the respondent Government suffer most and longest, since in such a case there is for the defendant Government no surcease?

These inquiries have value only in the fact that by considering them one is irresistibly impelled to the sane and safe conclusion that, in every international controversy of like import with this, the two Governments honestly and carefully seek a common meeting point, which is to be gained usually, as in this case, by mutual concession and mutual remission of matters which *can yield*, and, when that common ground of consent is reached, to submit it as the *whole controversy*; or *as being all that both parties will admit is the controverted question*, and that this mutual point of agreement *is as much a matter of agreement between the high contracting parties as is the covenant to arbitrate itself is an integral part of that covenant gives it its final character and provides for it its name — which is compromise*. The process by which this agreement is reached being concessions by each, each concession cancels the other, so that, outside the protocol, of the original contention *there is left nothing*. *All of the original controversy is found finally resting in the protocol or in oblivion*. Thus, when Venezuela and France first compared their views on the Fabiani matter, France claimed that there was unquestioned liability on the part of Venezuela, and during the discussion named in general, at least, the grounds thereof, and the amount, in part, at least, that she should receive. Venezuela denied all liability in every particular. As they pursued their efforts to reach an agreement France admitted that there might be a question as to amounts, but no question as to the fact of responsibility, and proffered to Venezuela arbitration of the *amount*. Venezuela consented to arbitrate, provided that the arbitrator might be a President of a South American Republic, and provided also that the *question of liability* be the *first question* determined.

Later Venezuela tendered a recession from her demand that the arbitrator must be the President of a South American Republic and consented that the President of the Swiss Federation might take charge of such arbitration, but insisted that the arbitrator be asked to decide, first, if this is the case provided for in Article V of the French-Venezuelan convention of November 26, 1885. Finding that arbitration could only be had by conceding this last point France made the concession in principle, but asked that it be not thus worded and in the end submitted for the acceptance of the Government of Venezuela the

compromise substantially as it was when it became the treaty between them. *Nothing on either side of the claims thus conceded survived.*

They were all *mutually agreed to be perpetually abandoned*. It matters not that each of the agreeing parties believes that much, perhaps all, of its early contention is still left, and is comforted in the thought that nothing has been, in fact, conceded, and that all really exists under the terms agreed upon. This, however, remains *certain* that they have agreed to submit the *whole question* to the arbitrator. They may contend before him, on the one hand, that all is included, and, on the other hand, that nothing can be found under its terms. Concerning the meaning, form, and effect of their agreement, they may essentially and antipodally disagree, but that *they have agreed that their contention is all included within the terms of the protocol, is not, and never can be, a matter of disagreement*. That the compromise has been made in order that the arbitrator shall make a *final and conclusive* award upon the *whole* of the original controversy "not buried in mutual concession," *is the most solemn covenant of all*.

If France had made the award at Berne the subject of diplomatic protest before the convention of February 24, 1902, or, in connection with that event, had submitted its grievance, there would have been an opportunity for Venezuela to make answer through the same channels. If, after such diplomatic interchange of opinion, it had seemed best to resubmit the question which had once been heard, or any part thereof, it would come before the tribunal then constituted to hear it, with the knowledge on its part that the hearing had been consented to by both of the Governments involved therein. This protest it did not make. There is nothing to indicate that it desired so to do, or had aught to say why it should not accept as final and conclusive the award of the honorable arbitrator of Berne, unless it be found in the fact that Fabiani is permitted to present his claims, in the manner he has presented them, before this Mixed Commission. So far as the umpire is advised the Government of France has not assumed responsibility for, or attempted to dictate as to, the claims which might come before this tribunal. So far as he is advised, the actual relation of France is found in the fact that it has sought and obtained a tribunal where its nationals may be heard, but has not passed at all upon the claims, sought to refuse, or to limit, the presence of any who considered that they had an international grievance for which the Government of Venezuela had responsibility. It is believed by the umpire that this accounts for the presence of this claim before this tribunal. The large intelligence, the high honor, the scrupulous integrity, the sensitive perceptions of the diplomats of France are assurances to the umpire either that they have carefully and purposely presented this claim, regarding it as entirely outside of the attributes and relations given it by the umpire, or that it is wholly the work of an individual, who had presented his claim on his own initiative, because he feels that in the decision at Berne he suffered a too serious diminution in his honest damages by the application of the rule established by the honorable arbitrator, and who hopes that there may be a chance for revision and reimbursement before the present tribunal.

The umpire holds further that the honorable Governments, in establishing the standard of measurement which was to be used by the honorable arbitrator of Berne in fixing the responsibility of the respondent Government, established at the same time the measure which, when applied by the arbitrator, was to determine alike the extent and the limit of Fabiani's claims. When, therefore, the honorable arbitrator made use of this standard, so provided him, the claims of Fabiani, by their own weight, fell within or without the line of demarcation so drawn. The honorable arbitrator, on his own initiative, eliminated nothing, subtracted nothing, from these claims; there was left for him nothing but first

to settle the meaning of the protocol, and then to observe its effect, and to point out which of the claims came within, and which without, the *action* of the *rule* agreed upon and prescribed to him by the two honorable Governments. In other words, when he seems to eliminate or to subtract from the claims of Fabiani, or mayhap, so states in his arbitral decision, he is in fact simply pointing out and designating the different elements of the Fabiani controversy, which, in effect, the high contracting parties had agreed to eliminate and subtract in order to reach an agreement that permitted the protocol and the arbitration. The moment the honorable arbitrator of Berne settles the pivotal question of the protocol, by defining the term "denial of justice," around which the storm clouds of conflict quickly gathered and the battle was fiercely waged, these claims fell into the lethe prepared for all such by the two Governments when they agreed to and accepted the protocol of February 24, 1891.

It is also true that this was not the beginning of such eliminations and subtractions by and between these honorable Governments. They began November 26, 1885, in the solemn compact then made between them, and thenceforward these nations rested upon their valued agreement to include within their diplomatic cognizance and intervention the same matters only as are accepted in the protocol of 1891, which substantially, even emphatically, reaffirms this previous convention and applies it to the concrete case in hand, hence if there were any difficulty in understanding the protocol when standing alone, by the light of the treaty of 1885, such difficulties are all removed, and one is permitted to pass within the veil and catch the genuine spirit which inspired it, as we hear the thoughtful plenipotentiaries declare on the part of their respective Governments that it is done —

in order to avoid in the future *everything* which might interfere with their *friendly relations*.

What they agreed to in order to avoid in the future a disturbance of friendly relations was done February 24, 1891, in order to avoid and to remove the very thing, which, until removed, did disturb the friendly relations of the two Governments; and in the agreement which was merged in the protocol such concessions as were made on the part of both Governments were the price which each paid for the restoration and continuance of friendly relations, so essential to the highest welfare of both nations. So far as these concessions affected the pecuniary interests of Fabiani they were the especial tribute required of him by his Government to conserve its general good. How great was this price was not known until the judgment of the arbitrator was obtained, defining the inclusiveness of the standard agreed upon. When that was known, in so far, if at all, as this limited his claims within what he could have obtained under an unrestricted submission, the draft had been made upon him in the interest of the common weal of his nation, which draft it was patriotic duty to honor, and thereafterwards, toward the respondent Government, to seek no recourse.

The umpire may be permitted at this time to refer to decisions made in the courts and international tribunals and to the opinion of Count Lewenhaupt and to quote from the reasons given for the judgments rendered and the opinions held, the subject-matter being similar in many aspects to the present case. They illustrate and support the positions taken by the umpire and are, in his judgment, ample in principle and precedent.

There is the Machado claim before the mixed commission of the United States of America and Spain, of February 12, 1871, presented by memorial in 1871, being No. 3 of the claims before said commission. It was dismissed for want of prosecution December 20, 1873 —

the commission reserving to itself the right to reinstate the said case on motion

by the advocate for the United States, sufficient causes being shown in support thereof.

In 1879 he filed another memorial, being No. 129 upon the docket. March, 1880, the advocate for Spain moved to strike it from the docket on the ground that it was the same case as No. 3. The advocate for the United States contended that the claim was different, and claimed that the motion of the advocate for Spain might be dismissed.

The arbitrators being unable to agree, the question was referred to the umpire Lewenhaupt, who, on July 12, 1880, rendered the following decision:

The umpire is of opinion that the question whether case No. 3 may be reopened has not been referred; that the question whether this claim, No. 129, is a new one or the same as No. 3 does not depend upon whether the items included be the same in both cases, but the test is whether both claims are founded on the same injury; that the only injury on which claim No. 129 is founded is the seizure of a certain house; that this same injury was alleged as one of the foundations for claim No. 3, and that in consequence claim No. 129, as being a part of an old claim, can not be presented as a new claim in a new particular. For these reasons the umpire decides that this case, No. 129, be stricken from the docket.

This case is found in Moore's Int. Arb. 2193. See also decisions similar in principle, Danford Knowlton & Co., and Peter V. King & Co., before the same commission, found in Moore's Int. Arb. 2193-2196. See Delgado case, Moore Int. Arb. 2196.

See the case of McLeod, Moore Int. Arb. 2419.

McLeod, a British subject, set up a claim against the United States of America for his arrest and imprisonment in the State of New York on a charge of murder committed at the destruction of the steamer *Caroline* in the port of Schlosser in that State on December 29, 1879. This claim was presented by the British agent to the commission under the convention between the United States and Great Britain on February 8, 1853. The agent of the United States maintained that the case was finally settled between the two Governments by Lord Ashburton and Mr. Webster in 1842. The British commission thought that the adjustment made between the two Governments was merely a settlement of certain national grievances and that any claim on the part of McLeod must be considered as one of the unsettled questions existing at the date of the convention of February 8, 1853. Mr. Upham, commissioner for the United States, was of a different opinion, and, among other things, says that two questions arise in the case:

I. Whether the settlement made by the Governments precludes our jurisdiction over the claim now presented.

II. Whether, independently of such exception, the facts show a ground of claim against the United States.

\* \* \* No claims can be sustained before us except those which the Governments can rightly prefer for our consideration. With matters settled and adjusted between them, we have nothing to do.

A settlement by the Governments of the ground of international controversy between them, *ipso facto*, settles any claims of individuals arising under such controversies against the Government of the other country, unless they are especially excepted, as each Government by so doing assumes, as principal, the adjustment of the claims of its own citizens and becomes itself solely responsible for them. \* \* \*

These subjects of difficulty and controversy between the two countries were thus fully and finally adjusted, so that the able and patriotic statesmen by whom this settlement was effected trusted, in the words of Lord Ashburton, "that these truly unfortunate events might thenceforth be *buried in oblivion*." \* \* \*

In my view, the entire controversy, with all its incidents, was then ended; and if the citizens of either Government had grievances to complain of they could have

redress only on their own governments, who had acted as their principals and taken the responsibility of making the whole matter an international affair and had adjusted it on this basis.

The umpire, Mr. Bates, sustained the position of the commissioner for the United States and rejected the claim.

John Emile Houard was arrested in Cuba and imprisoned without right, as it always appeared. Spain voluntarily released Mr. Houard and restored his property to him, requesting of the United States, as a condition of the pardon and restoration, that an end should thereby be put to all discussion concerning this case. This proposition was accepted by the United States. Mr. Houard came before the international commission between the United States and Spain and claimed damages for the wrong done him through his imprisonment and the consequences naturally flowing therefrom. The umpire made the decision as follows:

The umpire does not deem it consistent with the character of his office, nor required by the interests of either party, that the questions involved in the sentence, thus disposed of heretofore and intended to be closed by conditional pardon granted as the result of an international agreement, should now be reopened. (Moore's Int. Arb., 2429.)

See Bours' case, Sir Edward Thornton umpire, Moore's Int. Arb., 2430.

Illustrative of the position which the United States Government has taken in reference to the finality and conclusiveness of awards by commissions and by arbitration, reference may be had to the action of that Government with Mexico under the convention of April 11, 1839. Under said commission three claims were rejected by the commissioners on their merits and four on the ground of jurisdiction. The umpire rejected five claims on their merits and six on jurisdictional grounds. After the termination of the commission attorneys for claimants whose demands had been rejected asked that the convention and all the proceedings under it be declared null and void, while the attorneys for the more fortunate claimants strongly objected to such a course.

The Government of the United States determined to treat as final and conclusive the decisions that had already been rendered and to enter into negotiations for the adjustment of the unfinished business. Under this decision there was a new claim convention of November 20, 1843, which by its first article provided that all claims of the citizens of Mexico against the United States and all claims of citizens of the United States against Mexico —

which for whatever cause were not submitted to nor considered nor finally decided by the commission nor by the arbiter — (Moore's Int. Arb., p. 1249, note.)

under the convention of 1839 should be referred to a board of four commissioners.

Under the commission of 1839, wherein it was agreed that the decision of the umpire should be final and conclusive, and wherein the United States agreed forever to exonerate the Mexican Government from any further accountability for claims which would either be rejected by the board or by the arbitrator, or which, being allowed by either, should be provided for by the said Government in the manner before mentioned, there was presented the claim of Manuel de Cala, growing out of his imprisonment and the confiscation of his vessel and cargo. The American commissioner of 1839 allowed \$52,000, the Mexican commissioner nothing, the umpire \$5,867. It was alleged before the commission of 1849 that this award was made solely on account of the confiscation of the vessel and the imprisonment of de Cala, and that the value of the cargo was by some unaccountable oversight wholly overlooked by the umpire. The commission ruled against it, saying:

This board has no means of knowing upon what grounds the decision of the umpire was made, nor has it any power of correcting his errors, mistakes, or omissions, even if there was clear evidence of the existence of such errors or omissions. The whole claim of de Cala was submitted to the umpire, and in his decision he recapitulated minutely the several items allowed by the American commissioners, and immediately states the amount for which, in his opinion, Mexico should be held responsible. \* \* \* The board is of opinion that the decision of the umpire was final and conclusive, and that, by the terms of the convention of 1839, Mexico was released from any further claim or liability growing out of the transactions upon which it was founded. (Moore Int. Arb., 1274.)

See the Leggett case, Moore Int. Arb., 1276 *et seq.*

In Moore Int. Arb., 1408, Sir Frederick Bruce says:

In civil courts an appeal lies to a superior tribunal; in international courts, which recognize no superior judge, fresh negotiations are opened, and a fresh commission appointed, to which the disputed cases are referred. \* \* \*

I am of opinion that these claims must be submitted *de novo* to the actual commission, with a view to a fresh reexamination and decision on their merits.

Under the United States and Venezuela Claims Commission of 1868 gross frauds were alleged to be perpetrated, and a protest of the Venezuelan Government was filed with the Secretary of State for the United States of America February 12, 1869, alleging irregularity of the umpire and fraud in the proceedings and findings. After careful inquiry by the United States Government it was found that there had been fraud. The decisions were rejected and a new commission was formed by the joint action of both countries to rehear all of the cases.

Moore Int. Arb., 1660-1675.

Where a party, with full knowledge of the facts on which he relies for the impeachment of the award, has nevertheless accepted and executed the award, it will not be set aside because of the objections made by him. (2 Am. and Eng. Encycl. of Law, 789.)

A valid award creates a complete obligation, and need not be ratified by the parties in order to give it operative force. (Id., 806.)

But where an award is voidable, either because the arbitrators have exceeded their authority or because all matters submitted have not been considered by them, or for any other reason, the parties may ratify it expressly or by implication arising from their acts, and after such ratification they will be estopped from objecting to it. (Id., 806.)

The acceptance of the benefits of an award, as accepting the performance from the other party to the submission of the obligations imposed by the award, is a ratification and estops the party so accepting from afterwards denying its validity. (Id., 807, note.)

Acquiescence in an award has the effect of a ratification. (Id., 807.)

In a case before the Supreme Court of the United States entitled *United States ex. rel. Lutzarda Angarica de la Rua, executrix of Joaquín García de Angarica, deceased, plaintiff in error v. Thomas F. Bayard, Secretary of State* (127 U.S., 251 (L. R., 32, 159)), there appears, in the course of the decision, this quotation from the answer of the Secretary of State for the United States:

And this respondent, further answering, saith that the said petition proceeds upon a ground which wholly ignores certain grave international elements and considerations that entered into the claim of the petitioner's testator so soon as the Government of the United States began and assumed to urge and prosecute the same, and that thenceforth the said claim became, in contemplation of law, subject to the will of the Government of the United States and entirely beyond the control of the said petitioner's testator.

On July 4, 1868, a convention was concluded between the United States of America and Mexico for the adjudication of claims of citizens of either country upon the Government of the other. Article II of the treaty contains this clause:

The President of the United States of America and the President of the Mexican Republic hereby solemnly and sincerely engage to consider the decision of the commissioners conjointly, or of the umpire, as the case may be, as absolutely final and conclusive upon each claim decided upon by them or him, respectively, and to give full effect to such decisions without any objection, evasion, or delay whatsoever. (15 Stat. L., 682.)

And also in Article V there appeared the following:

The high contracting parties agree to consider the result of the proceedings of this commission as a full, perfect, and final settlement of every claim upon either Government arising out of any transaction of a date prior to the exchange of the ratifications of the present convention; and further engage that every such claim, whether or not the same may have been presented to the notice of, made, preferred, or laid before the said commission, shall from and after the conclusion of the proceedings of the said commission, be considered and treated as finally settled, barred, and thenceforth inadmissible. (15 Stat. L. 684.)

This was a case of petition for mandamus, entitled *United States ex rel. Sylvanus C. Boynton, plaintiff in error, v. James G. Blaine, Secretary of State.* (U.S. Sup. Court Reports, 139, 306; L.R. 35, 183.)

The payment of the sum awarded had been withheld by the Government of the United States because that Mexico, while complying with the terms of the award and paying in accordance therewith, had solemnly protested to the Government of the United States that deliberate fraud had been practiced upon the commission and that without it there would have been no award against Mexico and asking that the United States Government consent to reopen the case and to set aside the award. This petition was brought to compel the Secretary of State to make payment of the sums due to the relator, notwithstanding the situation suggested.

President Hayes caused the charges of fraud to be investigated, and Mr. Evarts, then Secretary of State and a profound lawyer and eminent jurist, made a careful examination of all the matters concerned and submitted his conclusions to the President, of which we quote in part:

That neither the principles of public law nor considerations of justice and equity required or permitted, as between the United States and Mexico, that the award should be opened and the cases retried before a new international tribunal, or under any new convention or negotiation respecting the same; \* \* \* that the honor of the United States required that these two cases should be further investigated by the United States to ascertain whether this Government had been made the means of enforcing against a friendly power claims of our citizens based upon or exaggerated by fraud. (139 U.S. pp. 306-326; L. R. vol. 35 p. 186.)

In August, 1880, Secretary Evarts —

having been notified through the Mexican legation of the intention of the Mexican Government to commence suits to impeach and set aside the two awards, objected to such a proceeding as in contradiction to the whole purpose of the convention, as well as of explicit provisions thereof; and accordingly no further steps were taken in that direction. (Id. *ibid.*)

Chief Justice Fuller delivered the opinion of the court, and we quote briefly therefrom:

The Government assumed the responsibility of presenting his claim, and made it its own in seeking redress in respect to it.

The Chief Justice makes reference to *Frelinghuysen v. Key* (110 U.S., 63) in the following language:

In *Frelinghuysen v. Key*, while conceding the essential value of international arbitration to be dependent upon the *certainty and finality of the decision*, the court adjudged that this Government need not therefore close its doors against an investigation into the question whether its influence had been lent in favor of a fraudulent claim. It was held that no applicable rule was so rigid as not to be sufficiently flexible to do justice, and that the extent and character of any obligation to individuals, growing out of a treaty, an award, and the receipt of money thereon, were necessarily subject to such modification as circumstances might require.

Cornelius Comegys and Andrew Pettit, plaintiffs in error, *v. Ambrose Vasse*, defendant in error, before the United States Supreme Court, and reported in volume 26, page 193 (L.R. 7, 108), was a case growing out of the award of commissioners constituted under the treaty of the United States of America with Spain on the 22d of February, 1819. In the ninth article of the treaty it provides that the high contracting parties —

reciprocally renounce all claims for damages or injuries which they, themselves, as well as their respective citizens and subjects, may have suffered until the time of signing of this treaty. (8 Stat. L. 258.)

and they then proceed to enumerate in separate clauses the injuries to which the renunciation extends.

The eleventh article provides that the United States, exonerating Spain from all demands in future on account of the claims of their citizens to which these renunciations extended —

and considering them entirely *cancelled*, undertake to make satisfaction for the same, to an amount not exceeding five millions of dollars. (8 Stat. L. 260.)

To ascertain the full amount and validity of these claims a commission, to consist of three commissioners, was appointed, which within three years from the time of its first meeting should —

receive, examine, and decide upon the amount and validity of all the claims included within the descriptions above mentioned. (Id. *ibid.*)

There seems to be no especial agreement or covenant concerning the finality and conclusiveness of the awards, and they seem to stand upon the common basis ascribed to awards in general. Mr. Justice Story of the Supreme Court delivered its opinion. Among other things decided by the court there appears this:

The object of the treaty was to invest the commissioners with full power and authority to receive, examine, and decide upon the amount and validity of the asserted claims upon Spain, for damages and injuries. Their decision, within the scope of this authority, is *conclusive and final*. If they pronounce the claim valid or invalid, if they ascertain the amount, *their award in the premises is not reexaminable*. The parties must abide by it, as the decree of a competent tribunal of exclusive jurisdiction. *A rejected claim can not be brought again under review*, in any judicial tribunal; an amount once fixed, is a *final* ascertainment of the damages or injury. This is the obvious purport of a language of the treaty.

See the case familiarly quoted as *Frelinghuysen v. Key*, found in the United States Supreme Court Reports 110, p. 63 (L.R. 28, p. 71), where the Supreme Court decided the awards to be final and conclusive as between the United States and Mexico until set aside by agreement between the two Governments, or otherwise, and that the United States had right to treat with Mexico for a retrial for particular awards because of the alleged fraudulent character of the proof given in their support, and that the President of the Senate might con-

clude another treaty with Mexico in respect to any claims allowed by the commission. Mr. Chief Justice Waite delivered the opinion of the Supreme Court, in which opinion we find and quote the following:

No nation treats with a citizen of another nation except through his government. The treaty, when made, represents a compact between the governments and each government holds the other responsible for everything done by their respective citizens under it. The citizens of the United States having claims against Mexico were not parties to this convention. They induced the United States to assume the responsibility of seeking redress for injuries they claim to have sustained by the conduct of Mexico, and as a means of obtaining such redress the convention was entered into, by which not only claims of citizens of the United States against Mexico were to be adjusted and paid, but those of citizens of Mexico against the United States as well. \* \* \* Thus, while the claims of the individual citizens were to be considered by the commission in determining amounts, the whole purpose of the convention was to ascertain how much was due from one Government to the other on account of the demands of their respective citizens.

See also *United States v. Throckmorton*, 98 U.S. Sup. Court Reports, 61 (L.R. 25: 93); *U.S. Appt. v. Diekelman*, 92 U.S. Supreme Court Reports, 520 (L.R. 23: 742); *Choctaw Nation, appellant, v. U.S.*, 119 U.S. Sup. Ct., 1 (L.R. 30: 306).

Chapter 18, Book 2, of Vattel on the Law of Nations, Chitty's Edition, treats of the mode of terminating disputes between nations, and the entire chapter is referred to by the umpire as furnishing, in his judgment, a basis for this case. The umpire will quote but limitedly. Section 326 says in part:

If neither of the nations who are engaged in a dispute thinks proper to abandon her right or her pretensions, the contending parties are, by the law of nature, which recommends peace, concord, and charity, bound to try the gentlest methods of terminating their differences. \* \* \* Let each party coolly and candidly examine the subject of the dispute, and do justice to the other; or let him whose right is too uncertain, voluntarily renounce it. There are even occasions when it may be proper for him who has the clearer right, to renounce it, for the sake of preserving peace — occasions which it is the part of prudence to discover.

Section 327 is entitled "Compromise," concerning which he says:

Compromise is a second method of bringing disputes to a peaceable termination. It is an agreement, by which, without precisely deciding on the justice of the jarring pretensions, the parties recede on both sides, and determine what share each shall have of the thing in dispute, or agree to give it entirely to one of the claimants on condition of certain indemnifications granted to the other.

Section 329 is entitled "Arbitration." Concerning this he says, in part:

When sovereigns cannot agree about their pretensions, and are nevertheless desirous of preserving or restoring peace, they sometimes submit the decision of their disputes to arbitrators chosen by common agreement. When once the contending parties have entered into articles of arbitration, they *are bound* to abide by the sentence of the arbitrators. *They have engaged to do this*; and the faith of treaties should be religiously observed. \* \* \* For if it were necessary that we should be convinced of the justice of a sentence before we would submit to it, it would be of very little use to appoint arbitrators. \* \* \* In order to obviate all difficulty, and cut off every pretext of which fraud might make a handle, it is necessary that the arbitration articles should precisely specify the subject in dispute, the respective and opposite pretensions of the parties, the demands of the one and the objections of the other. These constitute the whole of what is submitted to the decision of the arbitrator; and it is upon these points alone that the parties promise to abide by their judgment. If, then, their sentence be confined within these precise bounds, the disputants must acquiesce in it. They can not say that it is manifestly unjust, since it is pronounced on a question which they have them-

selves rendered doubtful by the discordance of their claims, and which has been referred, as such, to the decision of the arbitrators. Before they can pretend to evade such a sentence, they should prove, by incontestable facts that it was the offspring of corruption or flagrant partiality.

Mr. Bayard, Secretary of State for the United States of America, a very eminent and able lawyer, acting in his office aforesaid, gave this official opinion on May 12, 1886:

Motions to open or set aside international awards are not entertained unless made promptly, and upon proof of fraudulent concoction or of strong after-discovered evidence. Wharton's Int. Law Digest, sec. 316, vol. 3, page 81.

The award not having been vacated, opened, or set aside during the lifetime of the former commission, and the claimant having done nothing since to waive his rights thereunder, it was further ruled that such award should be treated by our Government as a valid and conclusive ascertainment of his claim against New Granada. Wharton's Int. Law Digest, sec. 328, vol. 2, page 672.

Mr. Seward, Secretary of State for the United States, in correspondence July 17, 1868, referring to the *Alabama* claims and to an effort to adjust them which had been made by both Governments and reviewing the situation, says:

In the first place, Her Majesty's Government not only denied all national obligation to indemnify citizens of the United States for these claims, but even refused to entertain them for discussion. Subsequently Her Majesty's Government upon reconsideration proposed to entertain them for the purpose of referring them to arbitration, but insisted upon making them subject of special reference, excluding from the arbitrators' consideration certain grounds which the United States deem material to a just and fair determination of the merits of the claims. The United States declined this special exception and exclusion, and thus the proposed arbitration has failed. *Id.*, sec. 221, vol. 2, p. 568.

On page 569 of the same volume there is a statement by Mr. Frelinghuysen, Secretary of State, to Mr. Rosecrans, October 17, 1883, as to the action of the United States concerning arbitration, the finality of the decisions, and the solemnity of the agreement which authorizes the arbitration.

Mr. Fish, Secretary of State for the United States, to Minister Russell, of Venezuela, June 4, 1875, says in part:

That if a State, after having submitted a controversy regarding claims and debts due to individuals, to arbitration, whether by another State or by a commission, refuses to pay the award, it loses credit and leaves no alternative with other powers than that of refusing intercourse, or of an ultimate resort to war. *Id.*, sec. 220, vol. 2, p. 550.

Mr. Frelinghuysen, Secretary of State for the United States, February 11, 1884, says in part:

The claims presented to the French commission are not private claims but governmental claims, growing out of injuries to private citizens or their property, inflicted by the government against which they are presented. As between the United States and the citizen, the claim may in some sense be regarded as private, but when the claim is taken up and pressed diplomatically, it is as against the foreign government a national claim.

Over such claims the prosecuting government has full control; it may, as a matter of pure right, refuse to present them at all; it may surrender them or compromise them without consulting the claimants. Several instances where this has been done will occur to you, notably the case of the so-called "French spoliation claims". The rights of the citizen for diplomatic redress are as against his own not the foreign government. \* \* \* The commission is not a judicial tribunal adjudging private rights, but an international tribunal adjudging national rights. *Id.*, sec. 220, vol. 2, p. 558.

Should the Government of the United States, either by its neglect in pressing a claim against the foreign government or by extinguishing it as an equivalent for concessions from such government, impair the claimant's rights, it is bound to duly compensate such claimant. *Id.*, sec. 220, vol. 2, p. 566.

On a careful review of the history of this claim from its origin to this day, enlightened by study and reflection, fortified in principle, and controlled by reason, responsive to his conscientious conception of duty, the judgment of the umpire is clear and positive that the compromise arranged between the honorable Governments February 24, 1891, followed by the award of the honorable President of the Swiss Federation, December 15, 1896, were, "acting together," a complete, final, and conclusive disposition of the entire controversy on behalf of M. Antoine Fabiani. Therefore the claim presented before this tribunal, and, on disagreement of the honorable commissioners, coming to the umpire, and there entitled "Antoine Fabiani No. 4," is disallowed, and the award will be prepared accordingly.

NORTHFIELD, *July 31, 1905.*

EXHIBIT IN FABIANI CASE — AWARD UNDER CONVENTION OF 1891

(Exhibit not reproduced. For the original text of the award under Convention of 1891 see Moore's *History and Digest of International Arbitrations*, Vol. V, pp. 4878-4915.)

PIERI DOMINIQUE & Co. CASE <sup>1</sup>

Prevention by the chief of the custom-house at Carúpano of the beneficial use of the tramway enterprise by the claimant was without right and the injuries resulting are properly chargeable to the respondent Government.

Suspension of the tramway traffic by order of the municipal council of Carúpano is equally without right, and the injuries resulting are properly chargeable to the respondent Government through this municipal division thereof.

Suspension of the tramway traffic by order of the municipal council of Carúpano that the private aqueduct company might use its streets to lay the pipe lines of the company whereby serious injury resulted to the claimant must be met with a proper recompense by the city and is here properly chargeable to the claimant Government through and because of said municipality.

<sup>1</sup> EXTRACT FROM THE MINUTES OF THE SITTING OF MAY 12, 1903

The arbitrators proceeded then to the examination of the claim presented by Messrs. Pieri and Nasica, of which the different parties are the object of the following decisions:

The claim of Mr. Nasica, amounting to 1,500,000 bolivars, is rejected by the commission; the claim of the Messrs. Pieri & Co., amounting on the one hand to 3,730,000 bolivars and on the other for acts posterior to May 23, 1899, to 280,400 bolivars, is accepted in its *ensemble* for 600,000 bolivars by M. de Peretti.

The French arbitrator considers that the continual hindrances brought by the municipal authorities of Carúpano to the exploitation of the line of tramways have rendered the latter so difficult that the rescission of the contract ought to be pronounced. In exchange for the indemnity which he demands for the concessionary the city of Carúpano will remain in possession of the line, of the depot, and of the cars which constitute the actual material existing.

M. de Peretti adds that he has been able during his trip to Carúpano to prove that the last war had completely stopped the exploitation; the line, of which the rails have been torn up in several places, is cut in two by four barricades; the depot, which has served as a military hospital, is partly demolished and the cars have almost all been put out of service.

(Continued on p. 140.)

- The defects and faults of the street following and resulting from the laying of these pipe lines by the aqueduct company, after their condition was known to the city and they were accepted in that condition, and which defects and faults resulted in serious injury to the claimant, the damages resulting are properly chargeable to the respondent Government through this municipality, having special reference to the fact that the claimant had resumed use of the streets on the formal statement of the municipality that they were in proper condition therefor.
- The arrest and imprisonment of the claimant on the oral order of the civil chief without warrant, his detention for twenty-four hours in prison, and his subsequent discharge on payment of the jail fee without intervention of court or tribunal of any character is wholly unjustifiable and is a proper subject of indemnity.
- The losses accruing to the claimant through the sale of his houses not being the direct and approximate result of any cause for which the respondent Government is responsible no damages can accrue.
- Because the claimant Government and the respondent Government agreed in the protocol constituting this commission that payment of awards made should be in the 3 per cent diplomatic debt of Venezuela and because that such diplomatic debt has a value at present very much below par, it is urged by the claimant Government that the umpire add a sufficient amount to his award to make it as valuable to the claimant as though the award was payable in gold. This interference with the solemn compact made between the two nations is justified on the part of the claimant Government upon the ground of the inequality which exists between it and the other governments which have recently had arbitral relations with the respondent Government. The arrangement for payment in the one case permitted a long delay in payment, without interest. This arrangement requires immediate payment through its diplomatic debt with interest at a low rate. The inequity, therefore, is not very pronounced, and if it were the umpire regards himself incompetent to make the award suggested.

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OPINION OF THE VENEZUELAN COMMISSIONER

These claims amount to 5,510,400 francs, made up as follows:

	<i>Francs</i>
Claim of Pieri Dominique . . . . .	3,730,000
Claim of A. L. Nasica . . . . .	1,500,000
Claim of Pieri Dominique & Co. . . . .	280,400
	<hr/>
Total . . . . .	5,510,400

In the records of these claims there are connected two claims for indemnity against the Government of Venezuela, presented on the 6th of July, 1895, to

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Doctor Paul is in favor of according only 20,000 bolivars to Mr. Pieri for the destruction of the printing office and 150,000 bolivars for the damage caused to the company of tramways by the last war and for the abandonment which M. Pieri had to make to the municipality of Carúpano of the concession of the tramway, of the depot, and of the material which makes up the exploitation of the said line. He refuses to acknowledge for the interested party the right to an indemnity from the fact of his dispute with the municipal authorities.

Doctor Paul presents the reading of the memoir containing the arguments upon which he bases his opinion. After the discussion, the arbitrators each maintaining his opinion, it is agreed that this claim will be submitted to the umpire.

the governor of Martinique by L. Nasica for the sum of 1,500,000 francs and by Pieri Dominique for the sum of 3,730,000 francs, for outrages committed against their persons and property by the people and authorities of Carúpano, on the 21st of June, 1895. Besides, other documents have been presented according to which Pieri Dominique & Co. claim the sum of 280,400 francs for several acts originated by the war during the years 1901 and 1902 in the city of Carúpano, and which, it is alleged, caused damage to the Tramways Enterprise, the property of Pieri Dominique.

Paragraph 3, article 2, of the protocol of Paris, dated the 19th of February, 1902, provides —

that, if several claims for indemnities based on different facts are presented by the same claimant, and one of them is in the case of being submitted to the proceeding established in article 2, the other shall be added to it to be the object of one only settlement.

The two claims for indemnity presented by Pieri Dominique are based, the one on facts that took place in the years 1895 to 1896 and the other on different facts occurred in 1901 to 1902; but as the former is in the case of being submitted to the proceeding established in article 2 of the protocol, the latter must be the object of the simultaneous examination of this commission, that one same decision may be rendered concerning both of them.

The claim of A. L. Nasica is based on the following:

Annex No. 55:

	<i>Francs</i>
1. The destruction of a printing press and the robbery of all the material and merchandise . . . . .	600,000
2. The blows and wounds received . . . . .	600,000
3. The physical and moral sufferings undergone on account of the persecution of which he was a victim . . . . .	300,000
Total . . . . .	1,500,000

That of Pieri Dominique:

	<i>Francs</i>
1. The abandonment of the Tramways Enterprise, the exclusive privilege of which was to last 38 years and the average revenue of which, taking as a basis the progressive increase, may be valued at 80,000 francs a year . . . . .	3,000,000
Annex No. 55:	
2. Damage done on the day of the outrage, destruction of the printing press, of a large part of the tramway material, robbery of different objects, and demolition of a part of the immovable . . . . .	70,000
3. Forcible and difficult realization, in view of the absolute want of security, of twelve houses, the yearly rent of which is 9,000 francs . . . . .	300,000
4. The physical and moral sufferings, traveling expense, and residence out of Venezuela, far from his family . . . . .	360,000
Total . . . . .	3,730,000

The evidence presented with regard to the facts to which these two claims are confined having been examined, it is found: That Pieri Dominique bought this enterprise at a public auction on the 8th of May, 1891, in the town of Carúpano, from the liquidator of the joint stock company, "Tranvias de Carúpano," for the sum of 38,500 bolivars. Pieri Dominique continued the exploitation of the Carúpano Tramway without any obstacle until early in March, 1895, when he desired to build a branch line to have wagons pass before the custom-house, and carrying out this purpose, he laid the rails; that this being done, the collector of customs, who was absent from the place, notified him on his return from Caracas, of the order to remove the rails, because they

obstructed the traffic indispensable for the operations of the customhouse; that at the same time the municipal council ordered Pieri to stop the works he was doing on the tramway line until after the commission of surveyors appointed to that purpose should report as to whether said works did or not interfere with the free traffic; that Pieri obeyed the order of the council and even requested it that the commission appointed should be at once directed to examine the points of the line that he would indicate and that required to be repaired in order to render traffic comfortable and secure; that the commission rendered its report and expressed the opinion —

that the portion of the line lying between the wharf and the custom-house must be restored to its primitive state — that is to say, to that in which it was before the contract with Messrs. D. Pieri & Co. had been entered into; that the municipal council approved said report and ordered the same to be transmitted for their compliance therewith to D. Pieri & Co., said company being free to establish the branch line in the lower part of the mound, which it was its duty to previously bring to the knowledge of the council, as well as any other reformation it might in the future pretend to make on the general line.

It also appeared to be proved that Pieri Dominique, who considered himself prejudiced in the rights granted him by his concession, *did not proceed to adduce those rights in a contentious action before the competent tribunals of the State*, in conformity with article 8 of his contract, but on the 10th of June, 1895, he issued a flying sheet, entitled: "To the public and to justice," in which he qualified in insolent terms the action of the collector of customs and of the municipal council; that a few days after, Pieri Dominique, being associated to A. L. Nasica, placed him in charge of the direction of a printing office he had in the same house of the tramway station, and there the first issue was edited of a newspaper entitled "El Eco del Oriente," which contained an editorial article written by Nasica, offensive to the local constituted authorities and especially depressive for the people of Carúpano; that on the 21st of June, two days after the appearance of said newspaper, the place where the printing press was was invaded by a group of people, who had a quarrel with Nasica, the result of which was that the types of the printing press were thrown to the street, as well as its materials; that Nasica fled with some confusion; that Pieri hid in the house of a friend, and that both of them cautiously embarked two or three days after for the island of Trinidad.

The alarm consequential to these occurrences, which assumed an especially serious character for the numerous French colony, that, as is well known, forms the principal portion of the merchants of Carúpano, gave occasion to the fact that, the very day said occurrences took place, said colony published a manifestation signed by its principal members (Annex No. 57), in which the following protest was made:

And as those assertions (those copied from the editorial article of the first issue of *El Eco del Oriente*) are absolutely untrue, as far as the French residing in this region of the Republic are concerned, we, as citizens of France, declare that far from being the objects of hatred and persecutions we have been treated by the authorities of the nation, of the state, and of the municipalities, with the same consideration they bestowed upon us before the lamentable interruption of the diplomatic relations between Venezuela and our beloved native land. We make this protest because we believe that man must, in all the acts of his life, profess fealty to truth and justice.

On the same date another manifestation was published, signed by the same French citizens, together with some Venezuelans (Annex No. 57) in which it is stated:

The undersigned, French and Venezuelan citizens, believe it to be their duty to make it to appear that we are satisfied with the actions and conduct of Gen. Froilan Caliman, the collector of customs, in the maritime custom office at this port, who, without departing from the route of the law, makes efforts to contrive the means of facilitating our operations with said office, for which reason we recognize in this official a good servant, who tries to maintain the national Government the confidence of which he enjoys, in high repute; and we are persuaded that his presence at the post he holds constitutes a guaranty for our interests and a security for the honest merchants of the East.

The aforesaid protest and manifestation are signed by, besides other respectable members of the French colony, Messrs. Franceschi & Co., Joucla & Co., Rafalli Hermanos, Augustin Lucca & Co., A. Vicentelli O., Vicentelli & Santelli, Federico Benedetti, Andres Pietri, and Juan A. Auberon, and it is to be observed, as a very especial circumstance, that Messrs. Franceschi & Co. were at the time partners of Pietri Dominique & Co. in the enterprise of the Tramway of Carúpano.

It appears proved by the investigation made by the consular agent of France at Carúpano, by order of the vice-consul of the same nation in Caracas, and by the answers given to said consular agent by Messrs. F. Benedetti, Dr. B. Bermúdez, J. Blascini, F. Massiani, Santos Ermini, J. Vicentelli O., and Joaquin Hiques (Annex D No. 7):

First. That a mob penetrated the house where Pieri's printing press was and threw all the utensils of the printing press into the streets.

Second. That the enterprise of the Tramway suffered nothing by that event, it being untrue that a part of the tramway station was destroyed.

Third. That what happened to Pieri's printing press was due to an insulting and degrading editorial article of the paper edited at said printing office and directed against the local and national authorities and the citizens.

Fourth. That it was the people who, in a moment of indignation against those who injured it, exercised that vengeance.

Fifth. That it is untrue that the mob went to and entered the private house of Pieri Dominique.

Sixth. That no superior official of the custom-house, no member of the municipal council, no local authority was among the assailants of the printing press.

Seventh. That the police only arrived too late at the place where the event took place and that it did not know how to show the energy or the activity necessary to prevent the disorder.

Eighth. That Pieri and Nasica were hidden for two or three days in a private house and then abandoned the country, going by land via Rio Caribe and Yaguaraparo.

Ninth. That there was no arrest and no investigation made by the local authorities; and

Tenth. That, in view of the condition of the printing press, that was worked by the hands and the long time it had been in use those who knew it only give it a value of 4,000 francs.

For the best appreciation of these events the Venezuelan arbitrator considers the definition given by the vice-consul of France in Caracas in an official note dated the 5th of May, 1896, addressed to his excellency Mr. Hanotaux, the minister of foreign affairs of France, of the character of the two parties interested in the claim, Messrs. Pieri and Nasica, in the following words:

Mr. Pieri has a pretty great natural intelligence, very little instruction, an iron temper, and an obstinacy equal to his temper. He possesses a most inveterate sentiment of property, and openly resists whomsoever violates his rights, and that

with very little patience, for his violent temper is not guided by learning or prudence.

Mr. Nasica is little recommendable a personage, who puts his intelligence and learning to the service of all his vices. Wherever he has been he has left victims.

And further on the same note says:

As Mr. Pieri had a printing press, Nasica, who has an easy pen, advised Pieri to establish a newspaper to defend his interests and those of the colony. No member of the colony approved this idea, but Mr. Pieri, mastered by Nasica and feeling aggrieved in his interests, accepted the proposal, and *El Eco del Oriente* was established. The terms of its articles are very violent and could only be permitted to the natives.

The opinion expressed by the vice consul of France regarding Nasica is ratified in more vivid colors in the statement made by Mr. Jean Toussaint Santi, a proprietor at Ajaccio (Corsica), before the minister of foreign affairs of Venezuela on the 18th of August, 1895, a copy of which is inserted in these records. Santi states therein —

that he knew Nasica as being a man capable of all the acts of meanness that a perverse mind might perform, and that he knew, moreover, that he belongs to a family of outlaws and criminals.

It does not appear in the records that Nasica took any other step after he presented, in company with Mr. Pieri, to the governor of Martinique his claim for a part of the indemnity, amounting to 1,500,000 francs, in which he entered as pertaining to him the same printing press pertaining to Pieri and valued it at the sum of 600,000 francs. After having taken into consideration all the foregoing statements, which are proved by the records, the Venezuelan arbitrator is of opinion that the destruction of the printing press of Mr. Pieri Dominique was the deed of a popular vengeance against those appearing responsible for the injurious writings of the newspaper which was edited in said printing-press; that the enterprise of the tramway did not sustain any damage through those occurrences, and it appears from the records that the service of the enterprise was not interrupted; that the damage done to Pieri by the destruction of the printing press does not exceed 4,000 bolivars, and that for said damage only the authors of or accomplices in the aggression were responsible; that this responsibility ought to have been alleged in pleading by the owner of the printing press against those condemned as authors of or accomplices in the facts occurred on the 21st of June, 1895; that the want of energy, of which the police gave proofs, to stop or prevent the aggression of the mob, and the omission on the part of the competent authorities to have the preparatory proceedings instituted in order to prosecute the respective criminal suit against those appearing to be guilty, render them liable to responsibility for noncompliance with their duties; that it must also be taken into consideration that the conduct of Pieri and Nasica renders them largely responsible for the provocation that gave rise to the popular mob.

Appreciating in a spirit of justice all these circumstances, the Venezuelan arbitrator is therefore of opinion that the largest indemnity to be allowed to Pieri Dominique for the destruction of his printing press and the damages which were the consequence thereof is the sum of 20,000 bolivars, and he hereby allows it for this respect.

In regard to the other facts and consequences alleged by the claimant relative to the enterprise of the tramway, to the abandonment thereof, the forcible and difficult disposal of the houses pertaining to him, and to moral sufferings proceeding from his being far from his family, they are destitute of all ground and proof and are inconsistent to serve as the basis of the claim he pretends.

Far from proving that Pieri Dominique abandoned his enterprise on account of the events of the 21st of June, 1895, the documents produced show that the tramway continued to run without interruption immediately after those events and that the exploitation of the business was continued for several years; that Pieri Dominique returned to Carúpano in March, 1896, and resumed the management of his enterprise without any menace or aggression against his person; that according to the avowal made by Pieri before this tribunal, as appears from the records of the proceedings of the sitting of the 9th instant, Pieri bought five or six years ago — that is to say, after the occurrences of the 21st of June, 1895 — from the firm of Franceschi & Co., which was associated in the enterprise of the tramway, the interest of the latter in the business for the sum of 24,000 francs, which fact evidently proves that the assertion is groundless that Pieri was compelled to give up the enterprise, for the abandonment of which he claims the sum of 3,000,000 francs.

The questions arisen between the municipal council of Carúpano and the enterprise of the tramway on account of the drawing of the line, of the construction of the waterworks and the breaking of a bridge by the rains, which have been alleged to show the animosity of the authorities against the enterprise, do not absolutely prove that attitude. These questions are those that ordinarily occur between municipal corporations and the enterprises directly connected with the traffic and public works in the streets of a town. The local laws and the contracts provide the manner in which they are to be determined, the interested parties applying in due time to the competent judicial officials. It appears from the records that Pieri Dominique abstained from following the procedure established by the laws and by his contract and accepted the facts, continuing the exploitation of the tramway under the conditions and circumstances that were the result of the report of the commission of surveyors and of the orders of the municipal council of Carúpano. As regards the construction of the waterworks, if they temporarily prejudiced the interests of the tramway company, it had an action against the joint stock company "Acueducto de Carúpano," of which Mr. Vicente Giuliani Franceschi, a member of the firm Franceschi & Co., associated in the enterprise of the tramway, was the president. (Annex 50.)

For all the reasons aforesaid the Venezuelan arbitrator considers entirely groundless the claim for indemnity entered by Pieri Dominique against the Government of Venezuela, as far as it concerns the enterprise of the tramway of Carúpano up to the 23d of May, 1899, amounting to the sum of 3,660,000 bolivars.

Posterior to that date it appears proved that from March, 1902, on account of the several attacks that the town of Carúpano has suffered on the part of revolutionary troops and of the National Government the enterprise of the tramway has sustained damages, its traffic having been completely interrupted; that at several points the rails have been forced out and the line cut by barricades; that the draft animals of the tramway were taken by the military forces commanded by Gen. Calixto Escalante; that the wagons and carts have sustained deteriorations and are unserviceable on account of the occupation of the station and depot buildings by troops of the government quartered therein. It also appears proved that Pieri Dominique is compelled to abandon, *as he did*, the exploitation of his contract by the circumstances narrated and that in virtue of that abandonment *he has offered before the legation of France* to leave the depot building, the rails, wagons, and all the materials and implements used in the exploitation to the benefit of the municipal council of Carúpano, putting an end to the concession and waiving any claim that might derive therefrom in his behalf. Appreciating in their just value *the damages sustained* by the enterprise *from the interruption of the traffic in March, 1902, and the seizure of its*

*animals up to the last occurrences* the equitable and proved value of the materials, deposit, and all of that constituted its working capital, which, as appears from the records, cost for Pieri the sum of 62,000 bolivars, as well as of the other circumstances which represent for Pieri the gain frustrated of his enterprise, and in view of the circumstances under which the town of Carúpano had been placed, on account very especially of the continued revolutions which from four years ago have rendered that kind of enterprise almost unproductive, even in towns like Caracas, which have not been the theater of deeds of arms, the arbitrator is of opinion that the largest indemnity that may be allowed to Pieri Dominique for all those reasons is the sum of 150,000 bolivars.

As to the claim of L. Nasica for the sum of 1,500,000 francs, Nasica having no right to the printing press destroyed, no share pertains to him in the indemnity allowed for said destruction; and as the other particulars on which he bases his claim for indemnity are entirely groundless and show by themselves the indecorous condition of this claim, it is absolutely disallowed.

In short, the Venezuelan arbitrator is of opinion that as full indemnification the sum of 170,000 bolivars should be allowed to Pieri, with the declaration of his abandoning in favor of the municipal council of Carúpano the concession of the tramway, the depot, the stock in hand, and all the material of exploitation.

CARACAS, *May 12, 1903.*

NOTE BY THE VENEZUELAN COMMISSIONER

*Francs*

This claim, in its part concerning Pieri Dominique & Co. and Pieri	
Dominique, for the sums of . . . . .	3,730,000
and . . . . .	280,400
Total . . . . .	4,010,400

was accepted by the French arbitrator for the sum of 600,000 bolivars, rejecting the claim of Nasica for 1,500,000 francs. The part relative to Pieri was, therefore, referred to the decision of the umpire.

CARACAS, *the date above written.*

OPINION OF THE FRENCH COMMISSIONER

As is shown by the minutes of the session of the mixed commission of May 12, 1903, the Venezuelan and French arbitrators have both considered that Mr. Pieri had presented a well-founded claim and that he was entitled to an indemnity. But Doctor Paúl and myself have differed in opinion upon the amount of this indemnity. While I have reduced to 600,000 bolivars the sum of 4,010,400 bolivars claimed by the party interested, my colleague has reduced it to 170,000 bolivars. It is to be noted that the Venezuelan arbitrator, in conformity with the opinion of the French arbitrator, has pronounced, like him, the rescission of the contract which bound the contractor to the municipality of Carúpano to abandon to this latter in exchange for an indemnity "the concession of the tramway, the depot, and the material which constitutes the exploitation of the line". Doctor Paúl is then convinced that Mr. Pieri finds himself, not through his own fault, but because of a position he has been compelled to assume, unable to recommence work in his concession, and this inability, in my opinion, is not due to a state of war. It is solely based upon the malevolence of the municipality of Carúpano and the determination of the authorities of the State and the city to deprive Mr. Pieri of a concession they wish to operate themselves. At the time of my visit to Carúpano I was able to prove *de visu* that the last war had completely arrested the exploitation; the

rails had been torn up and in several places had been cut in two by four barricades. The depot, which had been used for a military hospital, was partly demolished by shells, and the cars had nearly all been put out of service, but all these damages were reparable.

Since March, 1903, Carúpano has been cleared of revolutionary bands. Since the month of July last the present Government has finally triumphed over the revolution and caused peace to reign throughout the Venezuelan territory. Dossier No. 8, prepared after May 12, 1903, proves that Mr. Pieri was not able to take up the exploitation of his enterprise because of the hostility of a part of the population, hostility which has the same causes as the malevolence of the State and municipal authorities, if indeed the latter does not explain and has not created the former.

Why, then, after having recognized implicitly the impossibility of Mr. Pieri's renewing the exploitation, does Doctor Paul refuse "to acknowledge for the interested party the right to an indemnity, from the fact of his dispute with the municipal authorities," when the said "disputes" (*démêlés*) have truly caused this impossibility? Moreover, does not this refusal, following the payment of the indemnity of 170,000 bolivars for damages caused by the incident of 1895 and the civil war, show clearly that even in the mind of the Venezuelan arbitrator the 170,000 bolivars do not represent an indemnity sufficient for all the damages of every nature to which Mr. Pieri was subjected, including the loss of the concession?

In fixing at 600,000 bolivars the indemnity to be accorded to Mr. Pieri, who claimed 4,010,400 bolivars, I have desired to accord him a sum which might represent exactly the material damage which has been caused him. I have not wished to increase it by a special indemnity which would be of a penal character for the State and municipal authorities. The latter, however, would have merited it because of the stubbornness with which they have unjustly pursued and tormented a citizen stranger, the possessor of a perfectly regular contract. It seems from numerous authentic pieces of evidence contained in the dossier and from information that I have gathered on the spot that the enterprise of the tramway of Carúpano has brought in and can bring in for the future to the concessionary from 30,000 to 40,000 bolivars a year. If one does not take into account the high return of money in Venezuela, more than a million of capital should be allowed to Mr. Pieri. On the other hand, it is well to remark that according to the common opinion of the two arbitrators Mr. Pieri ought to abandon the concession to the municipality. The latter will be anxious to exploit it, and the benefits which it will receive will represent almost exactly in capital the indemnity accorded to Mr. Pieri. Venezuela would thus withdraw without disadvantage from the unfortunate position in which the actions of the local authorities of Carúpano have thrust her.

Finally, it is to be considered that according to the terms of the protocol this indemnity must be paid in bonds of the diplomatic debt and not in gold. From the fact of this concession consented to by the French Government to permit the Venezuelan Government to settle its debts with greater ease the amount of the indemnity is found to be really reduced. The real amount of these bonds is far, at this time, from reaching half their nominal value. The granting to Mr. Pieri of an indemnity of 600,000 bolivars would then permit the Venezuelan Government to free itself for 240,000 or 250,000 bolivars from a claim the settlement of which would assure to the Venezuelan administration an annual income of 30,000 to 40,000 bolivars.

MARCH 25, 1904.

## ADDITIONAL OPINION OF THE VENEZUELAN COMMISSIONER

I must call the honorable umpire's attention to the fact that when I agreed in the opinion of the French commissioner declaring the rescission of the contract binding the claimant to the municipality of Carúpano, and the abandonment to the latter, for an indemnification of the concession, such as it is, the deposit made and the materials destroyed or damaged, for which in my opinion I stated that Mr. Pieri should also be indemnified, I was not prompted by the fact, as the French commissioner avers, that I was convinced —

that Mr. Pieri finds himself, not through his own fault, but because of a position he has been compelled to assume, unable to recommence work in his concession, and —

that inability is not due to a state of war, adds my colleague, but is solely based upon the malevolence of the municipality of Carúpano, and the determination of the authorities of the State and the city to deprive Mr. Pieri of a concession they wished to operate themselves.

In my written opinion read at the meeting of May 12, 1903, which, translated into English, I submit herewith to the honorable umpire, there is nothing whatever to show the conviction ascribed to me by my learned colleague, and I can not let such statements go unchallenged, as such motives are entirely foreign to the reasons I had to form my opinion in this case.

I have declared the rescission of the contract between Mr. Pieri and the municipality of Carúpano, because from the statements made by Mr. Pieri in his claim, his decided will to discontinue the operation of the Carúpano tramway is clearly shown, and because about the time the claim was entered (February, 1903) and at the time we — the two commissioners — rendered our decision (May 12, 1903), Carúpano was in a state of siege because of the continuation of the revolutionary movement led by General Rolando, which ended in July, after the attack and capture of Ciudad Bolívar. These facts are universally known.

I have endeavored, in my opinion, since Mr. Pieri showed his purpose to abandon the operation of the tramway and in view of the fact that the circumstances at the time did not permit the immediate renewal of the operation of the line because of the seizure and destruction of the materials, to conciliate the private interests of the claimant and his manifest will to abandon the business, with the interests of the community, which could not be left at the mercy of a person who, during his intercourse with the local authorities, had shown himself not to be animated by a conciliatory spirit, but, on the contrary, by the earnest desire to constantly provoke disagreements and scandals.

To estimate the amount of a just indemnification, I have used the data furnished by the documents submitted on the real cost of the business, the value of the building or depot and that of the rolling stock, cars in use, and animals. I have not estimated any exaggerated, imaginary, or eventual profits, because the determination of Mr. Pieri to discontinue the operation of the tramway line plainly showed that the business does not yield profits, but losses, because of the decline of business in Venezuela by reason of continued revolutions and the considerable falling off in price of the principal export product of the country. In proof of this, there is the fact that the two tramway lines existing in Caracas, where there has been no fighting and where there is a population of 80,000 inhabitants, have not been able to pay dividends to their stockholders for the last four years, and that the stock is quoted below 50 per cent.

The decided purpose the French commissioner ascribes to the authorities of the State and the city of depriving Pieri of the grant they wish to operate them-

selves does not seem to have other foundation than the statement made by the French consular agent in a communication to his minister in Paris February 10, 1897, to the effect that General Rolando, then President of the State of Bermúdez, had made Mr. Pieri a proposition to buy the tramway for a sum in the neighborhood of 35,000 francs. General Rolando ceased to be the chief authority of the State of Bermúdez eight years ago, and it has not been established that the authorities which succeeded him in the State and city of Carúpano have desired either to buy or to take the business. The sum of 35,000 francs which we are told General Rolando offered during an era of peace and prosperity in the State of Bermúdez being far below the sum I have granted, plainly shows how exaggerated is the estimate made by my learned colleague, fixing in the sum of 600,000 bolivars the indemnification of Mr. Pieri.

I had not in mind, as my learned colleague implies in his brief, when I declared for the abandonment by Mr. Pieri of the tramway concession to the municipality, that the latter would hasten to operate it and that the profits derived from such operation should approximately represent the indemnity granted Mr. Pieri. Far from this, my sincere belief which no one can suspect of being biassed, is that under the present condition of business in Venezuela, and especially in the towns of the eastern section of the country, which have suffered more than any others from the effects of the last revolution, the operation of a tramway line in a town like Carúpano is unproductive and that neither the authorities nor the municipality of that city have any interest whatever in becoming the owners of such line. I make this statement, in case the honorable umpire should in his award deem it more equitable for both parties that Mr. Pieri continue the operation of the concession of the Carúpano tramway, since he now desires it, during the years his contract has to run and to limit the indemnification which should then be granted to him to the value of the mules and material either lost or damaged by the Government forces during the military operations of the last war.

This statement, which I make as the commissioner for Venezuela, is the more indispensable, as in the latest brief submitted by the French commissioner it is not only stated, but affirmed, that according to evidence obtained after May 12, 1903 — date of our respective opinions — Mr. Pieri has been prevented from renewing the operation of the tramway because of the hostility shown by a portion of the inhabitants of Carúpano. While this assertion has no other support than the word of the party concerned and lacks corroboration by trustworthy evidence to give it weight, it shows the intention to convey to the mind of the honorable umpire an impression different from the true situation which the Carúpano tramway concern occupies as a profitable business in order to obtain a compensation for future profits entirely unjustified. On the other hand, the notes and letters appended to the brief of the French commissioner, as Exhibit 8, deal with facts subsequent to May 12, 1903, when the two commissioners investigated and rendered their decision on Mr. Pieri's claim, and the production of the same at this time before the honorable umpire is contrary to the rules of procedure governing this commission, since it can not deal with facts other than those which have taken place, according to the extended jurisdiction granted by paragraph 2, article 2, of the Paris protocol, up to the date of the 23rd of May, 1903.

I must take advantage of this opportunity to challenge the statement made by the French commissioner at the end of every one of his briefs of the fact that, according to the terms of the protocol, the indemnities awarded by this commission are payable in 3 per cent bonds of the diplomatic debt, and that from this concession granted by the Government of France to that of Venezuela to facilitate the payment of the latter's debts, it appears that the amount of

the indemnity is greatly reduced at present, as the real value of said bonds is not one-half of their nominal value. The honorable umpire will find on page 499, Venezuelan Arbitrations of 1903, Ralston's Report, in the case of the Decauville Company before this same commission,<sup>1</sup> my opinion as the Venezuelan commissioner, altogether rejecting the claimant's contention that an allowance should be made to compensate for the lowest cash value the bonds of the diplomatic debt might obtain. The French commissioner, in his decision, concurred in my opinion, by which it was acknowledged that the commission had no jurisdiction to alter or change the method of payment established by the protocol, by advancing theories which might affect the nominal value of the bonds of the diplomatic debt, as such method of settlement on the part of Venezuela of the sums awarded by the commission was a matter exclusively concerning the two contracting parties and in no wise subject to the jurisdiction of the arbitration commission, called upon to examine only the proofs of the facts and the justice and sound foundation of the claims for indemnification, estimating the measure of damages by the established proof of such damages and not by the kind of money, whether cash or bonds, in which Venezuela is to discharge the awarded liability.

In regard to the other points covering my estimation of the damages which I deem justified in the claim of Mr. Pieri, the liability affecting the Venezuelan Government by reason of certain established facts and the amount of indemnity I have granted for the abandonment or rescission of the tramway contract, taking into consideration the value, as appearing from the proofs, of such business and the fair compensation for the price of the concession as an industrial investment, I hereby ratify in all its parts my opinion of May 12, 1903, whereby I allow for all indemnification the sum of 170,000 bolivars.

NORTHFIELD, VT., *February 8, 1905.*

#### ADDITIONAL OPINION OF FRENCH COMMISSIONER

After having read the additional opinion of my honorable colleague, I can only maintain the conclusions of my memoir. I think I ought, moreover, to make the following observations:

My honorable colleague declares that in his opinion one can not raise anything which indicates his conviction that Mr. Pieri finds himself, not by his own fault, but from the fact of the situation which is thrust upon him, unable to renew the exploitation of his concession. It is, however, it seems to me, the logical conclusion which can be drawn from the decision rendered by Doctor Paúl. If he does not have this conviction, why has he accepted the rescission of the contract which I have judged equitable and necessary? It is not, I imagine, merely to be agreeable to Mr. Pieri. It is really because my honorable colleague has thought, as I have, that the position of the claimant was such that circumstances independent of his will prevented him absolutely from renewing the exploitation of his concession. Only Doctor Paúl is of the opinion that the ruin of Mr. Pieri is due merely to the hindrances which the revolution has placed in the way of the exploitation, while I consider that to these hindrances has come to be added the open and declared hostility of the Venezuelan authorities which was manifested repeatedly several years before the commencement of the revolutions.

If one refers to the text of the minutes of the sitting of May 12, 1903, he may read there the phrase which I have cited. Doctor Paúl "refuses to acknowledge for the interested party the right to an indemnity from the fact of his dispute with the municipal authorities." I have the right to conclude from this that the indemnity accorded by Doctor Paúl represents merely the damages caused

<sup>1</sup> *Supra*, p. 15.

by the revolution and is not a sufficient compensation for the losses sustained by Mr. Pieri. It is sufficient to review the dossier to note the fact that from 1895 to 1899 — that is to say, during a period previous to the revolution — Mr. Pieri was the butt of continual persecutions from the Venezuelan authorities. At every moment they stopped his tramways under different pretexts, they created difficulties for him at pleasure, they chose as if by chance the place where the tracks were established to pass canals which they might have placed farther away, etc.

The umpire will be able to convince himself of these facts by perusing the dossier. It is these repeated manifestations of the municipality of Carúpano which have convinced me that the latter wished to exploit itself the line of tramways, and that it was trying by all possible means to dispossess the concessionary. I have nowise been brought to this opinion, as my colleague thinks, by the fact that General Rolando offered to purchase the concession for a sum of 35,000 bolivars. This offer is but one proof the more in support of my opinion, but it has not been the determining proof. Doctor Paúl concludes, moreover, from this amount that the concession was not worth more. But it is well to remark that the proposition of General Rolando was not followed by any result, Mr. Pieri having without doubt judged the offer to be derisory; it is clearly seen that according to the documents contained in the dossier this sum of 35,000 bolivars represents the income which the enterprise of the tramway might yield annually.

The documents presented after May 12, 1903, have no other end than to demonstrate that there exists in fact a declared hostility against Mr. Pieri, since peace has now reigned in Venezuela for long months. This unfortunate concessionary is prevented from gaining his livelihood by taking up again the management of his concession. They also demonstrate that the concession has no such low value as my colleague would like to have believed, since without the persistent ill will of the municipality and of the population Mr. Pieri would find an advantage in again taking up the exploitation of his line. Whatever Doctor Paúl may say about it, Mr. Pieri was perfectly right, according to the protocol, in submitting these documents to the umpire. I searched in vain in section 2 of article 2, quoted by my colleague, the provision which would prevent Mr. Pieri from presenting the documents because they are posterior to May 12, 1903. On the contrary, I find that section 3 of the same article formally authorized him to do so.

I would particularly call the attention of the umpire to the enormous reduction which I have made in my decision from the amount of indemnity demanded, and I persist in thinking that the sum of 600,000 bolivars is the minimum which can be given to Mr. Pieri in compensation for vexations and losses which he has suffered and in exchange for his concession and his material. This reduction appears still more considerable if we take into account the depreciated currency with which the Venezuelan Government is to pay its indemnity. In regard to this I ought to bring up the manner in which my honorable colleague looks at this public debt. I should prefer not to be obliged to say that the Venezuelan Government wished to profit from the condescension, which alone among all the foreign governments the French Government has shown toward it, to allow it to free itself from its debts at a reduced rate and not to pay them integrally. In consenting to this concession of not being paid in gold the French Government has in no way wished to place its nationals, the victim of pillage or of denials of justice, in a position inferior as compared to the nationals of other countries placed under the same circumstances; it has wished only to permit Venezuela to acquit itself more easily in giving to the claimants in place of gold these bonds redeemable after a long time.

Can we conclude from this fact that it is forbidden the arbitrators in the fixing of an indemnity in equity to take into account the depreciation of the money which is to be given in payment? Can we say that this changes the mode of payment established by the protocol? The arbitrators have, to the contrary, a strict duty, and they can not fail without wounding equally equity and good sense to take account of the manner in which their award will be executed in such fashion that the sum which they have awarded shall be in fact paid. Otherwise their awards would be only deceptive. When my Government invested me with the duties of arbitrator it remitted entirely to my conscience in all that which considers fundamentally the claims which I might have to examine; it has only remarked that equity commanded me to take account in the fixing of indemnities of the depreciation of the bonds of the diplomatic debt.

The protocol would in fact be vitiated if the arbitrators did not take account of this article 3, which declares that the indemnities will be paid in bonds of the diplomatic debt. In reading this article the arbitrators are informed that the indemnities will be paid in a certain money; they ought to take notice of this to conform to the letter of the protocol and also to its spirit, which is a spirit of equity. So I can not help express my profound astonishment to read in the additional memoir of my honorable colleague the phrase which begins thus: "The French commissioner in his decision (Decauville affair) concurred in my opinion." etc. In the matter of the Decauville affair I have given no other opinion than that which is laconically expressed in the minutes of the sitting of June 15, 1903, which is as follows:

The examination of the claim of Mr. Decauville is then taken up, in favor of which is recognized by common agreement a sum of 41,400 bolivars.

On the contrary, my colleague will kindly remember that I have in every affair which has been submitted to us each time demanded that account must be taken of the depreciation of the diplomatic debt. And at every time, to arrive at an agreement, he has consented to raise slightly the amount of the indemnity, declaring that this should not be mentioned either in the minutes or in the report which he would present to his Government. I hold, in principle, that this correction should be made, and I should consider myself as having failed in my duty and having been forgetful of equity if I had neglected a single time to take account of the manner of payment of indemnities and tolerated that the Venezuelan Government should thus receive an unjust benefit, to the detriment of the victims of the abuses of power, of pillages, and of denials of justice.

NORTHFIELD, *February 11, 1905.*

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#### OPINION OF THE UMPIRE

On the 2d of May, 1882, a lawful contract of concession was made by and between the president of the State of Bermúdez, of the United States of Venezuela, and José Gabriel Nuñez Romberg, of the city of Cumaná, of said State, for the purpose of promoting and encouraging the means of communication in that section, which contract, among other things, provided that the government of the State granted permission to the concessionary to construct tramways or railways in the cities of Cumaná, Carúpano, and Maturín of that State, and also to establish ways of communication under the system named between different points of the section referred to, the works to be the property of the enterprise, but with the obligation to devote them to the transportation of passengers and merchandise at prices lower than those then existing between those sections

and in those cities and in accordance with tariffs to be approved by the government of the State of Bermúdez.

The concessionary was authorized to transfer to others, in whole or in part, the rights passing to him under the contract; also to use for the railways aforesaid the necessary streets or public walks, but in a way not to cause injury or obstruction to traffic. The enterprise was exempted from all State and national taxation, with the privilege of obtaining like exemption from municipal taxation through the action of the respective municipal councils. This concession was to continue for the term of fifty years, to be reckoned from the date of the inauguration of the first line of tramways or railways created under this contract, and when said fifty years had terminated, the enterprise, with all its property was to pass to and become the property of the State of Bermúdez.

On the 20th of the same month the enterprise was duly exempted from municipal taxation by the city of Carúpano.

Thereafter the anonymous company of "Tramways of Carúpano" was duly organized, the privileges herein named were duly ceded to the said company, and the enterprise of the tramways was inaugurated and installed in the city of Carúpano.

At a date not material this company, the "Tramways of Carúpano," went into liquidation, and its liquidator, on the 8th day of May, 1891, sold at auction to Pieri Dominique the said enterprise, including the privileges contained in the concession aforesaid, so far as the same referred to the city of Carúpano. The price paid therefor was 38,500 bolivars. It became the property of Pieri Dominique & Co., the other member being the house of Franchessi & Co., of the city of Carúpano, Pieri's interest in the company being much the larger part.

Under the management of Pieri Dominique & Co. the enterprise was extended and enlarged, and for some four years proved quite successful. The income for the year 1891-92 was 30,232 bolivars, and there was a steady increase to 1894-95, when it had reached 47,200 bolivars.

It was in the year 1895 that difficulties began, culminating in the very serious affair of June 21, 1895, which continued through the intervening years up to the sitting of this mixed commission in Caracas in 1903, of a degree more or less troublesome each year, to the great detriment and loss of the company.

Before the sitting of this mixed commission at Caracas in 1903 Pieri Dominique had become the sole owner of the tramways and of the concession, paying for the share of Franchessi & Co. the sum of 24,000 bolivars.

The claim of A. L. Nasica was dismissed by the honorable commissioners of France and of Venezuela at their sitting in Caracas, and there was reserved for the umpire only the claim of Pieri Dominique for himself and for Pieri Dominique & Co., he being the only person interested at the time this claim was presented before the mixed commission and the only person interested at the present time in the claim. The award is to be for his sole benefit.

The nationality of the claimant is unquestionably French, and there is a difference of opinion between the honorable commissioners only as to the amount which should be awarded the claimant for the damages and indemnities to which he is entitled.

The aggregate claim submitted by Pieri Dominique in his own behalf and as the successor of Pieri Dominique & Co. is 4,010,400 francs, covering injuries alleged to have been committed on his person and property commencing June 21, 1895, and continuing from time to time up to the conclusion of peace in 1903. After submitting this claim, and while the mixed commission was sitting at Caracas in 1903, Pieri Dominique appeared before the commission and suggested and consented that the award be made on the basis that he

surrender the enterprise, including all the privileges of the concession, to the municipal council of Carúpano.

When the case came on for hearing before the honorable mixed commission it was the opinion of the honorable commissioner for Venezuela that the sum of 20,000 francs was a sufficient indemnity for the damages suffered in the person and in the property of the claimant on account of the events of June 21, 1895, and those which are prior or subsequent, but immediately connected therewith or naturally flowing into or therefrom. For so much of the damages suffered by the claimant during the revolution of 1901-1903 as he regarded to be properly chargeable to the respondent Government and for the enterprise itself, including the privileges of the concession, he allowed the sum of 150,000 francs, making in all the sum of 170,000 francs. He finds no occasion to allow any indemnity for the action of the customs authorities at Carúpano and later on for the action of the city council in prohibiting and preventing the carrying on of the tramway freight traffic, for the forced interruption by the municipal council of Carúpano of the entire traffic for a period of three months in 1896 during the installation of the aqueduct system in that city; for the defects and faults of certain portions of the streets on which was laid the tramway of the claimant through the inefficient use and management of the same by said aqueduct company while making its house connections, whereby was ruined one of the horses of the tramway system belonging to the claimant; for the forcible suspension of the passenger traffic by order of the municipal council at another time; for the arrest and imprisonment for twenty-four hours of the claimant, without warrant or any subsequent charge or trial, on the oral order only of the civil chief of the district of Bermúdez; for the delay and final neglect of the municipality of Carúpano to rebuild a bridge carried away by a freshet, upon which rightfully rested the railway of the claimant, inducing serious loss in receipts through inability to conduct the enterprise and entailing upon the claimant the expense of rebuilding the bridge; or for the losses resulting, as claimed, in the alleged compulsory sale by the claimant of his twelve houses at great sacrifice.

It was the opinion of the honorable commissioner for France that the claim of 4,010,400 francs ought to be reduced to 600,000 francs, which includes the compensation to be paid the claimant for the enterprise of the tramways, its privileges and franchises. He considers this sum to be no more than just for all the losses suffered by the claimant for which he holds the respondent Government liable. He especially urges the allowance of this sum, because the payment is to be made not in gold but in bonds of diplomatic debt at 3 per cent, which manner of payment he regards as a more favorable proposition to the respondent Government than that made by any other claimant Government, and he is therefore of the opinion that in making the award the reduced market value of these diplomatic debts should be met by an award sufficiently enhanced to meet the deficit. He is also of the opinion that the vexations, difficulties, and injuries brought upon the claimant by the officers of the nation, state, or municipality, or suffered by them to be brought upon him, without rebuke or attempt at prevention were the result in part of a prejudice on the part of the nationals against all foreigners, and especially against those of French citizenship, and also in part were a result of a studied attempt of the President of the State of Bermúdez and of certain officers of the city of Carúpano to compel an abandonment of the enterprise by the claimant to them. He does not, however, claim that there should be any punitive proposition in the award to be made, but that it should contain simply the material damage which, in his judgment, the claimant has suffered if he now relinquishes the property and privileges of the concession to the municipality of Carúpano.

The honorable commissioners having disagreed in the manner above stated, by their joint action the claim comes to the umpire for his decision and award.

He finds himself greatly indebted to both of the honorable commissioners for the care and skill with which they have presented their respective opinions, shedding much light upon the questions at issue and greatly aiding the umpire in his efforts to determine the equities of the case.

After a careful study of these respective opinions and of the facts involved the umpire finds himself compelled to hold (a) that the interference of the chief of the custom-house with the enterprise of the tramways, and especially in the part covered by his order to the claimant that he desist from all freight transportation, were acts wholly unwarranted, in direct antagonism to the clear right of the concessionary, and that this interference resulted in very serious damage to the claimant; (b) that the order of the municipal council to the same effect, made in January, 1897, was without right, very unjust, strictly against the terms of the concession, and resulted in serious loss and damage to the claimant; (c) that the suspension of the tramway service by the municipal council at the request of the aqueduct company for the installation of its pipe line was within the power of the municipal council to be followed by a sufficient indemnity to the claimant for the losses sustained by him in the interest of the aqueduct company, and that this indemnity is primarily due from the municipality to the claimant, since the aqueduct company sought the intervention of the municipality. The orders to suspend the tramway traffic came from the municipality. It was the order of the municipality which was obeyed, and it is therefore to the municipality that the claimant may properly look for his compensation. Whether the city did or did not obtain indemnity from the aqueduct company in order to meet this proper claim of Pieri Dominique & Co. is a matter not important to this inquiry, since it can not affect the claimant's right in the premises; (d) that the defects and faults of the street caused through the action of the aqueduct company in making its house connections with the main line were properly chargeable to the municipality as the party primarily liable for the injuries which might result therefrom to the lawful users of the street, it being borne in mind that the traffic of the tramways had been resumed on formal notice from the city authorities that the conditions would permit its resumption; (e) the arrest and imprisonment of the claimant, on the 8th day of October, 1896, on the oral order of the civil chief without warrant, his detention for twenty-four hours in prison, and his subsequent discharge on payment of the jail fees without intervention of a court or tribunal of any character is a serious assault upon the liberty of the individual and the sacredness of his person, is wholly unjustifiable, and is the proper subject of indemnity; (f) the staying of the traffic of the tramways by the order of the municipal council as it occurred on June 14, 1896, can only be justified as a matter of municipal right for the public good and can only be met properly by a charge upon the public to compensate the individual for his sacrifice to the public interests; (g) the allowance made by the honorable commissioner for Venezuela of 20,000 francs for the incidents of June 21, 1895, and the injuries and damages which are the approximate results or antecedents of those incidents in the judgment of the umpire is a sufficient sum to be allowed, and in the judgment of the umpire covers such damages as accrued because of the interference of the chief of customs with the tramway service; but there should be added thereto interest at the rate of 3 per cent from June 21, 1896, at which time it is certain that the respondent Government had due notice of those incidents and of the justice of this claim; (h) the sum set by the honorable commissioner of Venezuela of 150,000 francs in the judgment of the umpire is ample to cover the revolutionary incidents of 1901-1903 for which the respondent Government

may be held liable, and, in addition, for the purchase price of the tramway enterprise and the privileges of the concession; but it is equitable to relate back this purchase to the time when this property was taken by the Government for barricades and hospitals, which the umpire assumes to be January 1, 1902, and interest should be allowed on the sum of 150,000 francs from that date to the 31st day of July, 1905. the anticipated conclusion of this arbitration; (i) there can be no allowance for any losses accruing to the claimant in the sale of his houses, such losses not being the direct and approximate result of any cause for which the respondent Government has responsibility. and it is only for such results that indemnity can be awarded.

Concerning the responsibility of the national Government for the acts and neglects of the State of Bermúdez and the municipality of Carúpano, the umpire holds here, as he did in the claim of Davey, in the British-Venezuelan mixed commission of 1903, found in Ralston and Doyle's *Venezuelan Arbitrations*, page 410.

Before coming to his decision in that case the umpire gave much time and thought to this question of national responsibility, and his opinion there given is the result. Further study and reflection adds to his conviction that his position then taken was tenable. just, and necessary. He respectfully refers the honorable commissioners to the opinion above cited for an elucidation of his views on that subject. He would also cite the opinion of Paul, commissioner in the French-Venezuelan commission of 1902, in the claim of Battistini.<sup>1</sup> Id. 503, as bearing upon this question of nationality liability for State indebtedness; the opinion of Duffield, umpire in the German-Venezuelan commission of 1903, case of Beckman & Co.. Id. 598; also the opinion of Bunch, umpire in the Montijo case, Moore's Arb. 1421-1447.

It is the opinion of the umpire, however, that the decision in this case does not rest upon the ordinary postulates. It is here proposed that the claimant abandon, transfer, and make over to the municipality of Carúpano his enterprise of the tramway, his concessions and privileges in consideration of payment to be made therefor and to be included in the award. To put the municipality of Carúpano in possession of this enterprise as sole owner thereof to the entire exclusion of the claimant while the municipality is unquestionably the debtor of the claimant for its acts and neglects in connection with this enterprise would be so manifestly unjust and inequitable as not to permit a moment's favorable consideration. Whatever may be the usual relation of the nation to and with its municipal subordinate divisions, it is certain that in this case it can and will be so related to the municipality of Carúpano as to exact and require full repayment to itself for all it shall undertake and expend in behalf of that municipality in connection with this enterprise of the tramways. Whatever hesitancy, if any, there might be ordinarily in making such acts and neglects of the municipality a matter of international award is dissipated by the peculiar facts incident to this claim, as above stated.

So much of the award as corrects the wrong done the claimant by his arbitrary arrest and imprisonment stands solely upon the recognized and rightful responsibility of the nation, internationally, for the unlawful and injurious acts of its subordinate officials and is on all fours with the case of Davey first above cited.

Concerning the allegation of prejudice on the part of the nationals of the respondent Government toward foreigners, and especially the French, and also the allegation that there was a studied attempt of the President of the State of Bermúdez and of certain officers of the city of Carúpano to compel abandonment of his tramway enterprise by the claimant, it is sufficient to say that these

<sup>1</sup> *Supra*, p. 18.

allegations are not material to the inquiry, since there is no claim for punitive or exemplary damages and since all essential facts bearing upon the question of the actual damages suffered are found without involving the consideration of these questions.

The honorable commissioner for France again urges upon the umpire the propriety and duty of increasing the sum which he otherwise would award the claimant by an amount equal to the diminished value of the diplomatic debt of 3 per cent as compared with gold, and in this opinion he gives especial prominence to the claimed inequality of the plan accepted by the high contracting parties in the protocol providing for this commission with the plan adopted by the claimant Governments and the respondent Government in the several protocols of 1903. This particular reason was not passed upon by the umpire in his opinion given in the claim of Jules Brun,<sup>1</sup> if it were, in fact, then pressed upon his consideration by the honorable commissioner for the claimant Government.

In the motion for allowance of interest on awards from their date until payment, which was made in the British-Venezuelan Commission of 1903 and which on the disagreement of the honorable commissioners came to the umpire for his decision, a careful and painstaking study was made by him of the basic principles underlying this question, and while the exact proposition now before him is not identical with that, yet the principles which govern him in his decision are in large part the same.

Here, as there, the warrant for such action must be found, if found, in the protocol which constitutes this tribunal and defines its duties, its powers, and its limitations. There, as here, the protocol determined the manner and means of payment, and over that matter gave the tribunal no jurisdiction. Here, as there, the functions of this tribunal end when it has determined the damages sustained by the claimant. The reasons stated by the umpire in that case are applicable here, and the attention of the honorable commissioners is respectfully invited to it as found in Ralston and Doyle's Venezuelan Arbitrations of 1903, page 413. It will be observed that there, as here, the alleged ground for the requested award was a claimed equity. The long delay in payment which seemed probable was urged as the reason for the allowance of interest; here by the terms of the treaty, the award draws interest, but its value in the market is below par, and hence the opinion of the honorable commissioner for France that the umpire should increase the sum awarded to meet this lessened value. It will be noted especially that the very terms of payment provided for in the protocols of 1903, and which are considered by the honorable commissioner of the claimant Government to be so much more favorable for the claimants than the plan evoked by the convention controlling this tribunal as to work injustice and inequity to the claimants before this commission by the inequality which it produces, were regarded by the British Government so onerous as to require the efficient aid of the umpire to maintain justice and equity through an allowance of interest. In the one case a certain method of assured payment without interest was devised and preferred by the high contracting parties; in the other the high contracting parties preferred a certain method of payment with interest in bonds circulating in the markets of the world. In the one case the award is not rated at par because of the necessary delay attached to its payment; in the other it is not rated at par for reasons satisfactory to the world of finance.

The inequality produced by the two methods of payment is therefore not very striking, nor is the inequity resulting therefrom very pronounced, and

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<sup>1</sup> *Supra*, p. 24.

taken together they are insufficient to move the umpire to accord with the opinion of the honorable commissioner for France, even if the umpire were competent under the terms of the protocol to make such an award, and concerning that question the review which he has just made confirms his judgment as expressed by him in the claim of Jules Brun.

In order to compensate the claimant for his material damage suffered in all of the ways herein referred to, including interest at 3 per cent where interest is proper, there should be added to 170,000 francs allowed by the honorable commissioner for Venezuela the sum of 180,000 francs, which makes in all the sum of 350,000 francs, for which amount the award will be drawn.

#### ADDENDUM

After this opinion was written, but before the award had been made, it was brought to the attention of the umpire that conditions had materially changed in Carúpano since the sitting of the honorable commission at Caracas. At the time named the revolution was still rampant in that part of the respondent Government, with the latter in possession of Carúpano, holding it under martial law, and with its troops occupying for military purposes the station of the tramways and for barricades portions of the tramway itself. The Government of Venezuela was then, in fact, in occupancy of the tramway system to the exclusion of the owner. There seemed to both commissioners no better way to dispose of the claim than, on the one hand, finally to surrender what was lost and, on the other, fully to accept what had been taken. They did not agree upon the terms, however, and the claim had to come before the umpire.

It transpired in the meanwhile that the revolution was quelled, peace was restored, and the claimant had entered into undisturbed possession of his franchise and such of his properties as he chose to make use of; had occupied the station house, regained a part of the movable property of the enterprise, and had begun again its exploitation. By the terms of the contract the tramway system was eventually to become the property of the municipality and was at all times under its civil control. Hence it had seemed to the honorable commissioner for Venezuela very unwise and, in a sense, not within its competency, for the respondent Government to interfere with either the ownership of the claimant or the present civic control and the ultimate municipal ownership of the city of Carúpano, and for these reasons he declined to accede to the proposition of abandonment on the part of the claimant and on the part of the respondent Government of acceptance and payment of his franchises and properties. The whole question was thoroughly and ably presented to the umpire at a sitting of this honorable commission, held on the 12th day of August, instant, the honorable commissioner for France believing and urging that the plan adopted at Caracas was the better and should be adhered to in the disposition of the claim. The honorable commissioner for Venezuela held and insisted that the arbitral tribunal constituted at Paris February 19, 1902, had no authority to do other than to award indemnities for damages suffered by Frenchmen in Venezuela and that it could not compel abandonment of property by its owner or acceptance of it by the respondent Government. To this position the honorable commissioner for France demurred and urged that it had authority to so award.

To-day, having carefully considered the questions involved and having reflected upon the opinions respectively held and ably declared to him by his able and learned associates, the umpire has concluded, and hence holds, that the safe, sane, and wise course for this tribunal to pursue is to pay scrupulous regard to the terms of the protocol which constituted it and to place the entire responsibility in that behalf upon the high contracting powers which arranged

and settled those terms. He is confident that the language of that compact does not permit the use of any such powers as will be involved in a compulsory award of the character proposed by the honorable commissioner for France, holding that in this respect, the claim under consideration is identical in that regard with the claim of the French Company of Venezuelan Railroads, and the reasons there given<sup>1</sup> by the umpire are here referred to for an elaboration of his opinion. He therefore decides that it is only for damages suffered in Venezuela that the claimant has recourse to this tribunal, and for those the umpire will award the sum of 300,000 francs.

NORTHFIELD, *August 14, 1905.*

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HEIRS OF MASSIANI CASE  
HEAD NOTES

- An indebtedness of the respondent Government to the late Thomas Massiani in his lifetime is a part of the patrimony which descends to his widow and children, to be distributed in accordance with the laws of Venezuela.
- The widow of Thomas Massiani was born in Venezuela, acquired French nationality by the laws of both countries by her marriage to Thomas Massiani, by the laws of France retained that nationality after his decease, but by the laws of Venezuela was restored by his death to her quality of a Venezuelan citizen.
- During their marriage and since his death she has been domiciled in Venezuela. The law of her domicile prevails in this conflict and her nationality before this tribunal is Venezuelan.
- The children were all born in Venezuela and it has always been their domicile. While by the laws of France they are Frenchmen, being the children of a Frenchman, they are by the laws of Venezuela citizens of that country. As in the case of the widow, the law of the domicile prevails, and before this tribunal they are Venezuelans.

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<sup>1</sup> EXTRACT FROM THE MINUTES OF THE SITTING OF AUGUST 28, 1903

The commission then proceeded to the examination of the Massiani claim.

Doctor Paúl rejects it, and bases his opinion upon the following considerations: The heirs of Thomas Massiani are all Venezuelans by Venezuelan law. The mixed commission of 1890 has already rejected the claim in question, and the present commission would not be able to revise a judgment of the former commission. Finally, the very documents upon which the Massiani heirs base their right to the payment of the sum which they claim does not seem sufficient to prove the existence of the debt in a decisive manner.

M. de Peretti replies that M. Massiani (Thomas) enjoyed exclusively French nationality, and that his heirs, if they are Venezuelans according to Venezuelan law are considered as Frenchmen by French law; that if the commission of 1890 has rejected the claim in question, it is because the Venezuelan Government did not give an acknowledgment to a document of which M. Philippe Massiani has been able to obtain an authentic copy only in 1903; that the present commission seems to him competent to revise a judgment of the earlier commission if a new fact has been presented, which is the case in the Massiani claim; finally, that the credit seems well established by the document delivered to M. Philippe Massiani by the Venezuelan administration.

He is, then, in favor of granting to the Massiani heirs a sum of 270,813.56 bolivars, representing the capital of the debt, and not according interest because of the negligence during long years by the claimants in the defense of their rights.

The arbitrators not being able to agree, the claim of the Massiani heirs will be submitted to the examination of the umpire.

Thomas Massiani deceased prior to the convention of February 19, 1902; therefore neither of the high contracting parties could have had him in mind as a possible claimant at the time of said convention.

His widow and children being Venezuelans in the contemplation of the respondent Government, their right to the intervention of France was not agreed to by Venezuela in said protocol.

The indebtedness of Venezuela to the estate of Thomas Massiani may still remain, but the forum is certainly changed. The present forum is the one constituted for Venezuelans. This forum is the result of the selection of their paternal ancestor and their own selection after attaining majority.

Having French paternity, and thereby having French nationality in France, they needed only to be domiciled therein to have a nationality which all the world must maintain to be French. They have preferred to remain in Venezuela; its laws and its courts are theirs; these they may invoke; with them they must be content.

To be sovereign and independent, each country must be master of its internal policy and subject neither to advice nor control by any other country.

The laws of Venezuela concerning citizenship are not peculiar or offensive, but are in accord with the law of nations in general.

#### OPINION OF THE VENEZUELAN COMMISSIONER

This claim has been presented in the name of Mrs. Carmen Silva de Massiani, widow of Tomás Massiani, of Felipe A. Massiani, Ascensión Massiani de Phelan, Nuncia Massiani de Orsini, Luis A. Massiani, children of Tomás Massiani, and Isabel Paván de Massiani, acting in behalf of her minor children, Antonio José, Tomás María, Mercedes, Luis Enrique, Carmen de Lourdes, and Gloria, issue of her marriage with Mr. Antonio Massiani, now deceased, son of Tomás Massiani, and therefore those minors being grandchildren of the latter.

The claim proceeds from debts which, the claimants sustain, were contracted by the Government of Venezuela, in favor of him from whom they derive their rights, Mr. Tomás Massiani, by the years 1864 to 1869.

The documents presented prove that Tomás Massiani died in the city of Carúpano on the 9th of October, 1901, leaving as his lawful heirs his wife, Carmen Silva de Massiani, and his children Felipe A. Massiani, Antonio A. Massiani, Ascensión Massiani, Nuncia Massiani, and Luis A. Massiani; that these children have married as follows: Ascensión Massiani to a Mr. Phelan, Nuncia Massiani to Agustín Orsini, and Antonio J. Massiani to Isabel Paván, of which latter marriage there are under the parental control of Isabel Paván de Massiani, her husband being dead, six minor children.

From the certificates of birth presented of Mrs. Carmen Silva de Massiani, widow of Tomás Massiani, and of her children, Felipe A. Massiani, Antonio José, Ascensión, Nuncia, and Luis, it appears that all of them are of Venezuelan nationality, they having been born in the city of Carúpano, State of Sucre, United States of Venezuela, and that the same circumstance exists respecting the minor children of Antonio José Massiani, represented by their mother, Isabel Paván de Massiani.

With reference to Mrs. Carmen Silva de Massiani, while by articles 19 of the Venezuelan civil code and 12 of the French civil code the woman married to a foreigner follows the condition of her husband, the final provision of the Venezuelan civil code, which establishes that that change only subsists during the marriage, is conclusive.

Mrs. Carmen Silva de Massiani, having become a widow, has recovered, according to the Venezuelan law, which governs her personal status, her Venezuelan nationality; and, even if it might be sustained that, according to the

French law, she continues to be French, this commission, in determining the conflict of nationality arising from the two laws, must take into consideration the especial circumstances and the facts showing the real condition in which Mrs. Carmen Silva de Massiani has maintained herself with reference to her nationality, as well as with respect to the nationality of her children.

It is not proved, nor has it been attempted to prove, that Mrs. Silva de Massiani, after she became a widow, or her children of full age, have ever pretended, by acts proving such circumstance, to obtain and preserve a nationality different from that which the Venezuelan law attributes to them, under which law they have performed all the most important acts of life connected with the personal statute, *status civitatis*, and governed by the especial laws of that statute, such as those relating to successions, inheritances, guardianships, and marriage. It is not proved either that the male children of Tomás Massiani have rendered France the military service obligatory for every Frenchman, or in any way contributed to the satisfaction of other charges that would procure the protection due to those who do not abstain in an unjustifiable way from the compliance with their duty to their native land.

On the contrary, all the especial circumstances and precedents connected with the persons of the claimants show that they have during all their life remained in the territory of Venezuela; that there they have had for three generations the business and the principal and only seat of their interests, and they have contracted in the same territory marriages with persons of different nationalities, enjoying under the protection of the Venezuelan laws the security they grant and the services which the authorities of their residences were called upon to render to them in order to safeguard their persons and interests. From those facts it is deduced that the permanent settlement of the widow and children of Tomás Massiani, in the territory of Venezuela, of which they are all natives, is the result of a reasoned and persisting will and the manifestation of a free and spontaneous purpose which makes the law of domicile prevail over any other law when determining the question of nationality.

Mrs. Carmen Silva de Massiani, her children, who have been born and, one of them, died in Venezuela, and her grandchildren, all born in Venezuela, are Venezuelans, not only by the law of Venezuela, but in virtue of all the especial personal circumstances of continued residence, business ties with the Venezuelan soil, which has given them everything, including their national character.

It is doubtless that when a group of men are considered, and the aptitudes, habits, and attributes of each individual are studied, it is found that each person pertaining to a group possesses certain common characters that are like a common property of all the members belonging to the same group. Hence it results that, if attention is paid to the common attributes pertaining to all the individuals of each group, it may rightly be said *that these individuals belong to this or that nation*.<sup>1</sup>

In view of the aforesaid circumstances, the arbitrator for Venezuela is of opinion that this tribunal has no jurisdiction to take cognizance of and decide

<sup>1</sup> 687. Il est hors de doute, lorsque l'on considère une réunion d'hommes et qu'on étudie les aptitudes, les habitudes et les attributs de chaque individu, on trouve que chaque personne, que appartient à cette réunion, a certains caractères individuels et certains caractères communs, qui sont comme la propriété commune et de tous les membres qui appartiennent au même groupe. De là il résulte que, si on porte son attention sur les attributs communs qui sont propres à tous les individus de chaque groupe, on peut dire avec raison que ces individus appartiennent à telle ou telle nation. (Fiore, Nouveau Droit International Public, sec. 687.)

the claim in question, and that there is, besides, with respect to it a precedent that renders it equally inadmissible.

Said precedent consists in the fact that the same claim was presented by Tomás Massiani, from whom the present claimants derive their rights, against the Government of Venezuela, before the mixed commission sitting at Caracas from 1888 to 1890, instituted in accordance with the Venezuelan-French convention of 1885.

Tomás Massiani claimed from the Government of Venezuela, before the said commission, the sum of 351,449.80 bolivars. As appears from the certificate issued by the citizen minister of foreign affairs on the 20th of the present month, annexed to this opinion, the members of said commission in the sitting of the 7th of July, 1890, gave the following award with reference to the claim in question:

The first part of the claim of Mr. Massiani, of which mention is made in the record of the proceedings of the 19th of May of the present year for 49,666.84 bolivars, was accepted by the commission, the question being a credit already recognized by the Government of Venezuela, and the present commissioner being authorized by a note addressed to him by the minister of foreign affairs on the 18th of July last, No. 643, to examine the claims that had been presented to the commission of 1879, and the second part of the same claim amounting to 301,784.96 bolivars was disallowed, because the interested party did not produce a sufficient document in support of his claim.

The reason on which was based the disallowance of the claim, in the part above determined, which is tantamount to its having been denied or rejected, was, as expressed in the same award, the want of sufficient proof to justify it.

The successors to Tomás Massiani now pretend that this commission should examine and decide again what was already the object of the decision of the mixed commission of 1888 to 1890, and base their pretention on a certificate from the centralization board of the general auditor's office, bearing the date of the 12th of August, 1890, posterior, as may be seen, to the date of the award of the mixed commission, in which certificate the movement in the books of the custom-house of Carúpano is partly detailed, and ending by a note signed by the auditor-general, in which it is declared that, according to said books, Tomás Massiani appeared to be the creditor of the Government of Venezuela up to the 23d of June, 1890, for the sum of 270,813.56 bolivars.

The claimants give that certificate the force of a *decisive* document in favor of the creditor, and sustaining that that document was retained by the debtor, or that, at least, this prevented its presentation in due time before the award of the mixed commission of 1890, they pretend that the commission, in virtue of those reasons, should invalidate the award of the preceding commission of the 7th of July, 1890, and again decide in favor of their claims.

In the law the invalidation of a sentence is admissible when founded on several causes, as: The omission of the summons for the reply of the defendant; the falsity of the document in virtue of which the sentence was rendered, and the retention in the possession of the adverse party of a *decisive* document in favor of the action or the exception of the claimant, or any act on the part of the adverse party preventing the presentation in due time of said *decisive* document.

To admit that this commission is called upon to decide the invalidation of the sentence rendered by the preceding commission it would first be necessary, as provided by the Venezuelan Civil Code of Procedure, which establishes that the suit for invalidation must be brought before the same tribunal that rendered the sentence, to declare that this commission is the same commission sitting in Caracas in 1888 in virtue of the Venezuelan-French convention of 1885.

This similitude or identity can not be deduced only from the international character of both commissions, but would require to be the result of an express convention of the two high contracting parties vesting this commission with the power of revising and finding the decisions of the preceding commission in the same way as the national law gives its ordinary tribunals the express power of invalidating their own sentences in such cases as the law determines.

No suit for invalidation has either been brought before this commission, in which the debate should be confined to examine the *decisive force* of the document presented in favor of the creditor, whether it was or not in the possession of the debtor when the sentence was rendered, or whether said debtor did or did not perform any acts that might prevent the presentation thereof. The commissioner for Venezuela does not consider that he must give an especial decision on these points which constitute a suit for the invalidation of a sentence previously rendered, because such has not been the subject of examination by this commission; but he is of opinion that the document presented is destitute of *decisive force* in favor of the creditor, for it is nothing but a certificate issued by the general auditor's office to the effect that according to the books of the custom-house at Carúpano it appeared that on the 23d of June, 1869, there was a balance in favor of Tomás Massiani, without determining in a decisive manner that he was creditor for that sum on the date of the certificate, the 12th of August, 1890, or twenty-two years thereafter. No data have been furnished with reference to the fluctuation of that account in the intervening twenty-two years, during which Mr. T. Massiani continued his importations through the custom-house at Carúpano, and transfers were made decreed by special laws for the conversion of the balances against the States into bonds of national debt.

The apparent abandonment in which, according to the pretention itself of Mr. Massiani, his credit was left during twenty-one years without any explanation; the lack of steps to obtain its payment or at least to procure proofs that might safeguard his rights, constitute so strong a presumption against the subsistence of that credit that it suffices to strengthen the opinion expressed that the certificate produced is an inefficient document and is destitute of the decisive force that the law and common sense require for the invalidation of a sentence that was rendered, because the claimant did not produce *a sufficient document in support of his claim*.

The decisions of tribunals of the nature of these commissions are conclusive and final, and such tribunals are constituted in order precisely that their decisions have that force with the purpose of putting an end to long-pending and vexing questions which generally disturb the progress of international relations.

When a court of arbitration rejects, for lack of proofs, a claim, or when it admits it in its entirety or in part, its decision is a law which binds the two contracting nations.

In the same case of the claim of Tomás Massiani, that of being admitted in part and in part rejected, were many others submitted to the examination of the commission of 1888 to 1890, and that commission was given the power of fixing or appreciating according only to the documents produced in each case, the just value of each reclamation.

In execution of that power it examined and decided more than one hundred and forty claims, rejecting many of them for lack of proofs, so that of the sum of 11,284,532.37 bolivars to which the claims having a determined value amounted the commission only admitted as lawful and proved the sum of 1,109,615.50 bolivars.

For the reasons stated I am of opinion that this commission must declare itself incompetent to take cognizance of the claim entered, because the claim-

ants are Venezuelans, and, besides, that it must declare said claim to be inadmissible, as far as the sum of 301,784.76 bolivars and the interest thereon are concerned, because respecting that part of the claim there is a sentence passed and affirmed.

As to the new promissory notes presented as a complement of the said claim, they are not covered by this opinion, because as they are not authenticated they do not meet the requisite indispensable for their being taken into consideration according to the rules of procedure established by this commission.

The French arbitrator was of opinion that the claim was to be admitted for the sum of 270,813.56 bolivars without interest, and an agreement not having been arrived at, the claim was referred to the umpire.

CARACAS, *August 28, 1903.*

#### OPINION OF THE FRENCH COMMISSIONER

According to the exposition made in his letters of April 6 and May 13, 1903, by M. Philippe Massiani, son of M. Thomas Massiani, French citizen, who lived in Carúpano and died there October 9, 1901, the Venezuelan Government would have been answerable to the latter for a sum of 728,476.48 bolivars. This amount is made up as follows:

First, 341,737.36 bolivars loaned from 1863 to 1869 to the administration of the custom-house of Carúpano and to General Acosta, chief of the Constitutional army of the east, this administrator and this general being duly authorized by the national Government to contract loans in its name.

Second, 351,003.12 bolivars representing the interest on the sum loaned from the date of the obligation to June 30, 1903.

Third, 3,200 bolivars handed over in 1885 upon the requisition of Generals Urdaneta, Pietri, and Rojas.

Fourth, 14,136 bolivars loaned to the Legalista revolution of 1892.

Fifth, 18,400 bolivars furnished the Restaurador revolution in 1899. The amount, which appears under No. 5, formed the object of the demand for indemnity presented to the mixed commission established by the protocol signed at Washington February 27, 1903. This commission allowed to the Massiani heirs, taking account of interest, an indemnity of 19,900 bolivars, as results from the extract below from the minutes of the sitting of September 10, 1903:

Doctor Paúl declares that M. Massiani (Thomas) being to-day deceased and having left as heirs his wife born in Venezuela, of Venezuelan parents and four children born in Venezuela, he sees himself obliged to refuse consideration of the claim presented by this Frenchman because his heirs are all Venezuelans according to Venezuelan law, and the advantage of the arbitral tribunal is reserved by the protocol for Frenchmen.

M. de Peretti replies that M. Massiani (Thomas) who has himself addressed before his death his letter of claim to the legation of France enjoyed exclusively French nationality, and that consequently the commission is competent to examine this claim without its being necessary to look into the question of knowing if the heirs who are all considered as Frenchmen by the French law and enjoy in reality two nationalities, have manifested in the course of their life the intention of remaining French.

The commissioners not being of accord remit the dossier to the umpire and ask him to decide if the claim in question, and of which they do not discuss the amount, enters into the category of those which are included by the terms of the protocol.

Mr. Filtz pronounced the following sentence:

The umpire, the commissioners being heard and after the examination of the dossier of the claim of Massiani (Thomas) and son, considering that the character of Frenchman is not denied to Massiani senior, that the claim was presented by

him and not by his heirs and that there was no occasion to examine, consequently if the said heirs who enjoy in fact two nationalities have evidenced in the course of their life their preference for one of the two, decides that the claim in question certainly enters into the category of those which are provided for by the protocol and consequently accords to Massiani (Thomas) and son the indemnity of 19,900 bolivars.

The credit which is set forth in number four enters into the category of claims provided for by article 1 of the protocol of February 19, 1902, in that the Venezuelan Government has accorded a round sum of 1,000,000 bolivars. The commission which met at Paris to make a division of this sum, considering that the claim had been formulated by M. Thomas Massiani, who enjoyed incontestably French nationality, accorded to his heirs the indemnity demanded. The credit which appears in No. 3 is established by a "vale" dated June 28, 1885, and signed by the three generals who made the requisition. My colleague concludes to reject this demand, because aside from the reasons which caused him to refuse all the claims presented in the name of Massiani thought the latter ought to have been presented to the mixed commission which sat from 1888 to 1890 and was competent to examine the claims arising between 1869 to 1886, and again that the "vale" presented no authentic character, the signatures not being legalized.

I partook in these latter points of the opinion of Doctor Paul and we rejected this demand. The credits which appear under Nos. 3, 4, and 5 are then out of the cause.

There remains the credit which appears under Nos. 1 and 2 and which amounts to 692,740.48 bolivars. When this claim was presented to the mixed commission in the course of the sitting of May 14, 1903, M. Massiani (Philippe) had not yet obtained from the Venezuelan Government the documents which seemed to establish in an incontestable manner the credit of his father. The dossier did not then establish the credit until after the taking up of the accounts of the Massiani house. Doctor Paul asked Philippe Massiani, who was heard by the commission at its meeting of May 23, 1903, to show that after the decease of his father he had acquired all the rights of the firm Massiani & Co., and that his mother, his brothers, and his sisters had executed regular warrants of attorney. M. Philippe later remitted a dossier which satisfied this request.

Of a common accord my colleague and myself postponed the examination of this affair to a later date, M. Massiani having informed us that he was soliciting from the Venezuelan administration a recognition of the debt. He obtained, in fact, this instrument May 27, 1903, but the amount of the debt recognized was only 270,813.56 bolivars. This figure did not agree with that of the claim. The interested party declared that he would solicit a rectification. He did not remit until August 4, 1903, the document which, according to him, justifies his claim in its integral amount.

The affair entered into discussion at the sitting of August 6, 1903, as the register of the proceedings of the commission bears witness:

The arbitrators then took up the study of the Massiani claim, which in the course of the sitting of May 23 had been postponed to a later examination.

After having passed over in review the complementary pieces addressed by the interested parties, and having exchanged views with his colleague, Doctor Paul expressed the desire to study the dossier anew, and it was agreed that the arbitrators would render their decision on this claim at the next meeting.

At the meeting of August 24, 1903, "after a new exchange of views and a long discussion," as the minutes say, the affair was again reserved. Finally at the sitting of August 28, 1903, Doctor Paul having concluded to reject the demand, I appealed to the umpire.

I have accorded to the Massiani heirs an indemnity of 270,813.56 bolivars, because after having read the documents sent May 27, 1903, to M. Philippe Massiani by the minister of foreign relations it seems impossible to me that the credit should be contested. This document is an authentic copy delivered to M. Philippe Massiani upon his request by the director of public law to the minister of foreign relations with the authority of the minister of the liquidation of the credit of Massiani effected August 12, 1890. This liquidation concerns a table of loans, with their dates and their amounts, extracted from the books of public accounts and closed with the following declaration of Gen. T. B. Arismendi, contador general de la sala de centralización:

Consequently and as results from the former administration, it appears that M. Thomas Massiani is the creditor of the Government for the sum of 67,703.39 pesos, or 270,813.56 bolivars.

It is undeniable that on the date August 12, 1890, the Venezuelan Government owed this sum to M. Thomas Massiani. If the payment had been made since to the interested parties it would have been very easy for the Venezuelan administrator to prove it by producing the receipt. It is then beyond doubt that the debtor is still at the present hour responsible for this sum to the personal representatives of M. Massiani.

The rights of succession have only seemed to me completely established for this sum. M. Philippe Massiani argues that the said liquidation does not include a sum of 30,971.40 bolivars, which caused the credit of 270,813.65 bolivars to amount to 301,784.96 bolivars, a sum already claimed in vain from a preceding mixed commission by M. Thomas Massiani. He has demanded of the minister of finances an official rectification and he flatters himself of having obtained it. Not sharing his opinion on this point, I have not been able, while recognizing for the interested parties only the right rigorously established, to accord this supplementary indemnity.

I ought to note here, for the information of the umpire, the notable contradiction which exists between the liquidation of August 12, 1890, and the official report, of which a copy certified by the director of the budget was sent to the minister of finances June 27, 1903, as a result of the demand for rectification of M. Philippe Massiani. Not only are the amounts produced by the latter document not in accord either with those of the demands nor with those of the liquidation of August 12, 1890, but the uncontested and uncontestable existence of this latter liquidation suffices to prove the inexactness of the conclusion of this official report. It concludes, in fact, that in the books of account one can follow the trace of the credit only as far as April, 1870, and that the liquidation remitted by the minister of foreign relations in a certified copy is dated August 12, 1890. Is this only an error? Does not this inexact report betray the predetermination of the minister of foreign affairs to efface the impression which ought to be produced on the arbitrators by the reading of the liquidation of 1890, the copy of which, vainly sought for during long years, seems to have been obtained only by a surprise, thanks to the friendly relation between the interested parties and certain officials of the ministry of foreign relations.

M. Philippe Massiani claimed, moreover, a sum of 39,952.40 bolivars, represented by receipts analogous to those which, remitted to the Venezuelan administration, had permitted him to establish notably the liquidation of 1890. Why have these receipts, which besides do not present sufficient authentic character, been thus preserved? Why did not M. Thomas Massiani present them to the mixed commission of 1888? Have they not already been settled? All these questions not having received satisfactory answers, I have not been able to admit this part of the claim.

Finally M. Philippe Massiani claimed 351,003.12 bolivars of interest reckoned at 3 per cent from the date of the obligation to June 30, 1903. I have not believed I ought to receive this demand even for the 270,813.56 bolivars, which I consider indisputably due by the Venezuelan Government. Messrs. Massiani, father and son, appear in effect to have taken no steps before the Venezuelan administration to obtain from it the reimbursement of their credit. They have both waited before filing their claim for the meeting of the mixed commissions. They have then waited of their own free will and have thus lost the chance to see themselves rewarded by a judge basing himself upon equity alone for the interest which in right they ought not to have counted upon.

I have already explained why I could not share the opinion of my honorable colleague upon the value of the document remitted to M. Philippe Massiani May 27, 1903, a document which, in my opinion, proves superabundantly the credit of the Massianis. Besides the fact the document does not seem to him "sufficient to prove the existence of the debt in a decisive manner," Doctor Paúl justifies the rejection of this claim by considerations drawn from the nationality of the Massiani heirs and by the fact that the mixed commission of 1888-1890 has already rejected the demand in question. M. Thomas Massiani, born in France of French parents, enjoyed incontestably and exclusively French nationality. His title of French citizen has been certified by the legation of France at Caracas and recognized by the Venezuelan commissioner at the mixed commission of 1888-1890. The claim was born during the life of Thomas Massiani. It is the right of a French citizen who has been injured, and consequently the mixed commission appointed by the protocol of Paris, which includes "the demands for indemnities presented by Frenchmen," is indeed competent to consider this claim.

One might insist upon that, as the mixed commission appointed by the protocol of Washington has done successively for the same interested party for part No. 5 of their claim and the commission of repartition appointed by the French Government for No. 4.

One would place, then, out of the case as the umpire, Mr. Filtz, has done in his award, the nationality of the heirs. But I consider that even if one takes this latter into consideration the arbitral commission created by the protocol of Paris has jurisdiction. The widow of Thomas Massiani, born in Venezuela, of Venezuela parents, but married to a Frenchman, and her children, born in Venezuela of French parents, all enjoy incontestably two nationalities. They are French according to French law and Venezuelans according to Venezuelan law. It results that when the protocol speaks of "demands for indemnities presented by Frenchmen" it has in mind claims presented by individuals to which the French Government assures its protection because the French law recognizes them as Frenchmen. It is in no way specified in the protocol that the Venezuelan law will be obliged also to recognize these individuals as Frenchmen. On the contrary, all the protocols signed last year at Washington between Venezuelan and foreign powers to regulate analogous difficulties have declared expressly that local legislation ought not to be taken into account. Then, even if the heirs of Mr. Thomas Massiani had presented a claim in their personal name, the arbitral commission would have been qualified to examine it. It is so with much greater reason, since this claim concerns a credit of Mr. Thomas Massiani himself.

On the other hand, it is true that the mixed commission of 1888-1890 rendered, at its sitting of July 7, 1890, the following award:

The second part of the same claim (claim Thomas Massiani), amounting to 301,784.96 bolivars, is definitely rejected, the interested party not supporting his demand by a sufficient document.

But it is necessary to know that this "sufficient document" was in the hands of the Venezuelan Government, which, being requested by the interested party, did not make it out until the 12th of August, 1890, after the close of the labors of the commission, and did not deliver a copy to Mr. Philippe Massiani until May 27, 1903. One can then discuss in what case and by what tribunal may an award rendered by the mixed commission of 1888-1890 be revised.

One could, however, remark that, this commission having rendered irrevocable decisions, these decisions could not be submitted to a revision unless a new fact unknown to the arbitrators has appeared to modify the appearance of the affair in such a manner that the decision may have been entirely different if the arbitrators had knowledge of it. One might establish then that this is precisely the case of the Massiani claim. Finally, one might maintain, with reason, that no tribunal would be better qualified than the present arbitral commission to examine anew an affair already submitted to the mixed commission of 1888-1890, and that even the protocol giving it competency to regulate all the claims of Frenchmen, whether they were directed against a former award or caused by an entirely different motive, this arbitral commission is alone in position to decide if there is room to revise such or such decision of the preceding commission.

In equity, the document sent May 27, 1903, to M. Philippe Massiani establishing incontestably the existence of his credit, and the arbitrators of 1890 having only rejected the Massiani claim for lack of *probative document* retained by the Venezuelan administration, an arbitrator can but condemn the Venezuelan Government to reimburse the Massiani heirs for the sum which it has recognized itself as due him.

In the course of our discussions relative to this claim Doctor Paúl declared to me that he would have been disposed to accord an indemnity equal to the sum included in the liquidation of 1890 if the interested party had filed a new claim bearing upon the refusal of the Government to deliver the document which was demanded of it.

I replied that this was a simple question of form, that the exposé made in the letters of M. Massiani of his numerous proceedings take the place of the formal claim, and that one could not, in order to reject his proven claim, base his action upon the moderation the claimant had displayed in not asking, besides the sum due, a special indemnity for the veritable denial of justice which this refusal in question constituted. In according to the heirs of Massiani only 270,813.56 bolivars of the 692,740.48 bolivars demanded, I have sought to restore them possession of that which is incontestably due them. I have laid aside all the demands which, not being, perhaps, without some foundation, are, however, not established by sufficient proofs.

We ought to consider that, according to the terms of the protocol, this indemnity must be paid in bonds of diplomatic debt and not in gold. From the fact of this concession, graciously granted to the Venezuelan Government by the French Government, to allow it to settle its debts with more facility the amount of the indemnity finds itself in reality reduced.

At this time the true value of these bonds is half their nominal value.

The payment of the Massiani heirs of the indemnity of 270,813.56 bolivars would then permit the Venezuelan Government to free itself by 125,000 bolivars of a debt amounting in reality to 270,813.56 bolivars.

MARCH 12, 1904.

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ADDITIONAL OPINION OF THE VENEZUELAN COMMISSIONER

From the extract of the oral proceedings at the sitting held in Caracas on

August 28, 1903, when the commissioners for France and Venezuela heard the claim entered by Felipe A. Massiani for the sum of 692,740.80 bolivars. it appears that the French commissioner held that the sum of 270,813.56 bolivars, representing the principal, should be awarded without interest, because of the negligence for many years shown by the claimants in defense of their rights. The same commissioner also rejected other specifications contained in the claim, as he did not consider them sufficiently established. The undersigned, as the commissioner for Venezuela, then and there rejected the claim in its entirety, basing my contention as shown in the opinion which, translated into English, I submit herewith, in these three main points, to wit:

First. Incapacity for want of proper jurisdiction of this arbitration commission to hear the claim in question, because Felipe A. Massiani and the rest of the claimants represented by him are Venezuelans, having been born within Venezuelan territory.

Second. Because there exists a condition of *res judicata* as regards the object of the claim in that portion dealing with the capital of 270,813.56 bolivars as submitted by the French commissioner; and

Third. Because the document produced by Felipe A. Massiani to prove the existence of the debt lacks sufficient force to establish beyond dispute the validity of the claim, such document being insufficient to overrule the award of the French-Venezuelan mixed commission of 1888-1890, decreed in the matter of the claim entered before said commission by the father of Felipe A. Massiani, demanding the same amount.

The Venezuelan citizenship by birth of the claimants, Carmen Silva de Massiani, the widow of Tomás Massiani; Felipe A. Massiani, Ascención Massiani de Phelan, Nuncia Massiani de Orsini, and Luis A. Massiani, children of Tomás Massiani; and the minor children of Isabel Paran de Massiani, Antonio José, Tomás María, Mercedes, Luis Enrique, Carmen de Lourdes, and Gloria, born during her marriage to Antonio Massiani, deceased, the son of Tomás Massiani, such minors being the grandsons of the latter, is fully established in this case and is not a point open to discussion. All of them, during a succession of years embracing three generations, have not only had one common native land, but one common city of birth, Carúpano, formerly a fishermen's town, where Tomás Massiani met and married, in 1858, Carmen Silva. The domicile of the widow has always continued to be the same as that of her forefathers and that of all her children and grandchildren. From the moment of her widowhood she recovered her Venezuelan nationality, according to the provisions of article 19, section 2, Title I, Book I of the civil code of Venezuela,<sup>1</sup> in force at the time of the death of Tomás Massiani, which took place in Carúpano on October 9, 1901. Her daughters, Ascención Massiani de Phelan and Nuncia Massiani de Orsini, do not appear to have lost their original nationality, as the foreign nationality of their respective husbands has not been established.

It is a generally-established principle that the individual status is governed by the laws of the country of which a man or woman is a citizen or subject, and the nationality in the case of the widow and children of Tomás Massiani as regards Venezuela is fixed by birth or *lex loci*. The conflict between French legislation which maintains the principle of descent, or *lex sanguinis*, and the Venezuelan laws, which support the principle of the birthplace, has already been the subject of learned discussions by mixed tribunals, when it has been

<sup>1</sup> Art. 19. La venezolana que se casare con un extranjero se reputará como extranjera respecto de los derechos propios de los venezolanos, siempre que por el hecho del matrimonio adquiera la nacionalidad del marido y mientras permanezca casada.

invariably decided that the conflict is controlled by the law of domicile, and in conjunction with this ruling the no less weighty doctrine that in such controversies the principle that in the event of double citizenship, no country can claim for a person having the nationality of the respondent country, but it may claim against all other countries.

Bluntschli (International Law, section 374) states the following:

Certain persons or families may in rare instances be under the jurisdiction of two or even a larger number of different states. In case of conflict the preference will be given to the state in which the individual or family in question have their domicile; their rights in the state where they had no residence will be considered suspended.<sup>1</sup>

The same opinion is held by Twiss, "Law of Nations," pages 231-232.

Moore, Int. Arbit., vol. 3, page 2454, in the cases of Lucien Lavigne, No. 11, and Felix Bister, No. 20; decision of Arbitrators, Spanish Commission (1871), April 27, 1878, says:

The act of Congress of February 10, 1855 (10 U. S. Stat. L., 604), which provides that persons heretofore born, or hereafter to be born, out of the limits and jurisdiction of the United States, whose fathers were or shall be at the time of their birth citizens of the United States, shall be deemed and considered and are hereby declared to be citizens of the United States, can not operate so as to interfere with the allegiance which such children may owe to the country of their birth while they continue within its territory.

Supposing, finally, that one individual united in his person several nationalities, it would be necessary to apply the law *best agreeing with his actual position*, otherwise the question would be insoluble. (Heffter, Paris, 1866, p. 74.)<sup>2</sup>

It was under circumstances similar to those of the present claimants that the mixed American and Venezuelan commission, acting under the protocol of December 5, 1885, settled the question of double nationality in the case of Narcissa de Hammer and Amelia de Brissot, both born in Venezuela, both widows of United States citizens, and both having resided in Venezuela during their married lives, both having had children born in the same country, both claiming in behalf of their respective children, and both having continued to reside in Venezuela after the death of their respective husbands. The unanimous decision of the commission was that they had no jurisdiction to hear and decide the claim. (See Moore, Int. Arbit., vol. 3, pp. 2456-2461.)

Many other analogous cases could be cited to corroborate the principle involved in this question of jurisdiction, but they are well known to the honorable umpire, who has quoted them in enlightened awards that in his capacity of umpire he had occasion to render in the claims of Mathison against the Venezuelan Government before the British-Venezuelan commission, created by the protocol of Washington on February 13, 1903, and in his award in the case of Stevenson against that Government before the same commission. (Venezuelan Arbitrations of 1903, Ralston's Report, pp. 433-438 and 442-455.) The Hon. Jackson H. Ralston, umpire in the Italian-Venezuelan Commission

<sup>1</sup> Certaines personnes ou familles peuvent exceptionnellement être ressortissantes de deux états différents ou même d'un plus grand nombre d'états.

En cas de conflit, la préférence sera accordée à l'état dans lequel la personne ou la famille en question ont leur domicile; leurs droits dans les états où elles ne résident pas seront considérés comme suspendus.

<sup>2</sup> Supposé enfin qu'un individu réunit en sa personne plusieurs nationalités distinctes, il faudrait appliquer les lois qui s'accorderaient le mieux avec sa position actuelle; autrement la question serait insoluble.

under the Washington protocol of February 13, 1903, rendered similar decisions in the claims of Miliani, Brignone, and Poggioli. (Ralston's Report, pp. 715-720, 759-762, 866.)

The learned commissioner for France makes an issue of the French nationality of Tomás Massiani, who was the husband of Carmen Silva de Massiani and the father of Felipe A. Massiani and his brothers and sisters, to maintain that the claim entered by the latter before this commission originated during the life of their father; that the injured rights are those of a French citizen, and the mixed commission created by the Paris protocol dealing with the claims for indemnification entered by French citizens "is qualified to hear the present claim without *taking into consideration the citizenship of the heirs of Tomás Massiani.*" Such opinion can not be maintained in the presence of the strict terms of the Paris protocol, which vest this commission with but limited authority to investigate and decide the indemnification claims *entered by Frenchmen.* When the terms of a convention have been clearly and precisely stated, there is no room for interpretation, but they must be applied with strict adherence to the meaning of the words. The respective article of the protocol states "claims for indemnification entered by Frenchmen." Entered before whom? Before the commission. Entered by whom? By Frenchmen, and under no condition by the heirs of French citizens, no matter what the nationality of such heirs may be. Nor, how could it be possible that because there exists a right which has passed to a Venezuelan citizen or an English or Chinese subject by descent from a French citizen, the country of which the deceased was a citizen, should arrogate to itself the authority to enter an action as a claimant against Venezuela, if the claimant is a Venezuelan, or to invoke the protecting action of England or China in case the owners of the credit or of the injured right be an English or Chinese subject? Such anomalies can not exist within the precedents and principles of international law. It is indispensable that the claim in its origin should have belonged to a French citizen; and, furthermore, that it has continued to be the property of a French citizen until the very moment in which by virtue of a convention entered into by the two countries such *claim is entered before the proper commission* to be investigated and decided upon. Countless decisions of international commissions confirm this as the only possible rule to maintain the jurisdiction of such courts within the limits which their own nature and the ends to be served by them mark as indispensable for the performance of their legal functions.

The right of France to intervene on behalf of a French citizen, in case Tomás Massiani should have entered before his death a claim against the Venezuelan Government, would have ceased to exist on the day the claimant died, if he had not left either ascendants, descendants, or collateral heirs, or if he had not been married. It would also have ceased, if his widow or the ascendant or descendant heirs should have deprived the country of the husband or father of the right to intervene by acts of their own volition or because they lack the personal status indispensable to appear before this commission and be awarded indemnities which the commission can not grant to other than such persons as enjoy solely French nationality established beyond dispute.

The commissioner for Venezuela, in support of this right application of Article I of the Paris protocol, adduces the following authorities:

Sir Edward Thornton, umpire in the case of M. J. de Lizardi against Mexico, entered by his niece María de Lizardi del Valle, wife of Pedro del Valle, makes the following statement:

As, therefore, Mr. Lizardi's niece is not a citizen of the United States, and as she would be the beneficiary of whatever award the commission might make, the umpire is decidedly of opinion that the case is not within the jurisdiction of the

commission. Even if the uncle of Mr. Lizardi had been a citizen of the United States, which the umpire does not admit, whatever may have been the merits of the case, jurisdiction of the commission would have ceased on the death of Mr. Lizardi. (Moore's Int. Arbit. vol. 3, p. 2483.)

In the claim of Oscar Chopin against the United States,<sup>1</sup> under the convention of January 5, 1870, entered in his own behalf and the name of three heirs to Jean Baptiste Chopin, a French citizen, resident of Louisiana, who died in 1870, leaving three other heirs, all born in the United States, as a portion of his estate, the claim in question, the counsel for France withdrew that portion of the claim representing the share of one of the four heirs of Jean Baptiste Chopin on the grounds that such heir had married a citizen of the United States, thus clearly recognizing the principle that the right to an indemnification is governed by the legal and individual interest of the beneficiary and not by the original wrong or the damages sustained by the French nationality.

In the case of José Maria Jarrero under the resolution of Congress March 3, 1849, for the settlement of the claims of the United States against Mexico, the original claim was in favor of a citizen of the United States, but before the conclusion with Mexico of the treaty which created the commission such claim passed to a Mexican citizen. The commission disallowed the claim and made the following statement:

It matters not that the claim was American in its origin. It had ceased to be American at the date of the treaty, and the holder of it could not invoke the interposition of our Government for his protection. (Moore, Int. Arbit. vol. 3, p. 2325.)

Particular mention should be made of the excerpts found in Moore's International Arbitration, vol. 3, page 2388 of the "notes" published by one of the members of the commission created by the convention between the United States and France July 4, 1831, showing that this matter was considered by said commission.

It was of course indispensable to the validity of a reclamation before the commissioners that it should be altogether American. This character was held by them to belong only to cases where the individual in whose right the claim was preferred had been an American citizen at the time of the wrongful act, and entitled as such to invoke the protection of the United States for the property which was the subject of the wrong and where the claim *up to the date of the convention* had at all times belonged to American citizens.

Again —

It was necessary for the claimant to show not only that his property was American when the claim originated, but that the *ownership* of the claim was still American when the convention *went into effect*. \* \* \* Nor could a claim that had lost its American character ever resume it if it had heretofore *passed into the possession* of a foreigner *or of one otherwise incapacitated* to claim before this commission.

The umpire above mentioned, Sir Edward Thornton, in the case of Herman F. Wulff against Mexico (Moore, pp. 1353-1354, note), decided:

The umpire can not acquiesce in the arguments put forward by the counsel for the claimant, *whoever that claimant may be*. He is of opinion that not only must it be proved that the person to whom the injury was done was a citizen of the United States, but also that *the direct recipients* of the award are citizens of the United States, *whether these beneficiaries be heirs or, in failure of them, creditors*.

<sup>1</sup> Moore, Int. Arb., p. 2506; page 83, Boutwell's report, House Ex. Doc. No. 235, Forty-eighth Congress, second session.

In the case of Silvio and Americo Poggioli, a native of Italy and an Italian subject, before the Italian-Venezuelan commission under the protocol of February 13, 1903, the umpire, the Hon. Jackson H. Ralston, decided in the matter of the claim of Americo Poggioli, who died before the convention took place, as follows:

However this may be, the claim<sup>\*</sup> of Americo Poggioli died with him, so far as this commission is concerned, as his only heirs consist of his widow and children, and all of whom are Venezuelans by birth. The claim of his heirs is therefore Venezuelan, under the rules heretofore adopted by the umpire, particularly in the Brignone and Miliani cases. (Venezuelan Arbitrations of 1903, Ralston's Report, p. 866.)

The decision quoted by my learned colleague in his brief, rendered by Mr. Filtz, umpire in the French-Venezuelan mixed commission, which met in Caracas under the Washington protocol of February, 1903, establishing that —

the condition of French citizenship of Tomás Massiani had not been disputed; that the claim in reference had been entered by him and not by his heirs, and that there was no need to examine whether said heirs, who, in effect, have a double citizenship, have shown or not during their life their preference for one or the other, and that therefore he adjudged the claim to belong to the class under the Washington protocol and accordingly awarded Tomás Massiani and sons an indemnification of 19,900 bolivars —

is not a precedent to be invoked. Such a decision is exclusively based upon the fact that the claim was presented to the minister of France in Caracas by Tomás Massiani, father himself, and such is not the case with the present claim entered before this commission by the widow and children of Tomás Massiani. On the other hand, the awards of Mr. Filtz, as umpire in the French-Venezuelan Commission, be it said without the desire to cast the slightest reflection upon his integrity, are noticeable because they are based solely on his own appreciation of the facts, without expounding any doctrine whatever, without reasoning the conclusions, which in the majority of cases are contrary to the rules and precedents established as fundamental principles of international law by the most eminent authors, expounders, and authorities on the subject having a universal reputation. Such decisions lack force as compared with the opinions quoted from among many others no less weighty that could be cited.

Tomás Massiani died in the city of Carúpano during the month of October, 1901, as shown by the death certificate in this case, before the conclusion of the Paris protocol of February 19, 1902, creating this commission, and without having entered before any representative of France, nor later before the mixed commission of 1888-1890, any claim whatever that may be construed to be the same entered before this commission by his widow and children in their capacity of heirs.

The present claim, as regards that portion of the same for 270,813.56 bolivars, which has been admitted by the French commissioner, originated, and, it may be said, was born in Felipe A. Massiani, in his own behalf, and in behalf of his mother, Carmen Silva de Massiani, and his brothers and sisters, on May 27, 1903, date of the document or certification issued by Mr. Manuel Fombona Palacio, chief of the bureau of foreign public law (*director de derecho público exterior*) in the ministry of foreign relations of Venezuela. The claimants base their pretensions in such documents, and as Felipe Massiani states in the communication to the French minister in Caracas, dated on August 4, 1903, that the mixed commission of 1888-1890 not having passed judgment upon his father's claim, because of the facts and causes stated, it becomes necessary to conclude that those same facts are at present the object of a new claim, and ends by

asking the French minister to transmit to the commissioners the subjoined document, which is sufficient to establish the proof of the grounds for *the claim he had entered before the commission in behalf of his mother, his brothers and sisters, and in his own behalf.*

The foregoing shows that neither as heirs of Tomás Massiani, because he was a French citizen, his widow and children being of Venezuelan nationality, in the case, which has never nor could ever have existed, of Tomás Massiani having presented such claim, because he died before the date of the Paris protocol, nor entering the claim on their own behalf, as the case is, the widow and children of Tomás Massiani are not qualified to appear before this commission as claimants against the Venezuelan Government, which is that of their own nation and to which they owe allegiance in conformity with the law. The commission therefore has no jurisdiction to hear the claim for indemnification that such Venezuelan citizens have entered before the commission in their own name and in behalf of the estate, based upon certain vested rights originating in the deceased.

Now the commissioner for Venezuela will discuss the second point upon which he has based his opinion, i. e., that because there exists a condition of *res judicata* as regards the object of the claim in that portion dealing with the capital of 270,813.56 bolivars, as admitted by the French commissioner, such portion of the claim must also be rejected. As it has been shown by the opinion rendered at the session of August 28, 1903, Felipe A. Massiani, in his own behalf and as the representative of his mother and children, pretends that this commission should examine some new documentary evidence he has obtained after his father's death to the end of establishing that the Government of Venezuela owed his predecessor in interest a certain sum, object of the claim entered before the French-Venezuelan Commission which met in Caracas in 1888-1890 in compliance with the convention entered into between Venezuela and France in November, 1885, said commission having disallowed the claim because —

the said claim, amounting to 301,784.96 bolivars, was disallowed because the interested party did not produce a sufficient document on which to base his pretention.

I submit herewith copy, both in Spanish and in English, of the minutes of the oral proceedings of said mixed commission, had on July 7, 1890, when all the claims of Mr. Tomás Massiani were examined, the commissioners dismissing one for 301,784.96 bolivars for the reasons before stated. The disallowance, as shown by the arguments in support of such ruling, was not based upon want of jurisdiction, nor on any other grounds which may give rise to the contention that the claim had not been examined on its merits. It was based upon no other grounds than the failure of the claimant to establish the pretended right or indebtedness, as the document submitted did not have sufficient weight to operate against the respondent party. Such decision constitutes the *res judicata*, which all the positive as well as the common law of nations hold to have an irresistible force, as shown by the principle *res judicata pro veritate habetur*.

The internal legislation of Venezuela affords a remedy against any judgment passed by the courts of the country to obtain in specified cases the reversal of such judgment, provided the remedial action is entered within three months after notice has been had of the sentence making the award, when the grounds for reversal are based upon the fact that the other party withholds or retains in his possession a *decisive document* favorable to the action or exception taken by the plaintiff or based upon an act of the opposing party which prevented that such *decisive document* was produced in due and proper time. In such cases, upon introducing the allegation of the retention or act on the part of the other

party preventing the production of the document. if such decisive document is not produced, a statement must be made of its contents and of the name of the person who should deliver up the same. (All codes of civil procedure of Venezuela have uniformly had the same provisions.)

The remedy against the judgment of a court having local jurisdiction only can not find application when dealing with an award made by an international court specially constituted by the agreement of the high contracting parties to settle in a definite manner the claims of the subjects of one country against another, claims that have already been prepared, with the proper documents, by the interested parties, and which, upon being filed before the arbitration commission, must be submitted with all the necessary evidence, or produce such evidence during the proceedings or hearings of the claim, and to this end such courts appoint certain fixed dates within which such testimony or evidence must be duly submitted.

Article 3 of the convention between France and Venezuela of November 26, 1885, under whose provisions the mixed commission of 1888-1890, which met in Caracas, disallowed the claim of Tomás Massiani, reads as follows:

Claims subsequent to 1867-68 will be definitely settled by a mixed commission consisting of one member for each part.

As soon as the work of the commission ends, and within three months following its adjournment, the Government of Venezuela shall issue a sufficient number of new bonds to equal the amount of the indemnities awarded, drawing the same amount of interest (3 per cent) from date of issue. Said bonds shall be redeemed, when the holders desire it, at the same time as the original bonds, and in all cases in accordance with the prescriptions of Article II of this convention.

It appears from even a cursory glance at the foregoing article that the intention of the high contracting parties was that the claims subsequent to 1867-68 *should be definitely settled* by a mixed commission, and the bond issue to be made by the Government of Venezuela to meet such obligation was limited to the amount that said commission should award the claimants.

It is a well-established principle, admitted in all legislation, and peculiarly and more forcibly applicable to the awards of arbitration courts created solely for the purpose of deciding *definitely* the settlement of pending questions or claims, that the authority of the *res judicata* applies in the first instance *to that which is the object of the claim*, when a judgment has been passed upon the essential points of such claim.

It is therefore evident that this commission can not assume authority to review the award or sentence passed by the mixed commission of 1888-1890 upon the claims of Tomás Massiani, wherein the claim against the Venezuelan Government for 301,784.96 bolivars was rejected because the liability had not been sufficiently established, and that same claim is the object of the present action of the heirs of Tomás Massiani. Under such circumstances the claim must be entirely disallowed.

In regard to the third point in my opinion, that the document produced by Felipe A. Massiani is not a *decisive document* to establish the existence of the debt or liability in question, it suffices to compare the two balance sheets produced, the one essentially different from the other, and to take into consideration that the certificate of the auditor of the central bureau of accounts (*Contador de la Sala de Centralización de Cuentas*) at the bottom of the balance from the books in his archives can only be construed as an evidence that said books showed that on the 23d of June, 1869, the date of the last entry in the account current, there was a credit in favor of Tomás Massiani and against the Venezuelan Government for the sum of 270,813.56 bolivars. The certificate in question does not throw any light on further transactions on the same account current from

June 23, 1869, until August 12, 1890, date of the certificate, or a lapse of time covering a period of over twenty-one years. It is not possible to admit that during that period the account was inactive, or that Tomás Massiani did not take any steps to collect the balance due him, or that he did not get any voucher to safeguard his rights. Notice should be taken of the fact that such period of twenty-one years — which in all legislations is sufficient to make null by prescription any personal liability or debt, and which is more than sufficient to prescribe a debt growing out of a balance in a current account — lapsed before the meeting at Caracas of the mixed commission of 1888-1890, and that Felipe Massiani was unable to produce before the commission sufficient proof to establish his credit, which should have appeared from his own books and papers. If such omissions are to be ascribed to negligence, as stated by the French commissioner, it is *culpable negligence* in the case of such an important amount, subject, according to the codes of laws of all countries, to suffer the consequences of the abandonment of property or private rights, and such consequences are to be declared by the courts to have lapsed or to be nonexistent. Such was the case in the matter of the claim of Tomás Massiani before the mixed commission of 1888-1890, which released the Venezuelan Government from the payment of the amount claimed and definitely settled all further controversy in the matter.

Before coming to a close I wish to rectify the statement made by my learned colleague in his opinion, that during our discussion I had stated that I should have been disposed to grant an indemnification equal to the amount shown by the balance sheet of 1890, if the parties concerned had entered a new claim based on the refusal of the Government to deliver the document which had been asked for. There exists, no doubt, a misunderstanding of what I may have said to my learned colleague in reference to the faulty presentation of the claim, such as it had been made, as I must have limited myself to saying that a new claim based upon the fact of the refusal of the Venezuelan Government to deliver a *decisive document*, which, it could be established, was *deliberately withheld* from a creditor, might have been admissible on the part of the Massiani heirs, putting aside the question of nationality, and in that case such claim might have been for an indemnification for damages, as in such form it did not conflict with the validity of the sentence of the mixed commission of 1888-1890, which is beyond our commission. Between such a statement made during our discussion and to admit as established the allegations of the claimants and to be willing to allow an indemnity there is a remarkable difference.

I therefore maintain in all its points my opinion that this commission has no jurisdiction to hear the claim of Felipe A. Massiani entered in his own behalf and as the representative of his brothers and sisters, because they are all Venezuelan citizens, and, in the second place, because there is a condition of *res judicata* as regards the object of the claim in that portion admitted by the French commissioner, and that the document on which the claim is based lacks the necessary force to establish a *decisive* proof, and for this reason it must be rejected on its merits.

NORTHFIELD, VT., February 9, 1905.

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ADDITIONAL OPINION OF THE FRENCH COMMISSIONER

After having read the additional memoir presented by my honorable colleague I can only maintain the conclusions of the prior memoir. To reply, it would be necessary for me to reproduce the explanation which I have already given superabundantly. I will confine myself, then, to a few observations.

This commission seems to me competent to pronounce upon the Massiani affair for the very reason of the French nationality of all the members of the

Massiani family. All the Massianis are incontestably French; it would be then contrary to the protocol of February 19, 1902, which speaks of all the claims presented by Frenchmen, to refuse them the benefit of this exceptional jurisdiction opened by the very protocol to all those who are French, without there being need of examining if they enjoyed concurrently another nationality.

My colleague tries to combat my opinion, based upon the strict text of the protocol by a great number of citations of authors and of precedents. I will content myself by remarking to the umpire that the precedents of international law have no value except in so far as has been demonstrated by a parallel exposé of the facts that the cases are identical. I have, then, judged it useless to refer to treatises of international law with a view of looking for precedents favorable to my argument, which I should have been able without doubt to find in as large numbers as has my colleague. I have considered it sufficient to produce one precedent, the value of which is singular and incomparable, since the persons considered are exactly the same, and I call the attention of the honorable Mr. Plumley to the grave inconveniences which would result from varying the jurisprudence in like conditions. There would be reason to deprive the arbitral decisions, which one might tax with a lack of seriousness and inconsistency, of all their authority. This precedent has consequently disturbed my honorable colleague, since he has thought he ought to declare, to lessen its value, that the awards rendered by Mr. Filtz had not the same value as the awards by the other arbitrators. I think I ought to protest against this allegation. Mr. Filtz, a magistrate who has grown gray in the service, has shown himself a perfect arbitrator, having, as he claims, for the only rules of conduct good sense, equity, and the protocol.

The awards rendered by him are unattackable and have the same authority as every other arbitral sentence; they have a greater authority, perhaps, here since they have been rendered in favor of the same persons with whom we are concerned. But since Doctor Paúl attaches a particular importance to precedents and thinks that one just cause does not defend itself sufficiently by its exposé alone, I present another, whose authority I think he will not contest, since it has been established by himself. In the course of the sitting of August 6, 1903, of the commission of which we both had the honor to join, and of which the present commission is but the natural conclusion, we rendered the following sentence:

There is accorded Mr. Charles Daniel Piton, and to the Misses Emilie Alexandrine and Isabelle Eugénie Piton, the sum of 228,714.64 bolivars.

But I will remark to the umpire that Mr. and Mrs. Piton claimed this sum on the part of their maternal grandfather because of a contract of the date of July 28, 1856, and a ministerial decision of January 7, 1868. This grandfather, Mr. Lemoine, a Frenchman by birth, had been dead for many years when his grandchildren, in 1903, presented their claim as heirs, but these three grandchildren — all three born in Venezuela of a Venezuelan mother — like the Massiani heirs, were all three Venezuelans by the Venezuelan law. Why then refuse to the Massianis that which has been accorded to the Pitons?

The umpire will kindly note, also, that not only from the point of view of nationality, but also from the point of view of the date, the Piton claim is like the Massiani claim. So far as concerns the plea of *res judicata* raised by my honorable colleague, I am content to recall to the umpire that the arbitrators of 1890 were not able to take it into consideration, since the interested parties were unable to obtain until thirteen years afterward, by surprise, without doubt, the document which permitted them to make their claim of value. They had no appeal from the mixed commission of 1890 to the Venezuelan

tribunals, which would not have had jurisdiction, but to this commission, appointed to examine all the claims of Frenchmen, of whatever nature they might be. It is not possible to forget that the Venezuelan Government had been put upon notice by the interested parties to submit at the right time the said document and that it has not done so. Is not this point a denial of justice of the first class?

Finally, I consider that it is superfluous to discuss the value of the document which constitutes the acknowledgment of the debt. It is sufficient to read it to be convinced.

NORTHFIELD, *February 11, 1905.*

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OPINION OF THE UMPIRE

Thomas Massiani and Benito Massiani, both Frenchmen, married, and residing in Carúpano, State of Sucre, in the United States of Venezuela, formed a copartnership in trade at said Carúpano under the name and style of Massiani Brothers, on the 14th day of June, 1864, which continued until its dissolution by mutual consent on the 17th of May, 1868, which dissolution of partnership was by lawful procedure. Thomas Massiani remained in charge of the business, assuming all partnership liabilities and enjoying all partnership assets, agreeing to pay to Benito Massiani for his share of the company assets 82,000 pesos, to be paid in the city of Paris within the term of five years in five annual equal parts, with interest annually at 5 per cent.

Prior to the year 1870 Benito Massiani died. His widow and children, resident in Paris, received of Thomas Massiani the sum of 230,000 francs, being the sum due for the remaining interest of the estate of the deceased Benito in the aforesaid assets. This payment is shown by a receipt signed by the widow, Mercedes Cova, at Paris, in France, on September 21, 1871; also signed by Emilio Massiani, son of Benito, who had attained his majority.

During the years 1863 to 1869, both inclusive, and as well in the years 1870, 1871, 1872, 1879, 1885, 1892, and 1899, the Government of Venezuela enjoyed loans and payments on requisition or otherwise from the said Massiani Brothers, the said Thomas Massiani, and the Thomas Massiani Company, which latter existed part of the period covered by the years aforesaid.

The principal sum in issue, and in fact the only sum, by the holding of the honorable commissioner for France, now in issue, accrued between the years 1863 and 1869, both inclusive, and amounted to the sum of 270,813.56 bolivars, this sum being for supplies and cash furnished to the maritime custom-house of Carúpano and to certain chiefs of the national forces, both having authority to pledge the credit of the Government.

Doctor Urbaneja, attorney for Thomas Massiani, in 1890, July 19, stated to the honorable mixed commission of France and Venezuela, then sitting in Caracas, that the sum due to Thomas Massiani at that time was 301,784.96 bolivars.

The sum presented, in fact, to the mixed commission of 1888-1890 was 351,449.80 bolivars, and on the 7th of July, 1890, the said commission awarded to Thomas Massiani 49,666.84 bolivars, and at the same sitting the said commission disallowed the claim for 301,784.96 bolivars for the reason that the claimant had not produced a sufficient document in support of his claim. The sum allowed by the commission was one recognized as existing by the Government of Venezuela, and there was then pending with the minister of hacienda that portion of the claim which was disallowed by that commission. The minister of hacienda was asked for the dossier containing the necessary proofs and for his authentication thereof, but on a too casual examination, he had

reported to that commission that there were no such papers in his office. It was on receiving this information that the commission dismissed the case. Doctor Urbaneja, attorney aforesaid, learning of this statement of the minister of hacienda and of the action of the commission on the claim, asked the commission to delay their final action on the case and repaired directly to the office of the hacienda and insisted upon further examination, which was had, and in the archives the accounts were found. Doctor Urbaneja further insisted that the minister of hacienda correct his erroneous statement to the commission and that he also send the accounts, duly liquidated, to the minister of foreign affairs as the competent medium for their transmission to the commission. Doctor Urbaneja notified the commission of these supplementary facts and requested it to ask the señor minister for foreign affairs to produce the papers then in his possession. He urged a reconsideration by the commission of the case and gave cogent reasons why it should thus act. This request to reopen the case and receive this new proof was made July 17, 1890.

The important papers, properly certified to, were sent by the minister of hacienda to the minister of foreign affairs, but did not leave the foreign office, were not presented or considered by the mixed commission, and there was no reconsideration of the case, and the commission dissolved without changing its first action. During all of the time of its sitting the accounts required were in the archives of the minister of hacienda and under the control of the ministry of Venezuela, and there was no reason why they were not produced, except that the examination made by the minister had been too casual to develop the accounts as being in the archives.

These papers were not, in fact, passed by the minister of hacienda to the foreign office until August 23, 1890.

In accordance with the arrangement with Massiani Brothers and Thomas Massiani, made by the maritime custom-house of Carúpano, these credits were to be reduced and canceled by an allowance on the import and export duties otherwise payable to the custom-house by Massiani Brothers and Thomas Massiani, and this plan of payment existed until October 22, 1872, when the minister of hacienda passed a resolution suspending the payment of all obligations based upon the custom-houses of the east, including the custom-house of Carúpano. Up to that date Massiani had been receiving pay in small amounts from time to time.

When the society of Massiani & Co. was organized at Carúpano the umpire has not learned, but on May 8, 1893, this company, composed of Thomas Massiani and his three sons, Luis Antonio, Antonio José, and Felipe Antonio, was dissolved by mutual consent under lawful proceedings had, and the business continued under the mercantile name of Thomas Massiani.

On October 9, 1901, the said Thomas Massiani deceased at Carúpano, leaving a widow, Carmen de Silva, the two sons, Felipe A. and Luis A., his two married daughters, Ascensión N. Phelan and Nuncia de Orsini, and the widow and children of Antonio José. Antonio José died March 12, 1900.

On the 30th day of May, 1903, Luis Antonio, in his own right, Augustine Orsini, in representation of his wife, Señora Nuncia Massiani, Isabel Paván de Massiani, widow of Antonio José, proceeding in representation of her minor children, Thomas, María, Mercedes, Antonio José, Gloria Margarita, Luis Enrique, and Carmen de Lourdes, acting with Señora Carmen de Silva Massiani, widow of the late Thomas Massiani, and Felipe Antonio Massiani, gave full power of attorney to Dr. Carlos F. Grisanti against the respondent Government in the matter of the claim. The widow of Thomas, Carmen de Silva Massiani, at this time resided in Port of Spain, Trinidad.

The amount claimed of the respondent Government was 301,784.96 bolivars,

and to this it is claimed should be added 39,952.40 bolivars, also 35,786 bolivars, made up of 3,200 bolivars, for cash and supplies furnished in 1885 to the titular Government, 14,136 bolivars to the successful Legalista revolution of 1892, and 18,400 bolivars furnished in 1899 to the successful Restaurador revolution.

On May 27, 1903, the certified copy of liquidation prayed for by Thomas Massiani May 8, 1890, and passed into the hands of the minister of foreign affairs by the minister of hacienda on the 23d of August, 1890, was furnished to Felipe A. Massiani and by him was presented to the commission sitting in Caracas in 1903.

But there were certain errors in the dossier as then presented to Felipe, as he claimed, and he presented a corrected copy to the citizen minister of hacienda on the 30th day of May, 1903, calling attention to the errors which were marked in red ink on the copy accompanying his communication, and he prayed that a certified copy, corrected in accordance with his suggestions, be returned to him. This request was referred by the minister of hacienda to the office of foreign affairs for the rectification desired.

It is claimed by Felipe Massiani, and is not questioned, that Thomas Massiani and his wife were married without any special agreement having been made as to the management of their property, and that in consequence there existed between them a conjugal society which makes common by halves to each the gains or benefits obtained during marriage. He refers for his authority to article 1369<sup>1</sup> of the civil code of Venezuela, in force May 18, 1903, which is said to correspond with 1393 of the French civil code. The claim before the present commission is property gains and is controlled by that law. Under these circumstances the widow is entitled by the Venezuelan law to six-twelfths of Thomas Massiani's estate as her half thereof and to one-sixth part of the remainder of his estate by inheritance, she taking equally with each of the five children. He refers to articles 717 and 718 of the Venezuelan code for his authority.

The marriage of Thomas Massiani and of Carmen de Silva occurred January 5, 1855, as is duly established by authenticated registration of the same.

By the duly authenticated registration of births at said Carúpano there were proven to be born to Thomas Massiani and Carmen de Silva as the fruit of such marriage Felipe Antonio in 1855; Ascensión del Carmen, 1859; Luis Antonio, 1866; María de La Mercedes in 1871, and of Antonio José there is no record proof. Antonio José Massiani and Isabel Paván were married April 23, 1883, and the birth and date of birth of each of their children named in the power of attorney to Doctor Grisanti are fully established by lawful evidence.

Señora Carmen de Silva, widow of Thomas Massiani, was of Venezuelan parentage, and up to the date of her marriage with Thomas she was a Venezuelan. They ever thereafter resided in Venezuela; their children were all born to them there and have continued to reside in Venezuela and were so residing at the time of the presentation of this claim to the mixed commission at Caracas in 1903.

It is asserted by Felipe that this claim against the respondent Government is a part of the patrimony of Thomas and that the same was transmitted at his death to his universal successors, his widow and children.

It is agreed that by the law of both countries her marriage with Thomas gave her French nationality, which continued until the death of her husband. At his death, by French law, the widow retained her French nationality, and

<sup>1</sup> Art. 1369. Entre marido y mujer, si no hubiere convención en contrario, existe la sociedad conyugal, cuyo efecto es hacer comunes de ambos por mitad las ganancias ó beneficios obtenidos durante el matrimonio, según lo establecido en el párrafo 3.º de esta sección.

by the law of Venezuela she was restored to her former estate as a Venezuelan.

The claimants insist that, upon the facts existing in this case, to deny them a right of recovery before this tribunal is equivalent to saying that the indebtedness of Venezuela to Thomas and his successors was extinguished by his death.

In presenting this claim to the legation of France, at Caracas, Doctor Grisanti makes the claim that the adjudication of the mixed commission in 1890, dismissing this claim, was passed on an error of fact, which error of fact arose through the statements of the respondent Government to the said commission, and through its retention of the accounts which it then disclaimed to possess. He cites article 695 of the Code of Civil Procedure No. 4.

The retention in possession of the opposing party of decisive documents in favor of the action or exception of the claimant, or act of the opposing party which has impeded the opportune presentation of such decisive document.<sup>1</sup>

This, as he claims, is cause for the invalidation of the judgment which follows such a situation.

The claim, 18,400 bolivars, furnished in 1899 has been presented before the mixed commission sitting at Caracas and established under the Washington protocol of February 27, 1903, and is no longer a fit subject for the consideration of this tribunal.

The sum of 14,136 bolivars paid on account of the Legalista revolution of 1892 was cared for by the round sum of 100,000,000 bolivars, which was accorded to the Government of France by Venezuela in bonds of diplomatic debts for the "insurrection events" of 1892, as it was provided might be done in article 1 of the Paris protocol of 1902.

The claim for 3,200 bolivars arising through requisition of the titular Government in 1885, and approved by certain generals having authority on June 26th of that year, was disallowed by the mutual agreement of the honorable commissioners at the sitting in Caracas for reasons to them sufficient and satisfactory.

This cause came before the honorable commissioners sitting at Caracas as a claim for 341,737.36 bolivars as the principal sum against the respondent Government and 351,003.12 bolivars as accrued interest on the same to June 30, 1903. For reasons which were satisfactory and controlling to the honorable commissioner for France he dismisses the claim for 30,971.31 bolivars, which the immediate representatives of the claimants insist were errors of omission and should have been added to the certified allowance by the Government of 270,813.65 bolivars, as he also dismisses the claim for the additional sum of 39,952.40 bolivars, which sum was not presented to the mixed commission of 1888-1890, although existing at that time and capable, as is insisted by the claimants, of being substantiated by receipts analogous to those passed upon by the Venezuelan Government; so by this holding of the honorable commissioner for France the claim is stripped of all accessories and stands at 270,813.65 bolivars, as acknowledged by the auditors of the Venezuelan treasury.

The honorable commissioner for France, governed by the reasons which he names, is of the opinion that there should be no allowance for interest on this sum, and that the only claim which he recognizes as a rightful demand upon Venezuela is the said sum of 270,813.65 bolivars, without interest.

The honorable commissioner for Venezuela rejects the claim in its entirety. (a) Because the claim is *res judicata*, having been refused for want of sufficient

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<sup>1</sup> 4a. Retención en poder de la parte contraria de documento decisivo en favor de la acción ó excepción del reclamante, ó acto de la parte contraria que pidió la presentación oportuna de tal documento decisivo.

proof to sustain it; that the claimant's position, holding that the decision of the said mixed commission ought to be invalidated because of the retention in its possession by the Venezuela Government of the dossier approved by its officers and through its statement to the honorable commissioners of 1890 that it held no such document, is not well taken and can not be sustained for reasons which are in part as follows: That the certified document produced is not a *decisive* document showing the real relation of Venezuela to the claimants, since it only purports to establish by the certificate of the general auditor's office that according to the books of the customhouse at Carúpano it appeared that on the 23d of June, 1869, there was a balance in favor of Thomas Massiani of the certain amount named; and that the production of this document before this commission is inefficient to overcome the decision of the mixed commission of 1890, when especially there are to be considered all of the presumptions which arise to meet the document, which are suggested somewhat in detail by the honorable commissioner for Venezuela; (b) That this commission has no jurisdiction over this claim, because neither of the successors of Thomas Massiani is French by Venezuelan law, and hence, since this commission was formed only to settle claims of Frenchmen, it has no jurisdiction of a claim which is solely for Venezuelans.

The honorable commissioner for France regards the position of *res judicata* as not well taken for the reasons stated by him in detail; and he considers the jurisdiction of this commission as unquestionable, holding that the widow of Thomas Massiani and his children and representatives being French, under French law, they are those for whom France intervened by the protocol of February 19, 1902. He regards the document in question as undeniably decisive and asserts that if payments had since been made it would have been very easy to prove it by books and papers. He considers that Thomas Massiani having birth in France of French parents always enjoyed incontestable and exclusive French nationality; that the claim in question had birth during his life, and it is consequently the right of a French citizen who has been injured in his property, and hence this commission, which is to consider the demands of indemnities by Frenchmen, is wholly competent to consider and determine it. He is of the opinion that the nationality of the heirs should be put out of the case, as is asserted by Mr. Filtz under the protocol of Washington.

The honorable commissioner for France is also of the opinion that, if the nationality of the heirs is to be considered, this commission is still competent. He reasons that the heirs enjoyed two nationalities — French by French law, Venezuelan by Venezuelan law — and that the protocol in providing for the consideration of demands for indemnities presented by Frenchmen was providing for claims presented by individuals to whom the French Government assured its protection because they were recognized by the French law as Frenchmen. It is his opinion that it is only necessary that the claimant is one whom the laws of France recognize as French, although at the same time the law of Venezuela makes the claimant a Venezuelan. He calls to his support in this opinion the peculiar wording of the Washington protocols of 1903, in regard to local legislation, and holds that the meaning and effect of the language of those protocols are to exclude from the consideration of the several tribunals constituted thereunder all recognition of Venezuelan law; and hence, what Venezuela recognizes in the matter of citizenship is not important to the determination of this question.

To the position of the honorable commissioner for Venezuela that one commission has not authority to revise the proceedings of another, he introduces the new fact, unknown to the arbitrators of 1890, which is the fact that in the archives of the Venezuelan ministry there was then an approved dossier fully

supporting the claim of Thomas Massiani, the existence of which the Venezuelan Government had denied, and upon which denial the commission had dismissed the claim. He also urges that this commission has especial power to examine anew the affair submitted to the mixed commission of 1888-1890, because the protocol gives it jurisdiction to pass upon all the claims of Frenchmen, and since the sentence anterior was caused by a reason entirely different from what in fact existed; and that in equity there being incontestable evidence that the credit in fact existed at the time of its rejection, which fact was retained from the consideration of the previous commission through the action or non-action of the Venezuelan Government, the heirs of Massiani should receive the sum which the Government of Venezuela has recognized to be due.

The honorable commissioners having disagreed as hereinbefore stated and having failed to reconcile their disagreements, they join to send the claim to the umpire for his determination and award.

An indebtedness of the respondent Government to the late Thomas Massiani in his lifetime is, without doubt, a part of the patrimony which descends to his widow and children to be distributed in accordance with the laws of Venezuela.

But the important question to be determined is, has this tribunal jurisdiction over this claim? Neither the widow nor the children are of French nationality as recognized by the laws of Venezuela. The widow was born in Venezuela, achieved French nationality by the laws of both countries when she married Thomas Massiani, but by the laws of Venezuela was restored to her quality of a Venezuelan citizen at his death. During their married life they remained in Venezuela; they were there domiciled when he died. It always has been her domicile. It is therefore her nationality, since such is the law of her domicile, which law prevails when there is a conflict as held by the umpire in the claim of Maninat heirs<sup>1</sup> before this same tribunal. The children of this marriage were all born in Venezuela. By the voluntary action of the father this was their birthplace. It has always been their domicile, first through the paternal selection and later through their own choice. Hence, governed by the laws of their domicile, they are Venezuelans.

Thomas Massiani deceased prior to the convention of February 19, 1902. Therefore he could not have been considered as a possible claimant by either of the high contracting parties at the time of that convention. His widow and children being Venezuelans in the contemplation of the respondent Government, their right to the intervention of France was not agreed to by Venezuela under the terms of the protocol as held by the umpire in the claim of the Maninat heirs. His reasons for his opinion in that regard and the authorities sustaining him in his reasoning and in his opinion having been therein stated and adduced, they need no further amplification here.

This case is on all fours with that of the estate of Stevenson, decided by the umpire in the British-Venezuelan mixed commission of 1903, and reported in Ralston and Doyle's Venezuelan Arbitrations of 1903, page 438. The reasons there given and the authorities there accumulated are directly in point in this case, and he respectfully refers the parties interested for further elucidation of these points to the opinion there found. His opinion then expressed is only confirmed and established by his subsequent study, and his reasons there given are to him as convincing and controlling now as then.

The indebtedness may indeed remain, but the form of action and the forum are changed. The forum to which they must now repair is the forum of the country Thomas Massiani chose for his domicile, for his marriage, and for the birthplace of his children; there death overtook him and his ashes are there.

<sup>1</sup> *Supra*, p. 55.

He voluntarily selected Venezuela as the country in which to make his fortune and to gain the properties for which the respondent Government is now the alleged lawful debtor to his estate. His life in that country was voluntary, free, a matter of choice. After weighing probabilities and anticipating results he remained. His children have attained full age and have also remained. The ties of race on the paternal side have been to them less strong than the ties which bound them to the country of their birth and the land of their maternal nationality. They have for their recourse the forum constituted for Venezuelans. They have all the rights, opportunities, and privileges common to their brethren of that nation. They easily could have been French had they preferred life in France to life in Venezuela. Having French paternity, and thereby having French nationality in France, they needed only to be domiciled therein to have a nationality which all the world must maintain to be French. For reasons dominant with them they have preferred to remain in Venezuela. Its laws and its courts are theirs. These they may invoke; with them they must be content.

The umpire recognizes the position of the honorable commissioner for France that the laws of Venezuela upon the question of nationality of its own inhabitants may be ignored and the laws of France be made paramount. He is also not unmindful of the reference made by the same honorable commissioner to the provisions of the protocols drawn up at Washington in 1903 in their allusion to the effect of local legislation. The definition of that particular provision in those protocols is not germane to any inquiry under the protocol of February 19, 1902, which has no such restrictive clause and which in no way and in no part suggests that each country is not entitled in every particular to equal place before the international tribunal thus constituted. The umpire has already held, in effect, in the *Maninat* case,<sup>1</sup> that to be sovereign and independent each country must be master of its internal policy and subject neither to advice nor control by any other country nor by all other countries in respect to such matters. France would not brook that Venezuela should name to her who are her citizens within her domain; she must be content to ascribe equal privilege of selection to her sister Republic, certainly while Venezuela in this regard has no peculiar or offensive laws, but rather has those which accord with the laws of nations in general.

A large number of questions naturally arising out of the facts which are grouped together in this case do not become important matters of consideration, since in the opinion of the umpire the claim does not come within the provisions of the protocol.

This claim is to be therefore entered dismissed for want of jurisdiction, but clearly and distinctly without prejudice to the rights of the claimants elsewhere, to whom is especially reserved every right which would have been theirs had this claim not been presented before this mixed commission.

NORTHFIELD. *July 31, 1905.*

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#### COMPANY GENERAL OF THE ORINOCO CASE<sup>2</sup>

If there were irregularities in the procedure of the respondent government in its suit for rescission in the matter of notice to the defendant company therein, these were all cured by the subsequent appearance of its attorney in said court and by its participation in the subsequent proceedings.

<sup>1</sup> *Supra*, p. 55.

<sup>2</sup> EXTRACT FROM THE MINUTES OF THE SESSION OF MAY 5, 1903

The examination of the claim of the General Company of the Orinoco was then entered upon.

If there were error in the manner of issuing and handing out the rogatory commissions called for by the claimant company, it was cured by the acceptance of those commissions by the attorney of the claimant company in the manner and form as issued and handed out without objection and by his proceeding to make use of them for the purposes for which they were issued. Failure to educe evidence by means of these commissions must be charged to the action or inaction of the company's attorney, and not to the high Federal Court of the government under all the circumstances detailed in this case.

If there were error in the action of the high Federal court in proceeding to final decree without serving special notice upon counsel for the defendant company therein and in proceeding to enter up such decree without notice in fact to said company or its attorney, it was cured by the neglect of the company to avail itself of its statutory remedies by petition for invalidation to the high Federal court. Failure to seek such invalidation through the proper statutory methods precludes the claimant government from asserting any denial of justice of such decree whereas if an invalidation had been sought, and it had been denied and the grounds therefor were clearly established, it might be

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Doctor Paúl read the memoir which he drew up after having gained a knowledge of the dossier. His conclusion is that the claim of the company is not well founded, and he rejects it absolutely.

M. de Peretti asks his colleague to let him take the memoir to study it before giving his opinion. Doctor Paúl agrees, and it is understood that the French arbitrator will give his opinion during the next meeting.

EXTRACT FROM THE MINUTES OF THE SESSION OF MAY 7, 1903

M. de Peretti returns to his colleague the memoir which Doctor Paúl kindly let him take at the last meeting. He declares that, after having read it with the interest which a remarkable argument demands, he persists in the opinion which he had formed in studying the dossier of the claim of the Company General of the Orinoco, namely, that there ought to be accorded to the latter an indemnity of 7,000,000 bolivars. He bases his judgment upon the fact that the Venezuelan Government has brought in its defense no document, no proof of a nature to weaken what is said by the company.

The amount claimed by the company amounted to 7,616,098.62 bolivars, of which 5,616,098.62 bolivars represent money expended and 2,000,000 bolivars benefits not realized.

The French arbitrator does not accord at all the second of these sums, and of the first he takes out 540,000 bolivars. The company claiming upon this capital an interest of 6 per cent, while the commission has decided that it would reckon interest at the rate of 3 per cent, it is to be remarked that the company having paid interest at 6 per cent to its lenders and holders of obligation, there is no reason for a reduction on the amount which it claims under this head. There remains, then, a sum of 5,076,098.62 bolivars, of which M. de Peretti demands the increase to the amount of 7,000,000 bolivars, that account may be taken, first, of the use of the interest from July 1, 1902, to the day of the award, and second, of the depreciation of bonds with which the payment of the indemnity is to be effected.

Doctor Paúl expresses to his colleague the desire that he present, as he himself has done, an exposition of arguments upon which he bases his judgment and by which, at the same time, he would reply to the arguments presented by the Venezuelan arbitrator. Doctor Paúl would be able to take these into consideration and see if it would be possible to reach an agreement.

M. de Peretti replies that he has no other arguments to give than those furnished by the company itself, whose argument he considers as sufficient, and that consequently if his colleague does not agree to the amount of 7,000,000 bolivars, which is demanded, he appeals to the umpire.

Doctor Paúl maintains his opinion, and it is agreed that this claim be submitted to the judgment of the umpire provided by the protocol.

a sufficient cause for the action of this commission on the ground of denial of justice.

*Held* that there was in said decree no denial of justice under the treaty of 1885 or in virtue of the rules or principles of public law.

*Held* that every matter and point distinctly in issue in said cause, and which was directly based upon and determined in said decree, and which was its ground and basis, is concluded by the judgment of the high Federal court in said cause; and the claimant itself, and the claimant government in its behalf, are forever estopped from asserting any right or claim based in any part upon any fact actually and directly involved in said decree.

*Held* that if the treaty of 1885 were applicable to this case, then there has been no denial of justice or such a delay of justice according to usage or to law, nor such exhaustion of the legal means available to the claimants, nor such a violation of treaty or the rules of the right of nations as would admit of a favorable award if the jurisdiction of the commission were thus limited.

In the suit for rescission the Company General of the Orinoco plead no counter-claims or claims in offset; hence they were not in issue, were not litigated, and therefore are not concluded by the decree.

Such claims as might have been pleaded as counterclaims or claims in offset to the suit in rescission, or which might have constituted a ground for an independent action, can be presented here as substantive grounds for an award.

The date when the suit for rescission was entered in court is the day on which the issues are considered as formed between the parties. The cause of action had then accrued. For such causes as accrued after that date the court gained no jurisdiction in virtue of the suit then pending.

The actions of the claimant company and the respondent government posterior to that date are all proper subjects of inquiry and of award.

The refusal of the respondent government to recognize or permit the properties, franchises, rights, and privileges of the Company General of the Orinoco to pass to the English company which was ready to take them, was a fatal breach of the contract and charges the respondent government with all loss and damage which accrued to the claimant company on account thereof.

The fact that there was ample justification to the respondent government for taking this position as a government does not change its relation, as the other party to a contract, with the claimant company, and as such other party it must stand in the same relation as though it were not also exercising governmental functions requiring it to prevent the claimant company from completing its contract of cession.

The claimant company had several grounds of defense to the suit for rescission; among them these:

- (a) No offer to restore to the company the benefits conferred by it upon the plaintiff, it being easily susceptible of proof that it had conferred many such benefits, capable of being measured in money.
- (b) The respondent government could not have sustained its position that it was without fault in the premises. The opinion gives in detail the instances falling under each of these heads.

None of these facts being brought to the attention of the high Federal court, it could only pass the decree which it finally registered.

The respondent government having prevented the completion of the contract between the Company General of the Orinoco and the British company, as heretofore stated, it became responsible for the value of the concession, since this action of the respondent government resulted in practically a total loss.

Approximate equity is all that can be attempted in a case so indefinite in many of its important facts.

When this sovereign act of the respondent government was interposed, the company was in shape to be relieved of all its indebtedness through the action of the British company. There is no inequity in holding that the value of the concession was the sum which the British company was then ready to pay. This proceeding may be considered, in a limited sense, as in the nature of a creditor's bill, the purpose of which is to recover that which is due for the benefit of the creditors.

OPINION OF THE VENEZUELAN COMMISSIONER

Under date of July 10, 1902, Messrs. Louis Roux, Felix Joseph Vial, and André Emile Belicam, liquidators of the "Compagnie Générale de l'Orénoque," addressed a memorial to the minister of foreign affairs of France, in which they state the following:

That in consequence of the sentence given by the high Federal court in 1891, without the appearing in court of the plaintiff company (par défaut), the creditors of the said company were obliged to apply to the liquidators for the vindication of their rights against the Government of Venezuela.

Following this the liquidators present a statement of their claims, as per items below:

	<i>Francs</i>
1. Capital of the Compagnie Générale de l'Orénoque	1,500,000.00
2. To the company called "La Monnaie" . . . . .	609,030.91
Interest at 6 per cent from 1892 to date and other expenses . . . . .	655,659.45
	1,264,690.36
3. To "La Banque de Consignations" . . . . .	236,356.00
Interest at 6 per cent from April 1, 1890, to date . . . . .	248,753.00
	485,109.00
4. To Mr. Alfred Chauvelot . . . . .	345,976.00
Interest at 6 per cent, as per account . . . . .	292,102.00
	638,078.00
5. To Mr. Eugene Ferminac . . . . .	101,000.00
Interest for twelve years at 6 per cent . . . . .	100,340.00
	201,340.00
6. To Mr. Louis Roux . . . . .	30,504.00
Interest at 6 per cent, as per account . . . . .	24,071.00
	54,575.00
7. To Mr. Albert de Suin . . . . .	6,264.00
Interest . . . . .	5,083.00
	11,347.00
8. To Mr. Theodor Delort . . . . .	14,641.26
Interest, ten years at 6 per cent . . . . .	8,402.00
	23,043.26
9. Liquidation bonds . . . . .	157,916.00
10. Expenses of the English company . . . . .	25,000.00
Expenses of the Belgian company . . . . .	100,000.00
Interest . . . . .	90,000.00
	215,000.00
11. Sundry expenses and unpaid salaries of 1891 . . . . .	75,000.00
12. Interest on the capital of the company from 1891 at 6 per cent . . . . .	990,000.00
	5,616,098.62
Total . . . . .	5,616,098.62

To this amount the liquidators further add the sum of 2,000,000 francs under the head of eventual profits, thus bringing up the total to 7,616,098.62 francs.

To this statement the liquidators annex nine abstracts of accounts, referring

to seven items of the claim, Nos. 7, 9, 10, and 11 being referred to as copies taken from the books of the company.

In another memorial, presented in Paris on September 12, 1901, by the same liquidators to the minister of foreign affairs, they annex two documents, one of which contains the declaration of Mr. Andres Fiat, the former attorney of the company at Caracas, who was acting as such at the time the company was sued before the high Federal court, in which Mr. Fiat affirms —

that the sentence of said court was given without having served previous legal summons to him or to the counsel of the company, which was thus really a sentence pronounced without hearing one of the parties concerned.

The liquidators further state in said memorial that of the two lawyers who acted as counsels for the company, viz., Dr. Diego B. Urbaneja and Dr. Ramón F. Feo, the first is dead, but the second of them is still alive, practicing in Caracas, and in capacity to make a declaration similar to that of Mr. Fiat's.

Together with the aforesaid two memorials and annexed documents referred to there is a letter from Mr. Theodor Delort, dated April 14, 1903, to the French minister at Caracas, in which he says:

Before my departure from Paris, the liquidators have conferred on me the power of attorney of the *Compagnie Générale de l'Orénoque*, and I hold such power at the disposal of the legation. All the books, documents, and accounts of said company are in the keeping of the liquidators, who can not let them out of their possession, as the work of liquidation is yet going on, and they may be at any time summoned before the commercial tribunal of the Seine, by reason of the liability of the company in case that the result of the claim now presented against the Government of Venezuela should not be sufficient to wipe out those liabilities.

They also produce a report or memorial of 111 pages, which was deposited with the minister of foreign affairs in Paris on December 3, 1895, containing a general description of the enterprise of "*La Compagnie Générale de l'Orénoque*" and a compendium of the documents which constitute the action entered on behalf of the Government of Venezuela on the 28th May, 1890, by the financial representative (*fiscal nacional de hacienda*) against the company for the rescission of its contract and for damages. Annexed to this report the liquidators presented 128 documents, the greater part of which are private letters, memorials, and notes, very many of which are void of legal authenticity.

The Venezuelan commissioner has examined all and every one of these memorials, notes, papers, and private letters presented to him by the French commissioner, and he has also examined the process carried on before the high Federal court against the said company during the years 1890 and 1891, as well as all the documents filed in the ministry of fomento regarding the several concessions of the contracts made by the Government of Venezuela, thus: In 1885, with Mr. Miguel Tejera for the exploitation of the natural products of the territory of the Upper Orinoco and Amazonas; and in 1887, with Mr. Theodor Delort for the exploitation of tonca bean (*sarrapia*) in the territory comprised between the Orinoco River, Brazil, and British Guiana; all of which contracts were transferred to the *Compagnie Générale de l'Orénoque*. A process took place between the Government of Venezuela and the *Compagnie Générale de l'Orénoque*, entered upon by the financial representative of Venezuela (*fiscal nacional de hacienda*) on behalf of said Government, said action having begun before the high Federal court on the 19th June, 1890, and the object of same being the following: First, the rescission of the contract signed on the 17th December, 1885, between Gen. Guzmán Blanco, envoy extraordinary and minister plenipotentiary to several courts of Europe, and Mr. Miguel Tejera, for the exploitation of all the vegetable and mineral products of the

territories of the Upper Orinoco and Amazonas during a period of thirty-five years; second, the rescission of the contract signed on the 1st April, 1887, between the minister of fomento of the United States of Venezuela and Mr. Theodor Delort for the exploitation of tonca beans (*sarrapia*) during a period of twenty-five years on the Government lands which lie between the extreme eastern boundary of the territories of the Upper Orinoco and Amazonas and British Guiana and between the Orinoco and the Brazilian boundary line; and third, for payment by the company of the sum of 40,048.62 francs for damages owing to the nonfulfillment of said contracts and expenses and costs incurred in this process.

This suit was ended by final judgment passed by the high Federal court on the 14th of October, 1891, against the company, which was condemned to pay the sum of 40,048.62 francs as well as expenses and costs incurred in the process.

The claim which the liquidators of the Company Générale de l'Orénoque pretend to make good against the Government of Venezuela is, therefore, based on a judgment passed by the high Federal court since October, 1901, which has been affirmed and has the sanction of *chose jugée*.

The contracts between the Government of Venezuela and Messrs. Miguel Tejera and Doctor Delort, which were afterwards ceded to the Compagnie Générale de l'Orénoque, were signed under the constitution of 27th of April, 1881, and the civil code which entered into operation on the 27th of January of the same year. Article 26 of said civil code states —

that any party, even if not resident in Venezuela, can be sued in the Republic for obligations contracted for in the Republic or the fulfillment of which has to be carried on in Venezuela.<sup>1</sup>

Article 14 of the contract signed with Mr. Tejera for the exploitation and colonization of the territories of Upper Orinoco and Amazonas, and article 15 of the contract signed with Mr. Th. Delort for the exploitation of all the tonca beans existing on the Government's lands mentioned in said contract, both expressly stipulate —

that all doubts and controversies arising from the fulfillment of both agreements are to be decided by the tribunals of the Republic according to its laws.

In the memorial presented on the 12th of September, 1901, to the minister of foreign affairs in Paris the liquidators of the Compagnie Générale de l'Orénoque contend that, according to a document which they annex thereto, containing a declaration of their former attorney at Caracas, Mr. Andres Fiat, who was acting as such at the time of the suit, judgment was passed by the high Federal court without summons having been served either on him or on the counsel of the company, which is equivalent to a sentence pronounced without hearing one of the parties concerned. This aforesaid document is signed by Mr. Fiat in St. Cloud on the 1st of May, 1901, and is legalized by the prefect of the said city and by the minister of foreign affairs of France. Mr. Fiat therein certifies —

that, while residing in the city of Caracas in 1890 and 1891, the Compagnie Générale de l'Orénoque conferred to him the necessary power of attorney that he might represent the company at Caracas in all matters.

He also certifies —  
that with reference to the suit entered by the fiscal nacional de hacienda on the

<sup>1</sup> Art. 26. Pueden ser demandados en Venezuela aun los no domiciliados en ella, por obligaciones contraídas en la República, ó que deben tener ejecución en Venezuela.

23d of May, 1890, before the high Federal court, against the *Compagnie Générale de l'Orénoque*, for rescission of the concessions of the 17th of December, 1885, and of the 1st of April, 1887, *he was never summoned nor did he ever receive an order to appear in court*, and that the counsel of the company, Messrs. Diego B. Urbaneja and Ramón F. Feo, were never summoned either.

He further certifies —

that consequently the judgment of the high Federal court was passed during his absence on the 14th of October, 1891, and that neither he nor the two aforesaid counsel of the company ever received any advice, and in this way they never knew that such sentence had been pronounced until three days after, when they saw it published in the *Official Gazette* of the 17th of October, 1891.

The declarations of Mr. Fiat contained in this document are inaccurate, as will now be proved. The suit was entered on the 28th of May, 1890, by the *fiscal nacional de hacienda* before the high Federal court, and on the 30th of the same month the president of the court issued a writ thus:

Considering that, according to the document annexed to the suit, Messrs. Andrés Fiat and Bernabé Planas appear to be the representatives of the company in Venezuela, order is hereby given for them to be summoned in order that they may declare if they are still holding the power of the company, and in order to appoint a counsel for the defendant, in case they are no longer attorneys of the company in accordance with the law.

There is legal proof in the papers of the suit that they were both summoned on the same 30th day of May, and they both appeared in court on the 2d of June and declared:

The only representative now of the *Compagnie Générale de l'Orénoque* is Mr. Andrés Fiat, who will duly produce his power of attorney in court on Wednesday, the 4th of June.

On the said 4th of June Mr. Fiat presented to the court his power of attorney and a translation of the same was ordered. On the 16th of June the interpreter, Mr. Veloz de Goiticoa, presented the power of attorney duly translated, and on the same date the court issued a writ ordering that the original power of attorney be returned to its owner and to summon the same in due form. On the 19th of June the *fiscal nacional de hacienda* altered the terms of the suit, limiting the sum demanded from the company for damages to 40,048.62 francs, as per account annexed. On the same 19th of June Mr. Fiat, as representative of the company, gave a receipt for the document containing the plaintiff's suit (*libelo de demanda*), which was handed to him, and said receipt was filed in court. On the same day the court issued a decree (*folio 88*) by which order was given to notify Mr. Fiat that the terms of the suit had been altered, and a copy of which alteration was handed to him.

Mr. Fiat was to give a receipt for this copy and he was to present in court his answer to the suit ten days after this date.

This writ was carried into execution on the same day, and Mr. Fiat gave a receipt on the 20th of June, which receipt is filed in court. On the 2d of July, which was the day appointed for answering the suit, there appeared in court the *fiscal nacional de hacienda* and Mr. Fiat, accompanied by his counsel, D. B. Urbaneja and R. F. Feo, and then and there all the parties agreed to defer the answering of the suit to a date fixed at eight days after the presentation of the documents to which reference is made in the suit by the plaintiff, *in order that the company should have time to examine these documents*. On the 22d of July,

Mr. Fiat, accompanied by his two counsel, Doctors Urbaneja and Feo, appeared in court and filed their answer to the suit, petitioning the court at the same time for an extraterritorial term in order to obtain evidence from France and Rome. The suit then followed its ordinary legal course, during which the parties were to produce their respective evidence, and the court reserved its right to decide on Mr. Fiat's petition regarding an extra territorial period of time. Later on the president of the court granted one hundred days to obtain the extraterritorial evidence, and Mr. Fiat having appealed from this decision, considering that the term granted was too short, the court then extended it to one hundred and thirty days. On the 5th of September Mr. Fiat was notified that the fiscal had petitioned the court that the suit be registered in Ciudad Bolívar, in order to avoid any transfer intended by the company. Mr. Fiat duly received this notice, at the foot of which he set his signature, and on the 8th of September he appeared in court, accompanied by his counsel, Doctors Urbaneja and Feo, and said —

that he did not believe that he could make any legal opposition to the Government, which is a party in this suit, for the recording of the suit with the alterations which were made to it afterwards.

On the same day order was issued by the court that a copy of the suit be sent to the judge of first instance of Ciudad Bolívar for its being recorded in the registry office in that city, and said order was carried into effect on the same 15th day of September.

In the course of the suit Mr. Fiat presented the court a petition dated August 7, 1900, in order that such evidence might be advanced as he thought convenient to the case of the company. Among this evidence were declarations to be made by witnesses resident in Paris, Rome, Port of Spain, Rio Chico, Barcelona, San Fernando de Apure, and Caracas. The president of the court issued a writ, dated August 12, admitting the presentation of such evidence, as far as the law permitted, and commissioned the several civil judges of first instance of the localities of the respective witnesses to hear their declarations, and petitioned and issued rogatory commissions to the competent judges of Paris, Rome, and Port of Spain for the same purpose. On the 11th of October of the same year Mr. Fiat appeared in court and stated —

that by virtue of the authority conferred on him by power of attorney from the company, he conferred special power to Dr. Ramón Feo and Dr. Martín F. Feo, so that both together or any one of them separately may intervene in the collecting of evidence that is to be made by the fiscal in this capital city; that he also conferred special power to Mr. Armando F. Larruceguy, of Porto Rico, for the collecting of evidence on behalf of the company in that district and to intervene in the collecting of evidence by the plaintiff; that he conferred special power on Mr. Julio Philipe, of Barcelona, for all the evidence that is to be collected in that city; that he conferred special power on Dr. Brígido Natera, of Ciudad Bolívar, for the collection of the evidence in Ciudad Bolívar and the Territorio Orinoco; that he conferred special power on Mr. Casto Rodríguez, of San Fernando de Apure, for all the evidence to be collected in that city; that he conferred special power on Mr. E. R. Mason, of Port of Spain, Trinidad, for all the evidence to be collected in that city, and that he conferred special power to Mr. Andrés Lenel Gutiérrez for all the evidence that is to be collected in the Territories Orinoco and Amazonas.

By order of the 11th of October, 1890, the president of the court ordered that commissions and petitions be issued to the different parties residing in the different localities where the evidence was to be collected, and that in said petitions and commissions the insertion of the powers conferred on them be made, as requested by Mr. Fiat. The said order was carried into execution on the 13th of October, as it is proved in the records by a note signed by the secretary

of the court to the effect that all the commissions and petitions issued had been handed to the defendant. All these commissions and petitions were duly returned, after having been carried into operation, and exist in the records of the court, with the exception of those addressed to the judges of Paris and Trinidad and to His Excellency Cardinal Limeoni, of Rome, which were not returned by the representative of the company, although he received them.

In page No. 56 of the document containing the evidence presented by the attorney of the company there is a note signed by the secretary of the court on the 24th of March, 1891, in which it is stated that after due computation both the ordinary and the extraordinary period of time granted for the collecting of evidence expires on that same 24th of March, 1891. On the same day the president of the court ordered that, the probatory period having expired that day, the papers and records of the suit were to be sent to the full court, which was duly effected.

On the 29th of April the fiscal stated that, this being the time for the court to study the papers and records of the suit, order be issued for the same to be effected. On the 21st of May the fiscal reiterated his petition, and on the 23d order was issued to begin the study of the papers and records on the 30th. The study of the papers and evidence commenced on the 16th of June and proceeded on the 24th of June, as the court did not meet on the 17th, 18th, 19th, 20th, 21st, 22d. and 23d. On the 1st, 4th, and 7th of August the court called supplementary judges to fill the vacancies of Dr. Chuecos Miranda and Mr. Carlos Hernaiz, who were absent, and that of Dr. J. P. Rojas Paul and General Velutini, who had petitioned to be excused from attending to court. On the 16th of September the supplementary judge, Dr. Carlos Grisanti, was called, and the 19th day of the same month was appointed for the study of the process. Doctor Grisanti joined the court on the day fixed, and the study of the papers and records was commenced on the following day. The same proceeded on the 21st of September and following days until the 25th, and the 29th day of the same month was appointed to hear the reports or pleadings of the plaintiff and defendant. On this 29th day of September the fiscal nacional de hacienda appeared in court, but no representative or counsel on behalf of the defendant, the court then proceeding to sit in conference. According to notes set in the records by the secretary of the court in chronological order, it is evidenced that from September 30 to October 13 only one sitting of the court took place, on the 3d of October, during which the judges conferred on the judgment to be passed and agreed as to the same. On the 14th of October the sentence was drawn and signed by the members of the court on the same day.

From the foregoing it is clearly evidenced that the *Compagnie Générale de l'Orénoque* was duly summoned, through their representative in Caracas, Mr. A. Fiat, to appear in court to answer the suit entered against them before the high Federal court by the financial representative of Venezuela (*Fiscal de la Nación*); that Mr. Fiat did appear in court, accompanied by his counsel, Drs. D. B. Urbaneja and Ramón F. Feo; that he made such contentions as he deemed convenient on behalf of the defendant company; that he petitioned for an extraterritorial term in order to collect evidence in various foreign localities, and the same was granted to him; that he appointed special attorneys for the collection of such evidence within and without the territory of Venezuela; that the commissions and petitions issued by the court to the different judges and public officials of the various localities where the evidence was to be collected were handed to him in due time; that he forwarded to their destinations these petitions and commissions, which were all returned to the court, after a part of the evidence had been collected; that another part of the evidence was not collected, either through negligence of the company or because

it desisted voluntarily of doing so, as there is no proof in the record that this was due to any cause beyond the control of the representative of the company; that after the expiration of the extra term granted by court for the collection of evidence, on the 24th of March, 1891, the fiscal de hacienda immediately petitioned that the court proceed to the examination and study of the papers and record of the suit in order that judgment be passed, for which purpose he continually applied to court, both plaintiff and defendant being present as according to law and there being no necessity of their being newly summoned for the complementary acts of the suit required to arrive to its final stage of being sentenced.

The sentence was thus pronounced by the high Federal court, after complying rigorously with the legal prescriptions and with all the formalities of the proceedings as established by law on behalf of both parties interested for the defense of their respective rights.

In the memorial or report presented by the liquidators of the company to the minister of foreign affairs of Paris, on the 3d of December, 1895, they pretend that *on the 25th of September, 1891, the high Federal court issued an order that the contending parties be advised that the 29th September had been appointed as the date on which they (plaintiff and defendant) were to present their respective reports or pleadings*, and that neither the representative of the company nor his counsel were summoned or advised, which lack of notice was in violation of articles 109 and 162 of the Code of Civil Procedure of Venezuela, and sufficient cause to invalidate the sentence.

This is inaccurate, as there was no such decree of the court ordering that the contending parties be notified; nor is there any violation of articles 109 and 162 of the Code of Civil Procedure as alleged for the nullity of the sentence.

In the papers and record no decree of the court exists under date of 25th of September, ordering the parties to be notified, there being simply a note sent by the secretary of the court, which reads thus:

CARACAS, 25th September, 1891.

In the sitting of this day the study and examination of the papers and record by the court was completed and the sitting of the 29th current is appointed for plaintiff and defendant to present their respective reports or pleadings.

Let the parties be notified.

O. BURGOS.

As may be seen from the draft of the foregoing note and from the phrase "let the parties be notified," which may be seen, at first sight, was forcibly inserted between the last line and the signature of the secretary, the said note was a fabrication of said secretary, conforming to no legal prescription, and in no way was it an order or decree of the judges of the court, who are the only parties authorized by law to issue such orders.

Article 287 of the Code of Civil Procedure in force at that time (chapter fourth, on the study and sentences of suits) directs the following:

After the completion by the judges of the study and examination of all the papers and record of the suit they will hear the reports which the contending parties may address to the court verbally or through their representatives and counsels, and they will also read such reports as said parties may address in writing which will be filed in the record.<sup>1</sup>

It may be gathered from this that, once the study and examination of the papers and records has been completed, there is no need of summoning the

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<sup>1</sup> Art. 287. Concluida esa relación se oirán los informes que de palabra dirijan las partes, sus apoderados ó patrocinantes y se leerán los que presenten por escrito, los cuales se agregarán á los autos.

parties for them to present their reports. Article 89 of the same code reads thus:

The summons to the defendant for answering the said (demand) having been served there is no need for serving any further summons for any act during the course of the *litis*, nor any summons which may need to be served will suspend the proceedings, unless there be a special legal prescription to the contrary.<sup>1</sup>

The words of this article are so conclusive that they exclude any possibility that the court might have considered it necessary, after studying and examining the papers and records, to summon the contending parties to present their reports on the process, which had not been in suspense at any time.

Article No. 109, quoted by the liquidators of the company, reads thus:

When a *litis* be in a state of suspense, owing to motives caused by the contending parties, it will remain in this state until any one of the interested parties petitions for its continuation. In this case the other party or his representative will be summoned, but the proceedings can not follow their course until this summons be effected.<sup>2</sup>

The process to which I am now referring was never in this case and far from its ever having been in suspense owing to motives caused by the contending parties, it appears from the records that on the same day that the probatory term expired the fiscal petitioned for the active continuation of the case and several orders (*señalamientos*) were then and there issued for the study and examination of the papers and records and in order to complete the court by the appointment of adjunct judges, all of which is evidenced by the respective notes set in the records by the secretary of the court. The other article quoted as having been violated is No. 162 of the same code, and it reads thus:

When the tribunal be so taken up with business as not to be able to commence the process on the day appointed, or on any of the following eight days or by any other cause and the process be thus delayed indefinitely, the contending parties or their representatives shall be notified of the new date appointed for commencing the same, in the manner established by article 109, but the term fixed by this article being liable to be reduced.<sup>3</sup>

It is evidenced from the notes set in the records that the first act of examining and studying the papers and records took place on the 16th of June; that the same followed its course on the 24th of June, before eight sittings of the court had transpired, an adjunct judge was appointed on the 1st of August to fill the vacancy caused by the absence of Dr. Chuecos Miranda; that Mr. Carlos Hernaiz, who had been appointed as adjunct, being away from the city, Dr. J. P. Rojas Paúl was appointed to replace him on the 4th of August; that Dr. Rojas Paúl having tendered his resignation, another appointment was made on the 7th of August in the person of Gen. J. A. Velutini, who was notified of same, and that the 16th day of September had been fixed for the study of the process.

<sup>1</sup> Art. 89. Hecha la citación para la *litis*-contestación, no habrá necesidad de practicarla de nuevo para ningún acto del juicio, ni la que se mande verificar suspenderá el procedimiento á menos que resulte lo contrario de alguna disposición especial.

<sup>2</sup> Art. 109. La causa, cuyo curso esté en suspenso por motivos imputables á las partes, permanecerá en el mismo estado hasta que algunos de los interesados en ella pida su continuación. En este caso se citará á la otra, ó á su apoderado sin que corra ningún término mientras no conste haberse practicado estas diligencias.

<sup>3</sup> Art. 162. Cuando por ocupación del tribunal ú otro motivo no principiare á verse la causa el día designado ni en ninguno de los ocho siguientes, y tenga que sufrir una demora indefinida, se avisarán las partes ó sus representantes el nuevamente señalado para principiar su vista, de la manera establecida en el artículo 109, pero pudiendo reducirse el término que éste fija.

It is to be noted that the sitting of court of the 16th of September proximo was the first sitting after the vacation of the tribunals which runs from the 15th of August to 15th of September, and that from the 7th to the 15th August no sittings transpired.

On the 16th of September the tribunal met and took cognizance of a communication from General Velutini, in which he stated that he could not accept, as he had to leave the city, and the court then appointed Dr. Cárlos Grisanti, who was duly notified, and the 19th of the same month was appointed for the examining and studying of the case, three days after Doctor Grisanti's appointment. On the appointed date Doctor Grisanti took his seat in court and the process began and followed its course on the 21st and 25th, on which last-mentioned day it terminated. It is thus evident that the process was never under indefinite delay, and that the court acted on the case at intervals of from two to three days, appointing adjuncts to fill the vacancy of some of the judges, the interested parties being in the obligation of calling on the secretary of the court in order to take knowledge of the acts of same.

In the notes contained in the memorial presented by the liquidators of the company to the minister of foreign affairs at Paris, referring to the evidence to be collected by the representative of the company regarding the process before the high Federal court, it is stated:

Mr. Fiat was taken unaware by the suit entered at court by the fiscal against the company for rescission of its concessions and had no time to ask for orders or to collect information, and as no memorial had ever been communicated to him and it was impossible to foresee that such action would be entered against the company, he had received no instructions from Paris. Mr. Fiat, being very much perplexed, presented a list containing the names of all the employees of the company to be examined by the court, but not knowing their whereabouts he set them all as residing in Paris. The petition of Mr. Fiat was inspired by the report which the administration of the company had just forwarded to the ministry of fomento. The tribunal accepted Mr. Fiat's petition, but instead of forwarding the commissions to Paris, as was done with those to Rome, by the diplomatic channel, according to international rules, they were handed directly to Mr. Fiat for transmission to Mr. Delort. Nothing could be more strange, and side by side to a proceeding which appears to be regular at first sight there are irregularities which nullify the defense, and, finally, the judgment was passed without summoning the defendant, as has been seen by the document No. 1. Mr. Delort delivered the commissions issued by the court to the board of directors of the company, who were unable to do anything with them and returned them to their counsel in Caracas, Dr. D. B. Urbaneja, and, following the advice of their counsel, the board had affidavits made by such witnesses as could be found, on the subject of the commission issued by court to the judge of first instance of Paris.

The statement that Mr. Fiat was taken unawares by the suit entered by the fiscal before the high Federal court and that he had no time to ask for order and information regarding the evidence is contradictory of the fact that Mr. Fiat was summoned on the 30th of May, 1890, to appear in court and take cognizance of the action entered against the company, and that it was only on the 7th of August, two months and eight days after he had been summoned, that he entered a petition to the tribunal for the collection of evidence. As to the action of the court in handing over to Mr. Fiat the commissions to Paris and Rome, instead of forwarding same through the diplomatic channel it is simply reckless and capricious to consider such action as an irregular omission. The Code of Civil Procedure, in article 205, on the extraordinary term for collecting evidence, says:

If one of the contending parties who has obtained permission for collecting evidence, as per the terms of the foregoing article, fails to do the necessary to obtain

same, or if it appear from the records that he made a malicious petition in order to extend the duration of the suit, he shall be fined with an amount equivalent to one-fifth of the value of the suit, which sum will be applied to pay to the other party whatever damages he may have suffered by the delay.<sup>1</sup>

It was the interested party who should have taken the necessary steps in order to have forwarded the commissions to the judge of the Seine through the diplomatic channel, and his having neglected to do so could have been cause of his being fined, as per the article 205 quoted, as he petitioned for the collection of evidence which required an extraterritorial term and thus lengthened the period of the suit, and he did not do the necessary to collect the evidence. It is well known that these commissions are accepted by the judges to whom they are addressed by courtesy in accordance with international use. In some international treaties these commissions have been regulated, but failing this the rule to be followed is that of reciprocity. There is no agreement on this point between Venezuela and France, and it was therefore necessary to adhere to Venezuela's legislation on the subject, to which article 559 of the Code of Civil Procedure at the time in force is pertinent. This article states:

Commissions issued by foreign tribunals for the examination of witnesses for valuations, oaths, interrogatories, and any other such acts to be effected in the Republic, will be carried into execution by virtue of a simple decree from the judge of first instance of the locality where such acts are to take place.<sup>2</sup>

This is in accordance with the most advanced principles of jurisprudence on the matter.

The Institute of International Law, during the Zurich session, has established the following principles and rules, which are highly favorable to the prompt expedition of justice:

Any judge may in any process address himself by rogatory commissions to any foreign judge, requesting him to carry into execution in his jurisdiction any act of instruction or any other judicial acts to which the intervention of a foreign judge may be useful or indispensable. A judge to whom a petition is addressed in order that he may issue a rogatory commission has to decide in the following points: First, of his capacity in the matter; second, on the legality of the petition; third, whether or not it is opportune in cases where the acts petitioned for can be effected by the judge under whose guidance the suit is, such as the examination of witnesses, taking of oaths of one of the parties, etc. The rogatory commission *shall be sent directly to the foreign tribunal unless the interested governments may afterwards intervene in case it be necessary.* The tribunal which receives the commission is under obligation to comply with it after having ascertained the following: First, the authenticity of the document; second, its own capacity, *ratione materiæ*, according to the laws of the country. (Annual of the Institute of International Law, Volume II, 1878, pp. 150 and 151.)<sup>3</sup>

<sup>1</sup> Art. 205. Si el litigante que ha obtenido concesión para evacuar las pruebas de que habla el artículo precedente no practicare las diligencias consiguientes, ó de lo actuado apareciere que la solicitud fué maliciosa, con el objeto de alargar el pleito, se le impondrá una multa equivalente á la quinta parte del valor de lo que se litigue, y se aplicará á la parte contraria en indemnización de los perjuicios sufridos con la dilación. Si ni aproximadamente fuere conocido este valor, será la multa de una cantidad que no baje de quinientos bolívaes ni exceda de cinco mil, con la misma aplicación.

<sup>2</sup> Art. 559. Las providencias de los tribunales extranjeros concernientes al exámen de testigos, experticias, juramentos, interrogatorios y otros actos de mera instrucción que hayan de practicarse en la república, se ejecutarán con el simple decreto del juez de primera instancia que tenga jurisdicción en el lugar en que hayan de verificarse tales actos.

<sup>3</sup> The rules proposed by the Institute of International Law at Zurich in 1877, were as follows:

There was, consequently, nothing irregular in the proceedings of the court in addressing directly the judge of the first instance of the Seine and in handing the commissions to the interested party for its compliance. If the Compagnie Générale de l'Orénoque did not in due time see that its representatives in Paris, Rome, and Port of Spain attended to the execution of the commissions and allowed them to keep the documents in their possession for an indefinite period, it is an act for the consequences of which the company is solely and exclusively responsible. To pretend that the other party in the *litis* shall bear any responsibility on the matter is entirely contrary to common sense and to equity.

As has been shown, besides the absolute lack of legal basis of the charges preferred by the liquidators of the Compagnie Générale de l'Orénoque against the proceedings of the court and the judgment passed by that high tribunal on the 14th of October, 1891, there is the remarkable circumstance that neither the company nor its legal representatives denounced the sentence as null and void within the period and in the form established in Part XVII of the Code of Civil Procedure then in force. Article 538 of said code says:

Suits may be invalidated by the following causes: First, when one of the contending parties has not had a hearing in the suit whose invalidation is intended

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1. L'étranger sera admis à ester en justice aux mêmes conditions que le régnicole.
  2. Les formes ordinatoires de l'instruction et de la procédure seront régies par la loi du lieu où le procès est instruit. Seront considérées comme telles, les prescriptions relatives aux formes de l'assignation (sauf de qui est proposé ci-dessous, 2<sup>me</sup> al.) aux délais de comparution, à la nature et à la forme de la procuration *ad litem*, au mode de recueillir les preuves à la rédaction et au prononcé du jugement, à la passation en force de chose jugée, aux délais et aux formalités de l'appel et autres voies de recours, à la péremption de l'instance.
  - Toutefois, et par exception à la règle qui précède, on pourra statuer dans les traités que les assignations et autres exploits seront signifiés aux personnes établies à l'étranger dans les formes prescrites par les lois du lieu de destination de l'exploit. Si, d'après les lois de ce pays, la signification doit être faite par l'intermédiaire de juge, le tribunal appelé à connaître du procès requerra l'intervention du tribunal étranger par la voie d'une commission rogatoire.
  3. L'admissibilité des moyens de preuve (preuve littérale, testimoniale, serment, livres de commerce, etc.) et leur force probante seront déterminées par la loi du lieu où s'est passé le fait ou l'acte qu'il s'agit de prouver.
  - La même règle sera appliquée à la capacité des témoins, sauf les exceptions que les États contractants jugeraient convenable de sanctionner dans les traités.
  4. Le juge saisi d'un procès pourra s'adresser par commission rogatoire à un juge étranger, pour le prier de faire dans son ressort soit un acte d'instruction, soit d'autres actes judiciaires pour lesquels l'intervention du juge étranger serait indispensable ou utile.
  5. Le juge à qui l'on demande de délivrer une Commission rogatoire décide: (a) de sa propre compétence; (b) de la légalité de la requête; (c) de son opportunité lorsqu'il s'agit d'un acte qui légalement peut aussi se faire devant le juge de procès, p. ex. d'entendre des témoins, de faire prêter serment à l'une des parties, etc.
  6. La commission rogatoire sera adressée directement au tribunal étranger, sauf intervention ultérieure des gouvernements intéressés, s'il y a lieu.
  7. Le tribunal à qui la commission est adressée sera obligé d'y satisfaire après s'être assuré: 1° de l'authenticité du document, 2° de sa propre compétence *ratione materiæ* d'après les lois du pays où il siège.
  8. En cas d'incompétence matérielle, le tribunal requis transmettra la commission rogatoire au tribunal compétent, après en avoir informé le requérant.
  9. Le tribunal qui procède à un acte judiciaire en vertu d'une commission rogatoire applique les lois de son pays en ce qui concerne les formes du procès, y compris les formes des preuves et du serment. (Annuaire de l'Institut de Droit International, Tom. ii, p. 150; Revue de Droit International. etc. Vol. ix. p. 308.)

or by the want of summons in cases where such summons is necessary for the continuation or for the decision of the suit and whenever this fault has not been remedied by the party alleging the same.<sup>1</sup>

Article 549 says:

The claim of invalidation by any of the parties shall not interfere with the execution of the sentence.<sup>2</sup>

Article 550 says:

The claim of invalidation can not be made six months after the party has had knowledge of the suit in which he has not obtained a hearing or of the sentence or order issued in the suit when it was in suspense.<sup>3</sup>

And article 551 runs thus:

When an invalidation is pronounced, the trial shall commence again from the beginning in case there may have been a lack of hearing of the claiming party, and from the moment that a lack of summons took place in case this lack of summons be the cause of the invalidation.<sup>4</sup>

In the memorial presented by the liquidators of the company to the minister of foreign affairs of France on the 3d of December, 1895, they state, on page 69, the following:

Nothing exists, therefore, which may give light on the sentence pronounced by the high Federal court on the 14th of October, 1891, which was published on the 17th, three days after, in the Official Gazette, No. 5385. It was by this publication that the counsel, Drs. D. B. Urbaneja and Ramón F. Feo, came to know of it. When Mr. Delort arrived at Caracas on the 26th of October, the whole matter had been completed. Mr. Delort hastened to Doctors Urbaneja and Feo for advice, and these counsel told him that there was nothing to do but to apply to the French Government, which had authority to intervene and to present a claim through the diplomatic channel by virtue of article 5 of the diplomatic convention of 1885.

It was therefore the opinion of the counsel of the company that according to the law on this matter no claim of invalidation of the sentence could be entered in court, although the term of six months granted by law for this purpose was still running. Mr. Delort, as well as the other representatives of the company, submitted to this opinion of the counsel, and in no time did they take action to enter a claim of invalidation, thus affirming the sentence pronounced by the court.

According to the liquidators, when referring to Mr. Delort the counsel advised the company to make use of the diplomatic channel by virtue of article 5

<sup>1</sup> Art. 538. Son causas para la invalidación de los juicios:

1a. La falta de audiencia en el juicio cuya invalidación se pretende, ó la falta de citación cuando ésta sea necesaria para continuarlo ó decidirlo, si no ha sido cubierta la falta por la parte que la alega.

<sup>2</sup> Art. 549. El reclamo de invalidación no impide la ejecución de la sentencia.

<sup>3</sup> Art. 550. Tampoco puede intentarse trascurridos seis meses desde que se descubrió la falsedad del documento, ó se tuvo prueba de la retención ó del hecho de la parte contraria, ó desde el día en que se pronunció la sentencia en caso de pronunciamiento sobre cosa no demandada ú omisión respecto de lo demandado, ó desde que llegó á noticia del reclamante el juicio en que no fué oído, ó la sentencia ó auto que se dictó en el juicio que estaba paralizado, ó desde que se tuvo conocimiento de la sentencia anterior que está en colisión con la pronunciada.

<sup>4</sup> Art. 551. Declarada la invalidación, el juicio se repone al estado de demanda cuando ha habido falta de audiencia del reclamante, y el estado en que se cometió la falta de citación, cuando es ésta la fundamentación de la invalidación. En el caso de colisión de sentencias, quedará con su fuerza la primera. En los demás casos, se repone al estado de sentencia.

of the diplomatic convention of 1885, not taking into account that article 5 of said convention runs thus:

The representatives of the high contracting parties shall not intervene in claims or grievances of private parties referring to matters pertaining to the civil or penal administration of justice, according to the local laws unless, in case of denial of justice or of judicial delays contrary to use and to law, or in case of the noncompliance with an affirmed sentence, and, finally, in case there be an evident violation of a treaty or of the rules of international law in spite of the exhaustion of the legal remedies.

The invalidation of the judgment passed by the high Federal court was a matter pertaining to the jurisdiction of the civil justice of Venezuela, according to its legislation. The company did not exhaust all the legal means which the laws of the country offered for the invalidation of the sentence, acting on the advice of her counsel, in whose opinion it was useless to do anything in the matter. Although the company did not exhaust these legal means and although the sentence was not in violation of any treaty nor of any rule of international law, article 5 of the convention of November 26, 1885, was invoked four years after, thus pretending to insure the possibility of intervention by the diplomatic representatives of France.

From the documents presented by the liquidators of the company it appears that from the 14th of October, 1891, on which day the sentence was pronounced by the high Federal court, until the day when the French commissioner handed over to the Venezuelan commissioner copies of the memorial presented by the said liquidators to the minister of foreign affairs of France on the 3d of December, 1895, together with annexed papers, the diplomatic representatives of France in Venezuela never intervened in favor of any claim whatever presented by the liquidators of the *Compagnie Générale de l'Orénoque*. It is to be observed, on the other hand, that in a dispatch addressed by said liquidators on the 12th of September, 1901, to his excellency the minister of foreign affairs of France, they say —

that they have been informed from Caracas that Mr. Quiévreux, the vice-consul of France in that city, who is in charge of all the business of the French legation, is possessed of no document whatever concerning the claim of the *Compagnie Générale de l'Orénoque*, for which reason he has been unable to attend to it, and they therefore request his excellency kindly to transmit to Caracas, if necessary, all the papers referring to their claim.

It is therefore perfectly evident that the diplomatic representatives of France have abstained from all intervention tending to the invalidation of the aforesaid sentence during a long period of years, and especially so during the term of four years that elapsed from the day on which the sentence was pronounced to that on which political relations were suspended between France and Venezuela in 1895.

What action did the liquidators or the representatives of the company ever take during all the years following that of the sentence to make good their assumption that the judgment passed was a notorious injustice or a denial of justice?

The liquidators' memorial of December, 1895, to the minister of foreign affairs of France states the facts of the case in a precise manner and defines the attitude assumed by the company during several years in consequence of the sentence that rescinded her concessions and condemned her to the payment of a sum of money and the costs of the suit. Under the title of "Applications made by the Company to the Government of Venezuela," the aforesaid memorial contains the following narrative:

From the year 1891, or nearly four years back, all applications made to the Venezuelan Government, in order to obtain a *friendly compromise*, that is to say, to obtain an indemnity, have been of no avail. In 1892 there was a revolution in Venezuela and the Government declined to transact any business on the plea of the political situation. In 1893 General Crespo came into power, and during his first year of provisional government all applications made by the company were deferred until the establishment of a constitutional government. General Crespo was elected as constitutional president for a term of four years on the 20th of February, 1894. In the month of May of that same year Mr. Delort, who was going to the Pacific coast, called at Caracas to present his salutations to General Crespo and to General Velutini. This last named was at the time very powerful, and Mr. Delort explained to him the desirability of arriving to a friendly understanding and to come to terms as to the indemnity which the *Compagnie Générale de l'Orénoque* pretended. General Velutini expressed to Mr. Delort his willingness to assist him in this direction, and suggested that Mr. Delort procure from France the necessary power of attorney which would give him sufficient authority for dealing with this matter. On the 25th of October, 1894, Mr. Delort returned to Caracas, where full power of attorney had been sent to him, but General Velutini was then in a very different frame of mind and Mr. Delort was unable to secure the slightest cooperation from him. Mr. Delort then decided to apply directly to General Crespo, who at the time was in his country seat at Maracaibo. General Crespo assured Mr. Delort, that *if the company had really any rights, justice would be done to it*. At this juncture Mr. Delort presented to Dr. P. E. Rojas, the then minister of foreign affairs, a report briefly stating all the facts and the rights claimed by the company. Doctor Rojas promised to examine said document carefully, for which purpose he asked for a time of two months. As Mr. Delort could not await in Caracas, he informed the minister that he would come back to Caracas in February or March, 1895. He did return to Venezuela on the 24th of May, and heard at La Guayra when he landed of the rupture of diplomatic relations between France and Venezuela, which had just taken place. A translation of this document presented by Mr. Delort to the minister of foreign affairs of Venezuela in November, 1894, has been deposited at the ministry of foreign affairs in Paris. That document was drafted without possessing full knowledge of all the records of the trial that took place before the high Federal court against the *Compagnie Générale de l'Orénoque*, and certain details are therefore wanting in said document (which are contained in this memorial), although the conclusions of said petition remain in their full force.

From the foregoing quotation it will be seen that the action taken by the representatives of the *Compagnie Générale de l'Orénoque* in liquidation in the four years subsequent to the sentence, during which time the diplomatic relations between France and Venezuela were on a friendly footing, was simply of a friendly and private nature with private and influential individuals and officials for the purpose of obtaining a friendly compromise of pecuniary advantage to the company, no diplomatic action whatever having taken place during that time. The record presented to Dr. P. E. Rojas, minister of foreign affairs, was not effected in an official manner, and no allusion whatever is made which may convey the idea that it was presented by the representative of France in Venezuela, who was the properly qualified party to communicate on this matter with the minister of foreign affairs. The document in question does not exist in the archives of the ministry of foreign affairs, and it is to be presumed that a document annexed to the record presented to this commission, marked "No. 106," containing 37 pages written in Spanish without any signature, dated 12th of November, 1894, which is said to have been addressed to the minister of foreign affairs, is the very same report presented by Mr. Delort to Doctor Rojas, who may have returned it to the former.

This document, which is not even signed by the person who presented it, is simply a narrative of facts which took place from the time of the concessions from which the *Compagnie Générale de l'Orénoque* originated and of comments

on the diplomatic incident between Venezuela and Colombia caused by the publication made in Paris by the Compagnie Générale de l'Orénoque of a report and geographical chart which comprised a zone of land which was sub litis between Venezuela and Colombia, on the real ownership of which judgement was pending from the Spanish Government according to the treaty of arbitration juris of the 14th of September, 1881. This document of report contains the following among other statements:

In short, an association was formed by a group of well-known honorable French citizens who placed reliance on the good faith of Venezuela, whose word was solemnly pledged by a contract drawn according to its laws for carrying into execution an arduous enterprise, which was chiefly to be to the honor and benefit of the country. Some very important work was done, as well as the very difficult task of establishing steam navigation between Ciudad Bolívar and Brazil. But the Venezuelan Government, which had pledged their signature either by error or by omission, realizing then by the urgent claims of Colombia, as well as by the arbitration sentence pronounced by Spain, that they had had no right to grant concessions on territory which they did not possess, found no other way for withdrawing from an awkward position than to rescind their contract with the company, taking no heed of the serious damages caused by such an action to the other party in the contract. It is therefore but just and equitable as well as honorable for the Republic that this group of foreigners who brought their capital to this country in good faith under a contract should receive an indemnity for damages they have sustained.

Further in the report it is stated:

There can be no doubt as to the responsibility inherited by this Government from the former administration, *owing to the want of loyalty shown at the time the contract was drawn where the Colombian claim was kept in concealment* and allowing the company to proceed with its work to invest its capital and to make colossal efforts in order to comply with its obligations, and owing to the proceedings of the Government even before the malicious and baseless suit for rescission of the contract was entered and had been sentenced by the high Federal court proceedings, which were contrary to law, to universal justice, to all sound principles, and to the very interest of the country, and by the force of which the company was ruined and all the elements of progress and civilization which were to benefit and improve those territories were misapplied and frittered away.

The violent language used in this report and the offenses therein addressed to the Government of the Republic explain why it was that the same was returned to its author and why no traces were left of its passage through the hand of the minister of foreign affairs.

To refute the assertions contained in said report with reference to the boundary question with Colombia, it will be sufficient to quote in extenso the reply of Mr. Delort on the 23d of September, 1888, to the minister of fomento, when the former was asked by the latter to explain the cause of the publication made by the company in Paris of a report and a map *in which a certain territory which had been submitted to the decision of an arbitrator appointed by Venezuela and Colombia appeared as having been granted to the Compagnie Générale de l'Orénoque by the Government of Venezuela.*

The dispatch of the minister of fomento to which Mr. Delort replied is as follows:

No. 452.]

DEPARTMENT OF TERRITORIAL WEALTH.

Caracas, 18 September, 1888.

To Mr. DELORT,

*Concessionary for the Exploitation of the Territories Upper Orinoco and Amazonas*

Under date of 15th instant the minister of foreign affairs has officially transmitted the following to this ministry:

“CARACAS, 15th September, 1888.

“SIR: The envoy extraordinary of Colombia has entered a claim against the publication of a geographical chart and a report by the Compagnie Générale de l’Orénoque of the Upper Orinoco and Amazonas, containing a description of the boundaries of their concessions in which are comprised, as granted to said company, vast territories which are *sub lite* between Colombia and Venezuela. Consequently and with a view to examine said report and chart, I trust that you will remit them to me, if you are possessed with them, or that you will kindly request the representative of the company to furnish you with same, as well as with his own report on the subject, should these documents not exist in your office. I transmit this communication to you in order that you remit to me the information required.

“ (Signed) CORONADO.”

Mr. Delort’s reply is as follows:

“CARACAS, 20th September, 1888.

“TO MINISTER OF FOMENTO.

“MONSIEUR LE MINISTRE: I have had the honor to receive your dispatch dated the 18th instant, to which I now reply. When the company of the Upper Orinoco was formed a report was drafted in Paris for distribution only among the shareholders. In said report the *concessions transferred to the company by Mr. Tejera* were inserted as well as an abstract of the articles of association and divers information on the natural products to be exploited as per the terms of the contract. To that report a map was annexed in order that the shareholders should know the location of the territories granted to the company *for exploitation*. That map is a copy of the one annexed to the statistical bulletin published in several languages by the Government of Venezuela. This report does not deal with the boundaries between Colombia and Venezuela *nor with a vast expanse of territory granted to the company, but only with the natural products of the extensive region of the Upper Orinoco and Amazonas. The company knows that the boundaries between Colombia and Venezuela are sub litis, submitted to the arbitration of the Spanish Government. The company therefore lays no claim on this point; and as she holds her concession from the Government of Venezuela, she is well aware that she has to conform to the final boundary fixed to the Republic. Up to the present time the company has extended her exploitation only to localities under the jurisdiction of Venezuelan authorities and her agencies, stores and others are situated at Atines, Maipures, San Fernando, San Carlos, and the Brazilian boundary, and our steamboats are plying only on the Orinoco, the Casiquaire, and the Guainia. I regret not to be able to send you the report referred to, but two copies of same must have been forwarded to you by the agent of the company in this city and should be in your possession. I trust, Monsieur le Ministre, that the explanation which I have the honor to submit to you will be satisfactory, and I trust as well that you will appreciate our good faith on this matter.*

“With the highest consideration, I remain, Monsieur le Ministre.

“ (Signed.) TH. DELORT.”

If the wording of this communication is compared with that of the report addressed by the very same representative of the company in 1894 to the minister of foreign affairs of Venezuela and with that of the memorial addressed in 1895 by the liquidators of the company to the minister of foreign affairs of France, when reference is made in both documents to the boundary question with Colombia, the acts of the representatives of the company may be appreciated in their true meaning and value; but in spite of all, the plain and steadfast avowal made by the representative of the company remains unaltered, viz. —

that the company knows that the boundaries between Colombia and Venezuela are *sub lite* submitted to the arbitration of the King of Spain, and that the company, therefore, lays no claim on this heading and is well aware that she has to conform to the boundaries which may be definitely fixed.

Nor could the company be ignorant of this, as she had been finally constituted on the 12th of March of that same year and she had been formed according to the articles of association published in Paris *with the property of the concession belonging to Mr. Tejera, a Venezuelan citizen, who had acquired it from Gen. Guzmán Blanco, an interest on 40 per cent of the profits having been adjudged to Mr. Tejera, according to articles 6 and 9 of said articles of association.* Could it be likely that Mr. Tejera, a Venezuelan engineer and ex-minister of public works, during one of the terms of power of Gen. Guzmán Blanco, from whom he had obtained the said concession, would not be well aware of all the details referring to the boundary question with Colombia which had been submitted since 1881 by Gen. Guzmán Blanco to the *arbitrio juris* of the King of Spain?

The author of the report addressed to the minister of foreign affairs of Venezuela on the 12th of November, 1894, asserts, on page 25 —

that the Government of Dr. Andueza Palacio blundered in like manner to his predecessors, *that nothing had been communicated to the company with the intention of keeping from her all knowledge of the claim of Colombia, and that it was evident that the Venezuelan Government knew they were wrong on this point toward the company and toward Colombia.*

But it was necessary to give some reply to Colombia, whose protests and claims were daily growing more pressing, and a means was devised for withdrawing from the embarrassing position caused by the contract of 1885.

These assertions were repeated later on in December, 1895, in the memorial presented in Paris by the liquidators of the company to the minister of foreign affairs of France and were complemented with the following statements:

Equity and justice, as well as the honor of Venezuela, impose on the government of Caracas the obligation to pay an indemnity to those parties who in good faith have invested their capital in the *Compagnie Générale de l'Orénoque* and who have been deceived from beginning to end.

The grave nature of these charges proffered against the Government of Venezuela, in order to base on them the right to a pecuniary indemnity in favor of certain parties pretending to have been the victims of deceit from beginning to end, imposes on the Venezuelan commissioner the task of throwing full light on the truth of this matter as to what refers to the claim of Colombia, which the company alleges was kept in concealment by the governments preceding that of Dr. Andueza Palacio.

It is altogether inaccurate that the governments preceding that of Dr. Andueza Palacio *had communicated nothing to the Orinoco Company with the purpose of keeping from her knowledge the claim of Colombia.*

Shortly after the formation in Paris of the syndicate which was to be the basis for the constitution of a limited company in favor of which the concession of Mr. Tejera was to be transferred, a report of fifteen pages was published in the city of Paris *on the concessions of the Compagnie Générale de l'Orénoque under formation, and annexed to it was an abstract of the articles of association of said company, together with a map comprising the navigable waterways within the territory granted.* This report on the territory granted was drawn, as stated, by Mr. Delort in his reply to the minister of fomento of Venezuela, under date of 25th of September, 1888, solely for the use of the shareholders of the company which they had the intention of forming, and the geographical chart was annexed to it with the purpose that said shareholders should know where the territory granted to the company was located.

In a dispatch dated in Bogotá on the 28th of October, 1887, the minister of Colombia called the attention of the minister of foreign affairs of Venezuela —

to a report published in Paris by a French company on the subject of certain concessions which were said to have been granted by the Government of Venezuela on the territories of the upper Orinoco and Amazonas belonging to the Republic of Venezuela and to a chart annexed to that report, in which the western boundaries of said territories were fixed in such a manner as to comprise within them the large zone which was sub litis between Venezuela and Colombia, the real ownership of which was yet to be decided by the sentence of the Spanish Government according to the terms of the treaty of arbitration juris of the 14th of December, 1881.

This dispatch ends as follows:

It is clear that neither of the two Governments can grant any valid concession on these lands, and it is likewise evident that the error of the *Compagnie Générale de l'Orénoque* is due to their having made reference to geographical or statistical data previous to the treaty of 1881 aforesaid, by virtue of which that zone is not only made debatable, but is to be defined by a special arbitration in exclusive manner.

The importance of these observations from the minister of Colombia could not escape our then minister of foreign affairs, Dr. Diego Bautista Urbaneja, who had been counsel to the company from the very beginning, as evidenced from the payments made to him by the mint of Caracas on the 28th of February, 1888, 28th of April, and 30th of May, and at the end of each successive month for professional services, (account of the Company "La Monnaie" with the *Compagnie Générale de l'Orénoque*, voucher 3), and consequently a dispatch, dated the 25th of November, 1887, was addressed to the minister of fomento requesting the necessary information and report aforesaid for replying to the minister of Colombia. The minister of fomento replied to the minister of foreign affairs that the aforesaid report had never been sent to his department. (Secretary's record of the ministry of fomento referring to the contract Guzmán-Tejera, transmitted to the high federal court to be annexed to the record of the suit against the *Compagnie Générale de l'Orénoque*.)

Mr. Delort, who was director in Venezuela of the works started by the syndicate and the only representative of the company with whom the Government of Venezuela had had any dealing up to the present, was in Paris at the time these events were taking place. When he returned to Caracas in December, 1887 (memorial of the 3d of December, 1895, p. 24), where he remained a few days, he proceeded to Ciudad Bolívar, there to attend to the work of organization.

Since February, 1888, Doctor Urbaneja was receiving from the "*Société de la Monnaie*" (the mint) the payment of fees for professional services rendered to the *Compagnie Générale de l'Orénoque* during the administration of General López, and it is therefore not likely that from that period of transition to the coming into power of Dr. Rojas Paúl, which took place in July of same year, Mr. Delort would be ignorant of the claim of Colombia, his own counsel being the identical person who had received the dispatch on the subject from the foreign office of Colombia. As soon as Dr. Rojas Paúl had been installed in power his minister of foreign affairs received on the 9th of August, 1888, a confidential memorandum from the minister of Colombia in Caracas, in which he was reminded of the dispatch of the 28th of October, 1887, for replying to which Doctor Urbaneja, when minister of foreign affairs in November, 1887, had solicited from the minister of fomento the map and report referred to in said dispatch, which map and report the said minister of fomento had been unable to remit because they did not exist in his department. For replying to the confidential memorandum of the 9th of August, 1888, the minister of foreign affairs addressed another dispatch, under date of the 15th of September, 1888, to the minister of fomento, requesting once more the remittance of the

said report and map in case these had already reached his department, and, if not, requesting that he would ask the representative of the company for said documents and a report on this subject. (Dispatch previously inserted.) This was transmitted by the minister of fomento to Mr. Delort under date of the 18th of September, 1888, to which he replied in the terms of his communication of the 20th of the same month, which has already been reproduced in extenso. This exchange of dispatches was taking place at the beginning of the administration of Dr. Rojas Paúl, one year and a half before Dr. Andueza Palacio came into power in March, 1890, and in spite of this the representative of the *Compagnie Générale de l'Orénoque* and the liquidators of the same have not hesitated to assure to a high official of the French Republic, its minister of foreign affairs, in the memorial before mentioned —

that the Government of Dr. Andueza Palacio blundered in like manner as his predecessors, that nothing had been communicated to the *Compagnie Générale de l'Orénoque*, not wishing to bring to her knowledge the claim of Colombia.

A claim which is based on this sort of argument is judged and sentenced by itself.

Apart from the inconsistency and lack of truth of the assumption of the company that the Venezuelan Governments kept in concealment the claim of Colombia with reference to publications made by the syndicate of the company of the Orinoco what took place between the Venezuelan and the Colombian foreign offices did not in any way alter the essence of the contract between the Government of Venezuela and Mr. Miguel Tejera, which was simply for the exploitation of the natural products of the territories of Upper Orinoco and Amazonas, and which neither meant to convey the alienation of any lands nor fixed any boundaries.

This concession comprised an extension of territory several times larger than the zone of land coterminous, on the western part of the Republic, with Colombia, submitted to the award of the King of Spain. The extension of those territories comprised very nearly 25,000,000 hectares, thickly wooded from the rapids of Maipures to the Brazilian boundary toward the south and to the Republic of Colombia toward the east. The justice and the accuracy of this appreciation are acknowledged by the very *Compagnie Générale de l'Orénoque* in the reply of her representative to the minister of fomento, in which they say:

The company lays no claim whatever with reference to the boundary question with Colombia, as she is well aware that she has to conform to the limits which may ultimately be fixed to the Republic of Venezuela.

The good faith with which Venezuela held in her possession, as belonging to her, a certain zone of lands which was afterwards awarded by the arbitrator to Colombia precludes all responsibility from the Government in the concession in question, which was never intended to convey any definite alienation, but simply the exploitation of natural products in those localities where Venezuelan settlements existed under the jurisdiction of Venezuelan authorities.

This declaration, which is altogether in accordance with the principles of international law, is concretely embodied in the award of the arbitrator on the boundary question with Colombia in the following words:

Whereas, according to the agreement signed by the parties the award is to fix the limits or boundaries, which in the year 1810 existed between the then general captaincy of Venezuela, to-day the United States of Venezuela, and the viceroyalty of Santa Fé, to-day the Republic of Colombia;

Whereas the law functions assigned to the arbitrator by the treaty of Caracas of the 14th of September, 1881, were enlarged by the declaration of Paris of the 15th of February, 1886, so that the boundary line should be fixed in the best man-

ner, as nearly as possible, according to the existing documents, whenever these documents throw not sufficient light on a given point;

Considering that, for the better understanding, section 6 (Orinoco and Río Negro line) can be divided into two parts, viz, from the Meta to Maipures, and from Maipures to the boulder called Cocuy;

Considering that the starting point and the legal base for determining the boundary line in part second of the 6th section is the real cédula (royal decree) of the 5th of May, 1768, on the real meaning of which there is a disparity of opinion between the two high contracting parties;

Considering that the terms of the aforesaid real cédula are not as clear and precise as necessary in this class of documents so as to base exclusively on same a decision juris;

Considering therefore that the arbitrator is confronted with the case foreseen by the declaration of Paris before mentioned;

Considering that the *United States of Venezuela* possess in good faith territories to the west of the Orinoco, the Casiquiare and the Río Negro, which rivers form the boundaries assigned on that side to the province of Guayana, by the said real cédula of 1768;

Considering that in said territories there exist very important Venezuelan settlements which have been fostered in the bona fide belief that they were located within the dominions of the *United States of Venezuela*, and lastly,

Considering that the rivers Atabapo and Río Negro form a natural, clear, and precise frontier, with the only interruption of a few kilometers from Yavita to Pimichin thus to keep clear of the respective boundaries of these two villages;

I have to come to declare that the boundary line debated between the Republic of Colombia and the *United States of Venezuela* is now defined in the following manner: \* \* \*

Section 6, Part I. From the mouth of the river Meta in the Orinoco down the stream of this last to the rapids of Maipures, *but always having consideration to the fact that the village of Atures from the time of its foundation has made use of a road which is on the left bank of the Orinoco for the purpose of turning the rapids from the said village of Atures to the harbor or port situated to the south of Maipures, opposite to the hill called Macuriana, toward the north of the mouth of river Vichada; the aforesaid incumbrance or right of way is here expressly assigned in favor of Venezuela, the same incumbrance to cease twenty-five years after the publication of this award or as soon as a road be made in Venezuelan territory which may render unnecessary the traffic along the Colombian road, the two interested parties having the right to regulate by common consent the use of this incumbrance.* (From the Official Gazette of Madrid, 7th of March, 1891.)

As may be seen from the preceding award, the arbitrator expressly acknowledged that Venezuela had possessed in good faith a portion of the territory adjudged to Colombia, and in consequence he established in favor of Venezuela the use of way between Atures and Maipures along the left bank of the Orinoco for a period of twenty-five years, to be counted from the publication of the award. This decision would have given full security of the *Compagnie Générale de l'Orénoque*, had it at the time carried out her obligation to construct a railway line which was to divert the hindrance of the rapids of Atures and Maipures and to facilitate the steam navigation of the Orinoco.

Having demonstrated that the charges preferred against the Venezuelan Governments and their proceedings toward the *Compagnie Générale de l'Orénoque* with reference to the Colombian boundary question are devoid of all bases, and having also demonstrated that the judgment passed by the high Federal court in the suit entered for rescission of the contracts granted to said company for the exploitation of the natural products of the territories of Upper Orinoco and Amazonas and for the exploitation of the tonca beans (sarrapia) on the territories conterminous with Brazil and British Guiana, was a sentence pronounced by that tribunal after having complied with all the legal prescriptions of the code of procedure then in force, and in every way in accordance

with the fundamental laws then in force in Venezuela, the Venezuelan commissioner considers that said sentence is valid and affirmed, and that it has been acknowledged and accepted by the Compagnie Générale de l'Orénoque, since this company did not in due time, according to the law, make us of her right to appeal in order to invalidate same.

After due examination of the fundamental part of this sentence, and after analyzing all the evidence produced by the contending parties, it is evident that the verdict of the high Federal court, in administering justice on behalf of the Republic and by authority of the law, was entirely adjusted to the prescriptions of the civil code on rescission of contracts, the Compagnie Générale de l'Orénoque not having complied with any of the obligations under Nos. 1, 2, 3, 4, 5, 6, 7, and 9 of article 2 of the contract of the 17th of December, 1885, nor with any of the stipulations 3d, 4th, and 5th of the contract of the 1st of April, 1887, and as a consequence of which rescission the tribunal condemned the Compagnie Générale de l'Orénoque to pay to the Venezuelan Government the sum of 40,048.62 francs for damages, besides the costs of the suit.

Two days after the financial representative of the Government (*fiscal nacional de hacienda*) entered before the high Federal court the suit against the Compagnie Générale de l'Orénoque a general meeting of shareholders of said company was taking place in Paris, on the 30th of May, 1890, in which a resolution was passed for the purpose of converting the Compagnie Générale de l'Orénoque into an English company, under the name of "Orinoco Exploration and Trading Company," which meeting likewise resolved *to dissolve and wind up the company and appointed liquidators*. In the memorial presented by the liquidators of the company on the 5th of December, 1895, reference is made to the aforesaid dissolution, after the following statements:

The board of directors had many debtors and they hesitated therefore to collect the harvest of 1890, but yielding to the representations of their agents they furnished the necessary funds in agreement with a Liverpool firm who sent out their special agent, Mr. Staedelli.

The position of the company in Paris *was very painful, as its credit had been totally exhausted. All efforts made in France proved to be of no avail*, while in England confidence was not lost and it was possible to go on there with the business. The board of directors therefore willingly considered a proposition from England for the constitution of a company in London, to which all the assets, contracts, material, works, etc., of the Compagnie Générale de l'Orénoque would be transferred.

No mention is made in this memorial of the liabilities of the company, although it may be inferred from their own statements that they must have been considerable. *as the credit of the company was exhausted in Paris and all efforts in France seemed of no avail.*

In the accounts annexed to the petition presented by the liquidators of the company on the 10th of July, 1902, to the minister of foreign affairs of France, which fixes their claim against the Venezuelan Government in the sum of 7,616,098.62 francs, will be found the following items referring to the liabilities of the company on the 30th of May, 1890:

	<i>Francs</i>
1 To the shareholders . . . . .	1,500,000.00
2 To the Société de la Monnaie . . . . .	722,851.56
3. La Banque de Consignations . . . . .	236,356.00
4. Mr. Alfred Chauvelot . . . . .	191,176.00
5. Mr. Eugene Ferminac . . . . .	63,000.00
6. Mr. Louis Roux . . . . .	13,059.55
7. Mr. Theodor Delort . . . . .	14,641.26
Total . . . . .	2,741,084.37

In this amount interest on the different credit balances is not included. The company had, therefore, on the 30th of May, 1890, debits amounting in total to almost as much as the capital of the company, equal to 1,500,000 francs.

Out of this capital, 600,000 francs had been allotted to Mr. Chauvelot, in 1,200 shares (fully paid) of 500 francs each, which were deducted from the 3,000 shares which formed the capital of the company.

Mr. Bricard, who had been appointed auditor in the first general meeting of the 9th of March, 1888, presented a report dated in Paris the 10th of March 1888, in which he emits his opinion in reference to the valuation given to the contributions brought to the company by Messrs. Miguel Tejera, Chauvelot, and Th. Delort.

The contribution of Messrs. Tejera and Delort consisted in the concessions granted by the Government of Venezuela for the exploitation of the natural productions of the Territories of the Upper Orinoco and Amazonas, and for the exclusive purchase and sale of all the tonca beans (sarrapia) of the territory between the Orinoco, Brazil, and British Guiana. In consideration of these contributions Messrs. Tejera and Delort had an interest of 40 per cent and 20 per cent, respectively, on the dividends to be distributed.

The contribution of Mr. Alfred Chauvelot consisted in the following:

First. The plant belonging to him, and principally the steam launches and boats of other kind, the rolling stock, etc., in short, all the goods bought by him for the intended exploitation.

Second. All the works already completed, such as houses, stores, offices, shops, etc., erected on the different agencies, and the actual organization of the exploitation, which included the contracts and agreements with the various agents and employees.

Third. The assets and liabilities of the company, including all goods on deposit or in transit, as well as the ingress and egress necessary for the purchase or sale of goods, or effects, etc., for the upkeep of the personnel.

Fourth. The agreement signed with several commercial agents for the purchase and sale of goods in Europe and America.

The opinion of the auditor with reference to the contribution of Mr. Chauvelot, in consideration of which he was allotted 1,200 shares of 500 francs each, is expressed in the following words:

A sum of 300,000 francs without any interest and without any guaranty was placed at the disposal of the explorers, and in consideration of this loan and of the penalties and privations suffered by Mr. Chauvelot and his friends (who had derived from this enterprise no benefit whatever, either direct or indirect, and who relinquished in favor of the company any benefits accruing from the sale of products exported up to date) 1,200 shares were allotted to him. I must add that the expenses incurred up to date far exceed the said sum of 300,000 francs, but said expenses are already incurred and they are represented by the plant and the work performed. These expenses had to be made and they will be beneficial to the company, who would have been obliged to incur the same after she had been constituted. It is therefore only right that the company liquidate these supplementary expenses at her own risk and peril and take them over.

The amount of these expenses, which were represented by plant and work performed, is said far to exceed the sum of 300,000 francs loaned by Mr. Chauvelot, but the exact figure is not given. From the examination of the accounts presented by the Société de la Monnaie it appears that on the 10th of March, 1888, when the auditor presented his report, the syndicate of the Haut Orénoque was raising the sum of 491,846 francs, not counting interest from the 1st of January of same year; that on that date the account was commenced with a debit balance of 499,523.69 francs; that the account of the Banque des

Consignations commenced on the 1st of January, 1890, with a debit balance of 285,900.70 francs and was increased with interest to the 31st of March, 1890, amounting to 3,849.59 francs, and with 31.75 francs, Mr. Brumeaux's fees for a summons, and with 13 francs for dispatches to London and to New York.

The foregoing shows that when the *Compagnie Générale de l'Orénoque* was constituted with a capital of 1,500,000 francs, a sum of 600,000 francs in fully paid up shares was allotted to Mr. Chauvelot in consideration of his loan of 300,000 francs, which was represented in plant, steam launches, and preliminary work for establishing the navigation of the Orinoco, which really constituted the working capital of the company; that this working capital had really cost a sum in excess of the 300,000 francs loaned by Mr. Chauvelot and that the company undertook to liquidate the same and to take it over at her own risk and peril; that according to the abstract of account of the *Société de la Monnaie*, the syndicate was owing to that society the sum of 491,486 francs, which was partially paid off during the course of that year with bills of exchange and cash, and that said account was thus reduced on the 31st of December, 1888, to the sum of 284,673.29 francs, inclusive of interest amounting to 28,427.85 francs. The sum of 900,000 francs paid in by the shareholders, besides the 600,000 francs allotted to Mr. Chauvelot, were absorbed by the liquidation of the debts of the syndicate and by the requirements of the trading of the society in buying and selling goods, exporting products, employees, and general expenses; and no evidence exists to show that any part of that sum of money had been invested as contracted by the company in the construction of two railway lines, in the sending out of a scientific commission for the study of the natural products and minerals existing in the territories, nor in the introduction of immigrants, or the building of chapels and schools in every village that the company was bound to found, nor in the construction of barracks, nor the introduction of Catholic missionaries, nor in the hospitals and drug shops for the attendance of natives and immigrants, nor in colonizing the tonca bean territories, nor in establishing navigation in the principal affluents of the Orinoco.

This sum of 900,000 francs, paid into the treasury of the company, as well as the sum of 1,241,000 francs, which she was owing to several parties two years after starting her operations, after having exhausted her credit and being unable to proceed, appear to have been all spent without any other apparent result than the exportation during the same lapse of time of 73,992.20 kilograms of rubber and 44,569.70 kilograms of tonca beans, according to the official figures mentioned in page 68 of the memorial of the liquidators.

The explanation of the result of the commercial operations of the company is furnished by the very figures taken from her books and reproduced in the memorial so often quoted. (See p. 66.) This demonstration or abstract is headed thus:

General account of expenses of the *Compagnie Générale de l'Orénoque*, from the original syndicate, September, 1886, to the 14th of October 1891 (on which day judgment was passed by the high Federal court), after deducting the moneys received for sale of products by the company.

Items referring to expenses:

	<i>Francs</i>
Expenses of first establishment, viz:	
<i>Expenses of syndicate</i> . . . . .	290,995.88
Ciudad Bolívar:	
Expenses of <i>administration, agencies, employees, navigation expenses, traveling expenses, etc.</i> . . . . .	487,263.09
<i>Furniture and naval stores, shop and transport stores, sawmill, utensils, etc.</i> . . . . .	425,040.66

	<i>Francs</i>
Atures and Maipures:	
<i>Work on boats and transportation of same over the rapids, mounting, remounting, repairing and maintaining same, railroad for the carrying over of the boats. Surveys of both banks of the river for the construction of a final line, roads, bridges, rafts, buildings, etc.</i>	629,080.37
Punta Brava:	
<i>Expenses of agency and of installation, harbor, road, and other work</i>	117,708.01
San Fernando and San Carlos:	
<i>Expenses of agency and installation, buildings, watch posts, etc.</i>	360,521.80
<i>Cattle ranch on the Vichada</i>	62,708.08
Paris:	
<i>General expenses of administration, board of directors, employees, traveling expenses, etc.</i>	118,628.19
<i>Stamps and registration</i>	6,821.80
Total	2,498,767.88

Considering the amounts of these items and all that is revealed by them, and taking into account the capital with which the company was founded and the colossal magnitude of the enterprise it entered upon unaware of the difficulties of same, as has been repeatedly acknowledged by her principal directors, it must be admitted that what happened was only natural and inevitable, viz: That the company exhausted its credit; that it was unable to proceed with its operations or to comply with its engagements and to pay its debts; that the general meeting of shareholders of the 30th of May, 1890, resolved to dissolve and wind up the company before they had any knowledge of the action suit entered by the representative of the Government of Venezuela, and, lastly, its attempts, twice baffled, to convert itself, first, into an English company with the name of "The Orinoco Exploration and Trading Company," and later on into a Belgian limited company under the name of "Compagnie Internationale des Caoutchoucs," both attempts having been made with the object of obtaining an increase of cash capital to pay off debts and proceed with the business.

The declarations of several parties who had held important posts in the employ of the company can be made good as further evidence of the real situation of the company in May, 1890, which, being in want of funds and having totally exhausted its credit in Paris, was unable to comply with its engagement toward the Government of Venezuela and to continue the exploitation of the concessions transferred to it by Messrs. Tejera and Delort, by reason of which the general meeting of shareholders resolved on the dissolution and winding up of same. These declarations are: First, the declaration made before the judge of first instance of San Fernando de Apure by Mr. Enrique Ligeron, submanager of the company in the Upper Orinoco, which declaration is a part of the evidence procured and presented by the representative of the company before the high Federal court in the action entered by the fiscal de la hacienda pública (financial representative of the Government); and, second, the report presented by the liquidators of the company to the meeting of shareholders held in Paris on the 27th of December, 1890, as well as the minutes of said general meeting.

Mr. Enrique Ligeron's declaration of the 13th of November, 1890, before the said judge is as follows:

I was submanager of the company in San Fernando de Atabapo more than four years, hence when I went to that place the steam launches which the company had taken there for navigating the river above the rapids had been carried above these rapids. *These steam launches had been transported on rails provisionally laid, and*

when I arrived there *no railway line existed and the rails had been scattered in different parts*. In the present condition of the river above the rapids *no steamboat can navigate on those waters, as the obstacles offered by the rapids are insurmountable*. The more convenient way of covering that space *would be the construction of railway lines over ground, which offers no great difficulties*, the most difficult part of which being *the construction of bridges on the affluents of the Orinoco, which run across these lands*. It is evident to me that the company made all efforts in order to comply with the engagements of its concessions, *but in my opinion it could not do more than what it performed, owing to the insufficiency of its capital for carrying out the different enterprises of its contract*.

The abstract of the minutes of the general meeting of shareholders of the 29th of December, 1890, contains the following:

The meeting having been regularly constituted, the liquidators read the following report: "In our meeting of the 23d of June last you were acquainted with the agreement signed with the Gold Trust and Investment Company for converting the *Compagnie Générale de l'Orénoque* into an English company called '*Orinoco Exploration and Trading Company*.' This agreement having been approved by the general meeting, *the dissolution and winding up of the company was resolved and I had the honor to be appointed liquidator.*"

The agreement with the Gold Trust having been definitely sanctioned by the shareholders, the new company was formed and registered in England; but political differences having in the meantime arisen between England and Venezuela, this last power has absolutely refused to acknowledge the new company and to transfer to same the rights and concessions of the French company. It was but very late that I was made acquainted with the causes which were opposed to the formation of the English company, and this delay was the cause of my losing very valuable time; but the moment I knew of these causes I took steps conducive to a result *which might save our company*. I have *appealed for assistance* to the former directors of the company who are now negotiating with the Government of Venezuela and have looked *toward another solution of the problem, which is the only means of insuring the future of the company, viz, the reconstruction of the present company with an increase of fresh capital in cash*. These gentlemen will now submit their views to you and will bring to your knowledge the result of their negotiations.

The chairman then said that owing to the facts which had just been mentioned by the liquidator the board of directors had sent to Caracas Mr. Berthier, who had been a former agent of the company, with the following mission: *to obtain from the Government the revision of the old concessions, which evidently contained clauses which were embarrassing to the Government as well as to the company*. Mr. Berthier was, besides, to make sure that the Government would make no difficulties *for the transfer to a new company (provided this be not an English company) of all the rights and concessions accruing from the new contract*. The double purpose of Mr. Berthier's mission has been obtained, the terms of the new contract proposed have been accepted, and one of its clauses will allow the transfer to a new company. The new company will be French-Belgian, formed *with the assistance of a powerful Belgian group*.

The chairman then read the draft of the Articles of Association of the French-Belgian Company in formation.

The *Compagnie Générale de l'Orénoque* having ceased to exist in May, 1890, by virtue of the dissolution voted by the shareholders, the administrators had no longer power to transact any business, and the authority of the liquidators was reduced to the collection of moneys owing to the company, to wipe off former debts and liabilities, and to conclude whatever operations were pending at the time of the dissolution. The liquidators had also to appear in court in whatever actions existed against the company, as the limited company called "*Compagnie Générale de l'Orénoque*" had ceased to exist by virtue of her dissolution, and there had likewise ceased to exist, from the moment that the liquidators had been appointed, all the powers and authority of the board of directors, as well as all the powers that might have been conferred by said directors.

From the minute examination of all the papers and documents referring to

this matter, made by the Venezuelan commissioner it is evident that at no time whatever was the knowledge of the dissolution and liquidation of the *Compagnie Générale de l'Orénoque* conveyed to the high Federal court, and that the liquidators never took any steps for the purpose of being represented in the action, neither at the time when the suit entered by the representative of the Government of Venezuela was to be answered (on the 22d July, 1890), nor on the 7th of August, 1890, when Mr. Fiat entered his petition for the collection of evidence, nor in any other circumstance whatever during the whole course of the process. It is likewise evident from said examination that the dissolution of the company was never officially communicated to the Government of Venezuela, and it is natural to infer that the cause of this omission was to keep this fact from the knowledge of the Venezuelan authorities, a fact which in itself was sufficient for the complete success of the action entered by the representative of Venezuela in the high court for the rescission of the contracts upon which the company was formed, since the dissolution and liquidation of the company frustrated the object to be obtained by the working of the concessions granted and made it materially impossible for the concessionaries to comply with their obligations, which was the legal basis of the suit.

It is equally evident from the avowals of the liquidators, in their memorial to the minister of foreign affairs of France, and Mr. Alfred de Berthier's correspondence annexed to same, that Mr. Fiat, who had been representing the company before the court up to the 11th of October, 1890, *had sent his resignation to Paris*, and that Mr. Bernabé Planas was then appointed as attorney, but this gentleman having declined the appointment, it was decided, on the advise of Mr. Delort, to send out a special agent. Mr. Berthier was appointed for this mission, as he was acquainted with all the details of the matter. Mr. Berthier, who was at the time in Martinique, was notified to proceed to Caracas, where he arrived on the 25th of October, 1890. (Page 47 of the memorial.) Mr. Berthier remained in Caracas from the end of October, 1890, to the month of July, 1901, and the action taken by him *tended solely to the obtaining of an extra judicial understanding with the fiscal de hacienda* (the representative of the Government) *in the suit pending before the high Federal court* —

*in order to put a stop to the process and the relinquishment on the part of the Government to demand an indemnity*, and the company, on the other hand, to renounce to its concession, in place of which another would be granted which would be immediately transferred to the new company.

Mr. Berthier, in a letter dated the 16th of December, transmits to Count de Ker Daniel, the liquidator of the company, the following:

I am not yet sure of this result, which has not so far been agreed to, but it is useless to deceive ourselves on it, as after all it does not amount to much. *What we would really gain is the cessation of the action entered against us.* All else is a chimera (leurre). I do not, however, believe that I can obtain anything better, *and I consider it lucky if we obtain this.*

According to the scheme proposed to the Government of Venezuela for a new contract —

the company was to relinquish her former concessions and the Government was to desist from the action entered before the high court, each party to pay their own costs, and the Government was to grant to the company for a period of twenty-five years the exclusive right for steam navigation on the waterways of the Federal Territories Upper Orinoco and Amazonas, and on the rivers Caura and Cuchivero, during which period the Government would not grant a similar concession to any other party or company.

The steamers of the company were to navigate under the Venezuelan flag. (Annexed document No. 92.)

It is to be observed that this scheme commences in this way:

The Compagnie Générale de l'Orénoque, represented by her legal attorney, as per annexed power, which will be certified.

No mention whatever is made that the company was in liquidation, and all along this document she is simply called the "Compagnie Générale de l'Orénoque."

Article 10 of this scheme is worded thus:

This contract can be transferred to any other party or company with the previous consent of the Federal Government, without which formality the transfer can not be effected; however, as an exception this contract can be transferred in part or in whole to the Belgian company called "Compagnie Internationale des Caoutchoucs et Produits Naturels au Bassin de l'Orénoque."

According to article 3 of said scheme the company had the right to construct within the territories mentioned the railway and telegraph lines which it might think convenient.

Mr. Berthier went on with his extra judicial negotiations until May, 1891. On the 17th of the same month this gentleman (as confirmed by his letter of 28th of May to the liquidators) transmitted to the said liquidators the following cablegram:

Contract accepted on best terms, navigation included; no special commission. I await instructions to proceed. Don't you wait longer, as time is very limited. If you can not remit one hundred thousand, send by cable whatever you can with authority to draw on you for the balance.

He again telegraphed on the 22d of May as follows:

On receipt of my letter of the 7th of May (which has not been presented), reply by cable. The tenth word of my telegram should have been "pullcinetto" (£600,000). Give your approval to contract, which comprises the free navigation. I have sent you a copy. I will not weary of pressing you, as there is no time to be lost.

Again, a third cablegram of the 25th of May reads thus:

As you have not telegraphed to me, the negotiation has collapsed. It is useless to proceed, there being no probability of doing any business for some time. I am unable to do anything for the present. I will leave on the 6th June. I can not remain here any longer. Congress dissolves shortly.

Mr. Berthier's letter continues in this way:

I have received your last telegram one day after I had transmitted to you mine of the 25th. This is equivalent to telling you that *said telegram arrived too late*. I therefore confirm the contents of said telegram, but I shall, however, await for the arrival of Doctor Morisse, as per your advice.

I considered, by the contents of the letters you have written to me, that you were in a position to reply immediately on receipt of my first telegram. The deciphering you made of same was nearly correct, and it should have given you to understand the danger incurred by waiting. In truth I was careful to tell you that the Government maintained the nullity of the former contract to be replaced by a new one. You ought to have known, in consequence, that this entirely new decision required a certain time and that by means of the railroad we evaded the trouble of having to wait for Congress. I am still going to make a last attempt *in order to prevent that the new company be annulled in consequence of the nonfulfillment of the contracts by the old company*. There will be an extraordinary session of Congress

which lasts for some weeks. I will try to obtain a solution of the process, whichever it may be. \* \* \* If I fail in my last attempt, there will be no other way but to lodge a claim against the Government. It follows, of course, that a counteraction (cross demand) may be entered. Two facts have now taken place on the Orinoco which will give us considerable power later on. The first is that the steamer *Meta* was put out of service without any cause by order of the governor of the territory, an action which constitutes an outrage against private property. The second is an armed aggression against the steamer *El Libertad*, which was nearly captured. All this may serve as a basis for demanding a large indemnity, but when would such a cause come to an issue? Before I leave I will settle this matter so as to give to my successor the starting point for a claim. It would likewise be the official verification of those deeds which may be considered as worthy of a savage country. Resuming what precedes I am going to try to obtain a solution which will countenance the existence (*la raison d'être*) of the new company. In case I fail, I shall make preparations for obtaining the required matter (elements) for the process which we must necessarily enter into. I will associate with Maiz, by private agreement, for obtaining the concession on the rapids and sell out the same. *In this way we shall keep our hands on the business.* I will conclude by saying that I rely on the sincerity of the promises made to me and that the political situation has been the only cause of our failure. It is probable that a satisfactory result may be obtained, provided you can wait and spend some money at the proper moment: but as I can see no issue for the present, and I must necessarily return to France, I request you to relieve me from this post.

In page 49 of the memorial addressed to the minister of foreign affairs of France the liquidators express themselves as follows:

When Mr. Berthier saw that he could obtain nothing, he looked to a solution of the matter by means of contract for a railroad on the right bank; but we did not understand his cablegram, and this solution, on the other hand, was not acceptable. In short, Mr. Berthier had proved very expensive and had achieved no sort of success. But what was more grave than all this is that, on his advice, the Belgian company called "Compagnie Internationale des Caoutchoucs et Produits Naturels du Bassin de l'Orénoque" had been constituted at Brussels in May in order to transfer to the same the new contract (article 10 of the final scheme). What was now to become of that company?

The immediate consequence of Mr. Berthier's return to Paris was that the liquidators left the company without any attorney to represent it in the suit before the high Federal court, there being no document in existence to prove that the liquidators took the necessary steps for their representation at Caracas after Mr. Berthier had left.

From the examination of all the documents presented it appears likewise that the company had no official representative in the territories of upper Orinoco and Amazonas and that it limited its action there to entrusting to four employees (two in San Fernando and two in San Carlos) the collection of moneys owing to it and to keep an employee at Atures and another one at Maipures.

More or less than three years after the company had been put into liquidation and owing to the abandonment or desertion in which the company had left all its goods and chattels, which consisted of personal property, some goods, effects, and a few buildings made of earth, timber, and iron roofing, and which were scattered in different places on the banks of the Orinoco, the governor of the territory Upper Orinoco issued a decree laying an embargo on all these goods and chattels (under date of 8th of March, 1893), giving notice to the national executive of this decree and remitting the inventory of said goods to the representative of the company at Caracas for his knowledge and purposes.

The allegation set forth that the governor of the Upper Orinoco had no authority to carry into execution the sentence of the high Federal court without

an order to the effect from said court does not imply that this governor had no authority to decree the inventory of the goods and chattels of the Compagnie Générale de l'Orénoque in liquidation, which were entirely abandoned and were suffering considerable damage, owing to the special condition of same and to the wide expanse of territory over which they were scattered.

From the evidence of document No. 2 of the records in the archives of the high Federal court and from the memorial addressed on the 3d of November, 1895, by the liquidators of the company to the minister of foreign affairs of France, it is proved that the acts of the governor of the aforesaid territory were limited to the following: To the appointment of the persons that were to make the inventory at Maipures and San Fernando de Atabapo, for which purpose the chief civil official was commissioned, as well as for acting as receiver, there being no legal representative of the company to deal with; to issue instructions to the same official, under date of 8th of May of same year, for the preservation of the real and personal property, for the caretaking of the machinery, hulks, tools, and other effects, and for the tending and care of the cattle and stock; to issue a decree appointing citizens Julián Franklin, Julián Rivero, Sergio Lira, and Pablo Sanchez to take charge of all the stock and cattle that were under the care of Braulio Valiente.

It is therein stated that the firm of Messrs. Dalton & Co. had presented a petition or memorial requesting the payment of expenses and salaries which they had incurred on behalf of the Orinoco company. Messrs. Dalton & Co. say in said memorial:

During our commercial relations with the company of the upper Orinoco and Amazons we have, during more than one year, paid all expenses of the caretaking and preservation of the property of the company, including expenses caused by Mr. Marcelo Chiarelli. Without our intervention and without the interest which we took in the matter *the property aforesaid would have been completely ruined, as it had been notoriously left in abandonment*, owing to the difficulties which the company experienced latterly.

Messrs. Dalton concluded by requesting the payment of 4,000 francs, as per account, which they annex.

Pages 8 and 10 of the aforesaid document No. 2 contains the inventory of the property of the company at Perico, consisting of 1 house roofed with iron, several tools and pieces of furniture, 6 mules, 1 horse (all in bad condition), and 1 donkey; page 11 contains the receipt of Braulio Valiente for the cattle of the company at Santa Catalina, which consisted of 23 cows, 26 calves, 1 horse, 1 mule, and 1 donkey. Page the 12th contains a declaration from the same Valiente, in which he states the following: That besides these animals he had delivered the following during the revolution: To Santiago Hidalgo 20 head, to Mr. Horacio Luzard 3 oxen, and to Mr. Pedro Quiñones 2 head, making a total of 25 head in all; that he has in his possession 3 head belonging to Mr. Julián Rivero, 3 cows and 2 calves belonging to Mr. Sergio Lira, 12 head belonging to Mr. Juan Figarella and 1 more head belonging to Mr. Boulissière; that 7 bullocks have died and 1 has gone astray; that 2 bullocks were slaughtered by Gen. Venancio Pulgar, jr., and 2 by General Anselmo, governor of the Upper Orinoco; that Mr. Juan Figarella sold 5 cows at \$25 each, 5 bullocks at \$30 each, 1 lean bullock for \$25, 1 calf for \$8, and 1 bullock to Mr. Boulissière for \$41; that the cattle belonging to Julián Rivero and Sergio Lira were delivered to them by order of Mr. Chiarelli, liquidator of the company.

Page 13 contains another declaration of the same Valiente to the effect that the house of Messrs. Dalton & Co. was owing him salaries as caretaker of the cattle of the company to the amount of \$333.75, \$30 for a hut and corral built

by him, and \$31 for payment to laborers, making in all a total of \$396.75.

Page 16 contains the declaration of the French citizen G. Aubey, as follows:

Question. From whom did you receive the property of the company in San Fernando de Atabapo in order to become their agent in that place? Reply. The agent of the company in that place was the French citizen Mr. Eduardo Marie, but he had been obliged to leave on important business and he had commissioned to put me in charge the Belgian subject, Eugenio Halveich, from whom I received all the property under inventory, Mr. Ramón Orosco being present and signing the same as witness.

Question. To whom does the house called "Casa Amarilla" belong? Reply. The house belongs to me conditionally. I will explain this to you. The liquidator of the company, called Mr. Roux, who resided in Paris, wrote to me in August, 1891, to say "that I was to consider all the *bonos* (promissory notes) which I held from the company as hard cash." I then took the house in guarantee with the intention of turning over the same to the company in case she might need it, and provided I was paid the sum of 6,002 francs, which the company was owing me.

Question. What goods are there now in the Casa Amarilla? Reply. There are some pieces of furniture and some goods.

Pages 18, 19, and 20 contain the declaration of Juan Figarella, a French citizen in the employ of Mr. Chiarelli, who had been intrusted with the liquidation of the property of the company by Mr. Edmundo Knots. This declaration is in every way indetical to that of Braulio Valiente with reference to the cattle.

Pages 21, 22, 23, and 24 contain the inventory of the goods in the Casa Amarilla, which was an erection in pretty good condition, built of earth with a thatch roof. These goods consisted of woven stuffs, haberdashery, and ironmongery, and the inventory of same was made in the presence of G. Aubey, Pedro Nicco, R. Orosco, and Nieves Arrabache.

Page 26 contains the declaration of Horacio Luzard, similar to that of Braulio Valiente, in what refers to the number of cattle.

Page 29 contains a receipt from Luis A. Ortega in favor of Gen. Juan Anselmo, governor of the Territory, for the amount of \$131.43 on account of work as caretaker of the property of the company.

Page 30 contains a receipt from Braulio Valiente for \$108.63 in favor of same governor for salaries as caretaker of the cattle of the company.

Page 31 contains a petition addressed to the judge by the aforesaid governor, requesting the payment of expenses incurred in taking the inventory of the property of the company, as per vouchers of Luis A. Ortega and Braulio Valiente for the sum of 959.24 bolivars and requesting that orders be issued for the sale of part of the property to cover said expenses. Then follows the record of the sale of the goods of the Casa Amarilla, as per inventory of 12th of April last, effected in public auction on the 22d of May, at which sale bids were made by the Vinciquina for 360 bolivars, by Nieves Arrabache for 400 bolivars, by Ramón Orosco for 800 bolivars, and by Juan Anselmo for 900 bolivars; and no higher bid being obtainable the goods were allotted to Gen. Juan Anselmo.

It is, therefore, inaccurate, as asserted in the aforesaid memorial, that the governor, Juan Anselmo, had declared, on his own authority; that he had a right to an indemnity in consideration of his labors, nor that *all the property of the Compagnie Générale de l'Orénoque* was sold and adjudged to Gov. Juan Anselmo for the sum of 900 bolivars.

In appreciating the true and real situation in which the property of the Compagnie Générale de l'Orénoque had been left after and by virtue of the dissolution of the company, and in consequence of the abandon in which the said property appears to have remained for years exposed to the inclemency of the weather in localities the natural conditions of which cause very serious

damage to buildings, goods, utensils, tools, steamboats, and others, it is the conviction of the Venezuelan arbitrator that all this property did not represent at the end of the period elapsed a value sufficient to cover the sum of 40,048.62 francs, which the company had been condemned to pay for damages by the sentence of the high Federal court, and the further sum which the company was likewise to pay to the Government for costs of the suit, which have not as yet been liquidated.

By virtue of this and of the reasons set forth in this opinion the Venezuelan arbitrator considers that the claim lodged by the liquidators of the company against the Government of Venezuela for the amount of 7,616,098.62 francs is totally devoid of basis and disallows it absolutely.

NORTHFIELD, *February 9, 1905.*

#### NOTE BY THE VENEZUELAN COMMISSIONER

The foregoing is a faithful translation of my opinion rendered at Caracas in session of the Venezuelan-French Commission of May 5, 1903, as it appears from the report called "Comisión Mixta Venezolana-Francesa, protocolo de 19 de Febrero de 1902. Dictámenes del Arbitro Venezolano."

#### OPINION OF THE FRENCH COMMISSIONER

The Company General of the Orinoco claims on the date of July 10, 1902, a sum of 7,616,090.62 bolivars, which is made up as follows:

One million five hundred thousand bolivars for its capital, 1,701,680.17 bolivars for the debts contracted in view of the service of the concession, 2,414,410.45 bolivars for interest at 6 per cent on these two sums for twelve years, and finally 2,000,000 bolivars for the eventual profits which it has lost. After having examined the dossier and studied the memoir presented by Doctor Paúl, I have judged that the Venezuelan Government ought to pay to the company an indemnity of 7,000,000 bolivars. In failing in the obligations which it had assumed, in deceiving the company by its dissimulation which changed the substance of its agreements, and in interfering with the management of the concession by its vexations and abuses of power the Venezuelan State has brought about the ruin of the company. Its responsibility is then involved, in my opinion, to the amount of sums disbursed by the company. These sums including the capital, the debts, and obligations contracted for the service, and the interest, amount to a total of 5,616,098.62 bolivars.

To arrive at this amount the company has reckoned the interest at the rate of 6 per cent. While this rate may be moderate considering the nature of the enterprise and the value of money in Venezuela, a rate of 3 per cent must be allowed in the calculation of interest to be granted to the capital. In fact my colleague and myself have agreed that interest given by the commission should be calculated at a rate of 3 per cent, this rate being fixed by the Venezuelan code as a legal rate the contract being silent, and being accepted for the already existing French diplomatic debt.

There is then reason to diminish the sum claimed by the difference obtained in reckoning interest at 3 per cent instead of 6 per cent, or 540,000 bolivars. This decrease, on the other hand, ought only to relate to the interest on the capital; in fact the company being obliged to pay an interest of 6 per cent to its lenders and holders of obligations it would be unjust to make a reduction on the sum claimed under this head and which enters entirely into the disbursements of the company.

I have not thought at all that I ought to accord to the company the indemnity of 2,000,000 bolivars which it claims for the eventual profits which it has lost. It has not been in business long enough to arrive at a time of profit, and no

one can know if it would ever have reached a point greater than the normal interest on the capital invested, the interest of which I take into account in the reckoning of the indemnity. That remains very doubtful if we consider the burdensome obligations which the company allowed to be imposed upon it in the contract. It would not be equitable that it owed to the situation of claimant the advantage of taking from Venezuela benefits upon which it could not have counted truly, considering the conditions of its management, if the latter had been developed without interference. It is, then, a sum of 5,078,098.62 bolivars that in equity the Venezuelan Government ought to pay to the company for losses suffered. But I have had to take account on the one hand of the use of the interest since July 1, 1902, the day on which the calculation prepared by the company stopped; and, on the other hand, of the depreciation of the bonds of the diplomatic debt. Twenty-seven months have already passed since the first of July, 1902, and this lapse of time increases the amount claimed by the company more than 800,000 bolivars, which will continue to accrue until the day of the final award. Up to to-day this will be a sum of at least 6,000,000 bolivars, which ought to be paid to the company for reimbursement of its expenses.

Finally, the indemnity, according to the terms of the protocol, having to be paid in bonds of the diplomatic debt, and not in gold, in virtue of the concession consented to by the French Government in favor of the Venezuelan Government, to allow it to pay its debts with greater facility, and the depreciation of these bonds being at the present moment about 60 per cent, I have judged it equitable to increase this indemnity of 6,000,000 bolivars by 1,000,000 bolivars, which thus reaches the sum of 7,000,000 bolivars in bonds of diplomatic debt. These 7,000,000 bolivars represent merely 2,800,000 bolivars in gold. This is the sum which the company ought to receive and the Venezuelan Government pay if the umpire should share the opinion of the French arbitrator. This sum represents only a little more than half of the disbursements of the company.

The Venezuelan arbitrator, playing the part of a lawyer rather than that of an impartial arbitrator in the brief submitted to me, undertakes to dispute the arguments of the company, and to demonstrate that the Venezuelan Government, far from having anything to be censured for, was, to the contrary, in a position to bring suit against the company for not having fulfilled its obligations. The minutes of the session of the commission of May 7, 1903, mentions that —

Doctor Paúl expresses to his colleague the desire that he present, as he himself has done, an exposition of arguments upon which he bases his judgment and by which, at the same time, he would reply to the arguments presented by the Venezuelan arbitrator. Doctor Paúl would be able to take these into consideration and to see if it would be possible to reach an agreement.

I have refused to follow my colleague into this field, believing that in my capacity of an arbitrator I am not called upon to present any arguments in favor of or against one of the two parties, but only to examine their statements and decide in favor of the one or the other. One of the lawyers of the Paris bar, Maître Poincaré, has undertaken to defend the company in the field of law, answering Doctor Paúl's arguments.

The reading of the brief prepared by Mr. Poincaré has but strengthened me in the opinion which I had formed after having studied the dossier and the plea of my colleague.

Doctor Paúl was so convinced that he was taking the part of the lawyer rather than that of an arbitrator, that he made the statement to me at the session, as shown by the minutes, that he would take my arguments into consideration if

I was willing to submit them and "see if it would be possible to reach an agreement."

Has not my colleague confessed by these words that an agreement is possible and that consequently the company has a right to an indemnity? I do not see, in fact, how we would have been able to arrive at an agreement unless he recognized the principle of an indemnity, contrary to his decision to reject the claim entirely. I am still persuaded that my colleague would have changed his absolute opinion if I had consented to diminish in notable proportions the indemnity which I have fixed. But conscientiously I have not been able to decide to do it. It is not my intention to censure Doctor Paúl, because his patriotism may have led him to become a lawyer representing his country instead of the man who was called upon to pass judgment. I am contented to make mention of it, and to the contrary I seize this occasion with pleasure to render homage to the courtesy and the breadth of mind he has shown in the course of the numerous sittings of the commission during which we have examined nearly four hundred claims, of which I understand that the exposé and the discussion must have been grievous many times to his Venezuelan sentiments.

But Doctor Paúl would not have been the only one among his authorized compatriots who would have consented to recognize the responsibility of his Government in this affair and consequently to admit that an indemnity is due to the company. In 1897 the President of the United States of Venezuela sent to Paris a semiofficial plenipotentiary, General Pietri, to endeavor to renew the diplomatic relations interrupted between the two countries since the departure in 1895 of the Marquis de Monclar, French minister, because of an incident which to reopen here is unnecessary. Mr. Pietri opened negotiations with the Quai d'Orsay, and such negotiations resulted in the signing of a protocol by virtue whereof normal relations between France and Venezuela were to be reestablished, provided such diplomatic act was ratified by the Congress of Venezuela. Annexed to said protocol there was a convention concluded on June 24, 1897, between the plenipotentiary of Venezuela and the liquidators of the Company General of the Orinoco, the text of said convention being attached to the papers (*dossier*) in the claim. It was stipulated by the convention that said company by way of a compromise agreed to relinquish any further claims upon payment by the Venezuelan Government of an indemnity of 3,600,000 bolivars.

The Venezuelan Congress did not ratify said protocol, the convention remaining, therefore, null and void. However, it may be inferred from such fruitless endeavors to come to an agreement that there has been a Venezuelan plenipotentiary, who eight years ago recognized the right on the part of the Company General of the Orinoco to a considerable indemnity.

The Venezuelan Congress having met in secret session to examine the protocol signed by Messrs. Hanotaux and Pietri, I have been unable to learn the reasons of its rejection by said assembly. It is possible that the convention subscribed to by the company may have had something to do with such rejection. But, even admitting that the existence of said convention had been the only cause of the refusal of Congress to ratify the protocol, said convention does not lose by that fact its character as a document of great value, for all those who know by experience that the facility with which the Venezuelan administration despoil foreigners of rights acquired by mutual consent is only equalled by the difficulty which the Government and public opinion in Venezuela experience in admitting for injured strangers the legitimacy of equitable compensation.

PARIS, September 2, 1904.

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## ADDITIONAL OPINION OF THE VENEZUELAN COMMISSIONER

I have read the brief lately prepared by the commissioner for France explanatory of his opinion rendered at the sittings held by the commission in Caracas on May 5 and 7, 1903, averring that the Government of Venezuela ought to indemnify the General Company of the Orinoco to the amount of 7,000,000 bolivars in 3 per cent bonds of the diplomatic debt.

The gallant expressions used by the French commissioner in speaking of my position on the mixed commission where I have had the most signal honor of sharing the arduous task with so distinguished and learned a colleague, I appreciate as a compensation for the mortifications which M. de Peretti justly believes my patriotic sentiments have suffered while examining the 332 claims submitted to our investigation and decision, representing in the aggregate the enormous sum of 80,000,000 bolivars, a sum which is about equivalent to the capital actually represented by the French colony in Venezuela.

Moved by a critical spirit, my learned colleague makes the following statements:

The Venezuelan commissioner, playing the part of a lawyer rather than that of an impartial arbitrator, in the brief submitted to me undertakes to dispute the arguments of the company. \* \* \*

I have refused to follow my colleague into this field, believing that in my capacity of an arbitrator I am not called upon to present any arguments in favor of or against one of the two parties, but only to examine their statements and to decide in favor of the one or the other. \* \* \*

Doctor Paúl was so convinced that he was taking the part of the lawyer rather than that of an arbitrator, that he made the statement to me at the session, as shown by the minutes, that he would take my arguments into consideration, if I was willing to submit them and see if it would be possible to reach an agreement. \* \* \*

It is not my intention to censure Doctor Paúl, because his patriotism may have led him to become a lawyer representing his country instead of the man who was called upon to pass judgment. \* \* \*

M. de Peretti de la Rocca, called upon to pass judgment on the claims of his countrymen, believes himself to be authorized under the Paris protocol to pass judgment upon the manner in which I have performed my work on the commission. I do not think that the protocol gives his authority so wide a scope, but I believe that I am obliged to state that his opinions as to the method I have deemed best to follow in the discharge of my duties and functions as an arbitrator, are entirely foreign to the impersonal character which discussions between arbitrators must have when a difference of opinion divides them while investigating and deciding upon a case.

The work I have helped to perform as the commissioner (arbitrator) for Venezuela on the two French-Venezuelan Commissions, in connection with the severe judge of my country, is well demonstrated by the facts that out of 332 French claims submitted to our decision, amounting to the sum of 77,477,409.47 bolivars, 306 were definitively settled or decided by mutual agreement, reducing the sum claimed from 34,127,226.10 bolivars to 3,950,731.14 bolivars, or about one-ninth part of the sum claimed; 16 claims were submitted, because of disagreement, to the final decision of the umpire, Mr. Filtz, who awarded the sum of 153,369.38 bolivars, and the other 8 claims, representing the sum of 42,988,047.50 bolivars, are subject to the investigation of the honorable umpire, Mr. Frank Plumley, in this city of Northfield.

If through the bandage covering the eyes of justice, as she is always represented, the French commissioner has been able to discover that in the claims of his countrymen, as submitted to our joint examination, the amount had been

inflated in the proportion of 9 to 1, what could the Venezuelan commissioner not have discovered, animated, as it is justly surmised, by his patriotic sentiments, which had been submitted to the hardship, as my colleague justly remarks of —

discussion [which] must have been grievous many times to his Venezuelan sentiments

from those 332 claims which offer, as shown, the plainest evidence that it has been pretended that Venezuela should pay for indemnity for damages an amount tenfold greater than the value of the actual damages sustained? If, because in order to succeed in preventing that such gross injustice be done by the mixed commissions to which I have been a party, my colleague considers that I have played the part of a lawyer in defense of my country, instead of that of an impartial judge, then I have done my duty, and I do not think I deserve on that score the censure of those who have no reason to desire that I should not have defended my country.

As regards the method adopted by the French commissioner of not supporting his decisions and opinions by arguments in order to distinguish his system of defense from mine, I have nothing to say. It is enough for me to be satisfied that I have fulfilled my duties to the utmost, and that I have in my opinions endeavored to follow the standard set by eminent jurists who have discharged these same duties of arbitrators and who did not think that they were to pass their sentences as imperial ukases, but that such sentences were to be based upon the exposition of the principles involved and upon a line of argument growing out of the examination of such principles, laws, and precedents. Such arguments have come to be a source of light to those who, like myself, desirous of learning how not to err, have gone thither to dispel shadows of darkness in their intellectual labors. Among other authorities, see the six large volumes of Moore's International Arbitrations; the volume containing the enlightened opinions of the commissioners in the United States and Venezuelan Claims Commissions, 1889-1890, and Ralston's Report, Venezuelan Arbitrations of 1903.

I must express at this point surprise to see how my colleague has construed the statements I made to him at the sitting of May 7, 1903, that I would —

take these [arguments] into consideration and see if it would be possible to reach an agreement.

To deduce from such statement, inspired only by my desire to become acquainted with the arguments of my colleague, to see — if I was convinced by them — whether we could reach an agreement or find out whether it was established that the General Company of the Orinoco was entitled to an indemnification, is equivalent to deriving from the question put by one person to another, "What reasons have you to demand from me the payment of that bill?" that such question establishes the fact that the debt has been acknowledged.

That my learned colleague should appeal to such a line of circumlocutory arguments in support of his opinion in favor of the General Company of the Orinoco plainly shows that in the store of arguments used by the company, and which my learned colleague produces as his own, there are not many weighty enough to bring conviction to the honorable umpire's mind of the sound foundation of the claim.

The French commissioner reaffirms his determination in the brief under discussion, when he avers that he abstains from following me into the field of argument,

believing that in his capacity as an arbitrator he is not called upon to present arguments in favor or against one of the two parties, but only to examine their statements and to decide in favor of the one or the other.

My learned colleague adds:

One of the lawyers of the Paris bar, Maître Poincaré, has undertaken to defend the company in the field of law, answering Doctor Paul's arguments. The perusal of the brief (*plaidoirie*) prepared by M. Poincaré has but strengthened me in the opinion which I had formed after having studied the dossier and the plea of my colleague.

Consequently, M. de Peretti, in his brief, limits himself to explaining his reasons for granting the company any indemnification for eventual profits; for reducing the rate of interest claimed to 3 per cent until July 1, 1902, when the estimate made by the company ends; and for granting besides a supplementary indemnification for interest from that date until the day of the final decision, fixed at 1,000,000 bolivars, and another million because of the depreciation of the bonds of the diplomatic debt, making a total of 7,000,000 bolivars.

I deny, as it is my bounden duty to do, most emphatically, the unfounded conjecture my learned colleague has made in his brief, when he states that I would not be the only one among my enlightened countrymen who would have consented to acknowledge my country's liability in this case, and consequently admitted that an indemnification is due the company. It is also indispensable, since the honorable French commissioner is willing to use it in support of his opinion, that I should take into consideration the incident of the Pietri-Hanotaux protocol and the draft of an agreement signed in Paris by M. Juan Pietri, which M. de Peretti has submitted as a part of his brief.

The incident in question, as it appears in the opinion of my learned colleague is as follows:<sup>1</sup>

In 1897 the President of the United States of Venezuela sent to Paris a semi-official plenipotentiary, General Pietri, to endeavor to renew the diplomatic relations interrupted between the two countries since the departure, in 1895, of the Marquis de Monclar, French minister, because of an incident which to reopen here is unnecessary. Mr. Pietri opened negotiations with the Quai d'Orsay and such negotiations resulted in the signing of a protocol by virtue whereof normal relations between France and Venezuela were to be reestablished, provided such diplomatic act was ratified by the Congress of Venezuela.

Annexed to said protocol there was a convention concluded on June 24, 1897, between the plenipotentiary of Venezuela and the liquidators of the General Company of the Orinoco, the text of said convention being attached to the papers (*dossier*) in the claim. It was stipulated by the convention that said company by way of a compromise agree to relinquish any further claims upon payment by the Venezuelan Government of an indemnity of 3,600,000 bolivars.

The Venezuelan Congress did not ratify said protocol, the convention remaining therefore null and void. However, it may be inferred from such fruitless endeavors to come to an agreement that *there has been a Venezuelan plenipotentiary who eight years ago recognized the right to a considerable indemnity on the part of the General Company of the Orinoco.*

The Venezuelan Congress having met in secret session to examine the protocol signed by Messrs. Hanotaux and Pietri, I have been unable to learn the reasons of its rejection by said assembly. It is possible that the convention subscribed to by the company may have had something to do with such rejection. But, even admitting that the existence of said convention had been the only cause of the refusal of Congress to ratify the protocol, said convention does not lose by that fact its character as a document of great value. \* \* \*

So much for the history of the incident of the Pietri-Hanotaux protocol. The other portion of the document, replaced by the dots, with which my colleague

<sup>1</sup> *Supra*, p. 219.

ends the paragraph, I shall not reproduce in this answer. They belong to that class of arguments called "*ab homine*," so generally used in French parliamentary oratory, but which are misplaced in abstract and severe debates before a court like this one. Whatever be the opinion the French commissioner may have formed of the administration and public opinion in Venezuela, will surely not have the slightest weight in the mind of the honorable umpire when he shall render his decision in the case. P. M. de Peretti is in the right when he states that the convention concluded between Mr. Pietri and the liquidators of the General Company of the Orinoco acknowledging to the latter, by way of a compromise, 3,600,000 bolivars, had something to do with the refusal of the Congress of Venezuela to ratify the Pietri-Hanotaux protocol, the object of which was the renewal of diplomatic relations between the two countries. It not only had something to do with the refusal, but was the sole cause thereof. Even if Venezuela had solicited the renewal of the relations, for which Mr. Pietri had received instructions, Congress was compelled to refuse to ratify the protocol tending to such renewal, because the convention annexed as a condition to the end in view represented for Venezuela a sacrifice of such magnitude and so unjustified, that Congress preferred to continue depriving the country of friendly relations with France to subjecting it to a censurable negotiation. General Pietri lacked the necessary authority and instructions to negotiate with the General Company of the Orinoco, and even the officious negotiations which were intrusted to him in France for the renewal of diplomatic relations were *ad referendum*, because, such relations being interrupted, he could not have been invested with the character of minister plenipotentiary to the Quai d'Orsay.

If from the officious capacity of Mr. Pietri to treat with the Quai d'Orsay of the renewal of the diplomatic relations between Venezuela and France and from the character, as minister plenipotentiary, which was vested in Mr. Pietri by the administration of 1897 to represent Venezuela in other States of Europe, the French commissioner draws a favorable conclusion when he says:

It may be inferred from such fruitless endeavors to come to an agreement, that there has been a Venezuelan plenipotentiary, who eight years ago, recognized the right on the part of the General Company of the Orinoco to a considerable indemnity.

what may I not deduce, as the Venezuelan commissioner, against the justice of such indemnification, following the same style of argument, upon considering that it has not been a Venezuelan plenipotentiary, but the National Congress, consisting of eighty plenipotentiaries representing the will of three millions of inhabitants, who disapproved the convention signed by Mr. Pietri, because they believed it to be unlawful?

M. de Peretti states in his brief that the perusal of the pleadings (*plaidoirie*) of Maître Poincaré, counsel for the company, who discusses my arguments, has come to confirm him in his opinion. I have read the brief of the eminent member of the French bar and lawyer of the court of appeals, and since his opinion has been sought for by the claimant company to impugn my opinion, I must examine it and reply to its allegations.

The first part of the brief and opinion of Maître Poincaré, called "Exposition of Facts," contains a relation based upon the documents and notes produced by the claimant company, making a better presentation of the same papers, statements, and letters found in the case (*dossier*) of the company. Of such exposition of facts the honorable umpire can only take into consideration for his decision such facts upon which both parties have agreed or the accuracy of which has been duly established, based on trustworthy documents showing the facts to be true.

The second part of the brief under consideration is called "Discussion" and is divided by Maître Poincaré into several chapters and sections dealing with the different grounds upon which the company has based its claim for indemnification, classified as follows:

First. Legal and decisive efficacy of the judgment rendered by the high Federal court against which the company opposes denial of justice, based upon the following facts: Irregularities in the summons, irregularities in the letters rogatory, irregularity in the pleadings (*plaidoiries*).

Second. Good grounds for the claim for indemnification, based upon substantial error vitiating the consent, failure to execute its obligations on the part of Venezuela, and fulfillment of its obligations on the part of the company.

Third. Conclusions: The amounts of the claims have been duly established by means of documentary evidence. The existing diplomatic debt is now worth from 40 to 42 per cent. That which is to be created for the indemnifications resulting from the protocol of 1902 shall be worth even less.

For the sake of brevity, in this additional opinion I shall examine only such points of the opinion of Maître Poincaré as are indispensable to strengthen the arguments in my first opinion and shall also point out whatever may be conducive to a clearer exposition of the juridical doctrine or international principles invoked, as well as to the first estimation of the facts.

The question advanced as the fundamental grounds for this case is in the first place whether the sentence of the Venezuelan Federal court, declaring the rescission of the contracts under which the General Company of the Orinoco operated and condemning said company to the payment of a certain sum and judicial costs, is a final or decisive sentence having the force of the *res judicata* and therefore binding and subjecting the company to all its consequences.

The General Company of the Orinoco, four years after such sentence has been passed, invoked the action of the French Government in order to enter a protest against said judgment, claiming, as Mr. Poincaré states —

that it has been the victim of an actual denial of justice, because, in the first place, all remedies against administrative and governmental action being withheld from it, mainly by reason of the decree of August 8, 1890, issued under pressure by Colombia, and the arbitrary seizure of 1893, and in the second place because of the violations of both public and private law executed not only during the proceedings but also outside of any judicial action.

The company produces no proof whatever to show that all legal remedies against administrative and governmental action have been withheld from it. The decree of August 8, 1890, as evidenced by its own terms, was issued in behalf of the large interests of the inhabitants of the region where the tonca bean is gathered and because the company had suspended the purchase of the bean for want of resources, and the Government could not permit the destruction of the interests and means of subsistence of that territory already threatened with abandonment on the part of the company and an absolute business stagnation. In regard to the seizure of 1893, subsequent to the judgment, the copies subjoined to the present additional opinion in support of the arguments of my first opinion will shed sufficient light to bring conviction to the mind that the property the company had abandoned on the banks of the Orinoco River because the company had gone into liquidation and was unable to even take care of and try to preserve said property has not sufficed, because of its state of deterioration and ruin to pay for the debts contracted in the locality, let alone those for which the company was liable to the nation by virtue of the sentence of the Federal court.

Against the argument I have put forth in my opinion that, according to the Venezuelan Code of Procedure, the General Company of the Orinoco had

six months after date of sentence within which to demand that it be invalidated, if the company had or believed itself to have sufficient grounds to ask for such reversal. Mr. Poincaré advances the argument that the sentence of the court was in itself indisputably a sovereign decision, not open to any remedy or appeal whatever before a higher court. It is true that such decision was not subject to appeal before a higher court, because the high Federal court is the highest judicial tribunal; but such decision was open to the remedy of invalidation before the same court, according to Case I, article 538 of the Code of Civil Procedure then in force, or, in other words, the failure to issue such summons when they are necessary to continue the case, if the failure has not been remedied by the party invoking the same. Article 539, quoted in his opinion, clearly stipulates that —

such case shall be tried in the same manner as the case upon which the sentence whose invalidation is sought was tried *before the court which has decided the case in the last resort (instance)*.<sup>1</sup>

M. Poincaré adds:

There was nothing to be gained therefore in asking the invalidation, as this could not be granted except for a special cause, and the most important grounds of complaint could not contribute to justify such a step.

One of these grounds, as will be hereafter shown, was failure to notify the company's attorney to make his pleadings. The learned and expert counsel for France has already stated that such failure, which is a most important ground for complaint against the judgment, as believed by the claimant party, does not constitute one of the special causes to demand the invalidation of the sentence, according to the provisions of article 538 of the Code of Civil Procedure.<sup>2</sup> Notwithstanding that such notification is unnecessary and not required by the Venezuelan law of procedure, the company uses it as the basis upon which rests its main argument to claim that the sentence of the Federal court was issued against it without previous hearing of its defense and that consequently the sentence is invalid.

The first cause of invalidation invoked by Maître Poincaré in his brief as vitiating the form or proceedings is the irregularity of the summons to answer the complaint. The counsel for the defense of the company's rights bases his contention to that effect on the testimony of Mr. Fiat, a former employee of the company, who affirms that when the State's attorney for the treasury (*fiscal nacional de hacienda*) entered his action before the high Federal court for the rescission of certain contracts and the payment of an indemnification he received no summons or order requiring him to appear.

It is true that in the records of the high court — the brief avers —

mention is made of the letter of the secretary of that jurisdiction, dated on May 30, 1890, addressed to Messrs. Fiat and Planas, informing them that the company had been sued before the high court.

But Messrs. Fiat and Planas have always declared that they had not received such letter and Mr. Fiat has added that it was only while reading a Caracas newspaper that he became aware that the company had been summoned to appear before the Federal court. It was then that he, of his own accord and without any previous summons, went to the secretary's office.

<sup>1</sup> Art. 539. Este juicio se promoverá del mismo modo que la demanda sobre que recayó la sentencia cuya invalidación se pide, ante el tribunal que la dictó en última instancia.

<sup>2</sup> For text of Art. 538 see *supra*, p. 198, note.

It can not be doubted, that if a regular summons had been issued to Mr. Fiat or Mr. Planas or if any notice by letter had been given to them of the action entered by the "fiscal," a receipt should have been demanded, as was done in the case of all subsequent summonses. It is thus shown that the proceedings were irregularly commenced.

What appears from the minutes in the case which may offer reasonable grounds for the deductions of the attorney presenting the brief under consideration?

At the end of the complaint entered by the fiscal the following resolution appears:

PRESIDENCY OF THE HIGH FEDERAL COURT,  
*Caracas, May 30, 1890.*

[27 and 32. Entered.]

Summon the General Company of the Orinoco, defendant, whose domicile is outside of the Republic, and serve a copy of the foregoing complaint, to appear before this court at the sitting of the tenth working day after summoned to answer the action, which, in the name of the national Government, the State's attorney for the treasury (*fiscal nacional de hacienda*) has entered. And whereas it appears from the documents produced that Messrs. Andrés Fiat and Bernabé Planas have held powers of attorney from said company, let them be notified, that they may state whether they still exercise such duties, and if not, a counsel for the defense (*defensor de ausentes*) shall be appointed as requested.

(Signed) CÁRLOS URRUTIA.  
MANUEL RENDÓN SARMIENTO.

On the same day and date the summonses were issued to Messrs. Fiat and Planas to appear at the first sitting of the court after being summoned for the purpose aforesaid, the summonses being delivered to the bailiff of this high court.

(Signed) RENDÓN SARMIENTO,  
*Secretary.*

At the session of this day, June 2 (two days after the summonses were issued), there appeared Messrs. Andrés Fiat and Bernabé Planas and stated that Mr. Andrés Fiat is now the representative of the General Company of the Orinoco and offers to produce the power of attorney at the session of next Wednesday, the fourth day of the present month.

Subscribed to —

(Signed) CÁRLOS URRUTIA.  
ANDRÉS FIAT.  
B. PLANAS.  
RENDÓN SARMIENTO, *Secretary.*

These are followed by others referring to the filing of the power of attorney in the French language; appointment of an interpreter to translate the same; his acceptance and oath; the translation of the power of attorney, and the order of the presidency of the high Federal court directing that the original power of attorney be returned to Mr. Fiat, and that he be duly summoned to appear as the attorney for the company.

Then follows an entry of the secretary, whereby it appears that a certified copy of the complaint was made and delivered to the bailiff to execute the summonses issued to the defendants.

As a part of the record, the following entry appears:

I have received the complaint in the action entered by the national Government against the General Company of the Orinoco, of which I am the representative. Caracas, June 19, 1890. (Signed) Andrés Fiat. (Minutes of the proceedings had before the high Federal court, a certified copy of which I submit to the honorable umpire, in Spanish and English, consisting of 6 exhibits, numbered 1, 2, and 3, respectively.)

The testimony furnished by the minutes of the proceedings shows that due regularity in conformity with the legal precepts was observed in summoning Mr. A. Fiat as the representative of the General Company of the Orinoco, and also establishes the fact that there is no truth in the declaration of Mr. Fiat, serving as a basis to the company's counsel to aver that the proceedings were irregularly commenced. In regard to the statement which, it is affirmed, Mr. Bernabé Planas made to the same effect, it is not found among the numerous documents submitted by the company, so that no other conclusion can be drawn except that the writer of the brief was induced to affirm a most serious fact affecting an old friend of the company, which is contrary to actual events.

The line of argument contained in the rest of this chapter of the brief dealing with the delay in summoning Mr. Fiat and answering the complaint because of the preliminary proceedings of giving notice, the filing and translating of the power of attorney, and the amendment of a part of the case by fixing the amount of the indemnification asked for is so inadequate to arrive at the conclusion that Mr. Fiat found himself deprived of all means of defense, and that such condition of inability permeated the whole proceedings, that I do not deem it my duty to undertake its discussion, such assertions clearly revealing the fact that Maître Poincaré is not familiar with the method of procedure in contentious cases before our Venezuelan courts, and that his learning and talents can not bridge over his deficient knowledge in the matter of our adjective legislation. All the proceedings of the high court from the origin of the case in all matters pertaining to the summons of Mr. Fiat, the representative of the company, are strictly in accordance with the provisions of the Code of Civil Procedure in force at the time, as the honorable umpire may see by an examination of the legal provisions referred to in conjunction with the proceedings in the case, a copy of which I subjoin hereto.

The next section of the brief in question deals with the irregularity of the letters rogatory issued by the president of the high Federal court to the civil judge of the first instance of the city of Paris and to his eminence the Cardinal, chief of the propaganda in Rome, which letters rogatory were delivered to the representative of the company. Mr. Fiat, personally to obtain the extra-territorial evidence he had requested, consisting of affidavits of witnesses residing in Paris, and a statement of facts requested from his eminence the Cardinal.

Maître Poincaré maintains that diplomatic channels should have been used to forward to their respective destinations the letters rogatory, and, as the Government of Caracas knows what is the regular way to be followed to obtain the desired ends, both such Government and the high Federal court are to blame if the interrogatories were not made in Paris and Rome; that such conduct could not have been prompted but by the desire to prevent that the requested evidence be obtained, and so it follows that the General Company of the Orinoco was deprived of its most essential means of defense, and that the taking of the evidence for which the high court had fixed a time — which was insufficient — was then incomplete of necessity.

The counsel defending such theory adduces in its support the principles laid down by the Institute of International Law in its session at Zurich in 1877, which I have already had the opportunity to quote in my former opinion, to wit:

As the opinion of the Institute was that letters rogatory should be sent *directly* to the foreign court by the court issuing the same.<sup>1</sup>

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<sup>1</sup> *Supra*, p. 196.

The learned counsel also quotes the opinion of Mr. Cárlos Calvo, who makes the following statement in his *Treatise on International Law*, Volume II, section 889:<sup>1</sup>

From the principle of the independence of nations it follows that the foreign court is not obliged to accept letters rogatory, but usage among nations has introduced the rule that foreign courts accept such request and proceed to take the necessary steps in the matter, except in such cases where such acts may impair the sovereignty of the country or the rights of its citizens. This is why letters rogatory, as a general rule *are not sent to the courts directly* but through diplomatic channels, so that the Government may examine the same before directing their execution, in order to become satisfied that they do not contain anything contrary to the laws of the State. In case letters rogatory should be sent *directly from abroad* to a court they must be forwarded immediately to the minister of justice.

M. Poincaré adds:

And let us remark that Mr. Calvo's opinion is later than that of the Institute of International Law, because Mr. Calvo in section 894 makes reference to that authority erroneously quoted by Venezuela.

The learned counsel also invokes the opinion of Dalloz, *Répertoire Général*, *Instruction Civile*, No. 83, as follows:

Our courts are frequently called upon by foreign courts. An order of the minister of justice (*Garde des Sceaux*) contains the following rules to be observed in similar cases: Courts must not comply with any letters rogatory in civil matters coming from abroad unless *they are transmitted to them* through the ministry of justice, who in turn receives them from the minister of foreign affairs with the translation, as the case may be, after examination. \* \* \* Letters rogatory in civil matter must be executed by the court without necessary intervention of the parties concerned. Notwithstanding this such parties are *free to intervene and in order to foster the proceedings* may ask the clerk to issue letters rogatory. *Beyond such cases of spontaneous intervention of the parties or one of them* the letters rogatory are executed upon request of the proper judicial authorities. The acts performed in the execution of the letters rogatory are sent by the court to the minister of justice with a certified memorandum of the costs, and the documents are forthwith *transmitted* to the minister of foreign affairs.<sup>2</sup>

<sup>1</sup> Il résulte du principe de l'indépendance des nations que le juge étranger n'est pas obligé d'accepter la commission rogatoire; mais l'usage des nations a introduit la règle que les juges étrangers acceptent cette mission et procèdent aux actes d'instruction qu'elle a pour objet, excepté dans le cas où ces actes porteraient atteinte aux droits de souveraineté du pays ou aux droits des nationaux. C'est pourquoi les commissions rogatoires, en général, ne se transmettent pas aux tribunaux ou aux magistrats étrangers directement, mais par la voie diplomatique, de manière que le gouvernement puisse les examiner avant d'en autoriser l'exécution pour s'assurer qu'elles ne contiennent rien de contraire aux lois de l'État. Dans le cas où une commission rogatoire serait transmise directement de l'étranger à un magistrat, celui-ci doit l'envoyer immédiatement au ministre de la justice. (Calvo, *Le Droit International Théorique et Pratique*, 5<sup>e</sup> édition, sec. 889.)

<sup>2</sup> Nos tribunaux sont souvent délégués par les juges étrangers; une instruction de M. le garde des sceaux contient les règles à suivre en pareil cas. Elle est ainsi conçue:

Les magistrats ne doivent déférer aux commissions rogatoires, en matière civile qui viennent de l'étranger, qu'autant qu'elles leur sont transmises par le ministre de justice, qui les reçoit du ministre des affaires étrangères, avec la traduction, s'il y a lieu, après examen. \* \* \* Les commissions rogatoires en matière civile ou pour des faits qui pourraient donner lieu à une action civile, doivent être exécutées par les magistrats sans intervention nécessaire des parties intéressées. Toutefois, les parties sont libres d'intervenir, et alors, pour motiver leurs diligences, elles peuvent demander au greffier une expédition de la commission rogatoire. Hors le cas de l'intervention

M. Poincaré concludes —

Thus the parties are not called upon to *transmit* the request. They have only power of intervention during the execution of the letters rogatory.

The authorities quoted, far from destroying what I have maintained in my opinion in support of the doctrine established by the Institute of International Law in its meeting in Zurich, comes to confirm my argument in all its conclusions.

There are two orders of facts of an entirely different character which Maître Poincaré confounds to the extreme of pointing out a difference between the Institute of International Law and Mr. Calvo, which does not really exist in this matter.

One of these points is the act of a court addressing to a foreign court a petition praying it to perform within its jurisdiction certain acts or proceedings, and to this end the letters rogatory are addressed *directly from one court to the other*. The other point is that of the *transmittal* of said letters rogatory addressed by a court to another, which, according to the Institute of International Law, *may be made through diplomatic channels*, and according to Calvo *must be always made through such channels and not otherwise*.

Calvo, in section 889, already quoted, further says: <sup>1</sup>

The request for such cooperation is made by a special letter whereby the court or judge concerned asks the cooperation of a foreign court or judge or *prays* such court or judge to perform within the proper jurisdiction certain acts or proceedings that the petitioner is unable to perform.

To solicit or pray for the cooperation of such foreign judge it is necessary to *address him* directly in writing a letter rogatory as done by the high court to the judge of the Seine in the following form quoted by Maître Poincaré.

United States of Venezuela; In their name the president of the high Federal court to the citizen civil judge of the first instance of the city of Paris.

And at the end of the petition —

Now, therefore, I pray the citizen judge of the first instance of the city of Paris to be pleased to have the present petition (letters rogatory) executed, pledging reciprocity in similar cases from the courts of the Republic.

To this M. Poincaré says that “it is nothing but a mere courtesy.” Exactly; such courtesy is what is expected to be used.

The petition or letters rogatory which a court or judge addresses to another being prepared, for which it is necessary that the party concerned should go to the office of the secretary (clerk) of the court and furnish the same with the necessary stamped paper upon which to extend the writ in reference to the evidence required, the corresponding revenue stamps, fees for copies and translation when such is necessary; then such acts should be performed as are necessary for the *transmission* of the letters rogatory addressed to the foreign

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spontanée des parties ou de l'une d'elles, les commissions rogatoires sont exécutoires à la requête du ministère public. Les actes qui constatent l'exécution d'une commission rogatoire sont envoyés par le parquet au ministère de la justice, avec un état de frais visé; les pièces sont ensuite transmises au ministère des affaires étrangères.

<sup>1</sup> La demande de cette coopération se fait au moyen d'une lettre spéciale par laquelle le tribunal ou le magistrat qui se trouve dans ces circonstances sollicite le concours d'un tribunal ou d'un magistrat étranger, ou le prie d'accomplir dans l'étendue de son ressort quelque acte de procédure ou d'instruction qu'il ne peut faire lui-même. (Calvo, *Le Droit International Théorique et Pratique*, 5<sup>e</sup> édition, sec. 889.)

court or judge through the diplomatic channels. All these acts should be performed by the interested party, who receives the papers in order to foster their *transmittal* by applying to the department of foreign affairs.

On what principle of international law or on what authority, ancient or modern, could the theory be founded that it behooves the judge in the case or the contrary party — as in the case in point, the Government of Venezuela — to perform officiously acts which only the interested party is able to attend to with due diligence, defraying the necessary expenses and fostering their execution? And so, Mr. Fiat, the attorney for the company, assisted in its defense by two of the most distinguished lawyers of Caracas, Drs. Diego Bautista Urbaneja and Ramón F. Feo, who received the petitions or letters rogatory addressed to Paris and Rome, does not incur any liability because he did not employ in the transmittal of such papers the diplomatic channels, nor did he use the good offices of the department of foreign affairs in Caracas, nor did even apply to such office, and the Government of Venezuela, the contrary party, is to be made liable for such a negligence, since it can not be supposed it was ignorance or the deliberate purpose of not giving the letters rogatory the proper course so as to claim later on that the proceedings were vitiated.

According to M. Poincaré's theory, the Government of Venezuela and the high Federal court, the contrary party and the judge in the case, should perform in regard to Mr. Fiat, the attorney for the company, the duties of counselors at law, and taking him by the hand, to go with him to the Venezuelan foreign office, legations, or consulates, which were to attest to the respective signatures and then to the post-office where the papers were to be stamped, certified, and mailed, notwithstanding the clearly manifested purpose of Mr. Fiat when he personally received the letters rogatory of not trusting to others such steps for the transmission of the documents.

Our Code of Civil Procedure contains an article, reproduced in all such codes, which has been in force in the Republic, to this effect: <sup>1</sup>

In civil matters the judge can not take action against a party except at the request of the other party, unless authorized by law to proceed otherwise.

Another analogous article provides that — <sup>2</sup>

The court shall maintain the parties in the enjoyment of such rights and titles as are common to both without preference or inequality, as well as in the enjoyment of such rights and titles as are privative to each party, respectively, according to the provisions of law or the different conditions represented in the action. But the court shall not allow such parties nor allow herself to *exceed the authority of their respective rights or jurisdiction in any case whatever.* (Arts. 14 and 27, Code of Civil Procedure, 1897.)

It was not facultative of the high Federal court to perform of its own accord acts tending to the *transmittal* of the letters rogatory, but in this case, as well as in all proceedings in the action, the court had to act by request of one of the parties, as the law does not authorize it to act on its own authority. To act otherwise would be to exceed its authority, an act punishable by our laws.

Mr. Fiat has not even pretended to maintain the fact that he endeavored to obtain from the court the transmission of the letters rogatory through diplomatic

<sup>1</sup> Art. 14. En materia civil el Juez no puede proceder sino á instancia de parte, salvo el caso en que la ley lo autorice para obrar de oficio.

<sup>2</sup> Art. 27. Los tribunales mantendrán á las partes en los derechos, facultades y goces que son comunes á ellas, sin preferencia ni desigualdades, y en los privativos de cada una de ellas, respectivamente, según los acuerde la ley á la diversa condición que tengan en el juicio. Pero no podrán permitir ni permitirse ellos extralimitaciones de ningún género.

channels, but, on the contrary, he has confessed that he requested and obtained said letters and sent them directly to Paris to Mr. Delort, without he or his legal advisers — who could not have been ignorant of such means of procedure — ever thinking that diplomatic channels should be employed. The consequences of such omission, if it had any consequences on the legal action, must be suffered solely by the General Company of the Orinoco and in no way by the opposite party or the Government of Venezuela.

The brief of the company's counsel now deals with the third cause or grounds for invalidation of the sentence — i.e., irregularity in the pleadings (*plaidoiries*). M. Poincaré stops to discuss the fact that the representative of the company was not summoned, nor were his counsel to enter their pleadings, and the only party present at the time set for such pleadings, according to the records of the case, was the State's attorney (*fiscal nacional de hacienda*). I have, in my first brief, most carefully examined the matter and have established, by quoting the respective articles of the Code of Civil Procedure, and the chronological examination of the minutes of the case, that the action was never suspended for motives which were imputable to the parties and that consequently, in conformity with the provisions of law, the high Federal court directed that the pleadings should be entered without the necessity of issuing summons to the parties or their representatives. Had the court acted or decreed otherwise it would have been contrary to a provision specifically set forth by the same code, to this effect:

After summons have been issued to answer the complaint there is no need of further summons for any other incident of the proceedings *nor the summons issued shall suspend the proceedings*, unless specially provided for to the contrary.<sup>1</sup>

Such action on the part of the court would have been contrary to the provisions of article 394 of the same code, reading thus: <sup>2</sup>

Upon the conclusion of the reading of the papers in the case (*expediente*), the oral statements of the parties or their attorneys or representatives shall be made or read, if in writing, as the case may be, and added to the record.

This article does not direct that the parties be summoned, and no such provision is made, because the parties to the action are constructively present during the hearing from the day they are summoned to answer the complaint without further summons, except in such cases as are specially provided for by the law.

The high Federal court is not authorized to alter or modify the method laid down by our laws of procedure, but, on the contrary, must adhere strictly to its provisions. Any act whatever in violation of such provisions is null and void. It was based upon such consideration, and in view of the original record of the case existing in the archives of the high Federal court that I stated in my former opinion that, in view of the fact that the sentence "that the parties be notified" was not duly authorized by the president of the court by means of a legal writ, order, or decree under his signature, but was only a statement under the signature of the clerk of the court (*secretario*) who in conformity with the laws governing our method of procedure has no other powers beyond the act

<sup>1</sup> Art. 146. Hecha la citación para la litis-contestación, no habrá necesidad de practicarla de nuevo para ningún otro acto del juicio, ni la que se mande verificar suspenderá el procedimiento, á menos que resulte lo contrario de alguna disposición especial de la ley.

<sup>2</sup> Art. 394. Concluida la relación se oirán los informes verbales de las partes, de sus abogados ó apoderados, y se leerán los que presentaren por escrito, los cuales se agregarán á los autos.

of attesting or certifying to any judicial acts, decrees, orders, or judgments of the justices of the court, which should always be made in writing and under their hand, I was convinced that the Federal court had not ordered such notification to be made.

Maître Poincaré profits by this remark, which I, in my capacity of an arbitrator was entitled to make, to affirm that the Venezuelan Government —

found itself obliged to make the unfortunate admission that the sentence “ that the parties be notified ” has been the exclusive act of the clerk (secretario) and that the court was not a party to the order.

It was not the Government of Venezuela that made the statement in question, but the commissioner for Venezuela, in view of the legal provisions governing the case and of the minutes in the record. My opinion was based upon the fundamental fact that the law does not provide that the parties be summoned when the hearing has not been suspended because of acts of commission or omission for which the parties are answerable. My opinion points out the way to demonstrate that the high Federal court did not infringe any provisions of law, as might be apparent from the sentence in reference, which is due to an error of the clerk, having no validity whatever.

Mr. Poincaré states in his brief that the Venezuelan lawyers, Drs. Diego B. Urbaneja and Ramón F. Feo, agree in their statement that the General Company of the Orinoco not having been summoned to appear on the day set for the pleadings, articles 109 and 162 of the Code of Civil Procedure (1880)<sup>1</sup> had been violated. I have not found among the documents and papers produced by the company any written opinion prepared or signed by said jurists to which credit might be given.

The company has pretended in several documents that said lawyers had rendered a favorable opinion on this and other important matters, but such opinions duly signed and verified have not been produced. The fact is worthy of consideration that Dr. Ramón F. Feo being still in Caracas, and it being an easy matter for the company to obtain a statement from him during the sittings of the commission in that city and his testimony on the facts relating to the action before the high Federal court, such steps have not been taken. It can not, therefore, be accepted that the authority and learning of such lawyers be invoked when no proofs are offered that they are or have been of the opinion ascribed to them in this matter.

The writer of the brief states that the sentence passed was not notified either to the representative of the company, Mr. Fiat, *who remained in Caracas for over a year after the sentence was passed*, or to the lawyers of the company, who lived in that city, nor even to the liquidators. This requisite of notification is not prescribed by our law of procedure, except in criminal cases. In civil actions, as it has been shown, the parties are deemed to be present at the trial from the time they are first summoned to answer the complaint and must be aware either personally or through their attorneys of all the stages of the proceedings. It should be noticed that at the date of the sentence, October 14, 1891, Mr. Fiat, although still residing in Caracas, was not the representative of the General Company of the Orinoco, in liquidation, as he had resigned since October 11, 1890; that the company appointed Mr. Bernabé Planas its representative, and that, this gentleman having refused to accept such commission, the company then decided to send Mr. Berthier, who arrived at Caracas about the end of October, 1890, leaving some time in July, 1891. Messrs. Urbaneja and Feo do not appear as being representatives of the company during

<sup>1</sup> See *supra* p. 194, note.

the proceedings before the high Federal court, but simply the counsel for Mr. Fiat at the beginning of the action. (See complaint to the minister for foreign affairs in France by the liquidators of the company, folio 47, and the minutes of the proceedings.)

As regards the notice to the liquidators residing in Paris, the Federal court must have been ignorant of the fact that such liquidators existed, as it does not appear that the court was informed that the company had gone into liquidation, notwithstanding the fact that such steps were taken on May 30, 1890, two days after the filing of the complaint before the high court. The company kept the Venezuelan authorities and especially the high Federal court ignorant of the fact that it had gone into liquidation — a grave omission which sufficiently explains the abandonment of its representation during the proceedings, the want of unity and cohesion in the acts for the defense, the difficulties had with the letters rogatory, and the non-appearance of the new attorney, Mr. Berthier, at the hearing, as he was then exclusively engaged in effecting an extra-judicial compromise which would put an end to the legal action and insure a new contract to the company in liquidation.

In the second chapter of the brief under consideration, under the head of "Bien fondé de la demande," the author directs all his efforts in support of the following claims:

First. That the agreements entered into by the Government of Venezuela and the company are vitiated from their origin, because of dissimulations which have substantially altered the convention and which permitted the Venezuelan Government to impose upon the consent of the General Company of the Orinoco.

Second. That in the execution of the contract the Government has not kept the contracted obligations.

By way of introduction, the author of the brief lays down the following premises:

It is upon the basis of equity that the arbitration commission must pass sentence.

It has been admitted that such should be the rule controlling matters pending between Venezuela and other States, and the protocol relating to those of the United States has established in this connection a rule applicable in this instance by assimilation: "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 of the provisions of local legislation."

It is not possible to admit the principle of assimilation advanced by Maître Poincaré in regard to the claims submitted to the decision of the umpire, according to the terms of the Paris protocol of February 19, 1902. The terms of such agreement and those of the Washington protocol of 1903 have no similarity whatever; on the contrary, the contracting parties were very careful to declare in the final paragraph of article 2 of the Paris protocol controlling the present commission, *that the procedure* adopted for the examination and settlement of the claims referred to in articles 1 and 2, were not instituted but as an exception, and *did not invalidate the convention of 1885*; and that by article 5 of this convention the high contracting parties agreed that: —

leurs représentants diplomatiques n'interviendront point au sujet des réclamations ou plaintes des particuliers concernant les affaires qui sont du ressort de la justice civile ou pénale, d'après les lois locales, à moins qu'il ne s'agisse de dénis de justice ou de retards en justice, contraires à l'usage ou à la loi, de l'inexécution d'un jugement définitif, ou enfin, des cas où, malgré l'épuisement des moyens légaux, il y a violation évidente des traités ou des règles du droit des gens.<sup>1</sup>

<sup>1</sup> Their diplomatic agents shall not interfere in the claims or complaints of private

If the declaration that the procedure adopted to submit to the examination of a mixed commission the claims of French citizens as an exceptional method, *which was not to invalidate the convention of 1885*, means anything, then it is as plain as daylight that this commission is bound to respect the sentences or decisions passed by the Venezuelan courts in accordance with local legislation in such matters as come under the jurisdiction of the civil or penal laws, *and only in such cases in which there is a denial of justice or delay in the administration of justice, contrary to usage or law*, or failure to execute a final judgment, or, in fine, in such cases where, notwithstanding the fact that all legal means have been exhausted, there should exist an evident violation of the treaties or rules of the law of nations, that this commission may approve of diplomatic interference and so fix the liability of the Government of Venezuela, if any.

In the claim entered by the General Company of the Orinoco there has been submitted to this commission a matter which comes under the jurisdiction of the Venezuelan civil courts, as the rescission of the contracts obtained by the General Company of the Orinoco for the exploitation of all mineral and vegetable products of the alto (upper) Orinoco and the Amazonas for a term of thirty-five years and that of the tonca bean for a term of twenty-five years upon the vacant lands lying between the eastern boundaries of the Federal territories Alto Orinoco and Amazonas, and between the Orinoco and the boundaries of Venezuela and Brazil, because it is thus established by the constitution, the laws of the Republic, and the fourteenth clause of the contract of December 17, 1885, reproduced in that of April 1, 1887, reading as follows:

Any doubts or controversies that may arise in the execution of the contract shall be decided by the proper courts in the Republic in conformity with the laws thereof.

The sentence passed by the high court, as coming under its civil jurisdiction, in conformity with local legislation and in compliance with the solemn agreement entered into by the contracting parties, which is the supreme law controlling bilateral contracts, can not give rise to diplomatic intervention nor impose upon the Venezuelan Government any liability growing out of said sentence, *unless it is established beyond doubt that there has existed a denial of justice or delays in the administration of justice, contrary to usage or a law*, or that a final judgment has not been executed, or that there exists an evident violation of the treaties or rules of the law of nations. In order to enter the action the only plea that it has been possible to advance is that of *denial of justice*, as regards the form of proceedings and the substance of the action.

In regard to the first contention, i.e. — irregularity in the form of the proceedings, it has been sufficiently shown that the grounds advanced by the claimant company are wholly without foundation. In reference to the second contention, i.e. — the decision on the substance of the action for rescission of the contracts entered by the fiscal de hacienda before the high Federal court, it suffices to transcribe the very same terms employed by the author of the brief to come to the conclusion that the high Federal court in adjudging the rescission of the contracts did so by virtue of legal provisions governing such conventions as contain reciprocal obligations, in view of and upon investigation of the proofs produced by the claimant in case the defendant fails to show proof in

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parties relating to such matters as come under the jurisdiction of the civil or penal laws, according to local legislation, *unless in cases of denial of justice or delay in the administration of justice contrary to usage or law, or failure to execute a final judgment, or, in fine, in such cases where, notwithstanding the fact that all legal means have been exhausted, there is an evident violation of the treaties or of the rules of the law of nations.*

support of the exception taken at the hearing of the case. Maître Poincaré says, page 78 of his brief:

Elle (la Compagnie Générale de l'Orénoque) n'a pu prouver qu'elle avait rempli ses obligations, sauf cas de force majeure, elle n'a pu montrer que c'était le Gouvernement qui avait manqué à ses devoirs; elle n'a pu présenter les très nombreuses et très intéressantes attestations écrites qu'à défaut d'enquête régulièrement ouverte en France, elle avait réunies, qu'elle était prête à fournir, que nous résumerons ou citerons plus loin et qui ont été totalement ignorées de la Haute Cour.<sup>1</sup>

Whose fault was it and whose the liability for the consequences if the General Company of the Orinoco did not know how or did not wish to defend its case and prove its exceptions when it had at its disposal all the legal means offered by the Venezuelan codes, so that such *proofs and testimony* would not be *wholly ignored*: If she had Mr. Fiat as her representative and Drs. Diego B. Urbaneja and Ramón F. Feo as her legal counsel, why did she not make use of her means of defense? If the representative or the counsel did find any difficulty, any obstacle having the color of denial of justice or of delay in its administration, why is it that they did not enter such complaint before the same court or did not file a protest showing such irregular method of procedure? Is it possible that at the end of four years after the sentence was passed such experienced lawyers should find omission in the proceedings and denials of justice which they did not detect during the hearing of the case?

On the other hand, the Government of Venezuela established with sundry proofs, not objected to, the truth of its statements, and the high court of justice, by means of personal inspection of the territory which is the object of the controversy, investigates and weighs such proofs which are found sufficient to adjudge by virtue of its legal authority has not fulfilled the obligations created by the contracts; and in conformity with article 1110 of the civil code, which deals with the resolutive conditions of contracts, and articles 1256 and 1163, does declare that there are great grounds for an action; that the contracts of May 24, 1886, and May 31, 1887, made between the national Government, on the one part, and Miguel Tejera and Th. Delort on the other, of which the company was the assignee, should be dissolved, and condemns said company to pay the national Government the sum of 40,048.62 bolivars for damages to the State, because of the company's failure to execute the aforesaid contracts, besides the costs of the action. Such judgment, rendered by the highest court of the Republic and for fourteen years having had the weight of *res judicata*, can not be reviewed, except to the grave detriment of the sovereignty of the nation, by any court of arbitration unless such judgment contains an essential denial of justice fully established. The honorable umpire has at his disposal abundant material to arrive at a conclusion in regard to such denial of justice. The honorable umpire well knows what such phrase means when dealing with a sentence rendered by a court having full powers to pass final judgment on a matter submitted by positive law and by the will of the parties to investigation and decision. The honorable umpire is well aware that neither sophisms nor farfetched arguments nor yet more or less specious pretexts can annul the action of the *res judicata* and brand those who by fundamental laws have been

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<sup>1</sup> It (the General Company of the Orinoco) has been unable to prove that it had fulfilled its obligations except in case of *force majeure*. It has not been able to show that it was the Government which failed to do its duty. It could not produce the immense amount of most interesting written evidence which in the absence of depositions regularly made in France it had gathered and was ready to furnish, and which we will quote later or epitomize further, evidence which was totally *ignored* by the high court.

intrusted with the highest offices and powers to administer justice to have been guilty of denial of justice.

There are proofs — there are documents and memoranda — to show that the company, at the time of the filing of the suit for resolution of the contract, was in a state of bankruptcy; that it was powerless to continue the attempts at development and steam navigation undertaken four years before; the own confession of the company to the effect that it had engaged in a venture without knowing either its extent or its difficulties; the balance sheet presented at the meeting of the shareholders on May 30, 1890, showing liabilities three times as large as the assets; the necessity to go into liquidation, which in all languages means a complete paralysation of business operations; the company's schemes of becoming first an English, then a Belgian association, in search of new capital, the loan of which it was impossible to obtain in France; the sending to Caracas of Mr. Berthier, eager to obtain a new contract releasing the company in liquidation of the former contractual obligations, freeing the company of the suit then pending before the high Federal court and saving it from the wreck; there are, in fine, the last letters of Agent Berthier, in which, after losing all hope of making a new contract with the Government of Venezuela, he prepares the ground for a *large claim*, giving out as its main foundation, not denials of justice, which was an afterthought, but two facts which had just taken place on the Orinoco River and which in time *would give them considerable grounds*. The first was that the governor of the territory placed out of commission the steamer *Meta* by the dismounting of certain valves to prevent their capture by the revolutionists; and the second event was an armed attack against the small steamer, *which was on the point of being captured*. All this will be examined by the honorable umpire, who is to decide whether the sentence of the high Federal court of Venezuela ordering the resolution of the contracts and condemning the company to the payment of an indemnity, very small, however, to the Government of Venezuela, has no value, as claimed by the liquidators of the company, because it involves a denial of justice.

In connection with said sentence it only remains for me to analyse the facts which constitute the first of the causes of the good grounds for the indemnity claim before mentioned, which the author of the brief bases upon the dissimulations which altered the substance of the contract and permitted the Government of Venezuela to obtain the consent of the General Company of the Orinoco.

Maître Poincaré devotes this section to the boundary question between Venezuela and Colombia, which the King of Spain decided, as umpire, by the award published in the *Gaceta de Madrid*, March 17, 1891. This event has come to be the main stronghold of the General Company of the Orinoco, which has gone so far as to charge Venezuela with fraud in the contracts made with Miguel Tejera and Th. Delort, which were subsequently conveyed by them to the company. In my former brief I dealt with these singular pretensions, and I believe I have fully confuted all the assumptions and charges that Mr. Delort in the first place, and then the liquidators of the company, and finally Maître Poincaré, have pretended and still pretend to maintain against the different administrations of Venezuela, from Guzmán Blanco to Andueza Palacio alleging that the company was kept in ignorance of the question with Colombia involving a portion of the vast expanse of territory subject to the concession.

From the extensive discussion of the subject by Maître Poincaré I will note the following points:

The Venezuelan Government says now

(It is not the Venezuelan Government that says it, but the commissioner for

Venezuela in his opinion, page 31 — Opinion of the Venezuelan commissioner and supported by indisputable proof) —

the good faith in which Venezuela was possessing a certain belt of her territory, which was afterwards adjudicated by the umpire to the Republic of Colombia, relieves its Government of all responsibility in the concession under discussion, the object of which never was a definitive conveyance but the development of natural products in places where Venezuelan interests had already been created and the authorities of the country discharged their respective duties.

The following is from Maître Poincaré:

Entendons-nous. Il est possible que vis-à-vis de la Colombie le Vénézuéla ait été possesseur de bonne foi, en ce sens qu'il espérait obtenir gain de cause devant l'arbitre. Nous croyons volontiers que c'est là la raison du silence gardé par M. le Docteur Urbaneja, par M. Tejera et par le Général Guzmán Blanco.<sup>1</sup>

It is not only before Colombia that Venezuela has been a *bona fide* possessor, nor that it has been such because she expected to gain the point before the umpire. This last circumstance we do not find adopted in any positive legislation nor by any commentator on civil law as a determining condition of the possessor in good faith against the opposing party.

Let us see the award of the King of Spain as the *arbitrator juris*:

*Whereas the United States of Venezuela are the possessors in good faith of territories lying west of the Orinoco, Casiquiare, and the Rio Negro rivers, forming the boundaries on this side as assigned by the aforesaid "real cédula" of 1768 to the province of Guiana, and whereas there exist in said lands numerous Venezuelan properties developed in the loyal belief that they lie in the domain of the United States of Venezuela, \* \* \* it is expressly assigned to Venezuela the right of way over the aforesaid road, it being understood that such easement shall cease twenty-five years after the publication of this award.*

How does civil law define the *bona fide* possession? The possessor in good faith is he who possesses as an owner by virtue of a just title — that is to say, a title capable of conveying ownership even if the title is vitiated, provided such vitiation is unknown to the possessor. As a complement to such definition, civil law has established the following principles, which are a part of the substantive legislation of both France and Venezuela, to wit:

Good faith is always presumed and whoever alleges bad faith must prove that such exists.

It suffices that good faith existed at the time of the acquisition.

The *de facto* possession, when it is continued, uninterrupted, peaceful, public, unequivocal, and with the purpose to hold the thing as one's own, is also established by both civil and natural laws as a title of possession capable of conveyance, thirty years being sufficient between private individuals even in cases where there is no title. If Venezuela, who possessed in good faith the territories west of the Orinoco, Casiquiare, and Rio Negro, and there developed numerous properties in the loyal belief that they lie within its domain, as formally alleged by the award of the King of Spain, at least since the date of the "real cédula" of May 5, 1768, establishing as the boundaries of the province of Guiana the rivers Orinoco, Casiquiare, and Rio Negro, could not gain the point, notwith-

<sup>1</sup> Let us come to an understanding. It may be possible, that as far as Colombia is concerned, Venezuela has been a *bona fide* possessor in the sense, that Venezuela expected to gain her point before the umpire. We are willing to believe that such is the reason of the silence of Doctor Urbaneja, Mr. Tejera, and General Guzmán Blanco.

standing the fact of interrupted possession in good faith for over one hundred years of the disputed territories Venezuela has at least remained in the enjoyment *coram gentibus et nationibus* by the just award of the umpire the title of *bona fide* possessor of said territory, because she had established therein valuable properties and developed them in the loyal belief that she exercised over them immanent sovereignty.

After the preceding demonstration of facts, based upon indisputable documents, what is the weight of the following conclusion of Maître Poincaré?

Venezuela could not guarantee the company the peaceful possession of a territory under dispute. Thus she granted a thing which was tainted with a concealed vice, since it was doubtful whether it belonged to Venezuela, and she knew it.

By all these reasons *which belong both to the realm of natural as well as positive law*, Venezuela is liable to the General Company of the Orinoco. The latter must obtain the annulment of the *contract of concession* because of substantial errors and vice in the consent, and therefore is entitled to an indemnity for all the damages caused by such nullity.

Let us compare this conclusion with the statement made by Mr. Th. Delort, the company's representative, on September 20, 1888, in a letter addressed to the minister of fomento of Venezuela, who had asked him certain explanations, transcribing the following communication of the department of foreign relations of Venezuela:

SIR: The envoy extraordinary of the Republic of Colombia has lodged a complaint against the publication of a geographical chart and a report of the company of the upper Orinoco and Amazonas in which, while describing the *boundaries* of such possessions, *a vast expanse of the territory in dispute between the two countries* has been included as having been granted. In consequence thereof and in view of the necessity of examining the chart and report in reference, I beg to request that you send them to this office, if you have them in your department, and if not, I beg that you request from the representative of the company a report on whatever has been done in this matter, as well as the chart and report in question.

(Signed) YSTÚRIZ.

The statement of Mr. Delort in answer to said note and in reference to the *concealed vice* and *error in the consent* to which M. Poincaré refers, is as follows:

The company *is not ignorant* of the fact that the frontier between Venezuela and Colombia is in dispute, and submitted to the decision of the Government of Spain. *In consequence the company has no claim whatever to make in this respect and as the concession originated from the Venezuelan Government it (the company) is well aware that it must abide by the definitive boundaries that may be fixed for this Republic.* Up to the present the company has not extended its operations but to such points as are occupied by Venezuelan authorities; and the offices, warehouses, and dependencies are in Atures, Maipures, San Fernando, San Carlos, and the Brazilian frontier and the steamers have *only navigated* on the Orinoco, Casiquiare, and Guainia.

(Signed) TH. DELORT.

*Verba volant, scripta manent.*

Maître Poincaré claims that that evidently important portion of the letter, as he states, was not *spontaneously* introduced in Mr. Delort's answer. So we have now that it is not the alleged *ignorance* in which the company was kept of the existence of the question between Colombia and Venezuela, as Mr. Delort declares that the company *was not ignorant* of such fact; it is not the *concealed vice* in the substance of the contract, since Mr. Delort himself states that the company has *no claims to make in this regard*, and finally, it is not *error in the consent*, because Mr. Delort avers that the company is well aware that it must accept the frontier which shall be definitively awarded to the Republic. The lack of spontaneity of such statements can not rob them of their intrinsic value.

Is it perchance spontaneously that the man caught in the very act of putting his hand into some one else's trunk — as in the case of the company, which in the map and report offered to the stockholders, when about to form the company, shows as her own definitive grant of land defining its boundaries a territory disputed by Venezuela and Colombia — confesses, when compelled to apologize, that appearances may be against him, but that he simply wanted to find out whether the trunk was empty? Whether spontaneous or not, the statements of M. Delort, in reference to his knowledge of the arbitration proceedings the ignorance of which was alleged and in regard to the fact that they had to abide by the consequences of the award and had *no claim* on this score, are decisive and cut short the handy boundary question between Venezuela and Colombia, on which the General Company of the Orinoco finds the grounds to pretend a large indemnity from the Venezuelan Government.

As a final statement on this point and not to leave unanswered a question of law to which M. Poincaré refers in his brief, that of the indemnification the vendor owes the vendee, the concessions being comparable from the standpoint of the obligations of the assignor to the sale of incorporeal rights, I will only say, admitting the common principle that the assignor is liable to the assignee, in assignments for a consideration for any indemnification growing out of concealed defects or faults in the thing assigned and for the peaceful possession of the thing sold or conveyed, which is a principle established in the Venezuelan Civil Code, that in the concessions made by the Government of Venezuela to Messrs. Miguel Tejera and Th. Delort, there are no concealed defects or vitiations, because, as such grants only dealt with the exploitation of mines and development of the natural products which lay within a certain belt of land, such operations have not offered nor could they offer any concealed defects or vice for which the grantor is responsible. And as regards the peaceful possession of the grant made with reference to the boundary question with Colombia, the grants do not fix any particular boundaries, but simply mention the territories of Upper (*Alto*) Orinoco and Amazonas in the first contract and the vacant lands lying between the eastern boundaries of the Federal territories Alto Orinoco, and Amazonas, and British Guiana, and between the Orinoco and the limits of Venezuela and Brazil.

The good faith declared in favor of Venezuela by the umpire, who decided the boundary dispute, in regard to that portion of the territory Venezuela was occupying with *animus domini* and the award fixing the boundary between both countries, establish as regards the extent of territory the development of which was the subject of the contracts, the condition *juris* between Venezuela and the grantees in the matter of the boundaries of the territories granted to be developed, which are only designated by their known names, without specifying their extent or their precise boundaries in the contracts under review.

On the other hand, the question of indemnification lies between the grantor or assignor and the grantee or assignee, and in the development contracts under discussion the assignors to the General Company of the Orinoco were Messrs. Miguel Tejera (a Venezuelan) and Th. Delort, who in turn had obtained such contracts from the Venezuelan Government. All questions relating to the concealed defects of the thing which was the subject of the contract or the lack of title of the vendor or assignor which may invalidate it grow out of the contract itself and at the very moment when such contract was made.

The Government of Venezuela never discussed with the General Company of the Orinoco the question of the development of the territories of Alto Orinoco and Amazonas. The stipulations to that effect in the respective contracts were agreed upon by the Venezuelan Government and Messrs. Tejera and Delort, and it is from said stipulations that the question dealing with the responsibility

of the contracting parties may originate. The General Company of the Orinoco could only claim from Messrs. Tejera and Delort, the assignors who made the transfer in favor of the syndicate, for a 40 and 20 per cent, respectively, of the amounts that might be paid out as dividends.

It is also worthy of notice that notwithstanding the knowledge the General Company of the Orinoco had of the boundary question before September 28, 1888, as evidenced by the above-mentioned letter from the company's representative, Mr. Delort, the company did not enter before the high Federal court in the proceedings had two years later for the rescission of the contracts any exceptions whatever growing out of the boundary question, nor advanced any claim against the grantors or assignors for a guarantee or liability. The case ended with the final judgment awarding the rescission of the contracts on October 14, 1891 — that is, seven months after the award of the King of Spain — and such declaration of rescission for failure of the assignee company to carry out the contracted obligations destroys or invalidates any importance the liability question may claim as affecting the Government of Venezuela.

Section II, Chapter II, of Maitre Poincaré's brief deals with the failure on the part of Venezuela to execute her contractual obligations, a question which was examined in the action before the high Federal court of Venezuela, as it was one of the exceptions filed by Mr. Fiat, the company's representative, who answered the action for rescission. The company could establish nothing in favor of its claims, as shown by the minutes of the proceedings, and, quite to the contrary, the sentence passed adjudged that it appeared from the proceedings that the Government of Venezuela had fulfilled on its side all the obligations devolving upon the Government by virtue of the contracts in reference. The charges the counsel for the company accumulates in his brief against the Venezuelan Government are in their large majority foreign to the obligations entered upon by the Government as regards the grantees or concessionaries to allow them to carry out the development of the natural products and the mines lying within the territories in the contract mentioned by their names. Such exploitation and development operations were carried on by the assignee company, as far as their limited resources would allow, as shown by the documents submitted, and, if such operations were not favorable to the ends of the company, it was not the fault of the Venezuelan Government, but of the company, which accepted the execution of the obligations and agreements contained in the contracts, which absorbed, nobody knows how, considerable sums for administration and installation expenses and expensive and inefficient attempts to establish navigation on the upper Orinoco. The colossal scheme, as confessed in several documents by the representatives of the company, was undertaken without knowledge of its immense difficulties nor of the territory and river network which were to be the object of the improvements to be made in compensation for the development of the natural products and the monopoly of steam navigation on the river Orinoco and some of its affluents. The representatives of the company have tried to cast the blame for such want of knowledge and for the castles in the air built by the promoters of the company, Messrs. Miguel Tejera and Guzmán Blanco, because they did not show them in due time all the difficulties to be met later on in the execution of the contracted obligations. Such charges, however, do not affect in the least the responsibility of the Venezuelan Government, which had no dealings with the General Company of the Orinoco, nor was bound to make for the company the previous survey necessary to find out exactly which were the obligations contracted, or whether it was possible or not with the limited capital the company had to undertake and carry to a successful issue the vast plan of improvements which represented for the company, as compensation, the right

to develop the natural products, and to enjoy the monopoly of steam navigation through the network of the Orinoco rivers, when such was established in conformity with the contract. To such considerations we must add the fact that Mr. Miguel Tejera and M. Th. Delort were the promoters of the syndicate of the General Company of the Orinoco, setting aside for themselves 40 and 20 per cent, respectively, on the profits of the company as a compensation for their concessions.

Let us see how Maître Poincaré describes the combination:

The beneficiary in the contract of December 17, 1885, Mr. Miguel Tejera, had close relations with General Guzmán Blanco. He had been connected with the general in several important business transactions, principally in the Carenero and the coinage deals, and without wishing to offend the memory of these gentlemen (both having died), it might be added that he (Tejera) passed as the figurehead (*prête-nom*) of General Guzmán Blanco.

He could not under circumstances take personal charge of the Alto Orinoco scheme, so he immediately formed the means, if not to convey it to another grantee, at least to trust it, keeping to himself certain advantages in the hands of a French syndica e.

It was thus that the syndicate of the Alto Orinoco was established in Paris in September, 1886.

Such candid confession plainly reveals the origin of the General Company of the Orinoco. It was the outcome of tacit understanding between the two grantors of the contract of December 17, 1885, wherein the grantee was the figurehead of the grantor, according to the statement of the representative and counsel for the company. Such crooked contract concealing material frauds, according to the representative and counsel already mentioned, was accepted by a financial organization, abandoning to the beneficiary 40 per cent of the profits. It is not necessary to be a financier to affirm that such organization was doomed to death from its inception, and that under the conditions of the deal and the contract the child of the combination, the General Company of the Orinoco, created one year and a half afterwards, or on March 10, 1888, could not possibly live. Legitimate business transactions can not prosper, unless in that pure atmosphere of credit and trust, which is only found in the road labor and capital follow, leading to wise management and legitimate though moderate gain. If Messrs. Tejera and Delort had appropriated to themselves, according to the statutes of the syndicate, 60 per cent of the profits, simply because they had transferred to the syndicate two written contracts without any positive value, could it be expected that French capitalists, who are as conservative as clever, would contribute to make up the business capital indispensable to the development of the scheme within its proper proportions? Undoubtedly it could not be so, and that is why the company, which could scarcely get together a capital of 1,500,000 francs, when it was established in March, 1888, had liabilities exceeding 800,000 francs, made up of a debt to the coinage association of 491,486 francs and another debt due M. Chauvelot, a member of the syndicate, of 300,000 francs, and for which 600,000 francs in unassessable stock were delivered to him. Under such circumstances the capital on hand to continue the colossal scheme was reduced when the company began operations to the amount of 400,000 francs. Two years later the company failed with liabilities amounting to 2,741,084.27 francs, *its credit being totally exhausted* (see report of liquidation), so that it was forcibly driven to go into liquidation on May 30, 1890. Such, and no other, could be the end of the company when the beginning was tainted.

I beg to submit to the honorable umpire with this additional opinion and an annexed portion of it an affidavit duly attested containing the deposition made

in Paris on June 6, 1903, by M. Joseph Hippolyte Andrau-Maural, a former representative and attorney in Venezuela for the General Company of the Orinoco, in liquidation from the latter part of 1890 until April, 1893.

Such affidavit contains, in confirmation of all the foregoing, the circumstances and the facts that have led the General Company of the Orinoco to its complete disorganization and the impossibility to continue to exist; and as a résumé of the causes which produced such results, the following may be transcribed:

The scheme was neither well investigated nor seriously prepared, and was put into execution in the worst possible manner. The scheme fell fatally under the weight of universal reprobation, a bad financial position from the start, through reprehensible dealings and detestable management.

This affidavit is accompanied by several letters addressed to M. Andrau-Maural by M. Roux, liquidator of the company, and M. Delort, its general representative in Venezuela, relating to the liquidation operations of the pending transactions in the Orinoco region, and instructions to open with the Government of Venezuela negotiations for an indemnification. M. Delort, in his letter of November 25, 1891, states (that is, one month after the sentence of the high court had been passed adjudging the rescission of the contracts and condemning the company to the payment of a certain amount) in part, as follows:

Third. The sentence of the high court has condemned the company to the payment of the sum of 40,048.62 bolivars, *which constitutes a new credit to be met by the liquidation.*

Will the Government collect such sum? In such case it is necessary to answer immediately that the liquidation belongs in the first place to the *creditors recognized before the sentence was passed*, and thereupon to claim from the Government the amounts due to the company by the Departments of War and Navy. (See Planas's letters in the documents delivered to the legation and Richard's letters on the requisitions (seizures) of the *Libertad*, a small steamer, December, 1888, and January, 1889. A first seizure of the *Libertad* took place in November, 1888, to carry troops from Ciudad Bolívar to Guayana Vieja.)

It is more than probable that, if the Government does not make a claim before the diplomatic reclamation is entered, it will do all that is possible to enter such claim afterwards. It is, then, an advantage *not to execute any liquidation operations until the moment the claim is filed so as not to put the Government on its guard*, as it may then pretend, because of its *credit* either to follow or else to *inspect* the liquidation operations.

Then follows a description of the assets of the liquidation in Venezuela, consisting, as stated, of the following:

- |                                       |                                       |
|---------------------------------------|---------------------------------------|
| 1. Floating property.                 | 5. Furniture, writing materials, etc. |
| 2. Property in the warehouses.        | 6. Animals, carts, wagons, etc.       |
| 3. All kinds of merchandise in stock. | 7. The cattle ranch.                  |
| 4. Real property.                     | 8. Bills for collection.              |

The same letter, further on, states:

It is very difficult, almost impossible, to issue *a priori* instructions; it is necessary to follow the events and to know how to get the best out of them. It suffices to establish on the one hand the basis of the compromise, in case such may be agreed upon, and on the other hand the direction matters should take, in case the Venezuelan Government should be obstinate and not accept a friendly settlement.

I. In case of compromise:

In our position before the French legation we can not undertake to do anything without its consent from the moment the diplomatic claim has been entered.

(Such claim was never directly entered. It is now that it has been entered before the mixed commission, but not by the French Government directly.)

The letter of instructions further says:

It seems to me clear that the Government will do nothing and will hear nothing before such claim has been presented, that is, delivered.

Only in that case the Government would perhaps like to enter into a compromise. In that case, with whom shall the Government enter negotiations?

With the French legation it would be difficult (for the Government) to enter into a *scheme of underhand negotiations (tripotages) and clandestine commissions which are the basis of all transactions and the reason of all dealings*. This is why direct negotiations with the legation may very probably fail. But the men in power are too shrewd to make a mistake and they will probably try to negotiate directly or indirectly by any means with the representative of the company. In this case you must keep the legation, which will certainly not interfere, informed of all the negotiations.

To give the honorable umpire an idea of the methods employed to get a heavy indemnity, the foregoing paragraphs are quite sufficient.

As a further complement to this brief, I beg to submit another affidavit of the same gentleman, M. Andrau-Maural, stating which was the property the General Company of the Orinoco in liquidation was possessed of in the Orinoco region in 1891, when said Andrau-Maural was appointed as its representative. After that date two years elapsed in the condition expressed in the testimony bearing number 3, to which I have referred in this writing, as abandoned, left in the open, and exposed to the destructive action of the climate and the elements in such remote country. I conscientiously took into consideration the deterioration and natural loss suffered by the property and for whatever the Government of Venezuela might be responsible on account of the established seizure of a small portion of the property. I found the positive value of such to be sufficiently compensated with the sum of 40,448.62 bolivars, which the company in liquidation should have paid for damages according to the sentence of the high Federal court, besides costs of the action which the company was also condemned to pay.

For the reasons stated in my former brief and for the reasons I now state I maintain my opinion that the claim entered against the Government of Venezuela is totally unfounded and must be rejected.

NORTHFIELD, VT., February 9, 1905.

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#### ADDITIONAL OPINION OF THE FRENCH COMMISSIONER

After having read the additional memoir of my honorable colleague I can only maintain the conclusions of the prior memoir. Faithful to the rule of conduct which I have traced for myself to remain within the field of impartiality which is suitable to an "arbitrator" (for that is the title which the protocol gives me) I shall not follow Doctor Paul in the discussion which he engages with M. Poincaré, advocate of the plaintiff party. Besides, this would be useless, the umpire having in hand the two briefs, and being able as well as myself to form an opinion after having read them. I shall content myself then with presenting to the Hon. Mr. Plumley a few observations which are suggested to me by this additional memoir upon some points, foreign, however, in their very foundation, to the matter, but upon the subject of which I differ absolutely from the opinion of my honorable colleague. In the first place it is a question of the manner in which we have understood, my colleague and myself, the rôle of "arbitrators" which has been intrusted to us by our respective Governments. I have not at all wished to censure Doctor Paul about the manner in

which he has understood his duties; he had, according to the protocol, the entire freedom to understand them as he has done. I have only wished to state to the umpire that I was not placed upon the same ground. I have insisted upon remaining an "arbitrator" and not to become the advocate of one of the parties; I have pronounced myself conscientiously with all impartiality, without being afraid to reject the pretensions which I found without foundation or exaggerated. It is because I have fixed for myself this line of conduct that I have not been able to give to my honorable colleague as he requests of me the "arguments" on which I base my ideas. An arbitral award, like an ordinary judgment, ought not and can not rest itself upon "arguments." The arbitrator, like the judge, ought only to give the reasons which have convinced him and led to his decision, but in this particular case I have stated the reasons for my decision since I have said: <sup>1</sup>

In failing in the obligations which it had assumed, in deceiving the company by its dissimulation which changed the substance of its agreements, and in interfering with the management of the concession by its vexations and abuses of power, the Venezuelan State has brought about the ruin of the company.

I did not think I had the power to say more. I have thought that in explaining thus my position I gave to my decisions an authority which they would not have had if I had supported as an advocate, the cause of the claimants as my colleague has sustained that of the Venezuelan Government. I have not bettered the arguments of the claimants; I have contented myself with weighing them. When I have accorded indemnities it is because I have considered these arguments acceptable. I have not furnished personal "arguments." I add that nothing prevented the Venezuelan Government, defendant, from imitating the claimants, plaintiffs; it could, in order to relieve its arbitrator from being at the same time its advocate, positions difficult to unite, have appointed special advocates in each case to produce documents and to call upon witnesses. It does not belong to me to seek for the reasons why it has not done so.

In the second place I maintain, in spite of the explanations given by my honorable colleague, that the phrase of the minutes "to see if it might be possible to arrive at an agreement" can not have any other sense than that which I have given it in my memoir. To refuse this would be the same as to declare that it has no sense, that which I can not admit. To arrive at an agreement after we have given opinions so diametrically opposite, it would be necessary that each of us grant concessions. On my side I would have to lessen the amount of the indemnity; on his side, Doctor Paúl would have to consent to accord one. In pronouncing this phrase, which he himself had inscribed in the minutes, my colleague then considered himself the possibility of according an indemnity to the company; there is no getting around it.

In the third place, I agree that Mr. Pietri, Venezuelan plenipotentiary had, like other plenipotentiaries, only powers "ad referendum." This does not avoid the fact that Mr. Pietri was a Venezuelan vested with high official character, and that, despite his well-known patriotism, despite the high functions with which his Government had honored him, despite his knowing the judgments of the high court condemning the company, Mr. Pietri recognized the right of the company to receive eight years ago an indemnity of 3,600,000 bolivars in gold. That is all I wish to establish.

The argument that my honorable colleague gathers from the refusal of Congress to ratify the diplomatic act signed by Mr. Pietri has in my opinion

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<sup>1</sup> *Supra*, p. 217.

no value. In fact, it is true, that, if instead of having been accorded by sentences of arbitral tribunals, the indemnities fixed by the umpires in the mixed commission had been the result of diplomatic agreements submitted to the ultimate ratification of Congress, the latter would have rejected them all as it rejected the Pietri-Hanotaux protocol; it is just because the claims of foreigners force Venezuela to such a plea in bar that it has been necessary to have recourse to arbitration, and in truth I do not think that one can demand of the elected representatives of a country who have to reckon with the legitimate susceptibility of national self-love that they condemn their own country with the impartiality and indifference which foreign umpires alone can show.

Then my honorable colleague maintains that it is the large amount of the indemnity accorded by the Pietri-Hanotaux protocol that prevented Congress from ratifying this act. I admit that willingly, but I ought to remark without insisting that there can be other reasons of which we are ignorant since the sitting of Congress in the course of which this protocol was examined was a secret session and no journal, so far as I know, has been published.

In the fourth place I ought to remark in the additional memoir of my honorable colleague, an interpretation of the protocol of February 19, 1902, entirely unexpected. Doctor Paúl maintains that the protocol of Paris and the protocols of Washington are not alike; that the first does not give the arbitral commission the same powers as the second. I find to the contrary that from the point of view of the extent of powers the protocol of Paris being less precise is by that very reason broader than the protocols of Washington.

As the protocol signed at Paris, February 19, 1902, the protocol signed at Washington, February 27, 1903, has suspended the application of the French-Venezuelan convention of 1885 which, during all the time that the effect of these two protocols remain in force, is a dead letter. Both to an equal degree have been exceptions to common law represented by this convention, which has regained its force only when the operations are ended of an exceptional order provided by the protocols. Only while the protocol of Paris announced this evident truth, the protocol of Washington considered it as so evident that it did not think it necessary to speak of it. To uphold the contrary would be to maintain that the protocol of Washington abrogated forever the convention of 1885, that which would not be the business of the Venezuelan Government, would not displease the French inhabiting Venezuela, who consider that this convention of 1885 deprives them of the effective protection of their legation.

This sentence

it is understood that this procedure \* \* \* is instituted only as an exceptional act and does not invalidate the convention of November 26, 1886,

signifies that as soon as the protocol of 1902, which, having created a procedure of exceptional arbitration, shall have brought forth all its effects, the convention of 1885 will remain the only convention in force between the two high contracting parties. To give any other sense to this phrase and to make it say that the said convention is opposed to the protocol while the latter is in application is to put the protocol in opposition to itself and to take from it every kind of significance. Then, like the commission appointed by the protocol of Washington, like the arbitral tribunal which rendered its award on the Fabiani affair at Berne, and based it upon denials of justice imputable to the Venezuelan tribunals of all grades, this commission has full powers to examine all the judgments rendered by all the Venezuelan tribunals, and to accord indemnities if it finds that there have been denials of justice. To adopt any other interpretation, as my honorable colleague has done, refusing to this commission the power to review a judgment of the high Federal court, would be to take away

from the protocol of Paris its efficiency, which protocol has for a purpose to correct failures of Venezuelan justice. There can not be the shadow of a doubt of this, and in the course of our labors at Caracas my colleague admitted it himself when he consented to accord an indemnity to the claimant Mr. Rogé, who had been unduly condemned by a Venezuelan tribunal.

In the last place I am obliged to give my idea of one of the dossiers which my honorable colleague has joined to his additional memoir. This dossier represented by papers forwarded by Mr. Andrau Moral was handed to me to-day, February 10, for the first time. I have the right to ask myself what are the reasons which have led this former representative of the company thus to betray the company which he formerly served. Has Mr. Andrau Moral been guided only by the love of truth and the search for justice? Does not his treason result, rather, from positive advantages upon the nature of which I can not insist? Or, indeed, is it the manifestation of a hostility which might have for its foundation the refusal of the company to pay certain sums to the interested party, or the manner in which the latter may have thanked him for his services? Of these three reasons, which is the one which has induced Mr. Andrau Moral to take such a step for the purpose of injuring the company? I have not the means of information sufficient to be well informed. So I can only ask the umpire to kindly wait, before taking into consideration the statements of Mr. Andrau Moral, giving no value whatever to his insinuations, the arrival of information which I have demanded from Paris by telegraph upon the integrity of this person thus appearing at the last moment and upon the conditions under which he left the service of the company. On the nature of this information will depend the credit which is suitable to attach to his statements. As for the letters of Mr. Delort joined in the original to the factum of Mr. Andrau Moral we can see only the manifestation of the desire of the company to settle this claim by a compromise which Mr. Delort with his experience of men and things in Venezuela thought only possible after a diplomatic action should have been engaged in. Besides, the letter of Mr. Delort, referred to by my colleague, if anyone wishes to read it from first to last and not to consider it as an extract, is not intended in truth to edify one with regard to the habits of the "men in power" in Venezuela, but it is in no way of a nature to spread doubts upon the right of the company to receive the indemnity which I persist in considering as due it.

NORTHFIELD, *February 10, 1905.*

#### EXHIBIT TO THE FOREGOING OPINION

Reverting to the "P. S." joined to my memoir sent to the umpire to explain my opinion on the claim of the Company General of the Orinoco, I have the honor to remit to the Hon. Mr. Plumley the following telegram, which I received this day from Mr. Delort. I translate it from the telegraphic style to facilitate the reading.

PARIS, *February 13, 1905.*

I became acquainted with Mr. Andrau Moral at Caracas in 1880. He asked me for employment. The minister of France, Mr. de Tallenay, gave me, as information, that he had been obliged to leave the French army for misdemeanor. He then came to seek his fortune at the mines of Callao, married at Ciudad Bolívar, entered the company of the Orinoco in 1891, being chosen by the agent of the company at Ciudad Bolívar without the director of the company at Paris being informed, to take command of the boat *Libertad*, which he lost the same year in a strange manner. I found him at Caracas in October, 1891, and his relations represented him as the representative of the liquidation during a very short time. He demanded money continually and was a very active agent for the claim against the Venezuelan Government. We do not then understand his protest. In 1893 he received the order of the liquidators to transmit his power and documents to Mr. Maninat, a new representative. He left the company, taking away impor-

tant pieces from the dossier and was sent from Venezuela in 1893 by President Crespo for an act of indelicacy notoriously well known. He came to Paris to ask me for a loan and forgot to pay me. I have not seen him since and the liquidators remain without news from him. His protest without right, value, or reason is an infamous and inexcusable act. Wait the dossier which we are forwarding you and which will furnish proofs. Please send copy of the protestation.

(Signed) DELORT.

When the dossier mentioned reaches me, I will present it as a second annex to my memoir after having shown it to my honorable colleague.

E. DE PERETTI DE LA ROCCA.

NORTHFIELD, *February 13, 1905.*

The French arbitrator has the honor to remit to the umpire a dossier of twelve exhibits which has just been sent to him by the Company General of the Orinoco in view of destroying the effect which may have been produced by the protestation of Mr. Andrau Moral remitted by the Venezuelan arbitrator. It will be enough for Mr. Plumley to read the letter of Mr. Andrau Moral of the date of June 19, 1893, and to compare it with his letter of 1904 to take account of the authority which the declarations of this person may have that the company seems justified in accusing him of having written his protestation for money. In fact the 19th of June, 1893, Mr. Andrau Moral wrote to the liquidators of the company:

"I put myself at your disposal for the steps to be taken to obtain from the Government the support which is necessary for the liquidation to bring to a head the legitimate claims against Venezuela."

As for the letter of Mr. Delort of November 25, 1891, which my colleague tries to use as a weapon against the company, I will remark to Mr. Plumley that the company itself produces a copy of it in the support of this claim. I maintain that there has not been any line of this letter from which one can raise an argument against the legitimacy of the claim in question.

NORTHFIELD, *March 1, 1905.*

E. DE PERETTI DE LA ROCCA.

NOTE WITH REGARD TO M. ANDRAU MORAL FOR M. DE PERETTI DE LA ROCCA

On his arrival in Caracas, October 25, 1891, he, M. Delort, was received by M. Andrau Moral, and great was his surprise for he believed him to be on the Orinoco on board the *Libertad*, which he commanded. He was ignorant in fact of the loss of this steamer of which he had not yet received the news on his departure from France. M. Andrau Moral was not unknown to M. Delort of whom he had asked, in 1880, to be appointed on the mission which the Messrs. Perière had sent to Venezuela to study the resources of this country and the business enterprises which might succeed there.

M. Delort had been placed at the head of this mission. In the programme of the investigation were included the four mines of Callao and M. Andrau Moral had come from Callao, where he had been employed, to Caracas to offer his services, but the information gained with regard to him by the Marquis de Tallenay, chargé d'affaires of France in Venezuela, prevented the acceptance of these offers. M. de Tallenay informed M. Delort that M. Andrau Moral had been obliged to leave the French army for misdemeanor. In 1883 M. Delort ran across M. Andrau Moral at Panama, where he was in the employ of the Inter-Oceanic Canal, and since that time he had not seen him. After the failure of the enterprise of the canal, M. Andrau Moral had come back to Ciudad Bolívar, where he had married a Venezuelan girl in 1879. He obtained, in 1891, from the agent of the Company General of the Orinoco in liquidation, M. Boulissière, the command of the steamer *Libertad*. M. Boulissière did not inform the people at Paris of this nomination, so that the liquidators found it out only through the report of the said agent relative to an attack on this steamer in April, 1891, by the armed bands of Valentini Perez.

After the loss of the *Libertad* in August M. Andrau Moral had come back to Caracas. He explained to M. Delort that going up the Orinoco August 6, at 5.15 in the morning at about 8 miles from Buenavista, the *Libertad* had encountered a squall from the east so violent that the steamer had capsized in a moment and

was wrecked by the explosion of the boiler a moment later. It was a great loss to the company, the steamer having cost a hundred thousand francs. At any other time M. Delort would have wished to make an investigation with regard to the responsibility of M. Andrau Moral in the loss of the said steamer of which he was the captain; but he was so preoccupied with the situation that the judgment of the high court, rendered October 14, 1891, was going to cause to the liquidation of the company that he laid aside this investigation for the time. He had taken counsel of the advocates of the company as to the measures to be taken and as the latter saw no other action possible than a claim through diplomatic means, it was necessary to prepare this by evidence for the chargé d'affaires of France at Caracas, M. de Lacvivier. M. Andrau Moral was at that time on excellent terms with the said chargé d'affaires. He offered M. Delort to aid him in his work which he was rushing as much as possible in order to return to Paris where his presence was necessary. It was necessary to be acquainted with Venezuela and Caracas to understand the position in which M. Delort was placed. The president, Dr. Andueza Palacio, whom he knew very well and for whom he had even had the opportunity to render a service some years before when he was in a precarious position, refused to receive him, and the ministers followed his example. The representative of the liquidation, M. Fiat, who had become an employée of the Government, had handed in his resignation and wished to withdraw through fear of compromising himself. For M. Delort personally, it was all right, but it was not necessary that he should speak of the Orinoco. No merchant would have accepted the representation of the company through fear of the Government. In such circumstances M. Delort was well pleased at finding in M. Andrau Moral a person who did not fear to compromise himself in openly supporting the company, and as M. Delort did not wish to remain at Caracas more than one month he had with the said Andrau Moral the advantage of the man already acquainted with the affair and being able to prosecute it effectively with the French legation where he was very well regarded. M. Delort then thought no more about an investigation with regard to the loss of the *Libertad*. He considered the faults of youth as peccadillos to be forgotten, and he prepared M. Andrau Moral to continue in the business of which he had laid the foundation.

Moreover, M. de Lacvivier encouraged M. Delort in this respect. On going away the latter left to M. Andrau Moral the instructions of which a copy is here attached, but not wishing, however, to invest him with powers of attorney without the approbation of the liquidator, M. Roux, he remitted in blank the said powers to the legation of France, awaiting the decision of the liquidator.

M. Andrau Moral was known to Doctor Urbaneja, legal counsel of the company, whose advice he was to follow. M. Delort went back to France and arrived in Paris the 15th of December. He had to explain first the situation of the company in Venezuela and the liquidator wished to call a meeting of the stockholders to explain it to them. M. Delort had brought to M. Roux a letter from M. Andrau Moral, dated November 15, offering him his services, a copy of the reply of M. Roux dated the 24th of December, 1891, being annexed. M. Andrau Moral wrote again to the liquidator offering once more his services, dated the 17th of November.

January 5 M. Roux telegraphed to M. Andrau Moral that he agreed to give him the powers of attorney. M. Andrau Moral wrote to M. Delort the 5th of January a letter to be forwarded to the liquidator, in which he declared that he would demand payment of a regular salary and otherwise he spoke of accepting other offers which were made him. M. Roux replied to him by a first letter of the 25th of January and then by a second letter. As a result of this correspondence M. Andrau Moral had represented the liquidation provisionally from the date of the departure of M. Delort the 15th of November, to January 5, 1892, and officially from January 5, 1892, to February 25, 1892, on which date he received the letter informing him that M. Maninat had been selected and that he was to turn over his powers to him.

But M. Maninat to whom they had written at the same time to represent the company, did not put himself forward in this affair, at this time, made no reply, and took no steps with M. Andrau Moral who continued to represent the company *voluntarily*, but he had really nothing to do. Affairs remained thus during the

whole year of 1892, which was exceedingly troublesome in Venezuela because of the civil war, the fall of Doctor Palacio, and the final victory of General Crespo. M. Maninat had come to France toward the close of 1892 and they had prevailed upon him to accept the power of attorney of the company. A letter was written to him, of which a copy is added. M. Maninat on his arrival at Caracas went to the legation to demand the dossier of the documents relative to the claims of the Company General of the Orinoco in liquidation. He was then informed that M. Andrau Moral had taken possession of some important exhibits and had gone away without returning them, and of this act M. Maninat informed those at Paris. M. Delort demanded these documents of M. Andrau Moral, who replied that he had left them with his cousin Mathew Valery, at La Guaira. M. Delort then communicated with this said Valery who pretended to have sent them back again to M. Andrau Moral and sent a letter herewith attached, a copy of which was transmitted to M. Andrau Moral who declared that the agent of the post in question had remitted nothing to him.

Finally M. Andrau Moral has restored nothing. M. Andrau Moral was without personal resources and he expected to receive regularly from the liquidator a monthly allowance which would permit him to live. He complained much because the liquidator, M. Roux, had not wished to assist him. But at this time the liquidation had some heavy expenses to meet in regulating other affairs more important than a salary to M. Andrau Moral. On the other hand, the dossier of the company ought first of all to have been examined at the ministry of foreign affairs. There was really nothing to be done at Caracas, as M. Andrau Moral himself knew. They did not see under these conditions the necessity of paying him, and the offer which M. Roux had made him, placing to his credit some settlements to be made later, was a gratuitous kindness. Nevertheless he drew several checks upon M. Roux and M. Delort, together 2,500 francs, drafts which were paid. That could not continue and M. Delort urged him while waiting to take some employment. M. Andrau Moral had been able to win the good will of M. de Monclar, so that he got him the appointment of consular agent of France at La Guaira, to which he added the consular agency of Colombia in this same port. So in this manner he found the means of existence. Unfortunately he had many political friendships and in this time of troubles, of expulsions and of flight he aided in the flight of certain compromised men. M. de Monclar did not pardon him for this fault and had him replaced. He then went to ask M. Orsi de Monbello to take him into his business in order to help him to get a living. M. Orsi de Monbello was in high favor of General Crespo, who placed him in charge of certain works, for which he was paid in advance to a certain amount, which is not common in Venezuela. M. Andrau Moral, who was notorious at Caracas, got rid of part of these advances for him, and General Crespo learning about it sent him out of Venezuela, causing him to embark officially at La Guaira. M. Andrau Moral came to Paris. This was in April, 1893. M. Delort welcomed him kindly and aided him so far as he could in his plans, which he continued to pursue. M. Roux also welcomed him and remitted to him what he could. But the question of money always being the main thing, M. Andrau Moral drew upon M. Roux from Ajaccio, where he had gone. M. Roux refused to accept and then received a letter of regular blackmail.

But M. Andrau Moral changed his mind, and June 18, 1893, he wrote to the liquidators, again offering them his services, but this time for proceedings to be made at the ministry of foreign affairs, where he pretended to have influence powerful enough to act and to bring to a successful end the legitimate claims of the liquidations in Venezuela. And it is after such a letter that M. Andrau Moral protests against the claims of the Company General of the Orinoco.

The liquidators of the company heard nothing further from M. Andrau Moral after this letter of June 18, 1893, and M. Delort has had no news from him since 1896. How, under these conditions, could M. Andrau Moral make a protest and to what end? It can not be for the remainder of the credit which he may have upon the liquidation, for it is to that alone that he ought to have addressed himself. He has no cause of complaint against the liquidation nor against M. Delort; however the protestation which he has made has for an end to injure the liquidation and

M. Delort; but, then, what object was he pursuing? M. Andrau Moral is not a man to act without interest, and for him interest is money.

That is why his action aside from its lack of right, value, and reason is contemptible and can only place in confusion those who search to use it, making in a way a common cause with him.

TH. DELORT.

PARIS, *February 17, 1905.*

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OPINION OF THE UMPIRE

The liquidators of the Company General of the Orinoco, a French company, presented their claim through the Government of France before this honorable commission at its sitting in Caracas in 1903, claiming indemnity in the sum of 7,616,098.62 francs of date July 10, 1902.

The claim having received the careful consideration of the honorable commissioners, they found themselves in serious disagreement, the honorable commissioner for France deeming it just that there be awarded the liquidators the sum of 7,000,000 francs, while the honorable commissioner for Venezuela refused them any sum. The claim was therefore reserved for the consideration of the umpire, to whom it was presented at the sitting of the commission at Northfield on the 13th day of February last.

Nothing is in controversy but the merits of the claim.

It arises out of two concessions granted by the respondent Government. The earlier was to Miguel Tejera, a Venezuelan, through Gen. Guzmán Blanco, plenipotentiary of the Republic of Venezuela, at Paris, France, on the 17th day of December, 1885, and was approved by the Congress of the conceding Government May 21, 1886, made executory May 24, and published in the Official Gazette of June 5 of the same year. The other was from the respondent Government to Theodore Delort, made at Caracas April 1, 1887. It was approved by the Federal council, later by the national Congress, May 26, 1887, became executory May 31, and was promulgated June 13 of the same year.

The concession to Miguel Tejera was contained in fifteen articles and comprised certain valuable privileges to and certain compensatory requirements of him in substance as next hereinafter stated. To the concessionary was granted the exclusive right to exploit all the mineral and vegetable productions of the territories of Upper Orinoco and Amazonas; to construct railroads, telegraph lines, and canals, such as he might think suitable for the development of the territories and the expansion of the enterprise, giving notice always to the national Government of the time when such works were to be commenced and submitting to the Government the plans thereof; the free importation of all material, implements, and instruments necessary for the construction and maintenance of the railroads and their equipments and the boats and their equipments; a rebate of 10 per cent from the regular customs duties on all other imports by the concessionary; the ownership in fee of all lands occupied by the concessionary for farms, pasturage, or industrial purposes; 6 hectares of land in fee to the concessionary for each immigrant introduced into the said territories as provided for in said concession, the same in all cases to be taken out of Government lands; immunity to the enterprise from any and every impost or contribution to or for Governmental support; right of navigation of the lower Orinoco and of exit or entry for his boats by the canal Macareo; that during the term of the concession the Federal Government was not to treat with any other person or company for the exploitation of mineral or vegetable products, steam navigation, and railroads, these being declared to be the basis of the contract; the privilege of assigning the concession in whole or in part to any other person, persons, or company, limited only to giving notice

of such transfer and assignment to the Government of the Republic; the concession to continue for thirty-five years from the date of its ratification; at the expiration of this time all railroads of more than 10 kilometers constructed by the enterprise, all lines acquired by the enterprise, and all mines exploited by it were to continue to be its property until the end of ninety-nine years from the date of ratification.

The obligations imposed upon the concessionary by the terms of the contract were in substance these:

To construct narrow-gauge railroads around the rapids of the Atures and the Maipures in the Orinoco, the construction to be commenced within eight months, counting from the date on which the ratification of this contract should be communicated to the concessionary; to establish steam navigation on the upper Orinoco, the Casiquiare, and the Rio Negro, the first boat to be in those waters within six months, counting from the date when the construction of the railroad should be begun; to introduce at his own expense into the said Territories an annual number of immigrants not less than 500; to erect a building for a school and a chapel in each of the new villages which should be founded at his expense; to construct at his expense two barracks suitable to accommodate 200 men each, one of which should be near the frontier of Colombia and the other in the neighborhood of the Brazilian frontier, both at points which should be selected by the Federal Government and for whose approbation the plans were to be submitted; to introduce into the said Territories at least three Catholic missionaries each year during a period of ten years; to support at his expense, at the most suitable places, hospitals and pharmacies for the assistance of the natives and immigrants who might fall sick in the work of the enterprise; to pay to the national Government during the existence of this contract the sum of 40 bolivars for each 46 kilograms of india rubber which should be exported to a foreign country; to send a scientific commission to explore the two Territories and to communicate to the Government the result of its labors; to maintain at his expense a body of police for the protection of his works, the chief to be appointed by the Federal Government; to proceed to the exploitation of the vegetable materials in such manner that the natural plantations existing might be preserved in good condition; to be responsible for the trees which might be destroyed in the exploitation of the india rubber and that he improve and benefit these natural plantations; to yield up to the Government all the property of the enterprise, which was to become the property of the nation, at the expiration of the general term of thirty-five years, excepting the properties named heretofore, which, under the privileges of the concession, were to belong to the company; to permit that all differences and controversies, which the carrying out of the concession might cause, should be resolved by the tribunals of the Republic conformably to its laws.

The enterprise contemplated by the Government of the Republic and by the concession was indeed colossal.

The two territories included in the concession had an area, as stated by Mr. Tejera, of 600,000 square kilometers. It was understood to contain vast and fertile plains, forests covered with wood, rare and rich; extensive mines of gold and silver; other metals and precious stones, and for immediate exportation and profit great quantities of india rubber, sarrapia, and oil of copaiba. The Orinoco, 2,000 miles long, received within these Territories its largest tributaries, and with these, above the Maipures rapids, had thousands of miles of navigable waters, extending west, east, and south, and beyond the boundaries of Venezuela. It was a land little known by the world at large, but it bore the charm of great attributed wealth of vegetable and mineral products, the exclusive exploitation of which passed to the concessionary by the terms of the contract.

From the map of Venezuela, as then constituted, the Orinoco and its eastern confluent were all within the domain of Venezuela, while important sections of the western affluents lay likewise within the Republic and under its control. The concessionary saw in these facts far-reaching opportunities for exclusive navigation over many waters and through immense regions, and there came to him visions, not fanciful, of giant fortunes. There was, however, little genuine knowledge of these Territories; they were largely unexplored and in detail unknown. It afterwards appeared that the population had been decreasing for some time through different causes, and many villages once fairly populous were reduced to very few inhabitants. The rapids, which it was the plan of this concession to avoid by means of railroads, had been the sufficient cause both of the ignorance of the outside world concerning lands lying beyond them and of a paucity of inhabitants, of enterprise, and of improvements therein.

The conditions peculiar to a tropical country had added to the usual factors making early explorations and investigations dependent exclusively upon waterways. The rapids had cut off approach from the north to the upper Orinoco, as well as descent therefrom. The Casiquiare joined together the Amazon and the Orinoco, and by this means the sea could be reached with freight carrying traffic from these Territories, and it was the only way by which the Territories had been open to navigation. It was only foresight and patriotism which suggested the plan proposed in the concession to unite these separated sections of Venezuela by means of steamboats and railways on and by the Orinoco.

While the enterprise promised much to its promoters financially, it bade fair to be of untold value to the Republic of Venezuela.

A French syndicate was formed September 1, 1886, to take over this concession, which was merged in the Company General of the Orinoco. This company was organized at Paris, France, March 28, 1887, with a capital of 1,500,000 francs, composed of 3,000 shares of 500 francs each. This company became the legal assignee of the concession of December 17, 1885.

April 1, 1887, at Caracas, the Government of Venezuela entered into a contract with Theodore Delort, a French citizen, for the exclusive exploitation of sarrapia for a term of twenty-five years within the Government lands which are included between the eastern boundaries of the Federal Territories of Upper Orinoco and Amazonas and British Guiana and between the Orinoco and the Venezuelan-Brazilian frontier.

In addition to the provision concerning sarrapia there was granted by the Government the right to construct railroads and telegraph lines wherever deemed necessary for the development of its works and to establish rates of transportation subject to the approval of the Government; to become the proprietor in fee of the lands occupied by these establishments; to receive in fee one hectare of land for each immigrant introduced; to import free of duty all materials, machinery, and tools necessary for the exploitation of sarrapia and for the construction of steamers, houses, railroads, and telegraph lines; the right to cut in the national forests the wood and timber to be used in all such constructions; to have all these privileges exclusively during the term of the concession; to have the unlimited right to assignment or transfer of said contract by simply advising the Government thereof.

In return for these privileges there were certain compensatory obligations resting upon the concessionary in said contract, such as that Mr. Delort was to organize a company with sufficient capital to carry on the exploitation named; also imposing these duties — to pay the National Government in specie 50 bolivars for each kilogram of sarrapia which should be exported; to introduce at the expense of the concessionary immigrants to colonize the

Territories in which the exploitation of sarrapia was to take place; to establish hospitals and pharmacies sufficient for the immigrants and workmen who might fall sick; to introduce Catholic missionaries to catechise the natives of the Territories where the exploitation was to take place; to establish steam navigation on the principal branches of the Orinoco where it was possible within the Territories included in the contract; to carry on the exploitation of sarrapia in such a manner as to keep in good condition the existing plantations; to transmit gratuitously postal correspondence.

This contract was also taken over by the Company General of the Orinoco, and it became the lawful assignee thereof.

Of both these assignments to the Company General of the Orinoco the respondent Government had due and sufficient notice and advices.

Prior to the organization of the Company General of the Orinoco the syndicate heretofore referred to did much toward preparing the way for performing the duties and gaining the privileges of the concession; but immediately following the organization of the company the enterprise was pressed faithfully and with measurable success. Unexpected difficulties and obstacles were met and overcome so far as the conditions would permit. Steamboats were placed on the lower Orinoco for navigation between Ciudad Bolívar and the Atures; between the rapids of the Atures and the Maipures and above the upper falls for the service of the upper Orinoco. By May 2, 1887, regular communication had been established between Atures and Ciudad Bolívar, the trip down taking five days and the trip up about ten. By the latter part of 1887 the boats on the upper Orinoco were plying between San Fernando de Atabapo and Maipures with reasonable regularity, accomplishing the service in about twelve days from San Fernando to Ciudad Bolívar, where before it had taken three months. The distance from Ciudad Bolívar to Atures is about 900 kilometers, and from Atures to Maipures is about 60 kilometers, and from Maipures to San Fernando de Atabapo is about 400 kilometers.

The discovery of two rapids between the Atures and the Maipures, not named in the contract and apparently not known, practically negated the idea of a successful scheme consisting solely of two narrow-gage railroads of about 10 miles each, one passing by the lower and the other by the upper rapids with carriage by boats between these two points, as was contemplated by both parties to the concession. It was essential to a wise issue that there be one railroad only of sufficient length to include both rapids, built at such distances from the river as the topography of the adjacent territory required. This would necessitate the crossing of wide and deep rivers, affluents of the Orinoco, and would entail expensive bridges and viaducts.

Such railway would cover a distance of 60 kilometers. One feature of the Orinoco not understood by either party to the concession, as it would seem, was the mighty flow of waters in a certain part of the season, reaching forty feet in height above low-water mark and inundating the country for leagues, especially on its western side, with a corresponding paucity of the waters during the opposing season. The successful navigation of the Orinoco was seriously impaired by these facts in the matter of accessible ports and towns of stable and organized character and by the lack in parts of a sufficient depth of water at its lowest ebb for the passage of such boats as the general condition of navigation in the upper Orinoco seemed to demand. It also prevented the railroads, which by the terms of the concession were to be built around the upper and lower rapids, from being located near the banks of the river as they existed in the ordinary flow.

A temporary railway was constructed around the lower rapids on the right and around the upper rapids on the left of the Orinoco in order to lift the

steamers overland and to points where they could be again placed upon the river for purposes of navigation between the rapids and above. By this means steam navigation was established on the upper Orinoco.

These railways were built and used for no other purpose. They could not be permanently maintained at these places because the annual floods would lay them deep beneath the waters.

Instead, pending the building of a satisfactory railroad line, cart roads were built around each of the rapids; carts, mules, and other draft animals were secured and maintained, and in this way and by these means and by the aid of an adequate ferry upon the Cataniapo, and by a raft upon the Tuparo, the products from the Territories were carried by the rapids and taken up by the steamers in the lower Orinoco, and similarly transportation was effected from the lower to the upper Orinoco. It was not transportation by railroads around the rapids, but it linked together steam navigation on the Orinoco and opened up the Territories of the Upper Orinoco and Amazonas and this outer world by way of northern Venezuela.

Important steps in the construction of the railroads were taken and while in fair progress the work was interrupted and prevented by serious inundations covering quite a period of time.

During the years 1887-'8 the company entered upon the construction of a railroad from the mouth of the Cano Meta to the Rio Ventuario above the great rapids, uniting the Caura with the upper Orinoco. The progress of this work was interrupted when twelve leagues had been completed by the impressment of the workmen, under order of the Government of Caura, to be used as troops in the defense of the Government against the revolution. The work thus interrupted was never completed.

Contrary to the early expectations of the projectors of the enterprise, it was impossible to obtain the requisite labor in the country where the work was to be performed, and it became necessary to obtain workmen from Ciudad Bolívar and even from Trinidad.

In the Upper Orinoco a census of all the workmen, including men, women, and children, did not exceed one thousand.

Stations and depots were duly established by the company at Punta Brava, at the mouth of the Caura, at the ports of Perico, Salvajito, Atures, Maipures, Vichada, San Fernando de Atabapo, San Carlos, and at the Brazilian frontier; storehouses, workshops, and supplies were at the stations Atures and Maipures; there were pharmacies at all the stations centralized at Puerto Perico; there was a chapel and home for the priest at San Fernando de Atabapo. The company also established herding and agriculture at La Vichada.

The flora of the territories was carefully studied and reported upon by Doctor Gaillard, a distinguished expert, the result of his investigations being printed in two volumes and presented to the Venezuelan Government. Explorations were made on the rivers Vichada, Guaviare, Inirida, Ventuario, Atabapo, Guainia, and the Casiquiare.

When the steamers were all placed as used in the enterprise of the company, there were the *Libertad*, *Caroni*, *Caura*, and the *Maipure* for navigation between Ciudad Bolívar and the lower rapids; the *Meta* and *Maipures* between the rapids; the *Atures*, *Naroa*, *Eva*, and *San Fernando* for the traffic of the upper Orinoco, of which steamers the first two made occasional trips to the Brazilian frontier and on the river Atabapo as far as Javita when the condition of water permitted. By means of the boats between the rapids the journey, which formerly occupied three or four days, was accomplished by them in six hours.

The company made careful reports of its proceedings annually, in 1888, 1889, and 1890, and these reports were furnished to the Venezuelan ministers

of public works and of fomento, so that they were fully advised of the doings of the enterprise.

Agencies were established by the company at San Fernando de Atabapo, San Carlos, and at the Brazilian frontier.

During the earlier stages of the enterprise it depended for information, to a large degree, upon its assignor, Mr. Tejera, who, in addition to a familiarity with the general characteristics of the country, gained in his department of minister of public works of the Republic of Venezuela, had paid official visits to the parts involved in this concession. Much of his information must have been obtained at second hand, after all, for it was seriously inexact and proved so misleading as to be very expensive to the company.

Experience gave the enterprise to know that in the upper part of the Orinoco its banks and the banks of the Casiquiare and of the Atabapo were completely inundated during the seasons of high water, which extended over a period of four or five months and attained a very serious maximum every ten or twelve years. As a result they are uninhabitable, except at certain elevated points, and the distance between these points is sometimes as great as 200 kilometers. The company found the native population very much scattered and established at places in the interior both above and beyond the reach of the annual floods. It was also learned that there was no agriculture and no live stock; that even to sustain life in these regions was difficult and many died of hunger.

The annual production of rubber in these Territories at the beginning of the exploitation of the Orinoco did not exceed 40 tons. There were also 50 to 60 quintals of copaiba oil and a few tons of piassava, although in the interior there were great opportunities for obtaining much larger products of all these, the development of which was a part of the plan and the hope of the company.

Except at Atures with three families and Maipures with one family there was no village upon the banks of the Orinoco from Cariben to San Fernando de Atabapo.

In February, 1889, application was made by the manager of the enterprise to the minister of fomento for lands which had been visited and selected on which to place the immigrants who were expected in a few months. It was explained in this communication that any earlier bringing of immigrants had been impossible, since the company's means of transportation had been inadequate to supply their needs, as everything on which they were to subsist at first must be brought into the country. The lands selected and applied for were situated opposite San Fernando de Atabapo. No reply was received to this application.

In the early part of the year 1889, 370 head of live stock were obtained in Buena Vista and were sent across the savannas to the Vichada, where, as has been previously stated, an *hato* had been established.

The necessity of building one railroad of 60 kilometers to go round the four rapids was fully developed to the national Government by the manager of the enterprise as early as February 4, 1889. A statement of the probable expense was given at the same time and the proposition was made to the Government that a 7 per cent guarantee be made to secure its construction. The estimated cost was 60,000 francs to each kilometer. No reply was made by the national authorities.

For the two years of 1888 and 1889 the company had a regular monthly service from Ciudad Bolívar to San Fernando de Atabapo, and without accident carried every paying passenger who offered himself for transportation. In 1888 General Silva, governor of the Territories Upper Orinoco and Amazonas, with his general secretary and a large staff, went from Ciudad Bolívar to San Fernando de Atabapo to take up his office under the national Govern-

ment in the boats of the company, taking with him also his troops, thirty soldiers, his baggage, and his provisions; similarly General Silva descended the Orinoco in 1889, and General Cabellero, receiving his appointment as governor to succeed General Silva, went from Ciudad Bolívar to the capital of these Territories in the boats of the company; later he came down on leave in these boats and again went back to his post in the same way, the company receiving no compensation for all the service above stated.

It was the universal custom of the company to receive as passengers without pay all employees of the Government. It carried the mail free from Ciudad Bolívar to San Fernando de Atabapo, and by means of its agencies performed the service of the budget of these Territories without commission or compensation.

September 15, 1888, the steamer *Libertad* was requisitioned by lawful authorities to transport troops, material, and provisions to the fort of Guyana Vieja in defense of the national Government. Reimbursement was demanded of these authorities by the company, but was refused. The fuel for the steamers and even the board of the crew during the trip was furnished without recompense by the company.

In December, 1888, the lawful authorities again requisitioned the steamer *Libertad*, which during the whole of that month made trips loaded with troops between Caicare and Rio Caura. To the request of the company for an indemnity there was a refusal. It was at this time that the workmen upon the railroad running out from Caura, an incident previously mentioned, as well as the agricultural laborers of the company, were impressed by the Government to march against the revolutionists. None of the workmen ever returned to the service of the enterprise.

October 31, 1888, the pro tempore governor of Upper Orinoco and Amazonas Territories issued a decree annulling all of the accounts of the Indians with the company wherein they were debtors. This was done in the especial interest of Valentin Perez and other like contractors.

Governor d'Aubeterre carried with him to San Fernando de Atabapo, his capital city, a considerable stock of different kinds of merchandise for the purpose of traffic in india rubber, which traffic he entered upon openly, in so far opposing the rights of the company in exploitation of this product.

In December, 1889, the same governor caused a petition to be signed against the company by persons of little standing, in this way attacking the company instead of assuring the execution of its contract.

At the same time a similar petition was passed among the merchants of Ciudad Bolívar. The claimants assert that it was done at the instigation of the minister of the interior.

Early in the year 1890, Governor d'Aubeterre made a long journey into the interior of the Territories in order to gather up the largest quantity possible of india rubber which had been harvested by means of advances made to the harvesters by the company.

May 17, 1890, a ministerial decree authorized the proprietors of sarrapia and other natural products to export them freely, paying the same duty as the company.

The historical order is here interrupted to name a very important matter, which may well be under consideration as having explanatory value in connection with the events of 1888 to 1891, both inclusive.

The Venezuelan-Colombian boundary question, which for a long time had been a matter of diplomatic controversy between these two countries, by a treaty executed by them September 14, 1881, was submitted to the arbitration of his Majesty the King of Spain. Gen. Guzmán Blanco was then President of

the Republic of Venezuela and executed on its behalf the treaty aforesaid. On February 15, 1885, at Paris, for and on behalf of his Government he signed a declaration extending the time within which the award could be made.

October 28, 1887, the minister for foreign affairs for Colombia wrote from Bogotá to the minister of foreign affairs for Venezuela asking for explanations concerning the prospectus with map accompanying which had been published in the interests of the concession. The nature of his communication can best be gained from the letter itself, which is here reproduced:

BOGOTÁ, *October 28, 1887.*

MR. MINISTER: A French society known as the "Company General of the Upper Orinoco" has published a memoir or description upon the concessions which, it says, the Government of your excellency has granted to it of certain rights within the Territories Upper Orinoco and Amazonas of the Republic of Venezuela.

Annexed to the memoir concerned is a geographical map in which the boundaries of the said territories on the western side are marked in such a manner that they include the large tract of land which in this part is in litigation between Colombia and Venezuela, and of which in virtue of the treaty of arbitration (arbitramento juris) of December 14, 1881, the true ownership is to be settled by the sentence of the Government of Spain.

I have the honor to call the attention of your excellency to this point, being convinced that the Government of Venezuela, in accord with the Republic of Colombia, will recognize that the error of the Company of the Upper Orinoco can not be passed over in silence, considering that it affects a solemn agreement between the two nations, in which is ceded in an absolute manner to a third party the right as arbitrator to define the boundary which separates Colombia and Venezuela.

It is evident that neither of our Governments can make any valid concession upon the said land; it is equally evident also that the error of the Company General of the Upper Orinoco can have no other cause than that of agreeing with geographical or statistical data anterior to the above-mentioned treaty of 1881, which places this zone of territory in a condition not only litigious, but about to be settled in an exclusive manner by an arbitrator already appointed.

I have the gratification to profit from this circumstance to renew to your excellency the expression of my most distinguished consideration.

(Signed) F. ANGULO.

TO HIS EXCELLENCY THE MINISTER OF FOREIGN AFFAIRS  
OF THE UNITED STATES OF VENEZUELA.

It does not come to the knowledge of the umpire that any reply was made by the Government of Venezuela to this note from Colombia; neither is there anything to indicate that the attention of the Company General of the Orinoco was immediately called to the questions raised by the note.

The first official attention given to its contents, so far as is known to the umpire, is found in the action of the minister of foreign affairs for Venezuela in addressing a communication to the minister of fomento, in substance following:

CARACAS, *November 25, 1887.*

The minister of foreign relations of the Republic of Colombia has brought to the knowledge of this department that the French company known as the "Company General of the Orinoco" has published a memoir with a map annexed in which is included in the limits of the territory conceded to the said society the territory in litigation between the two countries.

To be able to reply to the said note of the Colombian minister it is necessary to have before us the said memoir, which I pray you to send me by right of devolution if it is found in the department under your charge.

I am, etc., DIEGO B. URBANEJA.

To this there was a reply on the next day, as follows:

SIR: As it has never been remitted to this department I find it impossible for me to remit to the ministry over which you preside so worthily the memoir of the Company General of the Upper Orinoco, of which your communication of the 25th of the present month treats.

This seems to be the end of progress in this line until about August, 1888, when the minister of Colombia renews his inquiries, as appears from the communication of the minister of fomento, as follows:

CARACAS, *August 10, 1888.*

In order to examine and resolve a claim of the Republic of Colombia I have need to have before my eyes a copy of the contract passed with the Company General of the Upper Orinoco and Amazonas.

That is why I pray you to give me information of the concessions and privileges made to the said company.

I am, etc., A. YSTÚRIZ.

To this there is a reply on the day succeeding in these terms:

CARACAS, *August 11, 1888.*

SIR: In reply to your letter of the 10th of the present month, No. 293, I have the honor to send you the Official Gazette of February 26, 1886, No. 3,698, in which is published the contract with the Company General of the Orinoco.

I am, etc., FOMBONA PALACIO.

There follow successive communications between these officials of the Government relative to this affair which, perhaps, are better quoted in full than placed in abstract. They are therefore subjoined:

CARACAS, *August 13, 1888.*

SIR: Besides the contract of the Company of the Upper Orinoco and Amazonas constituted in virtue of the concession made to Mr. Tejera, which you have kindly remitted to me in the corresponding number of the Official Gazette, I should be very grateful to you to send me a general report upon the proceedings of this company to the department under your worthy charge, as also every communication which this company may have made upon our maps, notices, or memoirs relative to the privilege which the said contract gives it.

YSTÚRIZ.

CARACAS, *August 21, 1888.*

SIR: In reply to your note of the 13th instant, No. 297, I have the honor to inform you that the company which has been exploiting the Territories Upper Orinoco and Amazonas since the date of its contract, December 17, 1885, has asked of this department exemptions from import duties at different dates upon the objects destined for its works; that it announced November 14, 1887, that the steamers *Atures* and *Eva* had passed above the rapids of Maipures, and that the latter steamer arrived at San Fernando de Atabapo the 30th of August, 1887, and as to that which concerns the memoir published by this company relative to the said territories I remit it to you inclosed with its map annexed.

I am, etc., GIL.

CARACAS, *September 15, 1888.*

SIR: The envoy extraordinary of the Republic of Colombia has made a claim against the publication of a geographical map and of a memoir of the Company of the Upper Orinoco and Amazonas, in which in describing the limits of its concession it has included as having been ceded vast extents of land in litigation between the two countries.

Consequently, considering the necessity of examining the said map and memoir, I hope that you will kindly send them to this ministry if they exist in your department, and if not I pray you to ask the representative of the company mentioned for information as to what has been done in this regard and also the map and memoir concerned.

YSTÚRIZ.

On the 18th of September, 1888, the minister of fomento advises the minister for foreign relations by note in part as follows:

I am addressing myself this very day to Mr. Th. Delort, contractor of the Territories Upper Orinoco and Amazonas, asking him for information as to the contents of your said communication, and as soon as I shall receive them it will be very agreeable to me to send it to the ministry over which you preside so worthily.

I am, etc.,  
CORONALDO.

The letter addressed to Th. Delort, the manager of the company, by the minister of fomento is here quoted:

SIR: In an official note of the 15th of this month the ministry of foreign relations says to this department that which follows. (Here is a reproduction of the letter of the 15th.)

I communicate to you this note in order that you may give me information on the subject of which it treats.

CORONALDO.

The reply of Mr. Delort was made two days later and is of the tenor following:

CARACAS, *September 20, 1888.*

THE MINISTER OF FOMENTO: I have just had the honor of receiving your note of the 18th instant, to which I reply as follows:

In forming the Company of the Upper Orinoco there was made at Paris a memoir for the shareholders only in which was reproduced the contract which M. Miguel Tejera had transferred to the company, and furthermore an extract from the statutes and different information on the natural products which according to the contract were to be exploited. This memoir was accompanied by a map in order that the shareholders might know where the territories conceded for their exploitation were situated. This map was copied from that which accompanies the statistics which the national Government has published in different languages.

The memoir does not treat of the frontiers between Colombia and Venezuela nor, moreover, of the vast extent of territories conceded to the company; it treats only of natural products of the vast region which forms the Territories Upper Orinoco and Amazonas.

The company is not ignorant that the boundaries between Venezuela and Colombia are found in litigation and submitted to the arbitration of the Government of Spain. Consequently it has no pretension on this subject, and holding the concession from Venezuela it knows very well that it ought to conform itself to the frontiers which shall be definitely fixed by this Republic.

Up to the present the company has extended its exploitation only upon the points occupied by the Venezuelan authorities. Its agencies, its shops, and dependencies are situated at Atures, Maipures, San Fernando, San Carlos, and the frontier of Brazil, and its steamers have navigated only upon the Orinoco, Casiquiare, and the Guainia. I regret not being able to send you the memoir in question, but two copies ought to exist in your ministry, sent by the agent of the company in this city.

I hope that the explanations which I have the honor of sending you will satisfy you, so that you can render justice to our right conduct in such circumstances.

With sentiments, etc.,

DELORT.

In this connection the umpire decides to accept as the truth the statement of Mr. Delort and his associates, which is found as a part of the testimony in this case, that the 18th day of September, 1888, was the first day on which either he or the company knew that the Venezuelan-Colombian boundary line was then in process of settlement by arbitration. Not only are they entitled to belief since no one disputes them further than Mr. Delort's own statement of the 20th instant, but many of the previous acts of Mr. Delort and of the company

were entirely inconsistent with such knowledge. It is easier, therefore, to reconcile his words with the fact of ignorance than his acts with the fact of knowledge.

The Government of Venezuela remitted to the Government of Colombia the letter of Mr. Delort above quoted.

Colombia, however, was not satisfied, and January 24, 1890, it again returned to the subject. The position of Colombia upon this matter was unambiguous, indeed positive, and there is no question in the mind of the umpire that the situation had become very embarrassing and troublesome to the Government of Venezuela.

In the judgment of the umpire it was not ignorance nor forgetfulness on the part of General Blanco or Mr. Tejera which kept them silent concerning the boundary question, in their intercourse, not infrequent, with the company and its officers and manager. The umpire believes that they both regarded the matter as unimportant in its probable effect upon the enterprise of the concession, for the reason that both considered a decision in any considerable degree unfavorable to Venezuela as practically impossible. This explanation, most favorable to them, and at the same time most probably the truth, is the one accepted by the umpire.

May 28, 1890, the national attorney of the exchequer of the United States of Venezuela, by direction of the president of the Republic, through the minister of fomento, entered in the high Federal court of the Republic a suit against the Company General of the Orinoco for the rescission of the contracts of concession which this company had taken over respectively from Miguel Tejera and Theodore Delort. The petition or declaration alleges in substance and in general terms that the Government on its part had fulfilled the stipulations agreed to in both of the said concessions; and in like general terms that the company, on its part, had not fulfilled its obligations; first, as to the contract of December 17, 1885, in Nos. 1, 2, 3, 4, 5, 6, 7, and 9, of Article II, and all of Articles V and X; second, as to Nos. 2, 3, 4, 5, and 6 of Articles III of the contract of April 1, 1887. The petition specifically alleges that —

the Government has not received any notice that the cessionary company has begun its works, and it is a fact that no railway line has been offered to the public, nor any steam launch nor steamship line.

It is also alleged specifically in said petition that the cessionary company exported through the custom-house in Ciudad Bolivar during the years 1887, 1888, and 1889, india rubber weighing 73,292.20 kilograms, and had paid accordingly to the Government the sum of 63,740 bolivars at the rate of 40 bolivars for each 46 kilograms, as provided in the contract of concession of December 17, 1885, and that the quantity of sarrapia exported by the said company through the same custom-house and in the same years was 44,569.76 kilograms, for which there was paid to the Government the sum of 84,445.74 bolivars at the rate of 56 bolivars for 46 kilograms, as agreed in the contract of April 1, 1887, making in all the sum of 148,186.74 bolivars. It is also alleged in the petition that a contract is not deemed fulfilled by the obligee save when it has been so fulfilled in all the stipulations which it contains and that specially in this case in which they are so linked between themselves that failing one the whole or object of the contract does not exist, and hence the conclusion drawn by the said Government that said convention has not been fulfilled. That the inexecution of these contracts on the part of the cessionary company has caused the Government very grave damages and, therefore, it is obliged to ask before the high Federal court its solution.

The especial damages named in the petition are the losses which the Govern-

ment had suffered from the duties remitted under the contract upon articles imported by the company, as well as the loss of duties on the india rubber and sarrapia exported. The domicile of the company is alleged to be in Paris and that it is without a legal representative in Venezuela. The Government asks for procedure in accordance with Article XXVIII of its civil code; alleging further that the company may be sued under such circumstances as exist in this case by virtue of the provisions made in both contracts in reference thereto and in virtue also of Article XXVI of the civil code, which applies to suits where the contracts are to be executed in Venezuela. The petitioner also asks that the formalities be observed provided for in such cases in Article XCIII, XCIV, and XCV of the Code of Civil Procedure.

Reliance is had in the petition on Articles MCX, MCLXIII, and MCLXXII of the civil code as justifying fully the procedure on the part of the Government for the annulment and rescission of said contracts and for the recovery of the losses and damages suffered by it from their nonexecution by the cessionary company.

The suit was duly entered in the high Federal court on May 28, 1890, and on the 30th day of the same month the president of the said court issued a writ stating therein that —

Considering that according to the documents annexed to the suit Messrs. Andrés Fiat and Bernabé Planas appear to be the representatives of the company in Venezuela, order is hereby given for them to be summoned in order that they may declare if they are still holding the power of the company, and in order to appoint a counsel for the defendant in case they are no longer attorneys of the company, in accordance with the law.

The proceedings show that both of these gentlemen were duly summoned on that same day and that on June 2 following they appeared in court and declared that Mr. Andrés Fiat was then the only representative of the company in Caracas and that he would appear in court on the 4th day of that month and produce his power of attorney. This was done and a translation of the same was ordered, and on the 16th day of June this was completed and accepted by the court and a summons ordered upon Mr. Fiat.

On the 19th day of June the claim for damages was reduced by the attorney of the Government from 600,000 bolivars to 40,048. 62 bolivars, and on the same day Mr. Fiat received and receipted for the copy of the petition. On the same day the court issued a decree by which an order was made to notify Mr. Fiat of the amendment to the petition above stated and to give him a copy of the amendment. Mr. Fiat was also directed in the order to receipt for this copy and to present in court his answer to the petition after ten days from June 19. This order was duly served on Mr. Fiat on the day of its issue and he gave his receipt to that effect on June 20. July 2, the day appointed for the answer Mr. Fiat appeared, accompanied by his counsel, D. B. Urbaneja and R. F. Feo, and as well appeared the fiscal nacional de hacienda. It was then and there agreed to defer the answering of the suit to a date fixed at eight days after the presentation of the documents to which reference is made in the suit by the plaintiff, in order that the company should have time to examine these documents. On July 22 Mr. Fiat with his counsel, above named, appeared in court and filed his answer to the suit; at the same time he preferred his petition for an extraterritorial term in order to obtain evidence from France and Rome. The suit progressed in ordinary course, during which the parties were to produce their respective evidence, the court reserving its right to decide on the petition of Mr. Fiat in regard to an extraterritorial period of time. Later on the president of the court granted one hundred days to obtain this extraterritorial evidence, and Mr. Fiat having appealed from this decision on the grounds

that the term granted was too short, the court then extended it to one hundred and thirty days.

September 5, Mr. Fiat was notified that the fiscal had petitioned the court that the suit might be registered in Ciudad Bolívar, in order to avoid any transfer intended by the company. That he received this notice is established, because at the foot of it is set his signature, and on September 8 he appeared in court, accompanied by his said counsel, and declared that he had no opposition to make to the recording of the suit, with the alterations which were made to it afterward. The court issued an order on the same day that a copy of the suit be sent to the judge of the first instance of Ciudad Bolívar, that it might be recorded in the registry office in that city, and said order was carried into effect on the same day.

August 7, 1890, Mr. Fiat presented the court with a petition asking that evidence might be promoted as he thought convenient to the case of the company. As a part of this evidence were declarations to be made by witnesses resident in Paris, Rome, Port of Spain, Rio Chico, Barcelona, San Fernando de Apure, and Caracas.

The president of the court issued a writ, dated August 12, admitting the promotion of such evidence as far as the law permitted, and commissioned several civil judges of first instance of the residences of the respective witnesses to hear their declarations; he also issued rogatory commissions petitioning the competent judges of Paris, Rome, and Port of Spain for the same purpose. October 11 of the same year, Mr. Fiat appeared in court and stated that by virtue of the authority conferred on him, by his power of attorney from the company, he conferred a special power on Dr. Ramón Feo and Dr. Martín F. Feo, so that both together, or either one of them separately, might intervene in the collecting of evidence that had to be made by the fiscal in the city of Caracas, and also stating that he conferred special power on persons resident at Porto Rico, Barcelona, Ciudad Bolívar, San Fernando de Apure, Port of Spain, and for the territories of Orinoco and Amazonas, for the collecting of evidence on behalf of the company in their respective districts, and to intervene in the collecting of evidence by the plaintiff in the same districts. October 11, 1890, the president of the court ordered that commissions and petitions be issued to the different parties named by Mr. Fiat as aforesaid, and that said petitions and commissions contain the powers conferred on them as requested by Mr. Fiat. The said order was carried into execution October 13, and the said commissions and petitions being issued were handed to the defendant.

All these commissions and petitions were duly returned after having been carried into operation, with the exception of those addressed to the judges of Paris and Trinidad and to His Excellency Cardinal Simeoni of Rome, which were not returned by the representative of the company, although they were given him.

March 24, 1891, marked the expiration of the time given for the collecting of testimony, and on that date the president of the court ordered that the papers and records of the suit be sent to the full court, which was duly effected.

April 29, the fiscal moved the court to begin the study of the papers and records of the suit and that an order be issued for that purpose. On May 21, 1891, the fiscal renewed his motion, and on May 23, an order was issued to begin the study of the papers and records on the 30th of that month. This study begun in fact on June 16, and proceeded on June 24, the court not being in session on the 17th to 23d inclusive.

On the 1st, 4th, and 7th of August supplementary judges were called to fill the vacancies existing. Two of those selected were excused on their own petition. On September 16, the full court was made by the supplementary judge, Dr. Carlos

F. Grisanti, and the 19th was appointed for the study of the process. The study was begun as ordered, and proceeded on the 21st of September and following days until the 25th. The 29th of September was appointed to hear the reports or proceedings of the plaintiff and defendant. The records of the 25th of September show this note by the secretary:

CARACAS, *September 25, 1891*

In the sitting of this day the study and examination of the papers and records by the court was completed, and the sitting of the 29th current is appointed for plaintiff and defendant to present their respective reports or pleadings. Let the parties be notified.

O. BURGOS.

There was no decree of the court ordering the parties to be invited, as appears of record.

September 29, the fiscal nacional de hacienda appeared in court, but no representative or counsel on behalf of the defendant. The court proceeded to sit in conference.

From September 30 to October 13, only one sitting of the court took place, which was on the 3d of October, on which day the judges conferred on the sentence to be passed and agreed as to the same. October 14 the sentence was drawn and signed by the members of the court.

As appears from the history already given, the suit for rescission was begun in 1890, May 28; summons to the defendant was issued May 30; and on June 2 Mr. Fiat appeared in the high Federal court and avowed and acknowledged himself the legal representative in Caracas of the Company General of the Orinoco. On the next day, the minister of foreign relations at Caracas, wrote the minister plenipotentiary of the Republic of Colombia to the United States of Venezuela as follows:

THE MINISTER OF FOREIGN RELATIONS,

CARACAS, *June 3, 1890*

MR. MINISTER: Relative to the confidential memorandum of August 9, 1888, and to the note of your excellency of January 24, concerning a memoir published by the Company General of the Orinoco, I have the honor to communicate to your excellency that the Government has resolved to demand of the said company the rescission of the original contract.

Please accept, etc.,

M. A. SALUZZO

The most excellent Dr. J. F. INSIGNARIES,

*Envoy Extraordinary and Minister Plenipotentiary of the Republic of Colombia.*

The Colombian minister did not accept the proposed action of the Government of Venezuela as an earnest of sufficient protection to the interests of his Government, as is made evident by his reply, which follows:

LEGATION OF COLOMBIA AT VENEZUELA,

CARACAS, *June 6, 1890.*

MR. MINISTER: I have the honor to reply to the note of your excellency of the 3d of the present month, in which your excellency deigns to communicate to me relative to the confidential memorandum of August 9, 1888, and to my note of January 24 last, which refers to memoir published by the Company General of the Orinoco, that the Government of your excellency has resolved to demand the rescission of the contract made with the said company. I shall transmit the said note to my Government, but I ought to manifest to your excellency, as I am doing very respectfully by means of the present, that the fact which it communicates can not modify in any way the state of the claim in which in a matter so grave was initiated before the Government of your excellency by that of Colombia in a note of October 28, 1887, to which there has yet to-day been no reply. In fact,

as your excellency will clearly understand, in spite of the demand of rescission proposed and while waiting for it to be decided favorably the Company General of the Upper Orinoco will continue to enjoy the contract in virtue of which the Government has made concessions in the territories of the Upper Orinoco and Amazonas, a concession which the said company extends through error or unjustly to the lands which on this side are in litigation between Colombia and Venezuela as it appears with all clearness in the geographical map annexed to the memoir of the relation which has set in motion the claim of my Government without formal rectification on the part of the Government of Venezuela.

Favorable as the sentence may be to the Government of Venezuela there will still exist powerful reasons of equity and justice with which the Government of Colombia has solicited the said rectification because this act is notoriously in violation of the treaty of arbitration of September 14, 1881, by which the two nations submitted their differences with regard to the frontiers to the decision of the Government of Spain. Consequently it is my duty to insist, as I am doing, with the greatest respect, before the Government of your excellency for the said claim of my Government, reproducing to this effect the contents of the note of October 28, 1887, mentioned, which was the origin of my memorandum of August 9, 1888, and of my note of January 24 of the present year.

I profit, with pleasure, from this occasion, etc.

(Signed) J. E. INSIGNARIES.

To Doctor SOLUZZO,  
*Minister of Foreign Relations of the United States of Venezuela.*

Eleven days prior to the date of the suit for rescission the minister of the interior at Caracas issued a statement authorizing the proprietors of sarrapia and other natural products in the Federal Territories Upper Orinoco and Amazonas to export them freely on paying the same duties as the company. During the same month the agent of the company at San Fernando de Atabapo and the engineer of the Naroa were threatened with death and were forced to take refuge at the home of a habitant. Frightened by the conditions surrounding them, they declared they could no longer remain on the upper river and asked to be relieved.

The 4th of June Governor d'Aubeterre left his capital, descended the river, and arrived at Ciudad Bolívar June 27. The day of his departure from his capital he sent a long telegram to the Government at Caracas, stating that the company did not have funds wherewith to pay for the india rubber which was gathered and demanded that authority be given to those who possessed this product to export it directly either by way of Ciudad Bolívar or through the custom-house at San Carlos. The custom-house of San Carlos had been closed by the Government since 1886 and had never been opened for the use of the company, thus compelling it to use the Orinoco exclusively for the shipment of the products obtained by it.

On the departure of Mr. d'Aubeterre from San Fernando de Atabapo Mr. Henry Page became governor pro tempore. June 16, 1890, upon his own authority, he issued a decree which annulled the contract of December 17, 1885, and he sent Valentin Perez and Sinforiano Orosco to Caracas with this decree to obtain for it the approval of the Government. He based his action upon the anticipated damages which the agents of the company might cause the inhabitants and that through them the public order might be endangered. At this time there were three agents of the company in Upper Orinoco. They were Messrs. Calvaras and Nary at San Fernando de Atabapo and Mr. Oudart at San Carlos.

The Government decided not to approve of the decree of June 16, issued by pro tempore Governor Page, and on August 8, 1890, there was issued the following:

## The PRESIDENT OF THE REPUBLIC:

Whereas the decree rendered by the governor *ad interim* of the Federal Territories, Upper Orinoco and Amazonas, of June 16 last, in which he declares the caducity of the contract passed by the Federal executive with Mr. Miguel Tejera for the exploitation of all the mineral and vegetable productions of this Territory and of which (contract) the Company General of the Orinoco is the cessionary; and whereas, also, the demand which the inhabitants of the same Territory addressed to the said official, in which they set forth the prejudices, for their own interests and for the maintenance of the public order in these large and rich regions, caused by the acts of the agents of the company cessionary, conjointly with the acts of adhesion of the municipal councils of San Fernando de Atabapo and of that of La Urbana, to the manifestations made by the population; and

Considering:

1. That the Federal executive can not give his approbation to the said decree of the governor of the Upper Orinoco and Amazonas, inasmuch as this official by such an act has exercised a function which is attributed by the constitution and the laws to the Federal power;

2. That the Federal executive has already submitted to the high Federal court, through the agency of the fiscal national de hacienda the rescission, not only of the contract passed with Mr. Miguel Tejera, but also of that passed with Mr. Delort for the exploitation of the sarrapia (feve tonka), basing his action upon the fact that the company cessionary has not accomplished on its part the obligations to which it is bound by these contracts of establishing steam navigation upon the Upper Orinoco, of constructing railroads, of introducing immigrants to found colonies; of building churches, hospitals, barracks for the police; of establishing the postal service, and of founding missions;

3. That by the "documentación aducida" (allegations furnished by the documents) it is demonstrated that the acts of the agents of the Company General of the Orinoco, aside from the grave prejudices which they are causing to the inhabitants of the Territories Upper Orinoco and Amazonas in their legitimate interests, are going so far as to threaten the public security which the executive is bound to protect with the vote of the Federal council;

Be it decreed:

ARTICLE 1. The decree of June 16 of the current year rendered by the governor *ad interim* of the Federal Territories Upper Orinoco and Amazonas is disapproved, becomes null, and will produce no effect.

ART. 2. The Federal executive will dictate through the agency of the ministers of the interior, of hacienda, and of fomento, in all the extension necessary, the provisions tending to satisfy the just demands made by the inhabitants of the Upper Orinoco and Amazonas, while waiting for the high Federal court to decide whatever is just in the demand brought before it.

Given, signed by my hand, marked with the great national seal, and countersigned by the ministers of the interior, of hacienda, and of fomento, in the Federal palace at Caracas, August 8, 1890.

R. ANDUEZA PALACIO.

Countersigned: S. CASANAS.

VINCENT CORONADO,  
Minister of Hacienda.  
FRANCISCO BALAELO,  
Minister of Fomento.

On the next day the minister of interior issued the administrative order, No. 1011, as follows:

[Administrative order, No. 1011.]

CARACAS, 9th of August, 1890. (27 and 32.)

CITIZEN GOVERNOR OF THE FEDERAL TERRITORY AMAZONAS: Accompanying I send to you a copy of No. 5016 of the Official Gazette, containing a decree issued by the President of the Republic with date of yesterday, in which he annulled that which the Government pronounced on the 17th of last June, relative to declaring

the defunct condition of the contract celebrated by the national executive with the Señor Miguel Tejera, of which the cessionary is the General Company of the Orinoco, remaining consequently null and without any value or effect, and in which it was decided (or determined) that until the high Federal court may decide what may be justice the national executive will dictate, through means of this ministry and those of hacienda and fomento, to all necessary length, the arrangements (orders) necessary for satisfying the just exigencies manifested by the inhabitants of that Territory.

Consequently you will please not to give any permission to the agents of the expressed company to continue exploiting the products of that territory and give large franchises in order that the inhabitants can without hindrances undertake the work of exploitation upon the products referred to.

God and federation.

S. CASANAS

It will be observed that the provision in the decree of August 8, that the national executive would act through the ministries therein named took effect in the last paragraph of the above order.

On the 29th of August the minister of the interior sent a telegram of advice to the governor of the Federal Territories Upper Orinoco and Amazonas through Mr. Valentin Perez of the following tenor:

CARACAS, 29th August, 1890

Señor VALENTIN PEREZ:

The governor ought to enforce the decree suspending the prerogatives of the Alto Orinoco and Amazonas.

It can not continue exploiting the natural products of the Territories nor collect reward upon those which it expected to obtain by its proper work.

S. CASANAS

By a letter of later date he again brought the attention of the citizens of those territories to the situation, as existing under the decrees of August 8 and 9, by means of a letter, which is as follows:

CARACAS, September 10, 1890

Señor SONFORIANO OROSCO:

By resolution of the ministry of hacienda, dated May 27, 1890, it is ordered that the owners of sarrapia and other natural products which the company exports, to which you refer in a telegram of day before yesterday, can export them freely, paying the same duties as said company, and by the decree of the 8th of August it prohibits to the company the absolute (unconditional) exportations and exploitations which it had of those products, all which orders were transmitted to the custom-house opportunely by the ministers of hacienda and of fomento in order for their fulfillment. You and the rest are interested in this matter on account of the last urgent orders.

God and federation.

S. CASANAS

Having followed the process of the high Federal court from the inception of the suit for rescission, May 28, 1890, to the sentence of the high Federal court, given October 14, 1901, having traced the progress of the administrative department in its relation to the company to September, 1890, it is well to examine into the condition and history of the Company General of the Upper Orinoco during the same time.

May 30, 1890, the same day on which Mr. Fiat was summoned to appear before the high Federal court to answer to the suit of the national Government for rescission of both concessions, the Company General of the Orinoco met in a shareholders' general meeting at Paris, in which meeting a resolution was passed for the purpose of converting the company into an English company with the name of Orinoco Exportation and Trading Company, which meeting

likewise determined to dissolve and wind up the Company General of the Orinoco and appoint a liquidator.

It is said in behalf of the company by the liquidator in a memorial of date December 5, 1895, that —

the board of directors had many debtors and they hesitated therefore to collect the harvest of 1890, but yielding to the representations of their agents they furnished the necessary funds in agreement with a Liverpool firm, who sent out their special agent, Mr. Staedelli.

The position of the company in Paris was very painful, as its credit had been totally exhausted. All efforts made in France seemed to be of no avail, while in England confidence was not lost and it was possible to go on there with the business. The board of directors therefore willingly considered a proposition from England for the constitution of a company in London to which all the assets, contracts, material, works, etc., of the Company General of the Orinoco would be transferred.

It is ascertained that the liabilities of the company, as stated by it, were on May 30, 1890, as follows:

	<i>Francs</i>
To the shareholders . . . . .	1,500,000.00
To the Society (La Monnaie) . . . . .	722,851.56
La Banque de Consignations . . . . .	236,356.00
Mr. Alfred Chauvelot . . . . .	191,176.00
Mr. Eugene Ferminhac . . . . .	63,000.00
Mr. Louis Roux . . . . .	13,059.55
Mr. Th. Delort . . . . .	14,641.26
	<hr/>
Total . . . . .	2,741,084.37

It is an agreed fact that the company had no knowledge or intimation of the pending suit in Caracas at the time of this meeting of May 30, 1890, and that its proceedings on that day were without any relation thereto and not in any way influenced thereby. June 23, 1890, at a general meeting of the shareholders of the Company General of the Orinoco at Paris, a liquidator was appointed, and in the third resolution of the shareholders his powers were defined as follows:

Confers upon the liquidator its full powers to the effect of realizing the social assets by way of fusion or union in another French or foreign society, existing or to be created, to receive whether in specie or obligations or stock, free or not free, to have recourse to actions and deliberations which shall have for their object the formation and constitution of a new society to sell the stock or obligations received until the concurrence of the sums necessary for the payment of the liabilities and to turn over the surplus in conformity with the statutes. Also to take all the measures possible for the continuation of the business until the realization of the assets, to exercise in this regard all the powers conferred upon the council of administration by article 22 of the statutes.

Further, to negotiate and conclude all contracts, whether for the purchase and sale of the merchandise and other objects or for the exploitation of all or part of the social capital by lease or otherwise, by forfeit or by means of fines or parts of the benefits; to borrow all sums necessary for meeting the engagements of the society; to confer all guaranties upon the lenders — in a word, to do all which circumstances require in the interest of the society, the powers above mentioned not being limited.

The general meeting of the shareholders of the company was held December 27, 1890. From the liquidator's report made to this meeting it was learned that the approval given by the shareholders at their meeting of June 23 to an arrangement that would merge the Company General of the Orinoco in a new English company, as is previously stated herein, was so far completed on June 7, 1890, that an agreement had been signed by the company with the "Gold

Trust and Investment Company" providing for such transfer. Following the approval of the shareholders, as above stated, the new company, the Orinoco Exploration and Trading Company, was formed and registered in England. Owing, however, to the political relations then existing between England and Venezuela over the boundary line between the latter country and British Guiana, involving, among other questions, claims on the part of England in connection with the outlets of the Orinoco, the Government of Venezuela, from reasons of state, as it is understood —

absolutely refused to acknowledge this new company and to transfer to the same the rights and concessions of the French company.

This quotation is taken from the report of the liquidator at the shareholders' meeting of December 27, 1890.

He goes on to say in his report:

It was but very late that I was made acquainted with the causes which were opposed to the formation of the English company, and this delay was the cause of my losing very valuable time; but the moment I knew of these causes I took steps conducive to a result which might save our company.

I have appealed for assistance to the former directors of the company who are now negotiating with the Government of Venezuela, and have looked toward another solution of the problem, which is the only means of assuring the future of the company, viz, the reconstruction of the present company with an increase of fresh capital in cash.

Following the report of the liquidator the chairman of the meeting announced —

That owing to the facts which had just been mentioned by the liquidator the board of directors had sent to Caracas Mr. Berthier, who had been a former agent of the company, with the following mission:

To obtain from the Government the revision of the old concessions, which evidently contained clauses which were embarrassing to the Government, as well as to the company. Mr. Berthier was, besides, to make sure that the Government would make no difficulties for the transfer to a new company (provided this be not an English company) of all the rights and concessions accruing from the new contract. The double purpose of Mr. Berthier's mission has been obtained; the terms of the new contract proposed have been accepted, and one of its clauses will allow the transfer to a new company. The new company will be French-Belgian, formed with the assistance of a powerful Belgian group.

The chairman then read the draft of the articles of concession of the French-Belgian company information.

At some time succeeding October 11, 1890, on which day he appeared in the high Federal court as the attorney of the company, Mr. Andrés Fiat resigned his position as such attorney, and Mr. Bernabé Planas was appointed, but he declined the appointment.

On the advice of Mr. Delort it was then determined, as above stated, to send Mr. Berthier to Caracas as a special agent of the company, he being well acquainted with all details of the matter. He arrived in Caracas October 25, 1890, and remained until July, 1891.

His mission, as disclosed by the statement of the chairman above quoted, was to be confined to negotiations with the Government looking to a discontinuance of its suit without costs to the defendant, a relinquishment on the part of the company of the concessions it held, the Government to grant to the company for a period of twenty-five years the exclusive right of steam navigation on the waterways of the Federal Territories Upper Orinoco and Amazonas and in the rivers Caura and Cuchiroro, during which period the Government

would not grant a similar concession to any other person or company. This arrangement was put into writing; and in article 10 of this agreement there is found the following:

This contract can be transferred to any other party or company with the previous assent of the Federal Government, without which formality that transfer can not be effected. However, as an exception, this contract can be transferred in part or in whole to the Belgian company called *Compagnie Internationale des Caoutchoucs et Produits Naturels au Bassin de l'Orénoque*.

In another part of the agreement the company was accorded the right to construct within the Territories mentioned such railways and telegraph lines as it might think convenient or valuable.

Through misadventures this agreement was not effected.

In the meantime, anticipating success in the above-mentioned negotiations, the Belgian company had been constituted to take over the new contract. In the end there was no new contract and the Belgian company did not become effective. The departure of Mr. Berthier for Paris July, 1891, left no attorney to represent the company before the high Federal court, and it does not appear that another was appointed.

March 17, 1891, His Majesty the King of Spain published his award settling the boundary dispute between the Republics of Venezuela and Colombia. It was unfavorable to the first-named country and sustained the contention of the latter. It gave to Colombia more than one-half of the area of the Federal Territories Upper Orinoco and Amazonas as claimed by Venezuela up to the date of the royal award. It made the Orinoco south of its junction with the Meta, the Casiquiare, and the Rio Negro the line between the two countries, giving both of them equal rights therein. It removed from the control of Venezuela the Rio Guaviare, Vichada, Inrida, Atabapo, and Guainia. Of these the last four were wholly and the first was largely in the territory of Venezuela, as claimed by that Government in her contention before the royal arbitrator and as it appears from its official maps. Similarly the maps current in the United States of America prior to 1891 allotted this territory to Venezuela. Under the rectified boundary these rivers are wholly within Colombian territory.

On the territory thus removed from the dominion of Venezuela the company had established on the left bank of the Vichada an *hato*, where had been installed 300 cows, 12 bulls, mules, and donkeys, and had there prepared lands for cultivation; on the left bank of the Guaviare it had begun the cultivation of sugar cane, had built a sugar house and a still; on the left bank of the latter river and also of the Orinoco had been begun improvements of the cacao. Of these enterprises the Government of Venezuela had received due and seasonable notice. The company considered a valuable part of its concession to be the marble deposits on the Inrida, the minerals in the region of the Guaviare, and above all the great savannas west of the Meta, regarded as very valuable for cattle raising.

It is now time to bring forward the decree of rescission pronounced by the high Federal court. The amendment, previously named, which was made by the *fiscal nacional de hacienda* of June 19 was to the effect that examination of the documents relating to the articles imported by the Company General of the Orinoco disclosed that the unpaid duties on these articles by reason of the company's exemption amounted to 40,048.62 bolivars, which sum is demanded in damages as a substitute for 600,000 bolivars, which appeared in the original petition.

The answer which was made by Andrés Fiat to the suit in question on July 22, 1890, is in substance and effect summarized in that portion of the decree which is herein quoted, and therefore need not be set forth here.

Upon the issues formed and upon the testimony adduced before the high Federal court it proceeded in due course to the consideration and determination of the cause and to the pronouncing of its sentence.

The decree of the high Federal court is a carefully considered and carefully written document of many pages, but that which is essential to the questions here involved can be easily abbreviated. After having brought into the decree the essential facts connected with the process and proceedings anterior to the settling of its decision the court says:

6. That it appears from the documents that the Government has fulfilled on its part all the obligations which the contracts already mentioned imposed upon it.

And considering that from the documents result the proof of the failure of accomplishment by the Company General of the Orinoco of the obligations, 1, 2, 3, 4, 5, 6, 7, and 9 of the first contract, and also that it has not carried out the stipulations 3, 4 and 5 of the second contract, the Government having brought to an end the perfect execution of the said contract; that the representative of the said company has alleged, in reply to the demand of the present process, that "the facts on which they pretend to base themselves are not certain, or are inexact, and those which really can be established prove that the company has fulfilled with extraordinary effort and diligence and with enormous expenses up to the point where there have appeared insurmountable difficulties, which constitute *force majeure*, or acts of authorities dependent upon the Government itself and contrary to the stipulations of the contract."

That these exceptions offered by the company do not appear to be proven by the documents of the present process, and that finally the lack of accomplishment on the part of the company of the two contracts referred to is an evident fact being given that in the present case are applicable the provisions of article 1149 of the civil code, in virtue of which the omission in the accomplishment of any one of the requirements of a contract is equivalent to its absolute inexecution when there is no agreement to the contrary, and it has not been alleged nor proven that any compact of this nature exists; that article 1110 of the civil code establishes that "the resolutory condition is always implicit in bilateral contracts in the case where one of the two contracting parties does not accomplish its obligation;" that as for the resolution, it has the effect which article 1256 of the same code provides; that article 1163 of the said code imposes the payment of damages and prejudices to the debtor who does not execute his obligation, damages, and prejudices which in the present case amount to 40,048.62 bolivars, according to the liquidation produced by the demander, a sum to which the claim of the treasury on this subject is limited. For such reasons the high Federal court, administering justice in the name of the Republic and by authority of the law, declares to allow the claim presented in the present process by the fiscal nacional de hacienda against the Company General of the Orinoco, and consequently is declared the resolution of the contracts of May 24, 1886, and May 31, 1887, passed by the National Government with Messrs. Tejera and Delort, respectively, of which the company named is cessionary.

The Company General of the Orinoco is sentenced to pay to the National Government the sum of 40,048.62 bolivars for damages and prejudices caused to the nation from the non-accomplishment on the part of the company of the contracts named, together with the expenses of this process.

There was no appearance on the part of the company on September 29, 1891, at which time the National Government was properly represented and was heard in oral pleading before the court. No notice was served or summons made upon the counsel who had appeared in the case for Mr. Fiat. Indeed, since he was attorney of the company, and they were his counsel only, their relation to the company and to the case since he had resigned, their right to appear and to be heard, or the duty of the Government to have them cited in, had such a duty rested upon the Government at that stage of the cause, is in none of these respects very clear to the umpire. There was no attorney of the

company then resident in Venezuela, and there had been none since July previous, but whether this fact was known to the Government or to the court does not appear. The evidence of two witnesses adduced by the company is referred to by the court in its decree as having been considered by it in coming to its final judgment. Aside from this evidence the court was not assisted by the company in anyway after the court began its consideration of the facts, the law, and the equity of the cause, nor were the interests of the company in anyway subserved or protected at this time by the presence in court of attorney or counsel. In a very few days the company had knowledge of the action of the court; but it did not then or ever take any steps to be heard on any question or motion proper to have been taken on its part under the law of the Republic or the procedure of the court. Neither does it appear from the attitude of the company toward the suit for quite a period prior to October 14, 1890, and for years thereafter that it desired to be heard in the high Federal court on the matter of the final decree. The tenor of the proceedings of the company after it passed into liquidation is clearly that it depended, not on a successful defense to the suit, but solely upon negotiations with the Government for its existence and prosperity. No other version can be given to the acts, declarations, and apparent animus of its moving and managing spirits and agents.

At the time this decree was passed the Company General of the Orinoco had actually brought into Venezuela and expended in and about its enterprise the sum of 2,373,317.89 francs, after deducting from the total expenses the sums actually received for products exported under its concessions.

Certain conditions of the Company General of the Orinoco and certain administrative acts in relation to it will now be considered.

It was in March, 1888, that the company took possession of the lands granted by Mr. Vernet and formed on the Vichada the hato which bore the name of Santa Catalina. It was here that the cattle obtained at Buena Vista were placed, the chief purpose of this hato being to prepare for the necessities of the immigrants, since there was not in all the region of the Maipures so much as one single animal of the cow kind.

The minister of fomento was advised of the establishment of the hato, and later a concession of lands was demanded of him to be located on the Vichada for similar purposes. To this demand there was no reply by the Government.

The action of the governors of the Territories Upper Orinoco and Amazonas, and of persons representatives of the Federal Government in that locality, was such concerning the exploitation and exportation of the natural products of those Territories, which were exclusively the property of the company, that it resulted in depriving the company of any benefits of its concessions for the year 1890 and thereafterwards, notwithstanding adequate provisions had been made by the company with a Liverpool firm to furnish the requisite funds to complete the payment for those products and the agent of the firm had been sent out to Venezuela for that purpose, and in spite of the fact that much of the india rubber had been harvested by means of advances which the company had made aforetime.

Mr. Valentin Perez, the trusted representative and agent of the Government at San Fernando de Atabapo in the summer and early autumn of 1890, returned to his home in La Urbana late in that year or early in 1891, organized an armed force and began an expedition up the river. April 28, 1891, he attacked the steamer *Libertad*, at the mouth of the river Meta, with firearms. The steamer escaped without loss of life to its crew, although the marks of many bullets were found upon the boat. The doings of Perez came to the knowledge of the governor at San Fernando de Atabapo, who, fearing an attack, took

away the valves from the boiler of the *Meta* and removed different parts of the engine, rendering her useless should she fall into the hands of Perez, but it had a similar effect upon her usefulness and value to the company.

The governor also took by main force the arms and munitions which the company had a lawful right to keep at its agencies and which were necessary for its protection in that part of the country. Perez took possession, consecutively, of Atures, Maipures, and San Fernando de Atabapo, and seized everything of value which lay in his way; and, from his home at La Urbana to the capital of the Territories he burned all the wood sheds of the company, some seventeen in number, including the fuel contained therein. About this time Mr. Calvaras, agent of the company at San Fernando de Atabapo, attempting to escape to Ciudad Bolívar, died at Maipures of fatigue and privation. Mr. Mary, another agent, descended the river to Ciudad Bolívar. Mr. Oudart tried to escape from San Carlos, but he was attached and robbed. He gathered together a few men and attacked the troops of Perez by night, seized about one-fourth of his india rubber, threw it into boats, and went to Brazil. This practically ended the exploitation of these Territories by the Company General of the Orinoco.

Perez captured the governor and detained him as a prisoner. To reestablish order in the Territories the Government sent troops from Ciudad Bolívar to San Fernando de Atabapo. To accomplish this, it requisitioned the *Libertad* to carry its soldiers to Atures. Above the rapids the Government used the steamers of the enterprise to take the soldiers to the capital of the Territories. At Maipures the troops were fed with meat from the cattle of the company. For the service of the *Libertad* the company received 2,000 bolivars, but for the rest nothing.

The years 1892 and 1893 witnessed the successful revolution of Gen. Joaquin Crespo. As a consequence, public and private business and the processes of the courts and the administration of the Government were seriously interrupted and obstructed. It was not until February 20, 1894, that General Crespo was named constitutional President.

The matters of the Company General had suffered seriously through this revolutionary crisis. No execution had been issued for the damages and costs awarded the Government in its suit of rescission against the company. March 8, 1893, the new governor of the Federal Territories, Gen. Juan Anselmo, issued a decree of sequestration against the property of the company in the Territory of Upper Orinoco, to make effective the judgment of October 14, 1891, by recovering the amount thereof; and to that end he asserted the lien of the Government upon both the movable and the immovable property of the company, whether in its possession or in the hands of those who had appropriated it to their own use, appointed a depositary, and allowed thirty days during which time all persons who had anything belonging to the Company General of the Orinoco were to bring it to the depositary or to pay him the value of the same. After this delay of thirty days judicial proceedings were to be taken conformable to the laws against delinquents.

This decree was disaffirmed by the, high Federal court because no such power was vouchsafed the governor by the decree which created and organized the Territory. The court held that this could issue solely through the judiciary department, citing articles 298, 299, 300, 301, 302, 303, 304, 305, and 306 of the Code of Civil Procedure. It goes on to say:

That which the governor ought to have done was to bring to the knowledge of the judges of the locality of the circumspection of his command, in which were the interests of the company, the complaints of the interested parties, in order that according to the reasons alleged their acquired rights might be guaranteed, etc.

It resulted that all of the Company's property which at that time could be assembled in that Territory was sold at a nominal figure.

July 10, 1902, the liquidators of the Company General of the Orinoco addressed a memorial to the minister of foreign affairs of France in which they stated their case as follows:

That in consequence of the sentence given by the high Federal court October 14, 1891, without the appearing in court of the plaintiff company the creditors of the said company were obliged to apply to the liquidators for the vindication of their rights against the Government of Venezuela.

This was followed by a statement of their claim in detail.

In 1894, shortly after General Crespo became the constitutional President of the Republic, Mr. Theodore Delort came to Caracas in the interest of the liquidators in an effort to adjust the matters of difference then existing. While at Caracas he addressed a communication, in the nature of a résumé, to the minister of foreign affairs of Venezuela. Among other things of value is found this:

The honor and standing of the members who form this enterprise, our credit being understood and our proceedings correct, are the reasons which compel me to act to-day in the present claim, not to regain our capital lost, if it is understood that the Venezuelan Government wishes to render us justice, but to take into consideration the said credits and that we may be able to fulfill our engagements honorably.

Earlier in the communication Mr. Delort had stated the indebtedness of the company.

The purpose of the company to obtain means whereby to cancel its indebtedness is ascribed to it by the honorable commissioner for Venezuela in his opinion in this case, where he says:

And lastly, their attempts, twice baffled, to convert first into an English company with the name of "The Orinoco Exploration and Trading Company," and later into a Belgian limited company, under the name of "Compagnie Internationale des Caoutchoucs," both attempts having been made with the object of obtaining an increase of cash capital to pay off debts and proceed with the business.

The liquidators of the company presented a further memorial of their difficulties to the minister of foreign affairs for France, December 5, 1895.

For quite a portion of the time elapsing between October 14, 1891, and the treaty of February 19, 1902, the two Governments had not been in friendly diplomatic relation. This fact is named as an explanation of delays which have occurred in the presentation and pursuit of this claim diplomatically.

In the preceding attempt to present the salient facts of this case much time has been taken and many words have been used, and yet much which tends to throw light upon it has been omitted in order to condense and shorten the statement. It is hoped that the bases upon which a decision must rest are sufficiently apparent. The umpire must acknowledge his indebtedness to the company for the valued aid of its counsel Mr. Poincaré, and to the honorable commissioners for their efficient services both in the matters of fact and in the justice and equity to be evolved therefrom in arriving at a right award.

The claimant Government asserts its right of recovery because of denials of justice through a long series of administrative and governmental measures, notably the decrees of August 8 and 9, 1890, and the sequestration of 1893; also finds cause therefor in the unpunished wrongs perpetrated by Valentin Perez and in the abuses of the powers of the governors, notably Mr. d'Aubeterre, and the decree of annulment by pro tempore Governor Page; likewise in the decree of the minister of hacienda in April, 1890, and in successive acts of the

minister of the interior in the same year; and, further, in a multitude of acts, of manœuvres, of outrages; also in the refusal of the respondent Government to permit assignments of the concessions of the company and its properties to the English company formed and registered, and to recognize and allow said English company to take up and carry on the contracts of December 17, 1885, and of April 1, 1887, together with its unjust silence respecting the Colombian-Venezuelan arbitration and its acquiescence in the large expenditures made by the company in the extension and development of its enterprise after the knowledge of the Government that there had been no compliance in fact with the provisions concerning the railroads around the rapids of Atures and the rapids of Maipures, and to the general attitude of the Government and its administration toward the company after the year 1888, whereby it permitted, if it did not incite, attacks, open and covert, upon the concessions of the company.

It also claims denials of justice through violations of public and private right, committed not only in the course of the process (suit of 1890), but outside of every judicial instance. Concerning the suit for rescission, it is alleged to be a nullity, because (a) that Mr. Fiat, the attorney of the company in Caracas, received no citation or order to appear at the time of the presentation by the fiscal nacional de hacienda before the high Federal court of the demand for rescission of the contracts and payment of an indemnity; (b) the rogatory commissions issued in said cause on the motion of the defendant for the investigation in Europe were irregular in the issue and transmission and ineffective through the fault of the court or the Government; (c) the failure of the court or the Government to forewarn Mr. Fiat or the advocates of the defendant of the day set for the oral pleadings in the cause, and the resultant nonparticipation of the defendant in such hearing; (d) the sentence of the court October 14, 1891, was rendered in the absence of Mr. Fiat and the advocates of the defendant and without citation upon them or either of them to be present and without their knowledge, in fact, that the sentence was to be pronounced, and without other knowledge than its publication in the Official Gazette of October 17, three days after the decree was promulgated. This procedure was said to be in violation of Title 5, Venezuelan Code of Civil Procedure with regard to citation.

The claimant company also asserts its right for indemnity arising from requisitions of and injuries to its property by the authorities of the respondent Government and for other acts contrary to the law of nations. The honorable commissioner for Venezuela, a lawyer of high standing in the courts of his country, skillful in his profession, and of high honor, whose opinion in such a matter is entitled to great weight, finds no irregularities in the preliminary process of the high Federal court. The umpire fails to observe any.

However, if the umpire regarded the point as possessing value, he would more carefully study the question. In his opinion the appearance of Mr. Fiat as disclosed cures all irregularity of notice or entire lack of official notification, had either existed. This proposition is elementary, and requires no authority to sustain it. It effectually removes the first objection of the claimant to the proceedings of the high Federal court.

The second objection refers to the issuing of the rogatory commissions from the court direct to the attorney of the company instead of transmitting them through diplomatic channels at its instance and through its personal procurement. This is regarded as fatal error by the eminent counsel of the claimant company. Much ingenuity, ability, and learning are displayed in an effort to charge the failure in the execution of some of these commissions upon this act of the court and thereby to find cause to invalidate its final decree. Without entering the domain of this discussion it suffices to say that the attorney of the

company accepted these commissions from the hand of the court's officer without objection and proceeded to make use of them in his own way. It was he, and not the court, who sent them abroad through other than diplomatic channels. He had always the right and the opportunity to obtain the aid and the intervention of the friendly diplomatic powers of France. He had, moreover, the unused privilege of preferring to the high Federal court a petition for the reissuing of those commissions and their transmission through such channels as he might then request or suggest. There were many months in which he should have learned the necessity of such procedure, if it existed, and in which he might have appeared before the court for such purpose. So far as appears of record, every request he made in court was granted, and any failure to educe evidence through the rogatory commissions must be charged to the action or inaction of the company's attorney, and not to the high Federal court or the respondent Government. Such is the judgment of the umpire upon the second point of objection to the judicial process in question.

Objections "c" and "d" will be considered together.

The first point to be recalled is that the recognized and accredited attorney of the company before the high Federal court was Andrés Fiat. His power of attorney had been presented to the inspection of the court, it had been translated, examined, adjudged to be ample and correct, and in virtue thereof he was accorded a representative character for said company in said court. He had resigned. His resignation had been accepted by the company. Another had been appointed, and had declined to serve. It does not appear that Mr. Berthier was constituted an attorney with letters as such. If he were, he failed to qualify before the court. Until his resignation Mr. Fiat was the attorney of the company. Doctors Urbaneja and Feo were his counsel, so designated and named by him in court and so recognized and received. It is also true that so far as the umpire knows at this time there was no duly constituted attorney of the company in Venezuela. This was the situation September 25, 1891, the day on which selection was made by the court of the time on which the final audience was to take place and the parties were to be heard orally and in writing by their respective advocates. The situation was the same September 29, and it had not changed October 14. Was the high Federal court charged with any duty of notice to the company under these circumstances, provided such notice was required by the laws of the country and the rules of the court, if there had been an attorney of the company known to the court within reach of its process? The honorable commissioner for Venezuela holds that articles 109 and 162 of the Code of Procedure do not apply to such a case as is here presented. Article 109 refers to a cause in suspension; article 162, to a case of indefinite delay. In his opinion he gives a historical review of the case from its inception to the decree, and from this review he reaches the conclusion that —

the sentence was thus pronounced by the high Federal court after complying rigorously with the legal prescriptions, and with all the formalities of the proceedings as established by law on behalf of both parties interested for the defense of their respective rights.

He holds that the case had never been in suspense; that the day on which the time had expired for producing proofs the representative of the Government moved for active continuation of the case and the court acceded to his motion.

Similarly, the honorable commissioner finds no indefinite delay such as is designated in and covered by article 162.

Doctors Urbaneja and Feo, also learned in the law, gave an opinion sustaining the contention of the claimants. It is not necessary for the umpire

to decide between these conflicting opinions, since the company had opportunity to test the worth of its contentions by a petition to the high Federal court to invalidate its decision under and by virtue of case I, article 538, of the Code of Civil Procedure then in force in Venezuela. If the points now urged before the umpire were of the character to come under that article, the duty of the court was clear and its action certain. Practically it must come under the terms of that article or else it had not the vitality now claimed for it.

For six months an opportunity existed wherein this question could be considered, the proofs marshaled, and the petition made. If there had been such grave fault on the part of the high Federal court as in the opinion of the company's eminent counsel would amount to a denial of justice, why was not an effort made, based upon these grounds, to secure an invalidation of the decree? If this had been done and there had resulted a refusal on the part of the court to reopen the case, then the duty of the umpire to carefully consider the law and the facts relating to this objection would be paramount. There is not a single act of the high Federal court in connection with the suit in question which suggests in the slightest degree any other than a scrupulous regard for the rights of the defendants therein. With this judgment formed from his study of the procedure in this case the umpire would be peculiarly constituted if he should hold that this distinguished body would necessarily depart from its well-ordered course when, there was presented before it a just cause for reconsideration.

In the suit to rescind the contracts of December 17, 1885, and of April 1, 1887, it is therefore adjudged that the decree of the high Federal court of October 14, 1891, is not now open to attack by the defendant therein through the intervention of the claimant Government, and it is not a denial of justice under the treaty of 1885, or in virtue of the rules and principles of public law.

It follows, therefore, that every matter and point distinctly in issue in said cause, and which was directly passed upon and determined in said decree, and which was its ground and basis, is concluded by said judgment, and the claimants themselves and the claimant Government in their behalf are forever estopped from asserting any right or claim based in any part upon any fact actually and directly involved in said decree.

The general principle announced in numerous cases is that a right, question, or fact *distinctly put in issue and directly determined* by a court of competent jurisdiction, as a ground of recovery, can not be disputed, etc.,

*Southern Pacific R. Co. v. U.S.*, 168 Sup. Ct. Rep., 1. (S.C., L. C. P. Co., 42, 377, with extensive annotations.)

Also, see 9 Encycl. Pl. and Pr., 625, and the notes.

Is this holding by the umpire conclusive of this claim? The answer is affected by the decision which he will make upon the proposition, that no award can be predicated upon any other ground than a denial of justice; which proposition is based upon the ground that the treaty of 1885 is determinative of the issues which may be decided by this honorable commission. If the treaty of 1885 is applicable to this case, then his position in reference to the decree of October 14, 1891, decides adversely this claim.

If the treaty of 1885 was before the umpire he would interpret its provisions as did the honorable President of the Swiss Republic in the Fabiani award. Being so interpreted, it would be impossible to award damages here. There has been no denial of justice, nor such a delay of justice according to usage or to law, nor such exhaustion of the legal means available to the claimants, nor such a violation of treaty or the rules of the right of nations as would admit of a favorable award, if the jurisdiction of this honorable commission is thus limited.

Such, however, is not the interpretation placed by the umpire upon the convention of February 19, 1902. Article 2 of that protocol provides that —

Demands for indemnities other than those which are aimed at in article 1, but based upon facts anterior to the 23d of May, 1899, will be examined in concert by the minister of foreign affairs of Venezuela and by the French minister at Caracas, etc.

All of the cases which came before this honorable commission at Caracas in 1903, including the eight reserved for the consideration of the umpire, were under the above provisions of article 2, which concludes with the clause:

It is intended that this procedure, like that which is adopted for the claims of 1892, is instituted as an exception only and does not invalidate the covenant of November 26, 1885.

The provisions of the treaty of 1885 were not interposed in the case of Jules Brun, heirs of Maninat, Friedrich & Co., heirs of Massiani, Pieri & Co., or Antoine Fabiani. It was apparently not interposed in Caracas against any of the cases heard by the honorable commissioners and reported in Ralston and Doyle's Venezuelan Arbitrations of 1903.

None of the six cases above referred to and now before the umpire for his decision rest upon denials of justice. All have been submitted upon the claim, implied or stated, that the treaty of 1885 did not apply. The Fabiani claim was based entirely upon this proposition. To these positions of the claimants there has been no dissent on the part of the respondent Government. The umpire has been permitted to proceed upon this theory and has made his judgment and awards in accordance with what he understood to be the admitted construction of the convention of 1902; and it is not until he reaches the case now in hand that this question is raised, if it is now distinctly raised, by the respondent Government. He is inclined to the view that it is practically in assert to the assumption of the eminent counsel for the claimants that such might be the construction of this treaty that the respondent Government takes the position it has seemed to take in this case and contends for the paramount authority of the treaty of 1885.

Were the umpire unaided by the interpretation which in practice has been placed upon the protocol of 1902, he would have no serious difficulty in construing it adversely to the contention of the respondent Government. In effect, if not in express terms, the treaty of 1885, by the convention of 1902, is left in force generally; but for the purposes of claims to be considered under article 2 of the last-mentioned convention the treaty of 1885 has wholly superseded and practically abrogated it so long as the protocol of 1902 remains effective. Such must be the meaning of that provision in article 1 of the protocol of 1902, which relates to —

examining in concert the demands for indemnity presented by Frenchmen for damages sustained in Venezuela, etc.

Concerning this there might exist a doubt, but not when there is considered the provisions heretofore quoted, that the procedure instituted by the protocol of 1902 is —

as an exception only and does not invalidate the covenant of November 26, 1885.

The umpire holds, therefore, that by the terms of the convention of February 19, 1902, he can award such sum in damages in any and all of the cases submitted to him as, in his judgment, properly clarified and steadied by the ethical precepts of international law, equity and good conscience demand, in no respect limited or controlled by the treaty of 1885.

It is a consequence of this holding that if there were aught of wrong toward the Company General of the Orinoco done or permitted by the respondent Government through officials or persons for whose acts the Federal Government is responsible which were not concluded in and determined by the decree of October 14, 1891, then over such this honorable commission has jurisdiction and for such there may be an award in damages if justice and equity so permit and so require.

In the opinion of the umpire there are many matters anterior to May 28, 1890, which might seriously affect the rights of the contending parties which were not at all involved in the decree of the high Federal court. The restrictive quality of estoppel by judgments is well understood. It is not broader than the rule stated by the umpire in this case. It is only the particular matter in controversy which is decided. It is the exact issue as formed which is determined. There must be identity of cause, the same questions in issue, the same subject-matter. (9 Encycl. Pl. and Pr., 622-623; id., 624, 625; Story's Eq. Pleadings, par. 791; 24 Encycl. of Law, 2d ed., 775; 5 Encycl. Pl. and Pr., 780.)

What was affirmed in the case in question by the plaintiff therein? (1) That on the part of the plaintiff Government it had fulfilled the stipulations agreed to in both contracts. (2) That certain articles and parts of articles of both contracts as set out in the declaration had not been fulfilled on the part of the defendant.

What was the pleading of the company? (1) That it had performed. (2) When it had not performed it had been prevented by main force or by the acts and neglects of the Government or by the acts and neglects of the authorities for whom the Government was responsible, these acts and neglects referring to the matters of the contract. Such were the issues. These were determined: That the Government had fulfilled on its part all the obligations which the two said contracts imposed upon it; that the defendant had not fulfilled the obligations contained in Nos. 1, 2, 3, 4, 5, 6, 7, and 9 of the contract of December 17, 1885, nor the stipulations 3, 4, and 5 of the contract of April 1, 1887; that it was not prevented from fulfilling these obligations by insurmountable difficulties constituting *force majeure* nor was it so prevented by the acts of authorities dependent upon the Government itself and contrary to the stipulations of the contract. This reference to the acts of authorities dependent upon the Government in the answer of the defendant in excuse for its failure to fulfill certain of its obligations is understood solely to refer to matters springing from the contracts and referring to the Government as the other party thereto. Such also in the opinion of the umpire is the force, extent, and value of the decree upon that point. However, from the attitude which this claim has assumed in the mind of the umpire it is not necessary that he make critical analysis of the decree or of the elements of fact anterior to May 28, 1890, which may or may not be included therein and concluded thereby.

The answer of the defendant company in the suit for rescission was in defense only. It presented and suggested no counterclaims or claims in set-off. These were reserved. They were not plead, not in issue, were not litigated, and therefore can not be concluded by the decree.

The language, therefore, which is so often used, that a judgment estops not only as to every ground of recovery or defense actually presented in the action, but also as to every ground which might have been presented, is strictly accurate, when applied to the demand or claim in controversy. Such demand, or claim, having passed into judgment, can not again be brought into litigation between the parties in proceedings at law, upon any ground whatever.

But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to

those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action; not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action. (*Cromwell v. Sac County*, 4 Otto (U.S. Sup. Ct.), 351-371; (S. C., L. C. P. Co., 24, 195-204, and note.))

The law in respect to estoppel by judgment is well settled, and the only difficulty lies in the application of the law to the facts. The particular matter in controversy in the adverse suit was the triangular piece of ground, which is not the matter of dispute in this action. The judgment in that case therefore is not conclusive in this as to matters which might have been decided, but *only as to matters which were in fact decided*. (*Last Chance Mining Co. v. Tyler Mining Co.* 157 U.S. Sup. Ct., 683-685; (S. C., L. C. P. Co., 39, 862); 9 Encycl. Pl. and Pr., 629-630; 24 Encycl. of Law, 2d ed., 775.)

Not having been pleaded and passed upon in the suit for rescission, all claims or demands which by the claimant company on May 28, 1890, might have been plead as counterclaims or claims in set-off to the suit for rescission in its prayer for damages, or which might have constituted at that time ground for an independent action, are proper to be presented and considered in this honorable commission as substantive ground for an award. (24 Encycl. of Law, 2d ed., 775; *id.*, 791.)

It is certain that a claim in offset would not be concluded by a judgment when it was neither placed, considered, nor deducted in making up the judgment. (Sup. Ct. of Vt., found in 52 Vt., 121.)

For the same reasons as have already been given, the decision of October 14, 1891, settled nothing after May 28, 1890, the day on which the suit to rescind was entered in the high Federal court by the fiscal nacional de hacienda. The issues were formed as of that date. The cause of action had then accrued. It then existed or the court had no jurisdiction. For such causes as accrued after that date the court gained no jurisdiction in virtue of the suit then pending. The actions of the claimant company and of the respondent Government posterior to that date are all proper subjects of inquiry and of award.

The cause of action does not accrue until the existence of such a state of things as will enable a person having the proper relations to the property or persons concerned to bring an action; \* \* \* (1 Bouv. Law Dict., 295.)

Causes of action must exist at time of commencement of suit. (1 Encycl. Pl. and Pr., 209).

Hence a judgment against a defendant is not conclusive as to set-off or counterclaim which he might have pleaded to the action. In the absence of statute a defendant having a cross-demand against the plaintiff may, at his election, either use it in the pending suits as a set-off, or reserve it to be used as the basis of an independent action. His failure, therefore, to plead it does not preclude him from bringing a subsequent action upon it. (24 Encycl. of Law, 785.)

Notwithstanding the clear right of this honorable commission to weigh, pass upon, and merge in the award any and all rightful claims for damages inhering in the claimant company for wrongs suffered through those for whom the respondent Government is responsible and which occurred prior to May 28, 1890, it does not become necessary to take this position in order to obtain equity in this claim, and for that reason only none such will be considered for that purpose.

There is no disagreement that in the spring and summer of 1890 arrangements had been perfected by the liquidator of the company and approved by its shareholders whereby an English company regularly organized and registered

was to take over the properties and franchises, rights, and privileges of the Company General of the Orinoco, assume and pay its indebtedness, and furnish a pecuniary basis for the continuation of its enterprise. It is agreed that this compact and these results failed to be consummated solely through the absolute refusal of the respondent Government to permit it. There were unquestionably grave reasons of state which animated and inspired this action of the respondent Government and which in its judgment required and compelled it to take this course; but it was as fatal to the interests of the claimant company as though differently inspired. The contention which had been very threatening and serious between the United States of Venezuela and Great Britain over the right of the latter to an equal control with the former Government of certain mouths of the Orinoco — a right claimed largely through alleged occupancy by the British citizens of the country contiguous thereto — was a cogent reason why the former Government should seriously object to any relations with a British company through a contract which by its very terms gave exclusive rights in certain portions of that river and peculiar privileges over its whole extent. That to Venezuela it seemed impossible to permit such a condition to exist is evident from its acts. That it was wholly justified in this assumption is the opinion of the umpire. As a party to the contract, however, it was bound by its terms, and one of its provisions specifically permitted, without restriction or supervision, just such an assignment as was proposed.

The right to assign was the sole value of the contract to the original concessionary. It was exercised again in the contract passed from the syndicate to the company. These assignments were recognized by the respondent Government. The interpretation was thus and then made by the parties thereto and especially by the Government of Venezuela that the assignment named in the contract was not restrictive in its operation to the first concessionary. Without such an interpretation by the parties thereto it would seem to the umpire to be the only correct inference to be drawn from the language used when the purposes and conditions are considered.

This is beyond all fair question. As the Government of Venezuela, whose duty of self-preservation rose superior to any question of contract, it had the power to abrogate the contract in whole or in part. It exercised that power and canceled the provision of unrestricted assignment. It considered the peril superior to the obligation and substituted therefor the duty of compensation. Had there been no other troublesome question of State entangled with the contracts of the Company General of the Orinoco it is quite possible that this governmental surgery would not have taken the life of the claimant company. Such entanglements, however, existed.

One is found in the controversies between Venezuela and Colombia over the terms of those contracts, the territory involved, and the claims of the company in connection therewith. A careful student of the situation quickly discerns the delicate position occupied in that matter by the respondent Government. It is not difficult to understand the supreme confidence of Gen. Guzmán Blanco and of Venezuela in general, concerning the favorable final outcome of the arbitration then resting in the hands of His Majesty the King of Spain. This belief was so intense, so complete, that it is evident that the dispute over the boundary and the pending arbitration were not disturbing factors in the plans of Venezuelans or of their Government. This easy and perfect confidence begot a carelessness of conduct in reference to the territories involved, readily understood but none the less, even more, disturbing to the other party litigant. The position of Colombia was undeniably correct. Venezuela could not question it. The serene confidence of Gen. Guzmán Blanco and his compatriots had unintentionally betrayed the Republic into a seeming serious affront (1)

Colombia. The contracts were susceptible of no other interpretation than that through them there was an assumption in Venezuela of exclusive control over the upper Orinoco and its important confluent entering it from the west and over large areas of territory to the west of the Orinoco. Equally, there was an assumption that this control was to exist indefinitely. Notwithstanding the pending litigation over the boundary, the Company General of Orinoco was permitted to enter into unquestioned and absolute possession of these litigated areas. From the view point of nations the respondent Government had been led into grave error. This error it must repair. It could only repair by receding. It could only recede by compromise with the company or by annulment. Every day that the contract was continued it was more or less a menace to the peaceful relations then existing between those two countries. That which had been held as a valued enterprise, a boon to Venezuela, for the reasons stated had become a source of serious national danger. The changed position of the respondent Government toward the claimant company, a change not at all obscure or doubtful, is thus easily and, as the umpire believes, correctly explained. No other than a paramount reason, in the belief of the State, can explain the ministerial decree of May 17, 1890; the suit for rescission of May 29, 1890; the gubernatorial decree of June 16, 1890; the administrative decree of August 9, disaffirming the action of the governor only because it was a usurpation of power, but displacing it with the ministerial decree of August 9, 1890; the successive and progressive acts of the ministers and the governors of similar tenor and effect together substantially annihilating the enterprise. No ordinary cause would have suggested or permitted this destruction of an internal improvement possessing such potentialities for the future of Venezuela, against the ordinary policy of the country, which had been to foster and encourage such enterprises.

The umpire does not question that there was an intimate relation between these administrative and official acts and the attitude of Colombia toward the respondent Government in regard to these contracts. The prompt report made by the minister for foreign affairs to the minister plenipotentiary of Colombia at Caracas has deep significance when it is noticed that it answered a communication of that same Colombian minister of date January 24, 1890; which answer had been apparently withheld until something of a positive and decisive character could be given. Five days after the suit was entered in court, three days after the company had been summoned, the day after Mr. Fiat appeared, this notification to Colombia was made. A suit for rescission did not satisfy Colombia. Its interests were still, in its judgment, imperiled and would remain thus imperiled so long as the company had power or opportunity to extend its exploitation over the debatable ground. Colombia by its reply of June 6 indicates this very precisely and emphatically to the respondent Government. Following this correspondence there were the gubernatorial and administrative decrees of June 16, August 8 and 9, the telegrams of the minister for the interior of August 29, and his letter of September 10. Other facts might be easily adduced which are of some evidential value, all tending toward the same end. Enough has been said, however, to suggest the ground upon which the umpire bases his judgment that the strait of Venezuela in regard to the Colombian incident was a potent cause for the position assumed by the respondent Government toward the Company General of the Orinoco in 1889, 1890, and 1891. It was a question of governmental policy, and that Venezuela a decided upon this plan of action must be attributed to its solicitude for peace with a sister Republic.

Running as a not unimportant thread in this warp of discomfort and resulting discontent of the respondent Government was the attitude of antagonism

toward the company assumed by the business men of the Orinoco from Ciudad Bolívar through the Territories of Upper Orinoco and Amazonas. The monopoly in the natural products granted in its concessions interfered with their personal enterprises. These privileges were in compensation for the very important obligations resting upon the company, which when fulfilled were to be of incalculable value to the country, but this did not prevent the sense of wrong and the feeling of revolt on the part of these people. That this feeling was general and deep on their part is readily discerned. The governors and officials there resident were naturally sympathetic. The President and his cabinet observed and were disturbed by these manifestations of anger and dissatisfaction, which became very apparent. The situation in this regard was grave. The Perez campaign was perhaps the most violent and destructive, but it illustrates the situation. These contracts then became a source of constant annoyance to the administration at Caracas and of menace to the internal security and welfare of the State. It is quite probable that the natural hostility of the business men of that section of the country was increased and made bitter and rancorous through the method and manner of some of the agents of the company. Where concession and conciliation might have been most valuable emollients, they were not always in evidence, but instead there was no doubt at times superciliousness and arrogance.

Such is the purport of the evidence before the umpire. It is too like a possible fact to be discredited. It is not strange with all the cumulative reasons therefor that the Republic of Venezuela became very weary over the situation which its contracts had created or permitted, or that it sighed for relief therefrom at whatever cost.

The sum to be awarded the claimant Government in behalf of the liquidators must be made commensurate to the damages caused by the act of the respondent Government in denying efficacy to the contract of assignment from the Company General of the Orinoco to the English company. A careful study of the events connected with this Governmental act, and of those which followed, reveals nothing which in any degree lightens the responsibility or in any part changes the relation which the respondent Government assumed toward the Company General of the Orinoco and its creditors when it exercised this sovereign right. The successive struggles of the company for existence which followed this act have been collated in this opinion; they need not here be referred to in detail. Suffice it to say that its ruin was not its fault. It fought bravely to exist either in its own or in some other corporate entity, to continue in its contracts as they then were in some modified form. It sought these ends persistently and patiently, but without avail. Eventually there came the revolutionary upheaval of 1892-93, the unsettled conditions which followed, then, at the hands of the executive and judicial powers of the Territory — Upper Orinoco — the finale.

These efforts of the company for resuscitation and the expense involved were necessary, but they can not be charged against the respondent Government. They are not a proximate result of the primary act for which it is held responsible in damages. The Venezuelan Government might make a new contract but it was not bound to do so. It might recede from its suit for rescission, but it had a right to refuse to do so. These were matters of negotiation, and that they resulted unfavorably to the wishes of the company is unfortunate, but it does not add to the pecuniary responsibility of the respondent Government. The acts of administrative authorities in 1890 heretofore referred to only quickened the process of dissolution. There was in it all no demonstrated financial loss to the liquidators on the basis upon which this award is to rest. It was not the liquidators but the Liverpool firm, which was to reap the pecuniary

benefit of the concession for 1890. To the suggestion that there was undue and unnecessary loss of the property because of the acts done or permitted by the respondent Government from 1890 to 1893, both inclusive, there is this answer that the award practically covers that investment so far as the liquidators are concerned, and it is impossible from the data at hand to arrive at any just conclusions concerning the pecuniary loss, if it were proper or necessary to consider it at all. To the possible suggestion that the arrangement with the English company might have proved illusory, when the suit for rescission had become known to this latter company, there is the answer that there was then ample grounds for the successful defense of that suit, had defense been the desired policy of the company. A full defense lies in the fact that there was in this suit for rescission no offer to restore to the company the benefits conferred by it upon the plaintiff when coupled with the uncontroverted fact that the company had conferred many and repeated benefits upon the plaintiff Government, which were capable of being measured in money, and for which there had been no compensation. Notably among these benefits is the one stated in the suit itself, where it refers to the amount paid by the company to the Government under its contracts for the exploitation and exportation of india rubber and sarrapia. (*24 Encycl. of Law, 621.*)

Many other equally pertinent easily discerned facts in the historical data are brought into this case, in the opinion of the umpire. It is not necessary to do more than to refer to them in this general way. Again, it was easily susceptible of proof that the respondent Government could not sustain its contention that it was without fault in the premises, and this is an essential fact which must always precede and accompany a suit for rescission and without which there must always be judgment for the defendant.

In the *Encycl. of Pl. and Pr.*, vol. 18, page 752, there is laid down this general proposition:

The right to rescind belongs only to the party who is himself without default. Thus, if one having sufficient ground therefor wishes to avoid a contract, but has done some act which hinders performance by the other, or has failed in any way to perform his own part of the stipulations, his right is thereby lost to him.

What were these defaults of the respondent Government? There was the Colombian incident bristling with points along this line; there was the decree of the minister of hacienda of May 17, 1890; there were the unrecompensed requisitions of 1888 and 1889; the decree not disaffirmed, not annulled, of Governor Larrazabal, October 31, 1888, an indisputable attack upon the terms of the contract; the absorption of the workmen of the company at Caura for the national defense, which, while proper, if necessary as an act of sovereignty, was none the less an attack upon the terms of the contract, when the Government is viewed in its proper position as the other party thereto; its neglect to allot or designate lands for immigrants as and when requested; its neglect to allot or designate lands for agricultural purposes as and when requested; the traffic in india rubber entered into by Governor d'Aubeterre in direct contravention of the exclusive privileges inherent in the company under this contract, and other incidents not so important, which, taken together, add force and value, yet need not here be brought forward.

The umpire is convinced that with these facts proven before it the high Federal court would have rendered a judgment for the defendant. Certainly a courageous company, conversant with these facts, would not have regarded the retention of the contracts as a very debatable proposition, and for that reason alone would not have regarded them as of insignificant value. This point is adverted to only that there may be negated any proposition that on knowledge of the suit for rescission the British company might have refused

to go on with its contract on the terms agreed upon. This position of the umpire does not at all reflect upon the action of the high Federal court, which proceeded to pass its decree upon the facts which were before it and upon a cause whose defense had been abandoned because its manager believed that in negotiations there existed the better recourse.

What were the damages suffered by the claimant company because of the injury it received through the action of the respondent Government in reference to the contract with the British company? These damages were substantially the value of the concession at that time. There are minor matters which if definitely known in character, amount, and value might be considered, reckoned with, and deducted from this sum, but they are left too vague to be of evidential value, and hence they are omitted from consideration. Approximate equity is all that can be required and all that can be gained from a case so indefinite in many of its important facts. Substantially the property of the company was dispersed and disposed of to its entire loss, though its inability was not through any inherent weakness of its own, but resulted from the conditions which environed it. In 1890 it was in a situation to be relieved of its indebtedness through aid of the British company. The sovereign act of the respondent Government prevented this. There is no inequity if that Government be asked to take up the load just as it was when this act of sovereignty was interposed. The value of the concession may certainly be regarded as equivalent to the sum which the British company was about to pay for it. That sum was the amount of its indebtedness at that time, which was stated at 1,636,078.17 francs, to which may be added 25,000 francs, the sum representing the expense attending the contract with the British company, which was thwarted by the intervention of the respondent Government. This makes the sum of 1,661,078.17 francs. To this interest for fifteen years will be added 747,485.18 francs, which is the approximate length of time during which this sum has been in default, making a sum total of 2,408,563.35 francs, for which sum the award will be drawn.

These figures were gathered from a statement made by the liquidators, L. Roux, F. Vial, and A. Boullissière to the minister of foreign affairs at Paris, July 10, 1902. They comprise all of the principal sums there named, but exclusive of the interest reckoned, except the charge for the liquidation bonds, the expenses of the Belgian society, and the different expenses, salaries of employees unpaid since 1891. The latter item falls outside of the indebtedness in 1890, and the umpire understands the same to be true of the liquidation bonds, which were for that reason excluded. The reason for excluding the expenses of the Belgian society have already been stated in the opinion. This conclusion has the approval of Manager Delort, who said to the Government at Caracas, November, 1894, that it was only the indebtedness of the company which he asked to have canceled in order that the honor of the company and of its shareholders might be sustained. Then, again, this claim may properly be regarded in a limited sense as of the nature of a creditor's bill, the purpose of which is to recover that which is due for the benefit of the creditors that it may be distributed pro rata among them, but the controlling reason is the one stated in the first instance, that it appears to be the value of the property destroyed by the act of the Government.

The umpire has considered the propriety and importance of deducting from the sum allowed the damages assessed against the company in a suit for rescission. But he can not disregard the fact that the respondent Government in its suit for rescission admitted the receipt of 148,199.74 bolivars as its share of the products exported in accordance with the rescinded contracts and recovered its damages solely on the ground that the goods imported free would,

but for the contracts, have paid a duty to the amount claimed. Neither can he fail to consider that, except for the rescinded contracts, the respondent Government would have received no part of the 148,199.74 bolivars, and that no part of the goods in question would have been imported. It seems, therefore, equitable that the sum set as damages against the company in the suit for rescission be assimilated in and absorbed by the sums which the respondent Government directly received from the company solely because of the existence of said rescinded contracts. Hence the umpire has decided to make no such deduction and has therefore placed the award at the amount above written.

NORTHFIELD, *July 31, 1905.*

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FRENCH COMPANY OF VENEZUELAN RAILROADS CASE <sup>1</sup>

It was one of the claims of the company that the respondent Government should be awarded to pay France 18,483,000 bolivar; (1) on the basis that it was responsible for the company's ruin; (2) that the company renounce its concession and abandon its enterprise to the respondent Government, including all its properties. The umpire failing to find the respondent Government responsible for the ruin of the company, the sum claimed cannot be allowed upon that basis.

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<sup>1</sup> EXTRACT FROM THE MINUTES OF THE SITTING OF AUGUST 28, 1903

The examination of the claim of the French Company of Venezuelan Railroads, presented at the sitting of May 19 last and amounting to the sum of 18,483,000 bolivars, was then taken up.

The French arbitrator considering:

That the nonexecution of the obligations contracted by the Venezuelan Government with the company and the nonpayment of sums which it owed it from the fact of its engagements, and its requisitions carried on, has rendered the company unable to continue its exploitation;

That the inspection of the line, of the material, and of the buildings demonstrates clearly that the company had not recoiled before any expense to assure excellent conditions, the service of merchandise and travelers;

That the examination of the accounts establishes that the exploitation would have been remunerative in spite of the obstacles presented by the civil war and the inclemencies of the climate if the Venezuelan Government had paid over the amounts due from it and that consequently by the act of the Venezuelan Government the company has been deprived of the legitimate benefits which it had the right to hope for;

That according to the said contract the Venezuelan Government having accorded a guaranty of 7 per cent upon a kilometric value of 300,000 bolivars, has itself implicitly recognized that the value of the exploitation was 18,000,000 bolivars;

That the Venezuelan Government seems to have had the intention of annulling the contract and of according the concession to a new enterprise;

That the company's claim for indemnity for the damages suffered by its maritime service from Maracaibo to Santa Bárbara is perfectly justified;

Decides that the Venezuelan Government ought to pay to the French Company of Venezuelan Railroads the sum of 18,483,000 bolivars demanded by it, on condition that the latter renounce the concession of the enterprise and abandons to the Venezuelan Government its line, its buildings of exploitation and habitation, its stores and its terrestrial and maritime material in the condition which they are found, by means of which payment, renunciation, and abandon the two parties will be free from all their reciprocal engagements and obligations.

The Venezuelan arbitrator considering, on the contrary:

That the true reasons for the suspension of the exploitation of the line by the company are of economic order, the latter having been led to take this resolve

- To determine the other question, the power of the commission under the protocol of February 19, 1902, must be determined. He fails to find such power, but finds it limited to providing indemnities for damages suffered by Frenchmen in Venezuela. To accomplish this, its methods of procedure must not contravene the general and established principles of the law of nations, nor its awards be opposed to justice and equity. It is given no power to revoke, rescind, modify, or limit the terms of a contract to the very least degree. Such was not the purpose of its creation, it was endowed with no such powers. Were rescission or abandonment agreed upon between the claimant company and the respondent Government, then it might be competent for the commission to establish the indemnities for such rescission or abandonment.
- The contracts in issue were mutual and reciprocal, and neither party can make abandonment or rescission without the consent of the other. The United States of Venezuela does not consent. Therefore there can be no abandonment by the claimant company of its properties for which redress can be made compulsory upon Venezuela.
- The commission is utterly powerless even for good cause to decree an unaccepted or an unacceptable abandonment by either party of a mutual and reciprocal contract, or to award an act of rescission which has not, in effect, previously taken place.
- This commission can not order something to be done which would cause damage to the party obeying the order and then award damages therefor. This would be an injury received posterior to the submission and it would be damages in fact suffered by the claimant company in the United States of Venezuela and at the hands of the umpire.
- The contract between the claimant company and the respondent Government that all doubts and controversies arising from that contract should be resolved by the competent tribunals of the respondent Government can not be entirely ignored. No more serious doubt can be resolved than that involved

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because of the lack of traffic due to the troubled state of the country and by the impossibility in which its bad financial position had placed it of obtaining new funds necessary to make repairs for damages caused by the inclemency of the weather to a line established under unfavorable conditions:

That the Venezuelan Government could be held responsible neither for damages caused to the material of exploitation by a voluntary abandonment nor for those suffered from the fact of the troubled condition to the country or of accidents of war;

That the arrangement entered into by the company with the Venezuelan Government on the subject of the guaranty stipulated in the contract has been entirely carried out and that the company has received the sums accruing from the sale of the bonds which have been remitted to it in execution of the said arrangement;

That the Venezuelan Government has never refused to reimburse the company for the requisitions and damages caused by them to the material, and that the impossibility in which it finds itself of making this reimbursement as the result of the penury of the treasury in the course of the civil war obliges it only to pay interest after demand;

Decides that the claim of the company is without foundation.

It recognizes only the right to an indemnity of 10,000 bolivars for damages done to their steamer *Santa Bárbara* during the time when it was requisitioned, and reserves for it the privilege of claiming from the Venezuelan Government, by presenting the necessary proofs, the sums due for the requisitions, with interest corresponding. It equally reserves the right of the Venezuelan Government to claim for the fact of the abandonment of the exploitation.

Consequently, after a short discussion, it is agreed that the claim of the French Company of Venezuelan Railroads shall be submitted to the examination of the third arbitrator.

in the question of rescission and nothing could more clearly arise out of the contract itself than such a question. A claim for damage may be regarded as ulterior to the contract especially where the damage has accrued from the operation of the parties under the contract; not so the question of rescission.

The protocol of February 19, 1902, concerning itself only in the question of damages suffered by Frenchmen in Venezuela, can in no sense be regarded as a claim on the part of France or consent on the part of Venezuela that these restrictive features of a contract are to be abandoned when it affects questions like the one here being considered. Nor does it in any way tend to give the power to rescind were no such restrictive features to be found. It being determined therefore by the umpire that he can not declare or direct rescission or abandonment, but can only settle the question of damages which had been suffered by Frenchmen in Venezuela where he finds responsibility in the respondent Government, it follows that the second basis for the claim of 18,483,000 francs fails, and the award can not be made for such sum.

Neither is the claim of the company considered sound that the contract of April 18, 1896, should be declared void in equity for want of adequate consideration, as being made against the desire of the company, and under irresistible compulsion of circumstances which were availed of by the respondent Government to drive an unconscionable and hard bargain, for the umpire finds a consideration, also an apparent desire on the part of the company to make the contract, and does not find the compulsion of circumstances which is referred to and claimed by the company. The transaction was open, the negotiations lengthy, the time for reflections ample, and the action of the company taken under circumstances which permitted entire freedom of will and of conduct.

Courts are loath to interfere where there is an executed contract, where there are lacking the elements of fraud or mistake, and where it rests in fact upon the mutual assent of parties intelligent, competent, and free to contract. It is also negatively held by the umpire, because the company appropriated the fund paid it in redemption by the Government after a great length of time and opportunity for observation, investigation, and reflection, thus placing itself in a situation where it could not restore the status quo by returning the funds.

It is also held negatively, because there is no offer to restore, and if there were offer to restore, this commission under the protocol had no power to compel its acceptance.

The claimant company was compelled by *force majeure* to desist from its exploitation in 1899. The respondent Government from the same cause was prevented from paying its indebtedness to the claimant company. This was the sole cause of the acts and neglects of the respondent Government. Its first duty was to itself. Its own preservation was paramount. It had revenues only sufficient to that end.

The respondent Government is not chargeable with the loss which came to the company through the confusion and havoc of war, or because there were none to ride and no products to be transported. This was a part of the assumed risks of the company when it entered upon its exploitation. Such possible disordered conditions of a country are all discounted in advance by one who enters it for recreation or business.

There is no question as to the liability of the respondent Government for the natural and consequential damages which resulted to the railroad properties while they were in the use and control of the titular government. There is unquestioned responsibility on the part of the respondent Government for

all the necessary and consequential injuries which resulted to the railroads and its properties when used by either the successful revolutionary or the then contending governmental forces.

OPINION OF THE VENEZUELAN COMMISSIONER

Mr. Albert Reynaud, deputy administrator of the "Compañía Francesa de Ferrocarriles Venezolanos," in a communication which he addressed to his excellency the minister of foreign affairs of France, dated the 21st of January, 1901, introduced before said department the claim which is the object of this opinion, in the following form and terms:

As we had apprehended, during the fifteen months which have just elapsed since we were compelled by the revolutionary events to suspend our exploitation, and our last resources being already exhausted, the tropical temperature and depredations of the inhabitants have almost completely destroyed our railway and our immovables; our bridges have been carried away by the waters; the rails have been broken or twisted by the falling of the trees and the intensity of vegetation; our warehouses and deposits of materials have fallen down or are seriously deteriorated; our rolling stock, deprived of any care, has rusted and rotted.

Of our three steam vessels, one was used as target by the combatants of the two parties and sunk; the second had sustained serious damage whilst at the service of the Government of Maracaibo, and we have just sold it for the twentieth part of what it had cost us; the third and at the same time the most important has remained useless since several months past, and we have not been able to repair it for lack of resources. It must be in deplorable condition, which would require large expense to put it in order.

It would at present be impossible for us to value the extent of the damage we have sustained and still more to estimate the cost of its repairs.

The Venezuelan authorities, whether or not legally constituted, have ruined us by their proceedings during these last years and especially during these last eighteen months.

From a financial point of view, they have compelled us, through threats of grievous cruelty and imprisonment of our agents, to employ only at their service the last resources of our company.

From a commercial and industrial point of view, they have placed us in the impossibility of carrying on our double exploitation of the railway and the steamers by violently taking possession of our material and our personnel.

In fact, said authorities have arbitrarily dispossessed us of our rights and of our property.

We shall not be able to prevent them from retaining what they have taken from us or deteriorated, but we consider it to be conformable to the most vulgar equity that they reimburse to us its market value.

To fix that value we could not make a more moderate and less discussable estimation than the one the Venezuelan authorities themselves have fixed in their Congress of 1891.

By the concession granted us by the Venezuelan Government the latter thought it its duty to assign to us an interest guaranty of 7 per cent on a capital of 300,000 francs per kilometer. The length of our line was 60 kilometers; the estimation of the value of our railway amounted, therefore, according to that calculation, to 18,000,000 francs. That sum Venezuela owes us for the railway.

It also owes us an indemnity for the loss or detention of our vessels. (This indemnity the company has fixed, of late, at the sum of 483,000 francs.)

We again apply, Monsieur le Ministre, to your high and powerful intervention to obtain from the Venezuelan authorities the payment of that sum, reduced to its minimum. We do not think we must insist upon the importance which that restitution has for the French holders of our shares. You know the sad situations through which our company has passed since its creation. We ask, however, that you should allow us to tell you the present moment is, in our judgment, the most opportune to act. The Government of General Castro, according to the latest news, desires, it appears, to reorganize the Venezuelan credit.

The German and American authorities have expressed and continue to express their will to cause their subjects and citizens to be paid what is owed them.

We do not doubt but that the French Government will act in the same manner.

In the foregoing statement the facts are summarized upon which the demand of indemnity against Venezuela rests, as well as the manner in which the amount of that liability with reference to the railway has been appreciated; and regarding the steamers that were at the service of the company the indemnity is based on the primitive cost of said vessels, deducting the sum of 11,100 francs which the company received for the sale of two of said steamers, the *Reliance* and the *Santa Bárbara*.

The representative of the Venezuelan Government, in his reply to the foregoing claim, denies any proving force to the documents presented by the company, as it only consists in a statement of facts which the company itself narrates without any proof of the veracity of its assertions; and said documents, on the other hand, far from being favorable to the company, offer, on the contrary, sufficient merits to support very serious charges against the said enterprise for not having complied with the obligations it contracted and for the abandonment of the railway without any reason that might justify a measure of such a significance, which latter fact renders it responsible for the losses deriving therefrom to the commerce of the regions which the Government intended to benefit by the railway concession in question.

The agent of the Venezuelan Government refers in his reply to the technical report presented by Drs. F. Arroyo-Parejo and Ocanto, which was formulated in the very field and by order of the national executive in December of last year, appreciating that said report shows clearly and scientifically that the larger part of the losses sustained by said company are due to the bad construction of the line in the first place, and then to the abandonment of it, which facts are proved by the official documents produced by the Government and excluding any responsibility on its part; that what he has said of the line must be applied to the steamers the company had at its service, for the losses claimed for that respect are due to causes imputable to the claimant, which abandoned the exploitation without a reason warrantable in law and without taking into consideration the prejudice which by so inconsiderate a step it had to cause to the other contracting party, which up to the present has reserved to itself the action which pertains to it in law to legally claim the same; that regarding the other losses which the company says it sustained on account of facts imputable to armed factions and enemies of the public order raised against the lawful authority of the Government, it is a question determined in accordance with the principles of international law that lawfully constituted Governments which have endeavored by all the means at their disposal to reestablish order and energetically to affirm their authority are not responsible for such prejudice, and in conclusion the representative of the Government of Venezuela argues that the claiming company itself is the cause of the prejudice which it says to have sustained and of those which by the abandonment of the concession it has caused to Venezuela.

The points debated in this claim having been fixed, it pertains to this tribunal to examine the facts that may appear proved and to establish the responsibilities which those facts may originate as sources of obligations reciprocally affecting the parties interested in this issue.

The Congress of the United States of Venezuela, by law of the 3d of August, 1888, gave its approval to the contract concluded in Caracas on the 25th of July, 1837, between the minister of public works and the Duke of Morny, which had for its object the construction of a railway from Mérida to the Lake of Maracaibo, canalizing the rivers Chamas and Escalante, or some other

navigable river. By article 10 of said contract and in accordance with the law on the matter, the Government of Venezuela guaranteed the 7 per cent of the capital that the contractor, his assigns, or successors should issue in bonds, shares, or obligations in representation of the capital of the company.

On the 13th of August, 1888, Gen. Guzmán Blanco, envoy extraordinary and minister plenipotentiary of Venezuela in Paris, concluded with the Duke of Morny an amplification of said contract, and by article 1 of said amplification it was agreed upon that the railway from Mérida to the Lake of Maracaibo would be divided into two sections — the first, starting from the point on the Escalante River which the concessionary would determine and developing in a length of 60 kilometers in the direction of Mérida; and the second section, starting from the terminal point of the first up to the city of Mérida. By article 4 it was agreed upon that on the opening of the first section of 60 kilometers to the exploitation the guaranty provided for would be definitively acquired by that first part of the line; by article 7 it remained established that the Government of the United States of Venezuela guaranteed the 7 per cent of the capital of the company, which capital remained from that moment fixed at 300,000 bolivars per kilometer for the 60 kilometers of the first section and at 350,000 bolivars for each kilometer of the second section.

By a communication which the same Gen. Guzmán Blanco addressed on the 9th of November, 1888, to the minister of public works, this official was notified that the Duke of Morny had on the 28th of September of the same year transferred to the "Compagnie Française de Chemins de Fer Vénézuéliens" the rights which the contract of the 25th of July, 1887, vested in him.

The Congress of Venezuela approved on the 18th of June, 1891, the contract concluded by the minister of public works on the 16th of April, 1891, with Mr. Charles Weber, the representative of the "Compagnie Française de Chemins de Fer Vénézuéliens," modifying that of the 25th of July, 1887, which modification contains the three following articles:

ARTICLE 1. The concession shall remain confined to the first section of sixty kilometers, which will extend from Santa Bárbara to the high road, at a point one kilometer distant from La Vigía, where the line will terminate.

ART. 2. The payment of the guarantee shall be made at the close of each quarter of exploitation in accordance with the primitive contracts. The sum owed to the company shall be calculated at the rate of 7 per cent on the sum fixed in the contract of the 13th of August, 1888, after deducting the net profits realized by the exploitation. These profits will be the net proceeds of the receipts of any kind that the exploitation of the railway may obtain after deducting the general expense of the company and the exploitation expense.

ART. 3. The sums that shall be paid to the company by way of interest guarantee will constitute but advances which the Government of Venezuela has a right to be reimbursed, as follows: When the profits realized by the company in the exploitation of the railway will exceed the 7 per cent on the capital guaranteed, the Government will have one-half of the surplus until the entire reimbursement of its advances; when the Government shall have been reimbursed said advances, it will continue to participate in the profits to which this article refers until completing the 20 per cent thereof.

The company also obtained by said concession exemptions of duties for the importation of all its material, machines, implements, and other things necessary for the construction and exploitation of the railway, and in fee simple a zone of 500 meters of land on each side of the line of the one pertaining to the nation without any indemnification; it was, moreover, granted it that the wood necessary to the company for the construction works of the line might be freely taken in the national woods and that the company would not, at any time, be burdened with national or State taxes. There was also secured to the

company by said contract the exploitation and enjoyment of the revenue of the enterprise during ninety-nine years, at the end of which it was to become with all its appurtenances the property of the nation without any indemnification. In return the company agreed to terminate the work undertaken within a term of two years from the 13th of August, 1888, excepting that a compensation would be given, if necessary, for loss of time occasioned by main force; to transport the mail free of charge, and, for one-half of the tariff price, which would be established, *the employees on commission, the military officers on service and the troops and war ammunitions.*

The "Compagnie Française de Chemins de Fer Vénézuéliens" was constituted in Paris on the 28th of September, 1888, with a share capital of 300,000 francs, the Duke of Morny contributing thereto the railway concession to which the above contracts refer.

The construction of the railway, from the port of Santa Bárbara to the inland having been undertaken early in January, 1889, as appears from a note addressed by the president of the company, under date of the 3d of January, 1880, to Gen. Guzmán Blanco, the works went on with frequent interruptions and serious irregularities, such as the freshet of the Escalante River in January, 1890, which completely inundated all the works of the line, its warehouses, deposits of materials and offices at Santa Bárbara, compelling the company to absolutely suspend the works.

The report presented on that account by Mr. A. Lacasette, chief engineer of the railway, to the ministry of public works, found on pages 126 and 136 of the piece of records No. 1 of the papers which said minister has handed to this commission for its examination, details, in all its extent, the damage caused by the said inundation, and concludes by asking for an extension of one year to comply with the engagement contracted by the company, which extension was granted by the Government.

By the month of March, 1891, according to the report of the inspector of the railway, transmitted by the President of the State of Maracaibo, with a note addressed to the minister of public works, the locomotive arrived at the site called "Los Cañitos," distant 50 kilometers more or less from the Santa Bárbara station, the starting point.

On the 30th of September, 1891, according to a telegram addressed by the same inspector to the ministry of public works, it was communicated that the locomotives had arrived at kilometer 56, but soon after, in the month of October of the same year, according to report subscribed by the chief engineer of the line, Mr. Curau, inserted on page 66 of the piece of records No. 1 bis, a great flood produced by the swells of Cañonegro River made the water fall on the railway line on a width of more than 2 kilometers, and on account of their extreme violence the currents destroyed everything on the way and covered the distance from 49.50 to 51.60 kilometers up to a height of 50 centimeters and more. In said report it is added that the inundation also threatened the Cañonegro station, the one that was established on the highest land and on which many installations had been made. It was impossible to save a train formed by a locomotive and three platforms. This situation forced the company to suspend the exploitation beyond kilometer 48, it only remaining between Santa Bárbara and Los Cañitos.

In a telegram of the 21st of the same month the inspector announces to the minister of public works that the inundation having continued with heavier force, the Cañonegro station had disappeared, as well as the locomotive that was there, the whole space being now converted into a marsh with very powerful current.

The works of reconstruction at 50 to 53 kilometers, which were inundated,

lasted, according to the reports and returns sent by the company to the ministry of public works, until the month of August, 1892, there having arrived at the La Vigia station, on the 28th of July of the same year, a train that inaugurated the traffic between the initial station at Santa Bárbara and the terminal station at kilometer 60.

The company being unable to pay in November, 1892, the coupon of the obligations it had contracted to meet the expense of the establishment of the enterprise, asked for the benefit of the French law of the 4th of May, 1889, and obtained the appointment of a judicial liquidator. At the same time, and having had to enter into new engagements with the Tives-Lille Company and Dyle & Bacalan Works Company (Limited), it was owing said company, according to the balance of the 29th of October, 1892, the sum of 864,482.69 francs. In the impossibility to meet this debt, it asked for an agreement with its creditors, proposing the exchange of the old obligations for an equivalent number of the new ones, to which the distribution of the assets would entitle them, or, in case of the nonacceptance of that proposal, the payment of the 20 per cent of their credits in fifty annuities. Besides, it was proposed that the contractors of the construction, the only creditors of the company besides the bondholders, would be entitled to receive as many new obligations as the amount of their chirographic credit would contain, 382.25 francs. This agreement having been approved, the liabilities of the company were represented, according to the balance of the 31st of December, 1893, in the following manner:

Shares . . . . .		Francs	
			3,000,000.00
Obligations:			
		Francs	
1,811 old ones . . . . .		905,500	
42,757 new ones . . . . .		21,378,500	
		-----	
			22,284,000.00
Sundry debts . . . . .			40,979.31
To-order accounts. . . . .			42,392.15
Guarantee owed by the Venezuelan Government from the 1st of April, 1892, to the 31st of December, 1893 . . . . .			2,205,000.00
Interest due up to the 31st of December, 1893 (obligations) . . . . .			1,781,541.60
			-----
Total . . . . .			29,353,913.12

On the 1st of May, 1893, the official inauguration of the railway from Santa Bárbara to La Vigia, ordered by the Government of Venezuela, took place, and the exploitation service of the whole line, which had not undergone any interruption during the administrative year of 1893, was violently interrupted about the close of the month of April, 1894, by the earthquake which occurred in that region. The extraordinary violence of the seismic phenomenon caused the line to be injured through the fall of large trees, and the superposed works, as bridges and buildings, to be destroyed, and the traffic entirely paralyzed.

It was necessary at any price to remedy without delay this situation, for, if the railway was left in such a condition, the power of vegetation in Venezuela and the action of the tropical rains would speedily entirely destroy it and render any construction very difficult.

The available resources being insufficient, a loan is indispensable.

Consequently, we have at once convened the gentlemen commissaries for the execution of the agreement and obtained from them, as the representatives of the bondholders, the authorization to contract for an effective loan for 300,000 francs, which sum was considered by common accord as the *maximum* for the reestab-

ishment of the exploitation. According to the data furnished by the direction in Venezuela, we therefore propose to create bonds for a nominal value of 500 francs each, bearing interest at the rate of 6 per cent, which bonds shall be redeemed within the maximum term of ten years. (*Rapport du Conseil d'Administration, 1894.*)

The debt contracted by the company to make the repairs occasioned by the earthquake of 1894 did not confine itself to the sum of 300,000 francs, which had been considered as the *maximum*, but ascended to 2,000,000 francs, as appearing from the following paragraphs of the report of the administration council corresponding to the year of 1897:

We shall remind you, gentlemen, of the fact that, on account of the earthquake of 1894 and of numerous inundations which were the consequence thereof, our railway sustained from 1895 to 1897 considerable damage, and we saw ourselves compelled, in order to raise the resources necessary for those repairs, to create privileged bonds bearing interest at the rate of 6 per cent a year, free from taxes and redeemable within ten years at the latest.

The creation and issue of 4,000 of those bonds, which constitute the privileged debt of a nominal value of 2,000,000 francs, have been successively authorized by you.

The balance presented on the 31st of December, 1897, offers for that date the following situation:

<i>Liabilities</i>	<i>Francs</i>
Shares . . . . .	3,000,000.00
Obligations (44,569) . . . . .	22,284,500.00
6 per cent ten-year bonds (4,000) . . . . .	2,000,000.00
Sundry creditors' accounts . . . . .	102,403.09
Interest owed to bondholders on the 31st of December, 1896 . . . . .	6,235,175.00
Total . . . . .	33,622,078.09

On the 18th of April, 1896, between the citizen minister of public works of the United States of Venezuela, sufficiently authorized by the President of the Republic, and with the vote of the Government council, on the one part, and Mr. Charles Weber, representative of the "Compagnie Française de Chemins de Fer Vénézuéliens," according to a power of attorney executed before the notary Dufour and his colleague, of Paris, on the 21st day of March 1898, on the other part, a contract was entered into concerning the payment and redemption of the 7 per cent guaranty, the preliminaries and definitive provisions of which are as follows:

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Contract entered into on the 18th of April, 1896, between the Government of the United States of Venezuela and Mr. Charles Weber, representative of the "Compagnie Française de Chemins de Fer Vénézuéliens," concerning the payment and redemption of the 7 per cent guaranty.

Between the citizen minister of public works of the United States of Venezuela, sufficiently authorized by the citizen President of the Republic, and with the vote of the Government council on the one part, and Mr. Charles Weber, representative of the "Compagnie Française de Chemins de Fer Vénézuéliens," hereinafter called "the company," according to a power of attorney executed before the notary Dufour and his colleague, of Paris, on the 21st of March, 1891, which, duly legalized and translated, is hereto annexed, the following contract has been concluded:

PRELIMINARIES

(a) By a contract of the 25th of July, 1887, entered into between the National Government and the Duke of Morny, and afterwards approved by the National

Congress, on the 30th July, 1888, the nation granted to him the right to build a railway from Mérida to the lake of Maracaibo, the Government guaranteeing the 7 per cent on the capital that the contractor, his assigns or successors, should emit in bonds, shares, or obligations, and which would represent the capital of the company.

(b) On the 13th of August of the same year the minister plenipotentiary of Venezuela in Europe made some reformatations in the above-mentioned contract, among which the one that the total line of the railway remained divided into two sections, namely: the first, starting from a point on the Escalante River, at the discretion of the concessionary, thence to proceed in the direction of Mérida on an extent of 60 kilometers; and the second, starting from the point where the first terminates and proceeding from thence to the city of Mérida. And by this same contract of explanation and amplifications the guaranty of 7 per cent was fixed on a capital of 300,000 bolivars per kilometer of the first section and of 340,000 bolivars per kilometer of the second. This contract was approved by the Federal council on the 30th of November of the same year.

(c) By a contract of the 17th of June, 1891, reforming those of the 25th of July, 1887, and 13th of August, 1888, above cited, the company, as the cessionary of the railway from Mérida to the lake of Maracaibo, stipulated with the National Government: First, that said concession would remain confined to the first section, to which the reformation of the primitive contract refers, according to paragraph b—i.e., 60 kilometers from Santa Bárbara to a point distant 1 kilometer from El Vigia; second, that the payment of the 7 per cent guaranty would be made quarterly on the sum of 18,000,000 bolivars, fixed as the price of that section, according to the contract of the 13th of August, 1888.

	<i>Bolivars</i>
(d) The company claims from the National Government for guaranty due until the 31st of December, 1895 . . . . .	4,725,000.00
And, besides, for damage and other motives, the following items:	
Insufficiency of exploitation, according to returns and notes . . . . .	396,921.75
Damage sustained on account of the forcible conscription of the laborers of the company . . . . .	525,509.57
Requisitions according to voucher . . . . .	96,320.00
Damage and prejudices through nonpayment of the 7 per cent guaranty, which occasioned an emission of 2,616 "obligations," supplementary, of 500 francs each . . . . .	1,308,000.00
which forms a total of . . . . .	7,051,751.32

(Seven million fifty-one thousand seven hundred and fifty-one bolivars and thirty-two centimes.)

The Government has rejected the claim of the guaranty during the time elapsed from the 1st of April, 1892 (at which date the line could have been opened to traffic, if it had not been for the forcible conscription of the laborers), to the 1st of May, 1893, the date of the official inauguration; and it has likewise rejected the claim of the sum of two million three hundred and twenty-six thousand seven hundred and fifty-one bolivars and thirty-two centimes (2,326,751.32 bolivars), to which the items of insufficiency, damage, etc., above mentioned refer.

The company, although sustaining in principle the equity of the claims it has formulated, is willing to make important concessions with a view to arriving at an arrangement, and, after long discussions regarding the accounts presented, the Government and the company, by way of a compromise, have agreed upon the following:

ART. 1. The company reduces to one million nine hundred and fifty thousand bolivars (1,950,000 bolivars) the total amount of its claims for the 7 per cent guaranty, liquidated up to the 31st of December, 1895, and for any other cause to which it may be entitled.

ART. 2. For the redemption of the obligation of the Government to continue to pay the same 7 per cent guaranty on eighteen million bolivars, guaranteed capital, for the remainder of the ninety-nine years, terms of the contracts referred

to, the company agrees to receive two million five hundred thousand bolivars (2,500,000 bolivars), articles 2, 3 and 4 of the above-mentioned contract of the 17th of June, 1891, remaining in virtue thereof without any effect.

ART. 3. The payment of the one and the other sum is made by the Government in this act delivering to the representative of the company an order on the direction of the Disconto Gesellschaft of Berlin for the sum of four million four hundred and fifty thousand bolivars in par bonds of the Venezuelan loan of 1896 with 6 per cent yearly interest and 1 per cent of redemption, which order shall be provided, besides, with the approval of the representative of the Disconto in Caracas.

ART. 4. The representative of the company declares the nation, therefore, free from all responsibility, as well on account of the 7 per cent guaranty already due as on account of the obligation to pay that same sum in future, and will repeat this declaration on the receipt he will give the direction of the Disconto Gesellschaft.

ART. 5. The company binds itself to have, within the term of six months from the date hereof, *any imperfection undergone by the railway line on account of the change of the course of the Chamas River repaired and to keep the line in working order in accordance with the obligations contracted in the contracts above referred to, subject to the penalties imposed by the laws on the matter.*

ART. 6. In all that is not contrary to the provisions of this agreement the rights and obligations acquired by the company in virtue of the preceding contracts herein referred to remain in their perfect force and vigor.

Done in duplicate to one same effect in Caracas, this eighteenth day of April, one thousand eight hundred and ninety-six.

(S gned)

C. BRUZUAL SERRA,  
*The Minister of Public Works*

CH. WEBER,

*The Representative of the "Compagnie Française de Chemins de Fer Vénézuéliens."*

By article 5 of the above-inserted convention the company was bound to have, within a term of six months from the date of the compromise, any imperfections which the railway line might have undergone on account of the change of the course of the Chamas River repaired and *to keep the line in working order in accordance with the obligations contracted in the contracts referred to and subject to the penalties imposed by the laws on the matter.*

The company met the expenses of the interest service and of the redemption of the loan contracted by it to meet the expense of the repairs of the line, occasioned by the earthquake of 1894, and numerous inundations which followed in the years 1895 to 1897, with the proceeds of the negotiation of the 4,450,000 bolivars delivered by the Government of Venezuela in par bonds of the Venezuelan loan of the Disconto Gesellschaft of 1896.

The company collected the amount of the interest and redemption of the bonds of the loan, corresponding to the half years due on the 31st of December, 1896, and 30th of June, 1897, and having kept in its possession, when negotiating the bonds in 1898, the interest coupons due on the 30th of June of that year, amounting to about 79,000 francs, it received from the Disconto Gesellschaft on the 15th of January, 1899, a payment on account of 28,228.94 francs, there remaining, therefore, on the said date as a balance of interest in favor of the company a sum of about 50,000 francs.

These data appear from the two reports presented by the administration council to the ordinary general meeting in its sittings of the 30th of June, 1898, and 12th of March, 1900. From the first of them the following paragraphs are copied:

On account of the earthquake of 1894 and of numerous inundations which were the consequence thereof in 1895 to 1897, our railway having sustained considerable damage, we were compelled, in order to raise the resources necessary for their repairs, to create privileged bonds bearing interest at the rate of 6 per cent a year, free from taxes and redeemable within ten years at the latest.

The creation and issue of 4,000 of those bonds, which constitute the privileged debt of a nominal value of 2,000,000 francs, of which we have just spoken to you, was successively authorized by you.

We propose you, therefore, to give in payment of this privileged debt, to which they are already appropriated, the bonds of the Venezuelan 5 per cent loan, 1896, which we have received from the Venezuelan Government, in redemption of the interest guarantees it has promised us by our concession act, which bonds figure in the balance you have just approved as stock of the company, for a value of 3,152,000 francs.

As we told you at the beginning, we have a buyer of these bonds of our stock, which bonds are not quoted and the disposal of which is almost impossible for a sum that might enable us to redeem and reimburse the 4,000 bonds that are outstanding and to obtain besides the constitution of an administration fund of 200,000 francs. In view of the fact that the 3 per cent revenue of Venezuela is quoted in London at from 31 to 33 per cent, you will see, gentlemen, as the controllers of the compromise and as your administration council, that the company will obtain by this combination a realization under unexpected conditions of these bonds of the 5 per cent Venezuelan loan of 1896, since these realizations will take place at 70 per cent.

And from the second report, dated the 12th of March, 1900:

The funds that had remained available to the company after the reimbursement of the ten years' bonds would have constituted for it, *in normal times*, a sufficient administration fund, but the revolutionary events which almost uninterruptedly have occurred up to the present have rapidly consumed them.

These resources having been exhausted and in view of the continuation of the revolution the commissaries of the compromise, on the 16th of August, 1899, authorized the council to borrow up to the amount of 100,000 francs, the sums it would require to meet the situation, *whether there was a possibility to proceed with the exploitation or the necessity of suspending it*.

The coupons of the 5 per cent Venezuelan loan of 1896, due on the 1st of July, 1896, representing about 79,000 francs, were given as security for an advance, which amounted to 58,215.95 francs.

This advance was reduced 28,228.94 francs on the 15th of January last through the part payment made to us on that date on the coupons given as security.

In short, the debt we have in favor of our lender is this day of 29,987.01 francs.

He has in his possession a pledge of about 50,000 francs, nominal value, represented by the receivable balance of the aforesaid coupons.

From the narrative above made, from all the modifications made in the primitive contract which had for its object the construction of the railway from Mérida to San Carlos, from the different cases of main force which at different times suspended the construction works or largely destroyed them, from the agreements concluded between the contracting parties with a view to avoiding the sometimes insurmountable obstacles which nature opposed to the stability of the enterprise, and, finally, from the compromise concluded on the 18th of April, 1896, between the Government of Venezuela and the representative of the "Compagnie Française de Chemins de Fer Vénézuéliens," the following facts appear sufficiently proved:

On the 1st of July, 1898, which date it is convenient to establish for the due separation of the time to which the claim presented refers, all the engagements contracted by the Government of Venezuela with respect to the company, as the concessionary of the contract concluded with the Duke of Morny in August, 1888, and in virtue of the subsequent convention directly concluded between the Government of Venezuela and the representative of the company, had been exactly complied with. The obligations contracted by said Government by the contracts of the 13th of August, 1888, of the 18th of June, 1891, and the 18th of April, 1896, were: To give in fee simple to the contractor 500 meters

of national lands on each side of the line on the whole length thereof; to allow it to take in the national woods all the timber required by the enterprise for the construction of the works of the line; to permit the introduction, free from duties, of the machines, materials, implements, and other utensils necessary for the construction of the railway; not to impose upon the enterprise at any time any national or state contributions; to grant extensions of time for the conclusion of the work in cases of main force that might stop the works of construction, and, finally, to deliver to the company 4,450,000 bolivars in par bonds of the Venezuelan loan of the Disconto Gesellschaft, 1896, in payment of the sum of 1,950,000 bolivars, to which it reduced the total amount of all its claims for the 7 per cent guarantee, liquidated up to the 31st of December, 1895, and for *any other* cause to which it might be entitled, and, besides, for the redemption of the obligation of continuing to pay the same 7 per cent guaranty on 18,000,000 bolivars, guaranteed capital, for the rest of ninety-nine years, for which respect the company agreed to receive 2,500,000 bolivars. All the aforesaid obligations were in due time complied with, as appearing from the voluminous records relating thereto, and as is acknowledged by the company itself. The Government of Venezuela appears to be the debtor in the month of June, 1899, only of the sum of 50,000 francs for balance of interest on the bonds of the loan of 50,000,000 bolivars, which the company received, which interest corresponded to the first six months of 1898, and that debt is not one of the Venezuelan Government as a contractor with the "Compagnie Française de Chemins de Fer Vénézuéliens," nor said Government could pay it separately and directly to the company, as the latter has pretended, but it formed a part of an obligation contracted by the Republic with the Disconto Gesellschaft, of Berlin, with which the loan was contracted for and which is called by the same contract to receive the funds destined to the gradual redemption and the payment of interest.

Article 3 of the contract concluded on the 18th of April, 1896, with the representative of the French company explicitly says:

The payment of the one and the other sum is made by the Government in this act, delivering to the representative of the company an order on the direction of the Disconto Gesellschaft of Berlin for the sum of 4,450,000 bolivars, in par bonds, etc., which order shall be provided, besides, with the approval of the representative of the Disconto in Caracas.

Payment means cancellation, extinction of a debt, and, therefore, between the Government of Venezuela and the French company, as parties to the contract which had for its object the construction and exploitation of the railway from Santa Bárbara to La Vigía, any credit or claim that on account of the guaranty or for any other cause was possessed by the company against the Government remained legally extinguished in virtue of the provisions of articles 1, 2, and 3 of said agreement of the 18th of April, 1896. Any rights pertaining to the company as holder of coupons of interest, due and unpaid, of the loan of 50,000,000 bolivars of 1896 are a subject entirely strange to the juridical relations established between the Government of Venezuela and the company on account of the railway contract and completely alien to the facts connected with the compliance with the obligations derived from that contract.

As a proof of this inference, see Article VI of the Venezuelan-German protocol signed in Washington on the 13th of February, 1903, which runs as follows:

The Government of Venezuela undertakes to make a new satisfactory arrangement to settle simultaneously the 5 per cent Venezuelan loan of 1896, which is chiefly in German hands and the entire exterior debt. In this arrangement the state revenues to be employed for the service of the debt are to be determined without prejudice to the obligations already existing.

For the more precise appreciation of the grounds on which it is pretended to base the present claim, it is to the purpose to examine the steps taken by the direction of the "Compagnie Française de Chemins de Fer Vénézuéliens" near the ministry of foreign affairs of France posteriorly to the arrangement to the 18th of April, 1896, steps that moved the chief of said ministry to exercise his diplomatic action through the consul of France in Caracas based on the data furnished by the company.

In a letter addressed by the administrator of the company to the minister of foreign affairs in Paris on the 29th of November, 1898, said administrator asked for the intervention of the French Government to secure for his countrymen in the employ of the company in Venezuela the protection of their persons and property and compel the Government of Venezuela to comply with its engagements to its creditors, adding in said letter that the administration was informed by the Disconto Gesellschaft, of Berlin, that the Imperial Government would simultaneously interfere to the same purpose, and in support of his request he recalled the letters which had been addressed to the ministry dated the 2d and the 25th of June, 1898. It was in virtue of that request that the ministry of foreign affairs addressed on the 7th of December, 1898, to Mr. Quiévreux, in charge of the archives of the legation of France, the official note inserted in these records under No. 8, in which the following instructions are communicated to him:

You are not unaware that the "Compagnie Française de Chemins de Fer Vénézuéliens" was placed, in April, 1896, by the government of Caracas, under the necessity of accepting for the redemption of the guaranties that had been given in the concession of the enterprise, certain bonds proceeding from an especial loan of 50,000,000 bolivars, negotiated in Berlin. The Disconto Gesellschaft, in charge of the operation, distributed those redeemable bonds to the different European railway companies and our fellow-countrymen for all payment of a debt already due, of more than 7,000,000 francs, and for the redemption of 90 annuities of 1,260,000 francs had to content themselves with a net sum of 3,200,000 francs, represented by bonds of said loan.

The moneys proceeding from the payment of interest and from the sinking service have constituted for two years the only resources with which the French company has been able to continue its exploitation. But the deliveries have ceased this year, or, at least, the Disconto Gesellschaft has not been able up to the present to meet only one of the monthly payments of 1898.

In view of the suspension of payments of this 5 per cent loan of 1896, our countrymen declare that they find themselves under the necessity of abandoning their enterprise, which will lead to the definitive loss of the French capital which has been invested therein, and the amount of those capitals, I am assured, is not less than 33,500,000 francs.

In order to prevent this eventuality, that the company already considers as imminent, it is necessary that the Venezuelan Government determines to immediately pay a sum of 210,000 francs, including:

	<i>Francs</i>
For interest due . . . . .	160,000
For bonds redeemed . . . . .	50,000

If the information given me corresponds with what yourself may know concerning the financial situation of the French company, and, in case you know that, under the pressure of the legation of Germany, the ministers of Venezuela may be compelled to comply within a short delay with all or part of the obligations to the European creditors, you must procure that the rights of our fellow-countrymen are taken into equitable consideration.

For the date of the above-inserted note, the 7th of December, 1898, the French company had alienated the 4,450,000 francs in bonds of the loan of 1896 and only had an interest of about 79,000 francs in coupons due on the

1st of July, 1898; so that it induced the ministry of foreign affairs of France, by its erroneous indications, to ask from the Government of Venezuela the immediate payment of 210,000 francs as owed for redemption and interest of bonds which no longer pertained to it, affirming, however, that that redemption and that interest represented for the company a vital necessity and that without their payment it would find itself in the imperious case of abandoning its enterprise.

It thus appears from the resolution passed by the general meeting of shareholders held on the 30th of June, 1888, by which said meeting, approving the proposal of the administration council and of the committee of commissioners of the obligations, authorized said council:

1. To deliver on the 1st of July, 1898, all the bonds of the 5 per cent Venezuelan Loan of 1896 that the company had in deposit with the Disconto of Berlin, upon:

(A) The delivery of 3,619 ten-years' privileged 6 per cent bonds of the company.

(B) A cash balance of 390,500 francs.

2. To invite to the reimbursement, on the 15th of June, 1898, at 500 francs par, of the 381 privileged 6 per cent bonds, the numbers of which are indicated, and to separate, in order to meet this reimbursement, the sum of 190,500 francs from the 390,500 francs received as said in article 1.

The balance of 200,000 francs was to serve as working fund.

Besides, as already shown, the 79,000 francs, more or less, left in favor of the company for interest of the coupons due up to the date of the negotiation of the bonds of the loan remained represented in the sum of 50,000 francs, more or less, in January, 1899, for a part payment made by the Disconto of 28,228.94 francs and that nominal value of the coupons was utilized by the company in obtaining a loan and leaving them as security for the sum of 30,000 francs, more or less.

The argument that the company has adduced against the Government of Venezuela by making the existence of the company depend on the opportune payment of the redemption and interest of the bonds of the loan is inconsistent, for it is a fact that it considered convenient to its interest to negotiate those bonds when it thought it opportune so to do, availing itself of an offer of 70 per cent, which it considered highly advantageous.

Regarding the imposition which it is adduced the Government of Venezuela exercises against the company, compelling it to accept the 4,450,000 francs in bonds of the loan in payment of a debt of 7,000,000 francs already due, and for the redemption of ninety annuities of 1,260,000 francs each, while it can not truly be maintained that the compromise between the Government of Venezuela and the representative of the company took place in that manner, as it was the result of the free and spontaneous will of the two contracting parties, circumstances may certainly be pointed out, which show that the sum paid in bonds by the Government of Venezuela and which gave the company the opportunity of receiving in cash the sum of 2,508,000 francs represents, in view of the occasion on which the arrangement was made, the only possibility the company could obtain to find itself in a position to undertake and carry out the works of repairs of the line, which it indispensably required to put it in working order on account of the damage caused by the earthquake of 1894, and of the subsequent inundations until 1897.

The Government of Venezuela had contracted the obligation of guaranteeing the company the 7 per cent on the capital of the enterprise during ninety-nine years, taking as a basis for the computation of the capital the sum of 300,000 francs per kilometer on the length of 60 kilometers — i.e., 18,000,000 francs —

and also taking as a basis to fix the sum corresponding to the 7 per cent the proceeds of the enterprise in its exploitation, deducting from the income the general administration expense and the exploitation expense. The very nature of this engagement shows that the company was to constitute itself with a capital of at least 18,000,000 francs, at which the cost of the construction of the railway was estimated, and that it was to contribute, out of its own resources, all the sums indispensable for the completion of the work and the repairs indispensable for keeping it in constant exploitation. The articles of association of the company and documents thereto annexed show that the capital with which it constituted itself was only 3,000,000 francs; that it immediately created bonds to raise resources, which amounted to more than 18,000,000 francs, bearing interest at the rate of 6 per cent, and that from the year 1892 the company, being unable to pay that interest, had to ask for and obtain the appointment of a judicial liquidator, and the following year, 1893, asked for the conclusion of a concord with its creditors.

The inauguration of the railway took place in March, 1894, and in the same year, in the month of November, there occurred the earthquake that destroyed the line and caused the suspension of the exploitation, and thereupon other great inundations took place until the year 1897.

These disastrous accidents found the company in a state of insolvency, without possibility to make use of any credit, bound as it was by a concord with its creditors and without any other basis to raise funds to undertake the works of reconstruction than the guaranty promised by the Government of Venezuela that could not be rendered effective until the exploitation of the railway had been perfectly assured, in permanent conditions by the firmness and solidity of the railway line on its whole length.

The conclusion of the agreement with the company, which put an end to the guaranty, took place on the 18th April, 1896, and at that time the suspension of the traffic of the railway subsisted on account of the works of repairs which the company had to undertake after the earthquake of 1894, and that continued until 1897. Still, in the month of November, 1896, the national executive determined to defer to a request presented by Mr. J. Brun, as director of the railway, having for its object to ask for the extension of the time fixed by article 5 of the contract of the 18th of April of that same year, in order to have repaired within a term of six months the damage that the line had sustained through the change of the course of the Chamas River, and the president of the Republic was pleased to defer to that request by granting an extension of three months, from the 15th of October above referred to.

The precarious condition of the works of repairs and the continual dangers to which the line was exposed by the deviation of the Chamas River, are technically shown in the report addressed by the inspector of the line, Mr. Leonidas Vargas, in February, 1897, to the ministry of public works. From said report are taken the following paragraphs:

The principal station, Santa Bárbara, is 14 meters on the level of the sea and 5 meters on the low waters of the Escalante River, which in its freshets of 1890 ascended 3.50 meters over its level, overflowing in all its length and inundating the farms on its banks.

The terminal station at kilometer 60, "La Vigía," is 128 meters above the sea level on a high plain having a 2 per cent grade as far as kilometer 55, where the railway crosses the creek "Bobuqui," then comes the creek "La Arenosa," and on the distance to 46 kilometer there are found "Cañonegro" and "Los Cañitos."

In the year 1889, in December, the Chamas River had a large freshet by which corpulent trees were dragged along that were detained near "La Vigía," obstructing its natural bed with heaps of dirt, for which reason the current broke the

banks that sloped "El Vigia" and inundated all the woods existing between kilometers 52 and 41 of the line from Santa Bárbara to "La Vigia."

In 1890 the work of repairs began. Every one did his duty, but according as the river went on with its freshets it went on destroying all that man opposed to its caprices, always led by the unevenness of the ground, which presented a 2 per cent grade, and the waters invaded the woods and inundated a portion of the line.

Then comes the earthquake, the trepidations of which caused many a damage on the cordilleras of the Andes and adjoining plains, producing a larger unevenness in the woods lying between La Culebra and Caño del Padre, through which the railway passes, leaving rails in the form of Nos. 3 and 5, and of the letter S, curves straight and straight curves; springs of dark mud having a nauseous odor in the drains and culverts, flow 20 and 25 centimeters wide and incalculably deep, through which the invading waters of the Chamas entered, excavating the embankments of the rails and separating from the ground the sleepers that remained adhered to the rails: these were in the form of a hammock swinging when the rolling stock passed, moved by force of arms, that the mercantile intercourse might not stop.

From the year 1894 up to the present the French company has made strenuous efforts to restore the line to its normal condition. To that purpose they had built a siding from 43 to 46 kilometers, where the Chamas forms a drain consisting of two curves, through mud pits form 150 to 200 meters wide on each side. In November, when this siding was completed and tried, another freshet of the Chamas took place, stronger than the preceding ones, and inundated the line, dragging along an alluvial sediment that has stopped up the 70 meters' light of the "Los Cañitos" bridge, and the waters have spread on the banks and left the neighboring villages in a flood three and four feet deep and the rails with 20 or 40 centimeters of water over them. This I saw in my last visit to the line.

Now the company again undertakes the reconstruction, according to a document I have before me, and also undertakes to carry the Chamas to its former bed, *the only remedy which, in my judgment, can save the line of the railway, for else all the ballast that the Cordilleras of the Andes may give will not be sufficient to resist the violence of 60 meters in a minute that the Chamas possesses in the currents of the La Libertad straight line, from 43 to 46 kilometers, as it would be dragged away according as it would be put in place.*

The situation of the company regarding its repair works and the reopening of the railway traffic in February, 1897, after the expiration of the extension granted by the national Government by its resolution of the 15th October, 1896, is shown by the following letter of the director of the exploitation:

*Line from San Carlos to Mérida — Direction of the Exploitation*

L. R., No 329.] COMPAGNIE FRANÇAISE DE CHEMINS DE FER VÉNÉZUÉLIENS,  
Santa Bárbara, February 26, 1897.

CITIZEN MINISTER OF PUBLIC WORKS:

We have the honor to inform you that communications are reestablished and that the trains and locomotives of our company are regularly and without transfer running between Santa Bárbara and El Vigia *from this date.*

BREYSSLOU.  
*For the Director.*

During the administrative year of 1897, and the first six months of 1898, the railway company made use in its relations with the national Government of the exemptions granted it by the concession as regards the importation of materials as appearing from the records 15 and 16 of the archives of the ministry of public works. The direction of the exploitation omitted in the year 1897 to send to said ministry the statistical tables which it was its duty to periodically send to it, conformably to article 99 of the regulations on railways. The agency of the French company at Maracaibo said to the ministry of public works, in a communication dated the 17th of May, 1897, that in virtue of instructions communicated to him from Santa Bárbara del Zulia by Mr. Julio Brun, director

of the exploitation, the company in Paris had since long ago taken charge of the opportune remission of said data to the ministry.

From the tables sent to the ministry of public works, corresponding to the months from January to November, 1898, forming the records No. 17, it appears that the exploitation in said months left the company an unfavorable balance amounting to the sum of 184,418.13 francs.

During the period running from the 1st of January to the 20th of May, 1899, of direct and regular exploitation, the company could by dint of economies and in full crop realize a favorable balance of 30,000 francs, the receipts amounting to 172,593.01 francs and the expenses to 141,883.28 francs. From the 20th of May to the 12th of October, at which date the actual suspension of the exploitation took place, owing to the nonexistence of regular traffic, the receipts rapidly decreased and even ceased entirely, while the expense did not undergo any reduction. The deficit of that period amounted to about 60,000 francs, the receipts amounting to 83,153.33 francs and the expense 141,869.46 francs, and that deficit consuming the preceding favorable balance and the remainder of the resources of the company.

In the report of the administration council presented to the shareholders on the 12th of March, 1900, from which the foregoing data are taken, it is said that the Government of Venezuela was owing the company on the 31st of December, 1898, a sum of 174,097.20 francs for expense of transportations, regularly ordered by its official mandatories, and that on the 31st of December, 1899, the same Government was owing the sum of 203,529.70 francs.

The balance contained in the above-mentioned report, corresponding to the 31st of December, 1899, gives the following indication of the assets and liabilities of the company:

<i>Assets</i>	<i>Francs</i>	<i>Liabilities</i>	<i>Francs</i>
First establishment . . . .	16,352,175.70	Shares . . . . .	3,000,000.00
Deposit of stores in Venezuela	84,757.98	<i>Francs</i>	
Money in safe and in banks	1,827.35	Bonds,	
<i>Francs</i>		44,569,	
Debtors:		of 500	
Sundries	81,443.34	francs	22,284,500.00
Government of		Difference	
Venezuela	203,529.70	between	
		the nomi-	
	284,973.04	nal value	
Profit and		and the	
loss . . . .	1,010,417.59	proceeds	
Interest		realized	7,649,465.50
owed			13,635,034.50
bondhol-		Sundry creditors . . . .	99,117.16
ders on		Bondholders' interest on	
31st Decem-		the 31st December, 1899	
ber, 1889 .	8,439,083.35	(article 2 of concord) .	8,439,083.35
	9,449,500.94		
Total . . . . .	26,173,235.01	Total . . . . .	26,173,235.01

The foregoing indication throws light enough to make the financial situation known in which the "Compagnie Française de Chemins de Fer Vénézuéliens"

found itself on the 12th of October, 1899, at which date it abandoned its exploitation for lack of resources to continue to meet the most indispensable expense, which in proper commercial terms is called state of bankruptcy.

With assets represented by investments or dead capital of 16,436,933.68 francs, 1,827.35 francs in cash, and 284,973.04 francs in credits receivable, and liabilities of 14,734,151.60 francs in bonds, and 8,439,083.36 francs in interest, subject to a concord and without any credit, the company could not but abandon, as it did, the exploitation of the enterprise for lack of resources.

Such is the situation of every merchant who, being in want of the most indispensable means to continue the movement of his business, is constrained to suspend it and call his creditors to the liquidation and distribution of their credits.

The "Compagnie Française de Chemins de Fer Vénézuéliens" did not act in this way, but, protected by a concord which favored both its interest and that of its creditors, preferred to the liquidation and distribution of its assets declaring the Government of Venezuela responsible for the bad condition of its finance, for the lack of resources to continue the traffic, for the paralyzation of this on account of revolutionary movements, of the use of its steamers, which was the origin of the only important credit contained in its assets and the cause, through default of payment, as it pretends, of the ruin of its concerns.

The charges formulated by the company against the Government of Venezuela, and as appearing from the reports of the 12th of March, 1900, and the 30th of the same month, 1901, and from its communications to the ministry of foreign affairs of France, are summarized in the paragraphs of a communication addressed to the minister of foreign affairs by the president of the administration council on the 30th of March, 1901, running as follows:

MONSIEUR LE MINISTRE: We have just been officially informed, both through Mr. Quiévreux, consul of France in Caracas, and the "Compagnie Française de Cables Télégraphiques," that the minister of public works of Venezuela intends to have an inventory of our goods made to give the enjoyment thereof to an Italian.

We have the honor to transcribe to you, hereinafter, the communication such as it was addressed to us:

"PARIS, March 18, 1891.

"COMPAGNIE FRANÇAISE DE CHEMINS DE FER VÉNÉZUÉLIENS,  
15 Avenue Martignon, Paris.

"GENTLEMEN: As a complement of our telephonic communication of Friday last, we have the honor to convey to you herein the copy of a telegram we have received from Mr. Quiévreux, chargé d'affaires de France in Caracas.

"Kindly inform the 'Compagnie Française des Chemins de Fer Vénézuéliens' that minister of public works, considering that it abandons its Santa Bárbara line, has just appointed a commission in charge of proceeding to an inventory, this with a purpose to give this line to an Italian named Salvatore Botaro.

"Kindly accept, gentlemen, the assurance of our distinguished consideration.

"COMPAGNIE DE CABLES TÉLÉGRAPHIQUES."  
(Signed) — —.

This decision of the Venezuelan minister would constitute an actual and definitive spoliation of the rights and goods of our fellow countrymen, share and bondholders.

That ministry of Venezuela pretends to justify its decision by saying that we abandon our line. It does not even do us the honor of announcing its project to us, as it did not do us the honor of acknowledging the receipt of our claims and of the reasons that compelled us to suspend our exploitation in October, 1889.

Those reasons, Monsieur le Ministre, we have communicated to you and were numerous and important. One of them would have been sufficient to justify

our suspension. Our finance had been exhausted only to satisfy the exactions of the agents of Venezuela who did not cease to seize our steamers, trains, material, personnel, and who even in the moments of calm in the revolutionary disturbances opposed our transporting merchandise for which we were organized.

If we had been in due time reimbursed by the Venezuelan authorities the expense and disbursements of all kinds we had to make for them, we would have been able to continue, reorganize, and recommence our exploitation.

But nothing of that has happened.

We have never been honored with a proposal or even the least communication.

Now, only because we are French, because no diplomatic relations exist between Venezuela and France, and because, according to the idea spread over all the country, *everything can be done to the French without having anything to fear*, it is finally desired to rob us of what remains of our property, violating the seals with which we have provided it in the presence and with the assistance of the Venezuelan authorities and our consular agent.

The records, certainly too voluminous, that our company possesses in the ministry of foreign affairs, teem with official and unofficial evidence of the vexations suffered by our fellow countrymen, either agents or not of our French company, and even by our national flag. It would, rigorously, be sufficient for us to respectfully remind you, Monsieur le Ministre, of the fact that Mr. Brun, a French engineer, *was murdered* in May, 1898, in his post as director, in our directive house, at a window over which the French flag was floating, by a Venezuelan soldier, who obeyed the orders of the Venezuelan general, Eleazar Montiel. The flag was pulled down and dragged along in the mud, etc.

Through a prudence which we have thought would be appreciated we have avoided to revive these sad incidents.

Thenceforth, in 1898 and 1899, several of our service employees have been arrested, or threatened to be arrested, by generals and even by the brother of the late President of the Republic, Mr. Andrade, the president of the State of Zulia. Our steamers have been seized, deteriorated, and destroyed, of which a proof is offered by our steamer *San Carlos y Mérida*, which, anchored in the harbor of Maracaibo, has served as target for the marksmen of both parties and finally was sunk by their bullets.

We request you, Monsieur le Ministre, to excuse our insistence in asking for your intervention.

The question, in effect, is the interest the importance of which is considerable for our fellow countrymen, not only from the particular point of view of the millions which the bondholders of our company represent, but from the general point of view of the moral and commercial influence that France possessed in Venezuela and which it is about to lose forever.

*Venezuela is a rich country.* It would suffice for it to become a very prosperous country, that its interior organization should be regenerated.

Monsieur le Ministre, permit that we finally appeal to the protection of France in favor of the French interests we represent, that we renew to you the claims formulated in our letter of the 17th of January, 1901, and that we protest with all our force against the new abuse that seems to threaten us.

Kindly accept, Monsieur le Ministre, the assurance of our high consideration.

E. REYNAUD,  
*The President.*

The integral insertion of the foregoing note will facilitate the chronological examination of the facts therein mentioned, abstaining in this examination, as becomes our duty of an impartial judge, from all appreciation that is not entirely conformable to truth, that does not appear proved in the voluminous records to which the aforesaid note refers, that is not inspired with the principle of justice and absolute equity upon which the arbitrator must base his decisions.

In this examination of the evidence presented by the very claiming party, consisting in the declarations of the employees of the company themselves, the first place pertains, by order of dates, to the accident of the killing of Mr.

Brun, a French engineer, which took place on the 15th of July, 1898, in order to ascertain whether it is true, as affirmed by the president of the company, that Mr. Brun was murdered in his post as director in his own house, at a window over which the French flag was floating, by a Venezuelan soldier, who obeyed the order of the Venezuelan general, Eleazar Montiel, and pulled down and dragged the flag along in the mud, etc.

On the 1st of May, 1898, General Eleazar Montiel, late governor of the "Colon" territory, proceeding from Maracaibo on the steamer *Progreso*, landed with troops of the Government at Santa Bárbara. The said steamer went down the river Escalante, carrying 120 conscripts and the authorities of Santa Bárbara. The following day the steamer *Santa Bárbara* arrived, bringing on board a guard of 12 soldiers of the Government. On Wednesday, the 3d of May, at midnight 150 insurgents, commanded by a General Figuera, took possession of the steamer *Santa Bárbara* after short, but severe fighting, in which 5 soldiers of the Government and the boatswain of the steamer were wounded. During the 4th, 5th, 6th, and 7th of May the revolutionaries, masters of the territory, cut the telegraph and made the steamer *Santa Bárbara* set out for Santa Cruz del Zuba, a village situated up the Escalante River, with some of their men, scattering their partisans in guerrillas along the rivers to wait for the arrival of the troops of the Government. They had taken possession of 6 empty wagons and formed a barricade on the landing pier. On Sunday, the 8th of May, at 6.30 in the morning, a lively musket firing was heard at some distance from Santa Bárbara, while the troops of the Government penetrated by the bottom of the village, and a lively musket firing broke out in the streets.

Now comes the textual part of the report of Mr. Peysselon, chief agent of the company at Santa Bárbara.

Notwithstanding that the French flag was hoisted on all the windows and angles of the building of the direction, this building was not respected. Five bullets of a precision arm were directed to the windows only, and while Mr. Brun was closing the shutters of one of them he was very seriously wounded in his right hand.

Without hesitation and without a deliberated purpose we can say that the bullet which so unfortunately wounded Mr. Brun proceeded from one of the arms of the soldiers of the Government. The guerrilla which executed this sad deed was commanded by Eleazar Montiel, which affirmation I am in a position to make, because when I went to look for a physician, almost immediately after the misfortune, the first and only known person I saw was Montiel. When I went out the second time, I found his lieutenants, Beliais and José Acosta, with him. To make the first cure of Mr. Brun, it was necessary to wait a moment for the arrival of the physicians. Mr. Brun sustained then a very painful and long operation and the doctor did not conceal from us that his state was a serious one.

Mr. Peysselon completes his statement in the following terms:

Steps were taken immediately near the generals and the legal authorities to obtain the transportation of Mr. Brun to Maracaibo on the steamer *Progreso*. These steps had no result.

At 2 o'clock in the afternoon the troops were masters of *Santa Bárbara*. On Monday morning Generals Eleazar Montiel and Zuleta set out toward Santa Cruz with 100 men to retake from the insurgents our steamer *Santa Bárbara*. Several forces took part with them in the expedition of Tuesday. Our steamer, which the revolutionaries had led going up the Escalante to beyond Santa Cruz, amidst numerous risks which that waterway, unnavigable in that part, offered, was recovered on Wednesday by the troops of the Government and brought back to Santa Bárbara, towed by barks, as the revolutionaries had taken away the bearings and cushions of the axle in order to immobilize her.

By order of the legal authorities our shop immediately made the necessary pieces and within a few days put the steamer in navigating order.

On Thursday morning at 10 o'clock our director, Mr. Brun, who was a little

better, was embarked on the *Progreso*, bound for Maracaibo, and died on board at 8.45 p.m. on account of his wound having gangrened.

Such was the information which the agent Peysselon transmitted to his company while the events above narrated took place, affirming, without hesitation and without a deliberated purpose, that the bullet which wounded Mr. Brun had been intentionally directed by one of the soldiers of the Government, under the orders of Gen. Eleazar Montiel.

Let us now see which was the declaration made by the same Mr. Peysselon before the consul of France at Maracaibo on the 19th of May, 1898, regarding the events of the 8th of May. It is as follows:

On Sunday, the 8th, the legal troops carried on the steamer *Progreso* arrived at 12.30 at the village. Under these circumstances we must foresee a battle in the streets. This foresight advised us to immediately shut all the doors and windows of our dwelling house. While I was closing a window overlooking the square, Mr. Brun was closing that of his room, which overlooked the Santo Domingo street. At the same moment the musket firing began in that street, the window was closed already, but Mr. Brun had not yet had time enough to remove his hand from the lock, when a bullet of a precision arm pierced the window through, twisted the lock in an extraordinary way, and pierced his hand through and through, throwing the chips on his breast.

Mr. and Mrs. Crinière, who inhabit the house of the direction, assisted Mr. Brun in this sad circumstance. On my part I immediately went out to the square to have a physician called, met with twenty armed men of the Government, and the only person known to me to whom I could apply was Gen. Eleazar Montiel, the chief of the force. As the doctor had not arrived, I went out for a second time and saw the same General Montiel, with Beliais and Acosta, his lieutenants, and another guerrilla of the Government. Then, when the first panic was over, Drs. P. Rosales and T. Cohen could be called and immediately came to assist our friend.

To complete my declaration, I address you a copy of the information presented by Doctor Cohen, the physician of the company, who assisted Mr. Brun until his death. I must add that since the morning we had heard the dull noise of a distant musket firing; that in view of the situation prudence advised us to hoist the French flag on all the fronts of the house, which we did at about 10 o'clock in the morning, when the public rumor announced that the *Progreso* was sailing up the river with Government troops. In spite of our three colors, you see it well, Monsieur le Consul, our house was not respected and five bullets were shot on our windows. Mr. Brun remained at Santa Bárbara *until the first occasion that presented itself for him to come down to Maracaibo*. He was embarked on Sunday at about 10 with the greatest attention, and his state did not permit us to foresee so fatal and prompt an end.

The bookkeeper of the company, M. A. Crinière, declares, before the same consul of France, at Maracaibo, in the following words:

In the morning of Sunday, the 8th of May, fearing a serious encounter of the two parties, we hoisted at about 10 o'clock on the house of the direction flags with our French colors, two on the windows of the hall overlooking the square, which were hoisted by Mr. Brun himself, helped by Miguel Labarca, and two others which were hoisted by me, a very large one in Santo Domingo street. *It was through this street that the Government forces flanked the village, and the room in which Mr. Brun was wounded while closing a window overlooked this street.* The fifth flag was placed by the same Labarca on the entrance barrier overlooking the road.

We were intranquil because we did not see or hear anything, when at half past twelve it was known that the steamer *Progreso* was at the entrance of Santa Bárbara. A great movement took place and a white flag was seen at the station, *which tranquilized us a little*, as we thought that the two parties would make terms. Unfortunately it did not happen so, and a strong volley broke out at that moment in Santo Domingo street. It was that the soldiers sent from Maracaibo arriving by

the bottom of the village *attacked the forces of Generals Figuera and Pozo in rear*. Immediately Messrs. Brun, Peysselon, and myself ran in order to protect ourselves from the bullets to close doors and windows. I had already heard behind me as the noise produced by the fall of gravel. It was a bullet that had pierced through the window of the hall, on which there were two flags and which overlooked the square; almost at the same moment I heard Mr. Brun cry, "Ah! I am wounded." We all ran to help him and saw his right hand horribly mutilated by a bullet. This happened in one instant. We furnished the first attentions that so serious a wound required and, the musket firing being over, Mr. Peysselon ran in search of a physician. I followed him in search of water and saw soldiers of the Government keeping the entrance of the house of the direction which overlooked the road and the French flag floating over their heads, which did not prevent them from preparing to fire at us, and fortunately Mr. Peysselon had presence of mind enough to cry "French company," which was sufficient to prevent that they should carry out their purpose, and then Mr. Peysselon went out.

In view of the manner in which the two presential witnesses, who were high employees of the company, relate the events of the 8th of May and the manner in which the wound of Mr. Brun took place, the affirmation of Mr. Peysselon that the bullet which caused the wound of Mr. Brun was intentionally directed against the window where the latter was, can only be considered as entirely groundless and precisely suggested by *the deliberate purpose to attribute a mischievous intention to a merely accidental act*. The declaration of the bookkeeper of the company that on hearing the musket firing in the street Messieurs Brun, Peysselon, and himself ran to close the doors and windows to protect themselves from the bullets, proves to evidence that that impulsive movement of self-preservation, the desire of protecting themselves from the manifest danger offered by the entrance of the bullets fired in all directions by the forces combating around the house, was precisely the origin of Mr. Brun's presence at the fatal point and moment to be a victim of the deplorable accident that occasioned the wound of his right hand. To style this event as *murder* of the director of the company in his post of director in his own house, at a window over which the French flag was floating, by a Venezuelan soldier, who obeyed orders of General Montiel, is to pretend to entirely disfigure the natural and frequent accidents of a deed of arms, to convert them, as it has been attempted in the present declaration, in a characterized proof of outrages suffered by French citizens, agents of the company, and even by the French flag itself.

The very circumstance that the flag was pulled down and dragged along in the mud at the moment of the wound of Mr. Brun, as is roundly affirmed by the president of the company, in his note to the minister of foreign affairs of France strongly appealing to the protection of France in favor of his fellow-countrymen and of the French interests, proves to be a mere invention destined to impress the mind of a high French officer against the Venezuelan nation.

From the documents inserted in the records it appears that General Montiel was the chief of the forces that went up the Escalante River and recovered from the revolutionaries the steamer *Santa Bárbara*, the property of the company, which he brought back to the harbor of the same name; that the day after his return he put at the disposal of the company the steamer *Progreso* to the purpose of carrying Mr. Brun to Maracaibo; that it was said chief who approached Mr. Peysselon when the latter went out from the house, charging him with sending for a physician to take care of the former; that Mr. Peysselon durst not go himself in search of the physician, but returned to the house to wait for him; that seeing that the physician had not arrived he went out again, but only to the purpose of speaking again to General Montiel, returning thereupon to the house and waiting there for the physicians after the panic of the first moment was over, and as a complement of the credit which the position and affirma-

tions of Mr. Peyselson in this matter must deserve, it suffices to reproduce the note that he himself addressed on the 12th of May, 1898, three days before the death of Mr. Brun, to Gen. Mamerto D. González, the military agent of General Gómez in the Santa Bárbara district. Said letter runs as follows:

*Line from San Carlos to Mérida — Direction of the Exploitation*  
L. R. No. 658.] COMPAGNIE FRANÇAISE DE CHEMINS DE FER VÉNÉZUELIENS,  
Santa Bárbara, May 12, 1898.

Gen. MAMERTO D. GONZÁLEZ.

MY DEAR SIR: As the agent of the company and through impediment of Mr. Brun, I thank you for the restoration of public order and for having taken the necessary steps to bring the *Santa Bárbara* steamer. We are greatly pleased to see you among us to protect our persons and interest. I am, with all consideration, your respectful servant.

(Signed) J. B. PEYSELON,  
*Inspector of the Exploitation.*

The *Santa Bárbara* steamer having been returned to the company through the action of the force of the constituted Government, that protected the interest of the former, as expressed by the thanksgiving note above inserted, the public order having been restored by the disappearance of the insurrectional guerrillas, the company reestablished the traffic on its railway and steamer's lines in all the period of the subsequent months of 1898 and in the first months of 1899 until the 20th of May, with the result shown by the report of the administration council of the 30th of May, 1901, already referred to.

In the month of May, 1899, there arose the revolutionary movement denominated "Liberal Restaurador," conducted by General Castro, and its first field of action was the Cordillera of the Andes, the local movements affecting the region of the railway from Santa Bárbara to La Vigía. It was then that the President of the State of Zulia took possession of the steamers *Santa Bárbara* and *Reliance*, upon notification to Mr. Decleva, who acted as the director of the exploitation. This fact was communicated by cable to the direction of the company in Paris on the 12th of June, 1899, and on the 22d of the same month the agent at Maracaibo transmitted to the company the following cablegram:

President will not pay navigation salaries or opposes our dismissing our personnel. Receipts none. We can not foresee any increase of income. Steamer *Reliance* out of service. Give orders. I'll keep firm.

In a letter dated the 28th of May, the same agent, Decleva, writes to the direction the following:

In effect the movement increases. The region of the Cordillera and particularly the zone interesting us is greatly alarmed. It is said that the revolution will not propagate and is the result of merely local rivalries. If such is the case, the evil will be circumscribed in narrow limits; the country in general will suffer little, but we shall suffer the consequences — I mean to say *all the consequences of the events*. I am informed that mules coming to La Vigía with cargo have been taken by the revolutionists, that hundreds of others have taken a different direction in order to escape from the revolutionary bands. Such facts, the narrative of which spreads from village to village, are not proper to encourage transportation, as you will well judge. Many days will pass so, supposing the movement is of a short duration, before those people will have recovered confidence and send us their merchandise.

In the bill which I intend to present to the Government (I have already prepared it for the requisition of the month of March) it is my purpose to charge, besides the expense occasioned by the immobilization of our steamer, *the damage caused to our traffic; but what a small and problematic reward!*

By the correspondence of the agent, Decleva, the following facts are evidenced: That he agreed with the President of the State of Zulia that that Government would undertake to prepare and put in serving order the steamer *Reliance* and that, regarding the *Santa Bárbara*, Decleva would give the order that it might be brought to Maracaibo without delay and without waiting for any cargo; that he delivered, purely and simply, the steamer *Reliance*, the treasury of the State undertaking to pay the engineer, helmsman, fireman, wood, oil, and lamps; that he wrote an order to Captain Faria to the effect of bringing the *Santa Bárbara* steamer, availing himself of all the circumstances permitting him, without delaying the departure of the steamer, to ship the whole or part of the cargo, so as not to lose the voyage; that he was permitted to embark on board the *Santa Bárbara*, bound for San Carlos del Zulia, with the purpose of giving the necessary orders for the protection of the interests of the company, affirming, in a letter dated the 29th of May, that perhaps there was no danger for the employees on the line, and that the orders he might give from Maracaibo, under the influence of contrary information, might result in producing disorder among the personnel; that it appeared from the information received from the line that *everything was in peace and order on the 7th of June, 1899*; that La Vigia was placed under the watch of an inspector, the Venezuelan Lomonaco, commissioner of the Government, near the company, who at the same time was a colonel, commanding 15 armed men; that until the 9th of June the Government had furnished only 7 loads of wood, as far as the navigation was concerned; and regarding the *Reliance* Decleva said:

You know that I have been able to disburden myself of all the service and maintenance expense. The president complains that the small steamer costs him too much. I have smiled and changed the conversation.

The correspondence of Mr. Decleva, in a letter of the 18th of June, 1899, goes on as follows:

I have returned after a voyage without incidents. At Santa Bárbara, at La Vigia, on the line, *everything is quiet*. The line is in *good condition and the material complete*. All our engines have entered the shop, even that of the ballast works that I had set on service, and that I had to keep by order of the civil and military authority.

*The traffic continues to be none. It is now more than twenty days that not one load is arrived; our engines only run on the account of the Government.*

Regarding the navigation, you know that I have been able to obtain that the Government provides the fuel and the food on board.

I shall be compelled, gentlemen, to ask in July for a remittance of funds. I would not like to alarm you, but I can not give you a hope that I do not possess myself — *the hope of undertaking the transactions again.*

The revolution seems to be spreading itself and increasing every day.

Our exploitation has gone through other crises and revolutions, the political and financial consequences of which *might imperil the most important interests and even the existence of this country*, but the exploitation had never, on any occasion, been so directly and radically affected.

A letter of the 22d of June says:

In view of the daily loss that we are sustaining, *the imminent deficit of our resources* and the difficulties of a situation which complicates itself more and more and seems to be prolonging itself farther and farther, I have desired, as I informed you in a previous letter, to reduce our expense as much as possible. The dismissal of the navigation personnel from the moment the Government was not willing to take charge of it presented itself to me as a mighty and immediate measure. You know that the Government opposed this project. Not knowing what our strict right is, what our absolute right in the matter is, I have vainly endeavored to illustrate myself with the copy of the concession which I have in my possession. I have not been willing to take, on my own account only, a decision, and thus

engage you in an affair the solution of which did not appear to me to be entirely certain.

All the subsequent correspondence of the agent, Declava, with the direction of the company confines itself to the discussion with the President of the State of Zulua, on account of the elimination, which the former thought convenient, of the personnel of the steamers, to introduce economies in the expense of the company, in which discussion there interfered the consular agent of France at Maracaibo, Mr. d'Empaire, and the vice-consul at Caracas, Mr. Quiévreux, who, on that account, sent to Mr. d'Empaire the following telegram:

President of the Republic communicates me a dispatch according to which the agent of the French company *does not render the task of the Government easy in the difficult moments the latter goes through*. I request you to endeavor without delay to obtain in my name that the director of the company *cooperates as far as it may be possible in the restoration of order, thus avoiding disagreeable incidents*.

In the absence of a reply from the direction of the company in Paris to the cablegrams sent to it by its agent asking for instructions to decide as to his persisting in the position he had taken, Declava construed this silence, according to his letter of the 1st of July, 1899, as follows:

I do not know, I regret, your projects, your purposes. *You may have a secret one which you have not told me, which you have no reason to tell me, which you pursue without me, as it were, and of which the orders I receive are the consequence*.

If such is the case, I must obey your instructions at all events. But if, on the contrary, it is your intention to carry things *only to the limit that is prudent in view of the future interests of the company*, my passive obedience would prove to be a *blindness*. You do not ask for my opinion. It does not appear that you are willing to leave the decision of the situation to me. Your orders are peremptory, precise, categorical; hence my embarrassment. What has the appearance of a contradiction is only, in reality, an exceeding care in serving you, *carrying out your intentions*.

And in the letter immediately following, of the 3d of July, it is said:

I recur to what I told you yesterday. You may be pursuing a purpose unknown to me, *a purpose which only the resistance opposed here by your directors to the requisitions of the Government can prepare*.

And could I act against that purpose? No; my conscience prohibits me to do so; my duty, the devotion I owe to your interests, everything commands me to obey you.

To this discussion occasioned by salaries of the personnel of the steamers, amounting to the sum of 2,300 bolivars monthly, an end was put by the following telegram from the direction in Paris, dated the 4th of July:

No act of hostility; of the salaries pay what you can out of what you may have. It is well understood that the Government *will pay all the other expense and previously acknowledge its former and present debts*. *Here we have exhausted all the resources*.

The foregoing decision and the request to acknowledge the accounts having been communicated to the President of the State by the agent of the company, the President submitted said approval to the National Government, for such was incumbent upon it. Owing to this reply, Mr. Declava consulted the direction as to whether he could proceed to Caracas with the purpose of presenting these accounts, and was answered by cable on the 5th of the same month:

It is not possible that you should leave Maracaibo for Caracas. Mr. Simon will stop there in his next voyage.

According to a telegram from the consular agent of France at Maracaibo, dated the 13th of August, and addressed to the French consul, the Government

had reestablished traffic and intended to return the steamers of the company, but revolutionaries having reappeared at Tovar and Mérida, precisely in the line of exploitation, the French company had to wait for the result of the further operations before the restitution could take place.

In a letter dated the 23d of August of the same year, the deputy administrator of the company in Paris informs the minister of foreign affairs that the steamer *Reliance* had been returned to them, as he had already been notified, with its axle broken and the propeller lost; that the steamer *Santa Bárbara* remained in the possession of the Government of the State of Zulia; that the railway continued to be in the same condition, *without having as yet a free traffic*; that no payment had been made by the Venezuelan authorities, and that its director, Mr. Gustavo Simon, would leave on the 26th of August for Venezuela with instructions to go to Caracas.

On the 15th of September of the same year, said director, on his arrival at Caracas, asked, through the vice-consul of France, for an audience from the minister of finance, which was granted him immediately for the next day. In this audience Mr. Simon asked the National Government *for a settlement of accounts or a part payment, in order to be able to proceed on the exploitation of the enterprise*. Minister Olavarría answered that there was no money in the safe of the treasury and that he could not foresee when he could have funds, and that, therefore, he was sorry not to be able to give satisfaction or to make any promise for the future, however small the sum might be.

In the statement addressed on the 10th of October of the same year to the President of the Republic, then Gen. Ignacio Andrade, by the same director, Gustavo Simon, setting down the motives why he had determined to suspend the exploitation of the railway from Santa Bárbara to La Vigía, the following facts are made to appear:

That in September, 1899, there was a moment of peace, and some receipts were obtained, but that *the revolution reappeared on the 27th of September, and thenceforward the traffic was paralyzed and Maracaibo incommunicated with Santa Bárbara*; that meanwhile the Government did nothing to free the company from the revolutionaries and enable it to proceed on the exploitation; *that it had remained without one cent in its safe, with all the expense in force and without any income*; that in Paris the coupons of the 5 per cent Venezuelan loan of 1886 had not been paid, although due on the 1st of July, 1898; that its claims presented to the Government for damage and prejudice had not been satisfied, and that the circumstance to be most regretted was that they had not succeeded in obtaining from the Government the payment of the accounts for freight, money lent, sundry effects furnished, etc., which amounted on the 30th of September, 1899, to 200,000 bolivars, as there existed arrears from the year 1884, and that on the 3d of October the President of the State of Zulia had asked the company for the *Santa Bárbara* steamer to carry a commission to Encontrados and had not been able to pay for two piles of wood available on board and a sum of 300 bolivars on account of the traveling expense, as it had promised to do.

In virtue of the facts above narrated, the director of the company concluded his statement to the President of the Republic with the following declaration:

First. There is no possibility of realizing any revenue in the exploitation of the line, *as the revolutionaries are masters of it*, and until this date, the 1st of October, there is no hope that the Government may recover that place.

Second. The Government of Venezuela *can not pay the company* any of its debts, or even the least sum, or any sum by installments.

Third. The company *has no longer any resources, as they have all been exhausted*, and it has sent all its money from Paris to meet the expense of its line, *while there was no revenue on account of frequent revolutions*.

The company, considering that this state of things has caused it enormous pre-

judice and amage and that, if it continues to make the expense in course, it will directly go to bankruptey, *it is compelled through main force to suspend the exploitation of its line and its steamer Santa Bárbara* until an arrangement has been entered into with the National Government of the United States of Venezuela, and declares that, in the meantime, whether the railway is or not in the hands of the revolutionaries, said Government is responsible for all damage, prejudice, faults, deteriorations that may be caused to the rolling stock, the permanent way, the stores in the warehouse — in short, to all the goods representing the capital of the company.

It is well understood that the company *does not, however, abandon its rights to the concession of said railway.*

The foregoing statement was addressed in like terms to the President of the State of Zulia and to the minister of public works.

The President of the State of Zulia, in acknowledging to the consular agent of France the receipt of the foregoing statement, thought it to be his duty to tell him that whenever, owing to the necessities of war, it had been necessary to make use of the *Santa Bárbara* steamer, whether to mobilize troops or to avoid that the enemies should take possession of it, the Government had always furnished the fuel as well as the provisions and the salary of the employees and marines, when the direction had required it, and made several repairs on the steamer, which was in a very bad condition. He says in conclusion that, as soon as the reasons which compelled the Government to retain said steamer had ceased, he would notify the consular agent that it might be received by the person in charge of receiving it.

From the document appearing as subscribed and dated in Curaçao on the 22d of October, 1899, by Mr. Simon, and certified as correct by the deputy administrator, M. Reynaud, it is apparent that all the archives and printed papers of the company had been closed into boxes, with a detailed inventory, and delivered to Mr. d'Empaire; that all the personnel of the steamer had been dismissed, Captain Matos having made the inventory of the *Santa Bárbara* steamer, together with the mechanical engineer and the bookkeeper; that the company had the following advertisement published in the papers *El Fonógrafo*, *El Avisador*, and *La Compañía Francesa*.

The Compagnie Française de Chemins de Fer Vénézuéliens has the regret of informing the public and commerce that *on account of force majeure* it suspends the exploitation of its line and its steamer *Santa Bárbara*.

The lack of income during more than four years, the revolutions, and the non-payment by the Government of its debts to the company are the motives inducing the company *to ask for an arrangement with the National Government* before continuing its exploitation.

It is apparent that *from the 27th of September the railway line is in the hands of the revolutionaries and that up to this date, the 12th of October, there is no hope that the Government may recover this place.*

The director of the exploitation,

E. SIMONS

At the end of this document Mr. Simon expresses the hope that everything might be settled before the close of the month, because he had just been advised that the President of the Republic of Venezuela had resigned and left Caracas on a ship of war for an unknown destination.

In a communication addressed by the minister of foreign affairs of France to Mr. Quiévreux, vice-consul in Caracas, Mr. d'Empaire, the consular agent in Maracaibo, appears vested with the commission of watching and stating the state in which the goods of the company were.

The steamer *Santa Bárbara* was returned to the company on its return to Maracaibo after the expedition made on it by President Andrade, in which voyage it sustained a damage in one of the wheels. Mr. Glennie was appointed overseer of the seals, and Mr. Aiguillon, late chief engineer of the *Santa Bárbara*,

keeper of the maritime material. Mr. d'Empaire received from the director of the company a sufficient sum to pay for the furniture, rent, and the salaries of the agents Glennie and Aiguillon and of the one at Caracas, during six months; from the 1st of December, 1899.

In the fight that took place in the harbor of Maracaibo in the month of November, 1899, between revolutionary nationalist forces and those of the Government of General Castro, the steamer *San Carlos y Mérida*, at anchor in the harbor, sustained, on account of bullets, damages that caused it to sink, and the steamer *Santa Bárbara* also suffered deteriorations on its top part. Such appears from the testimonial investigation carried out by the consular agent of France at Maracaibo at the request of Mr. Arguillon. The witnesses Edmond Hainel, Antonio Martínez Peña, and José Vincente González declare that the steamer *San Carlos y Mérida*, at anchor opposite the stores of Rafael Morales and McGregor & Co., had wrecked in the night and day of the 1st and 2d of December, 1899, on account of the bullets received in its hull on the port and starboard sides during the fight and the fire between the forces of Gen. Cipriano Castro (Maracaibo side) and the forces of Gen. José Manuel Hernández (Los Haticos side).

The damages sustained on its sides were so numerous, that the aforesaid steamer sunk at 4 p.m. on the 2d of December, 1899.

The consular agent, Mr. d'Empaire, ordered the appointment of experts to estimate the damages sustained by the steamer *Santa Bárbara* during the time it was at the service of the State, to which purpose Messrs. Eugenio Kreutzer, a French mechanic domiciled in that town, and Manuel María Loto, a captain in the Venezuelan navy, commander of the Venezuelan steamer *Progreso*. Said experts—after having examined the steamer and its engines and considered that said vessel has been kept, from the last days of May of the preceding year until the first days of November, constantly in motion under pressure, without giving time to make any repairs on it or repaint it, which circumstance increased the value of the repairs required; that, through a constant labor the engine had suffered a great deal; that during the last voyage it made in the river Zulia, at the service of the Government, a piece of timber entirely broke one of its wheels—valued the damages at 10,000 bolivars, without being able to make an especial mention as to the state of the hold of the steamer that was submerged.

On the 20th of January, 1900, Mr. d'Empaire communicates to the direction that there was an individual that desired to know the lowest price of the little steamer *Reliance*, with a view to seeing whether he could buy it, and that he thought that the company would transact a good business, if it succeeded in selling it for any price.

On the 9th of December, 1899, Mr. Simon left Venezuela for Havre.

It is equally apparent that the company posteriorly disposed, according to its own declaration, of the two steamers, *Reliance* and *Santa Bárbara*, for the sum of 1,100 francs the former and 10,000 bolivars the latter.

On the 3d of February, 1900, the administration of the company addressed a letter to the President of the Republic, proposing to him the reorganization of the exploitation of the railway and maritime lines, upon the delivery which the Venezuelan Government was to make to him of a part payment of at least 300,000 francs in cash, calculated on the sums which he considered were owed to said lines both by the nation and the States, as follows:

(A) A sum of 300,000 francs for reimbursement of transportation expense and requisitions carried out by order of the authorities.

(B) A sum of 250,000 bolivars, at which the company valued the minimum of the indemnity which the authorities were owing to it for the material repa-

ration of the damage done to all its properties, railway, steamers, immovables, material, etc., during the last campaign.

(C) A sum of 105,000 francs monthly from the 1st of July, 1899, as indemnity for the losses that said lines had sustained from that date on account of the almost absolute suppression of the traffic and the immobilization of the means of exploitation. The total of those monthly debts that would be owed to them on the 1st of May, 1901, would amount to 1,050,000 francs.

The true motives that compelled the French company to suspend the exploitation of the railway line and of the steamer *Santa Bárbara*, as appearing explicitly declared by the director of the company, Mr. Simon, in his statement addressed to the President of the Republic, on the 12th of October, 1899, from the advertisements published in different newspapers and from all the documents of this claim, were only the lack of resources in the treasury of the company, of funds proceeding from the traffic, owing to the fact that this had ceased, on account of the revolutionary events which recommenced in September and continued in October of the same year. The company exhausted all its available resources, to the extent of being forced to eliminate the personnel of its employees.

The requisitions made by the authorities of the State of Zulia concerning the steamers and trains of the company, with a view to satisfying the necessities of the public service and restoring order constitute the exercise of a power vested in the authorities of a State with a purpose to provide for the security of lakes, rivers, and ways of communication and with a purpose also to subtract any element of struggle from the revolutionary action, thus cooperating in the restoration of order and the consolidation of peace. Those requisitions were voluntarily accepted by the company, as it was by its contract bound to accept them, and the nature of its business and its own advantage required it to do so. They could only give rise to the obligation, on the part of the Venezuelan authorities, to indemnify the company for the service rendered and the direct damage that the means of locomotion seized might sustain during that service, through motives that might be attributed to the especial nature of the same services, which obligation was determined and valued by the administration council of the company in its report rendered before the general meeting of shareholders, inserting it in the balance of the 31st of December, 1901, for a sum of 203,529.70 francs.

The government of the State of Zulia and therefore the National Government contracted the obligation of paying to the company the amount of those accounts, and this debt has never been denied by the constituted authorities. The local government of the State of Zulia could not in the days the aforesaid requisitions took place nor could the minister of finance at Caracas at the date he was visited by Mr. Simon make any part payment on account of what might be owed to the company. This impossibility is comprehensible under those circumstances, under which every resource was consumed by the imperative necessities of war, and both the National Government and the government of the State of Zulia were deprived of a large portion of the ordinary revenue on account of the same disturbance which deprived the company of the proceeds of its ordinary traffic on the line.

It is neither just nor equitable, therefore, nor is it based on any law, that the Government of Venezuela, because it could not pay in moments of penury of its revenues the sum of more than 200,000 bolivars to which the company made its credit amount, and of which it urgently needed to continue in the activity of its transactions, should be responsible for the sum of 18,000,000 bolivars, at which the company estimates the integral value of its capital and obligations (bonds).

When a debt is contracted to be paid in cash, it is a universal law that the

nonpayment thereof in due time only constitutes a delay which binds the debtor to pay interest at the rate agreed upon or at the legal rate, this when liquidated accounts or debts are the question.

The larger part of the credit that the company pretended to collect in the month of September, 1899, from the minister of finance at Caracas, requiring from him a part payment, proceeded from debts contracted by the government of the State of Zulia and approved by its legislature in previous years, but the company at no time theretofore had endeavored to obtain the payment of those accounts from the National Government, nor is it proved that the steps taken near the government of the State before the revolutionary events of June and July, 1890, were active.

The insistence shown by the company in those moments, placing the government of the State in the alternative of delivering a sum which it had not, or eliminating the personnel of its steamers; the silence kept by the direction in Paris for several days, leaving its agent at Maracaibo engaged in a discussion which grew more and more bitter with the authority, and, finally, the violent determination taken by Mr. Simon of entirely suspending traffic, dismissing all the employees of the line and placing under seal all the appurtenances thereof, precisely when a change of administration and victory of the revolutionary arms promised the prompt pacification of the country, only show the deliberate purpose of abandoning the enterprise, creating a situation entirely alienate from the conditions of the original contract, and only tending to accumulate difficulties, presenting to the Government of Venezuela, as a previous condition for the reestablishment of traffic, new and more exacting claims, as well as demands of money. It was, therefore, a perfectly voluntary act due to the purely financial causes, connected with the state of insolvency in which the company had been for some years past. That abandonment has continued since the suspension of the exploitation was determined by the direction of the company. All the damages that may have been caused by that abandonment to the material of the line, and that, it is natural, must have been very considerable, owing to the intemperance in which it has remained for four years and to the want of all care on the part of its owners, only affect the responsibility of those who adopted the measure, save the excuse they have adduced, the *force majeure* produced by the exhaustion of means and resources to continue the exploitation.

The free disposal of its property has always remained within the reach of the company, as is proved by the circumstance that the consular agent of France at Maracaibo has constantly been the custodian thereof, and that it was sealed to that purpose.

The measure projected by the National Government in March, 1901, of making an inventory of the line, of its permanent and rolling stock, and of the vessels and other appurtenances which the construction company had abandoned, as appears from the same resolution, was tried, taking into consideration the official capacity of Mr. Julio d'Empaire and his commission as custodian of the property of the company, and to that purpose the National Government intrusted said agent with the commission of attending to the formation of the inventory and reporting, with the remarks he might think pertinent, about the actual state of that property.

Mr. c'Empaire declined the commission, stating that he had been officially designed to take care of the material, tools, and archives of the company, which proved that they were not abandoned and that the company had but suspended the exploitation.

Mr. d'Empaire adds, in his reply to the Government, dated the 26th of March 1901, that whenever he has to apply to the authorities, either of the State of

Zulia or of that of Mérida, in has capacity of in charge of taking care of the interests of the company, asking for the suppression of some abuse or for support on the part of the Government, *he has always been answered and attended to, which clearly shows on the one side that the company has always preserved its rights to the line and its material, and on the other that such rights have at all times been recognized by the Government of Venezuela.*

In view of this reply, the Government thought it advisable to leave things in the same state they were, as it does not appear that it has in any sense attempted to interfere with the determinations of the company regarding the free disposal or maintenance of its goods on the railway line.

The damage those goods have sustained, according to the technical report presented to the minister of public works by Drs. Francisco Arroyo-Parejo and Eliodoro Ocanto, attorney-general and engineer, respectively, at the orders of the ministry, is due

“besides the natural causes of the exposition to intemperature and the weather, to the very especial one that the company did not carry out the drawing in accordance with the rules and principles ordered by science in enterprises of such a nature, for the line is constructed on lands the topographical configuration of which is unfit thereto,”

and said report adds that

“if it is certain that the inundations of the Chamas River have cooperated in that destruction it is also true that the company has not made such efforts or used such means as were necessary to prevent the damage.”

The report adds:

Without the help of the drains cut parallel to the road (during the construction) in order to extract therefrom the earth necessary for the embankments, which drains will always be the cause of the destruction of the line, the undermining of the ground would not have taken place, for the waters proceeding from the inundations would not stagnate on each side of the platform, but would go through culverts conveniently situated, following the natural depressions of the ground, to be lost on the plains; and to place again this line in a state of good service it is necessary *either to make the Chamas River return to its former bed* or to stop up the drains parallel to the line, raising the level of the line with good materials, and to make serious repairs to the rolling stock, which is almost tantamount to renewing it in its entirety.

For all the reasons aforesaid and in virtue of the careful examination of all the precedents of the case the Government of Venezuela can not be held responsible for the damage that the “Compagnie Française de Chemins de Fer Vénézuéliens” may have sustained, for the suspension of the exploitation of the line and the abandonment in which it has kept its property, or for the consequences that nature, the weather, and the bad construction of the works may have produced in its concerns.

Neither can this commission fix the amount owed by the Government of Venezuela to the above-mentioned company for services rendered by its railway and line of steamers, for those accounts have not been presented or been the object of any examination in this commission.

With regard to the damage done by revolutionary parties on the line from Santa Bárbara to La Vigia during the time it was occupied by said parties, neither this fact nor the responsibility of the authorities then constituted in the State of Zulia has been proved.

The only thing that has been proved is the damage sustained by the steamer *Santa Bárbara* while at the service of the government of the State of Zulia, which

damage was valued at the sum of 10,000 bolivars by the experts appointed by the consular agent of France at Maracaibo.

The prejudice caused the company by the sinking of the steamer *San Carlos y Mérida*, which, as it appears, was out of all active service since long before and which was not apt to be utilized, does not affect the responsibility of the Government of Venezuela, for it appears from the evidence produced that the sinking took place on account of the firing exchanged in a deed of arms, and is therefore recognized in international law as an accident inefficient to cause any responsibility on the part of the constituted authorities.

It is my opinion, therefore, that the company is entitled to an indemnity of 10,000 bolivars and interest thereon at the rate of 3 per cent from the 12th of October, 1899, which the Government of Venezuela will pay for deteriorations of the steamer *Santa Barbara* while at its service; that its rights must be reserved to it to obtain payment of the accounts for freight, transportation of troops, and the use of two steamers by the authorities of the State of Zulia duly formulated and proved and which, as expressed in the balance of the 31st of October, 1899, amounted on that date to the sum of 203,529.70 francs with interest thereon from the respective dates at which they had their origin; that to the Venezuelan Government the rights and claims must also be reserved which may pertain to it for the suspension of traffic, the abandonment of the exploitation and ensuing damage caused to the line through lack of maintenance, and that for all the rest the claim presented must be disallowed.

CARACAS, August 28, 1903.

#### NOTE BY THE VENEZUELAN COMMISSIONER

This opinion was presented at the sitting of the 28th of August, 1903, and an understanding was not arrived at with the French arbitrator, who was of the opinion that the company must be allowed the sum of 18,483,000 bolivars, to which the claim amounted, said company abandoning to the Government of Venezuela the railway with all its appurtenances and the concession. The two commissioners having failed to agree, this claim was referred to the decision of the umpire.

#### OPINION OF THE FRENCH COMMISSIONER

I have accorded to the French Company of Venezuelan Railroads an indemnity of 18,483,000 bolivars, considering that the Venezuelan Government is responsible for the ruin of the company, and that in equity this responsibility carries with it the rescission of the contract signed between the company and the Venezuelan State.

It seems to me beyond doubt that the Venezuelan Government has placed the company in the necessity of ceasing the exploitation of the line by depriving it of the considerable sums which it owed it from the fact of the guaranty and from the fact of the requisitions.

According to the contract the state guaranteed to the company the 7 per cent of the capital, and this guaranty was to be paid in hard cash. These provisions are repeated in the three stages which the contract in question has passed through.

But from 1888 to 1896 the State neglected to fulfill the obligations accepted at the time of the signing of this bilateral act. It did not pay a centime of the guaranty promised of which the part falling due December 31, 1895, represented already 4,725,000 bolivars. It is not surprising that the company, deprived of this sum upon which it had the right to count, then found itself in embarrassment. It had made all sacrifices; with only the resources of its credit, it had already finished the line provided in the contract and assured for three years the regular exploitation, in spite of inundations, earthquakes, and revolutions,

factors equally unforeseen and very capable of bringing trouble to the most wisely established provisions. It was natural that it should have reached the limit of its resources and appealed for the support which the State ought to have lent it a long time previous.

It is this moment that the Government of Caracas chose, taking advantage of the circumstances which itself had prepared, to impose a treaty ruinous to the company, obliged to pass under these Caudine Forks.<sup>1</sup> It reduced to 1,950,000 bolivars the total amount of all the claims that the company might present, as well from the point of the guaranty as from any other point, and promised 2,500,000 bolivars for the abandonment in the future of every right of guaranty. Then, instead of paying in specie these promised sums, it remitted them in bonds which, having ceased to bear interest, are to-day no longer negotiable, so that certain creditors of the company, whose borrowed money had, instead of the money of the guaranty, permitted the finishing of the construction and the pursuit of the exploitation, hold these depreciated bonds, which are only in their hands a lien without value.

The Venezuelan State has then found the means to free itself of its contractual obligations without opening its purse. Not only did it elude in this way the clauses of the contract relative to the guaranty in reducing the latter to zero, but it never paid the numerous requisitions for which at different times the company had sent it the drafts.

So the company, deprived of the millions of the guaranty and of the remuneration of the services rendered, saw itself at the same time dispossessed of its rolling stock, employed in transporting free of charge troops and military equipments, while the merchandise lay in the storehouses at the mercy of guerrillas, while its personnel was maltreated or imprisoned, its director wounded to death, its boats requisitioned or destroyed, its real estate encroached upon, its cash boxes emptied.

Is it not evident that the only cause of the arrest of the exploitation was the situation made for the company by the Government itself, which in every way in its power had rendered this exploitation impossible?

Moreover, the more time passed the greater the increase of the debts of the company and the difficulty for it to resume the exploitation of the line; in fact, the interest on the sums due is accumulating, its idle machinery damaged, the track is going down from the fact of the inclemencies of the climate and from the use which the inhabitants are making of it.

In these conditions it would not be an equitable solution to compel the company to resume the exploitation in consideration of the mere payment by the State for the ravages and requisitions. It is only by the rescission of the contract that equity can be satisfied. The Venezuelan State could not complain, since it has never executed it even after having strangely corrupted it.

In consequence of this rescission, the Venezuelan Government will become possessor of all that the company owns in Venezuela — that is to say, of the concession, of the line, of the buildings, of the rolling stock, of the maritime material, in the condition in which it is actually found. In exchange it would have to reimburse the company for the sums expended by it, which include its capital — say, 3,000,000 bolivars — and the value of the obligations and bonds emitted, with arrears of revenues due to the bearers — say 30,500,000 bolivars.

Moreover, it ought to take account of the interest of these sums and of the profits of which the company has been deprived. The indemnity would reach

<sup>1</sup> Caudine Forks (*Furculæ Caudinæ*), the name of an Italian village famous in Roman history on account of the disaster which there befell the Roman army during the second Samnite war, in 321 B.C.

without doubt two score millions. But for all these valuations it would be necessary to admit the affirmations of the company or to engage in interminable investigations, which would still leave many of the points in doubt.

It is the most simple means of determining the value of the concession; it does away with all investigation and all chance of error; it has, moreover, the advantage of being drawn from the contract.

The State and the company have both recognized that the concession was worth 18,000,000 bolivars for a line of 60 kilometers — the first according to it, the second accepting the payment of a guaranty of 7 per cent upon a kilometric value of 300,000 bolivars. Taking back the concession, the State will be free, so far as the company is concerned, paying to it this sum by way of indemnity.

It is fitting to add to it the value of the maritime material, say 483,000 bolivars; the service of navigation, the object of a special article of the contract, not having entered into the line of account at the time of the establishment of the calculation of the guaranty.

It is then a sum of 18,483,000 bolivars that the Government ought to pay to the French Company of Venezuelan Railroads.

The company, through its advocate, claims, besides, the adjudication of interest at the rate of 7 per cent, which in my opinion does not harmonize with the manner in which this indemnification may be estimated. We are now dealing with a simple exchange of values without any consideration of profits or interest.

If the interest were to be estimated would it not be also necessary to take into account, for instance, the products of the exploitation of the line while it was in operation and deduct them from the amount of the indemnity?

My colleague does not share my opinion. He has declared the claim of the company to be groundless and has accorded it only the right to an indemnity of 10,000 bolivars for the damage suffered by the steamer *Santa Bárbara*, and reserved the privilege of claiming from the Venezuelan Government, by presenting the necessary justification, the sums due for requisitions, with the corresponding interest. He has reserved equally the rights of the Venezuelan Government for the fact of the abandonment of the exploitation.

Doctor Paúl has published a "dictamen" which is a regular defense of the Venezuelan State. I have not been able to follow him on this ground, the position of arbitrator not authorizing me, in my opinion, to produce arguments in favor of one of the two parties in the case. Moreover, the company has intrusted to an advocate at the court of appeal at Paris, Mr. Dacraigne, the care of replying point by point to the plea of Doctor Paúl.

It only remains for me to call the particular attention of the umpire to a few observations.

In the first place, I have taken it upon myself to get information *de visu* of the condition of the line from Santa Bárbara to El Vigia. I then went on board the French cruiser *Jouffroy* on the south of the lagoon of Maracaibo. Then I went up the river Escalante as far as Santa Bárbara. There I inspected in detail the establishment of the company, and followed the line on foot for several kilometers. I observed that the company had neglected nothing to place the service of merchandise and passengers in excellent condition. A large rolling stock was found at Santa Bárbara, where the buildings of the company include, besides the passenger station, the depot for merchandise, the director's office, vast storehouses for the materials, and large workshops supplied with machines, tools, and material for repairs of all kinds. In spite of the numerous repairs which these buildings and this material would require after five years of abandonment, they are far from having no value and from being of no use.

In the second place, it is not superfluous to recall that a claim in all points

analogous to the claim of the French Company of Venezuelan Railroads has been presented by the English company of the railroad from Puerto Cabello to Valencia to the British-Venezuelan Mixed Commission which sat last year at Caracas under the presidency of an American umpire.

This English company had likewise ceased its traffic, which it has since resumed, because of the nonpayment of a guaranty promised, and because of requisitions. It obtained, if I am well informed, an indemnity of 7,000,000 bolivars gold. It had been less tried than the French company, whose terminus at Santa Bárbara is upon a river inaccessible to warships, in a region which is entirely out of reach of action of foreign navies, while Puerto Cabello, head of the line of the English company, can be visited by European squadrons.

Finally, while the foreign claimants will receive in gold the amount of indemnities which have been allowed them, the French claimants will have to be satisfied, according to the terms of the protocol of Paris, with the payment in bonds of the diplomatic debt.

Thanks to the concession consented to by the French Government to allow the Venezuelan Government to pay its debts with greater facility, the figure of the French indemnities finds it elf in reality singularly reduced.

The bonds in question having undergone a depreciation of 60 per cent, if the umpire partakes of the opinion of the French arbitrator, it is in reality only a sum of 8,500,000 bolivars in gold which the French company would be entitled to receive and the Venezuelan Government obliged to pay.

The value of the concession or of sums disbursed by the company is far from this amount.

PARIS, September 13, 1904.

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ADDITIONAL OPINION OF THE VENEZUELAN COMMISSIONER

I have most carefully examined the brief prepared by my learned colleague bearing date of September 13, 1904, explanatory of his opinion at the sitting of the commission held in Caracas, August 28, 1903. I have also read the brief and the opinion submitted by Maître Dacraigne, which is annexed thereto. But I have not been able to find in either of these documents sufficient reasons, based upon right and justice, to convince me that my opinion submitted at the session above mentioned does not adhere most strictly to the truth as established by facts, as well as to the statutory and common-law precepts which are applicable to such facts in order to find and establish the liability of the Venezuelan Government, while rejecting all that can not be held as good and sufficient grounds for liability. Under such circumstances I am satisfied that the grounds upon which my opinion was based still subsist as strong as ever, and I may say stronger than ever, as the new line of argument introduced by the French commissioner and Maître Dacraigne seems to strengthen my former opinion, as stated.

Both these gentlemen hold as a powerful reason to grant and demand the indemnification under discussion that the agreement made between the Venezuelan Government and the French Company of Venezuelan Railroads under date of April 18, 1896, by virtue of which the 7 per cent guaranty on the capital of 18,000,000 francs was redeemed and the company paid up to December 31, 1895, the amount of her claims due as per balance sheets on the same guaranty and settlement made for *any other and all causes the company may have a right to invoke, was a ruinous agreement* imposed upon the company, which found herself compelled to pass under the *Caudine Forks* of said compact. This new argument is of such character, that it is my sincere belief that no answer whatever is needed in rebuttal. Such argument offers, because of its far-fetched

application, the most telling proof of the scarcity of grounds, real solid grounds, the company has upon which to build the liability of the Venezuelan Government.

I will simply remark that when that agreement — now called *Caudine Forks* by my learned colleague — was entered into, the company, according to the statement of Maître Dacraigne, page 14 of his opinion, found herself in this position:

The *earthquake* of April (1894) left the company as unexpectedly as unfortunately *without resource of any kind*. In order to attend to urgent repairs and work and to procure funds, the company was compelled to make a first issue of 500-franc bonds, drawing an interest of 6 per cent.

On page 12 of the same opinion the following statement is found:

The company issued in this way 4,000, the largest portion of which was held by the Dyle and Bacalan and the Tives-Lille companies. It was agreed with these two companies that the payments made by the state were to be employed in preference for the payment of said bonds. It was therefore in execution of this covenant entered into by the company because of the failure of the state to keep its part of the agreement that in the month of June, 1898, the Venezuelan Railroad Company transferred to the other two companies the *Venezuelan revenues received*.

About the 30th of June, 1898, the general assembly of stockholders ratified such agreement, which was confirmed by the bondholders, *and after payment of all accounts there remained* out of this transaction at the disposal of the railroad company a balance of 200,000 francs as working capital.

If, notwithstanding the fact that the Venezuelan Government had delivered to the company 5 per cent bonds of the 1896 loan to the amount of 4,450,000 bolivars, thus enabling the company to redeem its debt, amounting to 2,000,000 francs, in stock and bonds, the largest portion of which was held by the Dyle and Bacalan and the Tives-Lille Companies, still leaving the company a working capital of 200,000 francs if, I say, notwithstanding that fact, the company was unable to meet the ruinous future events, it is plain that the failure of the company to continue repairs and to defray operating expenses would have taken place sooner.

This clearly shows that the company, in view of its critical financial position in Paris, its credit being completely exhausted, found it advantageous to its interest and to the continuation of the undertaking to accept the propositions made by the Venezuelan Government for the redemption of the guaranty and the payment of the amounts due, which the company agreed to reduce to the amount of 1,950,000 bolivars, fixing the redemption of the future guaranty at 2,500,000 bolivars.

In this agreement made by the French Company because the company found it to be acceptable and advantageous, Mr. Dacraigne finds grounds to hold "without possible discussion" that the French Company is authorized to ask the rescission of the contract and the reimbursement of all the expenses that such action entails, plus the corresponding damages and respective interest. Thus, he says, is justified the claim for the 18 millions expended and the interest as above specified.

Thus the Venezuelan Government, because of the fact that it has canceled its obligations up to the date of the convention, after having paid a heavy sum in settlement of a guaranty which could remain undue and without foundation, as the company was unable to continue operations because of the ruinous future events, must pay again and settle, besides, damages and interests because such had been paid. The Venezuelan commissioner has been unable to find in the legislation of any country, nor in the natural law, anything that may lead

to the acceptance and holding of such kind of liabilities as established either by private or international law.

The French commissioner holds that the Venezuelan Government, as stated in the opinion, would enter into possession of everything the company possesses in Venezuela, and details such possessions as "the line, the buildings, the rolling stock, the maritime property, *in such condition as they are found now*," and fixes the amount of the indemnity such conveyance would represent at 18,483,000 bolivars.

I have also been unable to find among the documents and papers in the case reasons justifying such forcible transfer, nor any advances whatever on the part of the Venezuelan Government which might lead to the supposition that the Government is inclined to accept such transfer of the property in question in such condition as it is found now for the amount demanded by the claimant company, which the French commissioner grants. Such transactions are always controlled by the convenience of both contracting parties, are agreed upon freely and spontaneously, and can not be the object of a decision of this commission.

I think it my duty to quote, in this connection, the following statement of the French commissioner as having special significance:

The company, through its legal advocate, claims, besides the adjudication of interest at the rate of 7 per cent, which, in my opinion, does not harmonize with the manner in which this indemnification may be estimated. *We are now dealing with a simple exchange of values* without any consideration of profits or interest. If the interest were to be estimated, would it not be also necessary to take into account, for instance, the products of the exploitation of the line while it was in operation and deduct them from the amount of the indemnity?

The Paris protocol by which this tribunal has been vested with arbitration powers by special commission intrusted to the legal representatives of France and Venezuela has narrowed the scope of said commission to a single and solitary point — that of examining and deciding upon the claims for indemnification entered by French citizens for *acts which have taken place* at a certain time. Now, to grant indemnities for *acts which have not actually taken place because of the exchange of values* which were to be made by virtue of a sentence of the commission, would be to substantially alter the terms of the protocol binding the contracting parties and to render the award of the commission nugatory, as it would then involve a violation of the pact which controls the commission.

The *pact*, or, in other words, the free agreement of the parties, by which they agree to submit the examination and settlement of differences arising among them to an impartial third party, controls the whole arbitration proceedings. The *pact* previously agreed to by the contracting parties is, in fact, the essential condition for the institution of arbitration proceedings — is the starting point, the rule to be followed by the arbitrators. The nature of things and common sense thus direct. The arbitrator or arbitrators can not constitute themselves as judges of a question. The limit of the mission intrusted to them grows exclusively out of the will of the parties; having been chosen to apply the law to a question, *they themselves can not create the rule of law and apply it. The pact determines and circumscribes the object of the dispute, \* \* \** (Pradier-Fodéré, Droit International Public, vol. 6, section 2612.)

The pact as laid down by the French court of cassation in its judgment of January 18, 1842 (Mauny case — see Dalloz, Jurisprudence Générale, Vol. IV, Arbitrage, No. 471, note) —

is the only essential thing to be consulted to decide whether the arbitrators have passed judgment without authority of jurisdiction.

It is true that the claim of the French Company of Venezuelan railroads embodies the sum of 18,430,000 bolivars for indemnities demanded from the Venezuelan Government, and this commission is vested with full authority to determine whether the amount of the indemnities which Venezuela is to pay for such acts as may have directly caused actual damages to the company's property or for actual services such company may have rendered the Government of Venezuela, such damages and services to be fully established and affecting Venezuela's liabilities. Any and all acts partaking of either character, be it *damages* or *services rendered* which the Government of Venezuela should indemnify, falls under the action of this commission.

It was by reason of this application of the terms of the protocol, which I consider the right application, that in my opinion rendered in Caracas on August 28, 1903, I differed from my learned colleague and explained the acts which in my judgment, and in conformity with the proofs furnished by the papers in the case the Venezuelan Government might incur a liability for, concluding my opinion with the following concrete statement:

I am therefore of the opinion that the company is entitled to an indemnification of ten thousand bolivars (10,000 bolivars) and interest at the rate of 3 per cent from October 12, 1899, which the Government of Venezuela will pay for wear and tear of the steamer *Santa Bárbara* while she was in the Government's service; that the company should reserve her action to obtain payment of the bill for freight, transportation of troops, and use of two of her steamers by the authorities of the State of Zuliz, duly made out and vouched for, and that according to the balance sheet of December, 1899, amounted to that date to the sum of 203,529.70 francs, and interest from their respective dates of origin, and that the Government of Venezuela should also reserve the actions and rights that might concern it, because of the suspension of traffic, abandonment of operation, and consequently damages suffered by the line because of failure to maintain and preserve it; and that as far as the other points are concerned the claim should be rejected as groundless. (Comisión Mixta Venezolana-Francesa. Protocolo de 19 de Febrero, 1902. Dictámenes del Arbitro Venezolano. Edición Oficial, 1903, p. 206.)

During the oral proceedings had at the sitting of August 28, 1903 (*ibid.*, p. 211), the grounds for my decision were summarized as follows:

The commissioner for Venezuela considering in opposition —

That the actual reasons of the suspension of operation of the line by the company are of an economic character, as the company was compelled to take such steps because of the lack of traffic due to the state of revolt of the country and because of the impossibility in which it (the company) was placed by reason of its bad financial situation of obtaining the necessary funds to repair the damages caused by the weather to a line built under unfavorable conditions;

That the Venezuelan Government *could not be responsible either for the damages* suffered by the working materials because of voluntary abandonment *nor yet of such damages* as the company may have suffered on account of the state of revolution in the country or by an accident of war;

That the agreement entered into by the company and the Venezuelan Government, in regard to the guaranty stipulated in the contract, has been duly and fully executed and that the company has received the sums resulting from the sale of the bonds which in compliance with the terms of said agreement were delivered to the company;

That the Government of Venezuela has never refused to pay the company the value of the *requisitions* (seizures) and the *damages resulting therefrom* to the material and that the inability of the Government to make such payments because of the exhausted condition of the public funds during the civil war only makes the Government liable for the payment of unpaid interests;

The commissioner is therefore of the opinion that the claim of the company lacks proper grounds and only acknowledges to the company the right to an indemnity for 10,000 bolivars for the wear and tear suffered by the steamer *Santa Bárbara*

while she was in the Government's service and reserves to the company the right to claim from the Venezuelan Government by filing the proper and necessary vouchers the amounts due by requisitions (seizures) and the corresponding interests;

Doctor Paúl reserves for the Venezuelan Government all its rights of action against the company because of the abandonment of the operation of the line.

The French Company of Venezuelan Railroads under date September 28, 1904 — that is to say, one year after the session of August 28, 1903, when the commission closed its labors in Caracas — submitted all the documents in support of the requisitions or services rendered by the railways and the ships of the company to the Government of the State of Zulia up to September 30, 1899. I have examined with due care and attention the bills and annexed vouchers and found correct the balance due to the company by the government of Zulia, according to a communication addressed by the manager to the President of the State on the date aforesaid and found under No. 3 " Dossier Réquisitions — Jacket No. 11." According to said communication and vouchers submitted the balance due amounts to *193,135.95 bolivars*.

In a communication addressed under date of January 18, 1900, by the board of managers of the French company to his excellency the minister of foreign affairs in Paris a copy of which is found in Exhibit 3, document 5, the following statement is made:

We take the liberty to send you herewith a copy of the report of our chief manager, the engineer, Gustave Simon, relating to his mission, which said gentleman delivered to us upon his arrival in France.

Every day that passes since we were *compelled and forced* by the revolutionary events to *suspend* our operations in Venezuela, since October 12, 1899, will render more difficult and onerous the possibility of our resuming operations.

The failure to maintain a road and, above all, a railroad leads to its rapid destruction, especially in a tropical country where vegetation is powerful and of almost instantaneous growth.

\* \* \* We estimate in 300,000 francs the minimum cash amount necessary to renew, before the end of April next, the operation and service of our business.

Now the different debts of the national Government, as well as those of the provincial governments, due to our company may be resumed as follows:

(a) The amount of 300,000 francs, in round numbers, representing *reimbursement of transportation expenses and requisitions* made by the account of the authorities.

The itemized accounts *have been furnished to the authorities* according to forms and decrees.

The largest portion of these bills have received proper official approval.

(b) The amount of 250,000 francs, our minimum estimate of the *indemnification* due by the Government of Venezuela by substantial repairs and damages caused because of its acts to *the whole of our property* during the last revolution.

(c) The amount of 1,050,000 francs which, at the rate of 105,000 francs *per month*, represents the amount of the *indemnification* which the Government of Venezuela owes us because of *suppression by its act* of our traffic during the ten months elapsed between July, 1899, and May, 1900.

We have taken as a basis for this estimate of the *indemnification* the amount of the guaranty of 1,260,000 francs which had been fixed and acknowledged to our company by the concession-contract, duly approved and ratified by the Venezuelan Congress and the President of the Republic.

Let us examine now, one by one, these charges for indemnity requested from the Government of Venezuela under date of January 18, 1900 — that is to say, three months after the abandonment or suspension of operations on the part of the board of managers, on the 12th day of October, 1899.

The first item — that is, the amount of 300,000 francs in round numbers, as reimbursement for transportation and requisitions by the authorities — exceeds in the amount of 106,864.05 bolivars the sum of the balance sheet

submitted by the same board of managers to the authorities on September 30, 1899, or twelve days before the suspension of operations and the delivery of the rolling stock, offices, implements, and other property of the company to the consular agent of France in Maracaibo, Mr. A. I. d'Empaire. The claimant has produced said bills and vouchers before the commission. In this regard, the Government of Venezuela is the debtor of the French Company of Venezuelan Railroads, as per bills and vouchers, to the amount of 193,135.95 bolivars, and interest at the rate of 3 per cent, as established by the company, from the date when it is shown such transportation and requisitions took effect in compliance with the orders of the local authorities of the State of Zulia.

The dates and respective balances are the following, as shown by the examination I have made of the bills in the record of the case:

	<i>Bolivars</i>
Balance approved by the legislature of the State of Zulia, February 27, 1894 . . . . .	2,994.85
Balance approved by the legislature of the State of Zulia, January 23, 1895 . . . . .	6,434.60
Invoice as per statement up to December 31, 1897 . . . . .	15,443.60
Invoice, etc., to May 30, 1898 . . . . .	3,886.00
Invoice, etc., to October 30, 1898 . . . . .	34,618.90
Invoice, etc., to March 3, 1899 . . . . .	6,532.00
Invoice, etc., to April 6, 1899 . . . . .	9,047.00
Invoice, etc., to September 30, 1899 . . . . .	114,679.00
Total . . . . .	193,635.95

An estimate of the interest on the several balances from their respective dates until that when the company may probably come into possession of the funds by virtue of the execution of the sentence which may be finally passed, a lapse of time which I believe to be reasonably within three months, taking into consideration any inevitable delay, will show that the company in this regard is entitled to the sum of 36,060 bolivars.

Between the amount of 193,135.95 bolivars, which is established by the company's statements, and that of 203,529.70 bolivars, balance in the company's statement of December 31, 1899, as due by the Venezuelan Government at that time, as shown in the report of the board of managers to the stockholders in the company, and to which I have made reference at the conclusion of my opinion of August 28, 1903, there is a difference of 10,393.75 bolivars, to which I find no other explanation in its support than that it represents the price the company has charged the Government of Venezuela for the service of the steamer *Santa Bárbara* during the days intervening between September 30, 1899, and the end of October of the same year, when it appears the steamer was returned to the company after having taken to the island of Curaçao Doctor Andrade, the President of the State, after the so-called "Liberal-Restauradora" revolution. Such amount, even if it does not appear in a specified form, as it should do, I deem to be a fair compensation for the services rendered by the steamer *Santa Bárbara* to the local authorities during the month of October, as, according to documents in the case, the company had suspended since the 12th of the same month all operations in its railroad and steamer service, so that there were no expenses for maintenance of the service.

On the aforesaid amount, which I recognize as also due by the Government of Venezuela, interest at the rate of 3 per cent should be added from October 30, 1899, to the date of the execution of the sentence as aforesaid, so that the amount of the indemnity increases to the sum of 1,767 bolivars.

So that the principal and interests on this amount, as shown, amount to

203,529.70 bolivars as principal and 37,827 bolivars as interest, or, in all, 241,357.70 bolivars.

I do not think that the indemnification which this commission may award the company should exceed such sum for delay in payment of services rendered the authorities of the State of Zulia at different times, because such services as are represented by transportation of employees and troops, both by land and water, during the time intervening between 1893 and March, 1899, the correspondence and other papers submitted in the case show they were a portion of the active and frequent business transactions of the company carried on with the local authorities, originating debits and credits in account current. There is no written or documentary evidence showing that the company did ever press the payment of the periodical balances of the account by means of any of the measures which the law places at the disposal of the creditor to obtain or enforce the payment of what is due him. Under such conditions there was no denial of justice nor has such claim been advanced. On the contrary, from the correspondence it appears that such activity in the account current of the Government with the company during the six years mentioned was of such importance for the latter that it could well afford, as it happens at times in this kind of business transactions, to take into consideration certain circumstances which only the company was capable of appreciating, in order not to institute legal proceedings to compel such payment, but willingly to wait the payment of such sums as fell due.

It must be stated that the delay in the payment of the balances on the part of the local authorities of the State of Zulia only represents in a period of over six years the amount of 78,450.95 bolivars, out of which sum 50,197.90 bolivars belong to the six months elapsed from October, 1898, to April, 1899, preceding the revolutionary events of May of the latter year. It is also worthy of notice that the company has not shown the total movement of its account current with the government of the State of Zulia from the year 1893 up to the month of April, 1899, when the government of the State appears to be the company's debtor to the amount of 78,456.95 bolivars. The company has only submitted to this commission the balances due at certain dates, which do not furnish sufficient data to find out the amount represented by the total volume of the business transactions during the six years in question to indicate whether the government of the State of Zulia is as remiss in the payment of its obligations as represented.

The same documents and correspondence, which I have had before me, show, as has been established, that the larger portion of the total balance for freights and requisitions due by the government of the State of Zulia on September 30, 1899, arises from services rendered by the railways and the steamers of the company to the authorities of the State of Zulia for the months elapsed from May of the same year when the revolution "Libertadora" broke out in the Andes until said authorities were deprived of their power, because of the triumph of the revolutionary party. It was during these months that traffic was suspended on the railroad, because of the interrupted communications with the interior and the complete cessation of all transportation of the products, which made the normal carrying trade of the line in the ordinary course of business transactions. The managers of the line found themselves in an embarrassing position to meet the indispensable expenses for the want of the income produced by such transportation operations, and it was then that the government of the State of Zulia, finding itself under the necessity of defending the duly constituted authorities and to restore public order, made use, as the government was entitled to do and the company bound to allow by the terms of the concession-contract and the imperious military necessity, of the means

of transportation over land and water that the company had at a standstill at that moment because of the lack of mercantile traffic.

Thus the debt created by the authorities of the State of Zulia in favor of the company under such circumstances represents the sole industrial profits the company could have obtained out of its land and water transportation facilities, while the use to which said authorities placed such means of transportation afforded the only possible means to protect and save such property either from the injurious action of a protracted period of idleness or from the risk of being seized and destroyed by the revolutionary party in order to prevent that the Government they were opposing might make use of it.

I do not find that the impossibility said government was in of satisfying the pressing request for payment which the agent for the company in Maracaibo began to urge precisely at the very moment said authorities were, for the same reasons alleged by the company, in want of funds and when the Government was compelled to spend whatever revenues might be collected to defray the expensive operations of war — I do not find, I say, that such impossibility can be made a cause to justify the claim of liability which the company pretends affects the national Government and settlement of which by an indemnity amounting to millions of bolivars has been demanded. If the managing board of the French Company of Venezuelan Railroads found itself compelled to suspend operations because of the lack of funds, and neither the company nor the board of directors can be made responsible for such state of affairs, as it is due, the company avers, to a case of *force majeure*, why is the national Government of Venezuela to be made responsible because the local authorities of the State of Zulia were in the impossibility to make disbursements to the company in payment of its debts when such authorities were also under the *force majeure* of impossibility on account of the war?

In an interview had in Caracas between the manager, Mr. Simon, and the minister of finance, Mr. Olivarria, in September (16), 1899, when for the first time a direct request for a payment on account of the sum due the company by the sectional government of Zulia was made to the national Government, the aforesaid minister of finance gave as a reason for not making the payment then requested lack of funds and impossibility to promise to make such payment in the near future. At the time of this interview the national Government of Venezuela, represented by the president general Ignacio Andrade, was reduced to the capital of the Republic after the armed conflict of Tocuyito, September 12, when the Government forces were defeated by the army under the command of Gen. Cipriano Castro, the present provisional President of Venezuela. General Andrade and those who composed the Federal executive could not at that moment be in a position to satisfy other needs than those the precarious conditions of the disorganized Government exacted as of vital importance. A month after, which was spent in gathering new troops and directing military operations, to which effect new war contributions were levied and requisitions issued on the inhabitants of Caracas for horses, mules, and provisions for the army, General Andrade found himself in the impossibility of continuing the struggle and abandoned the capital, accompanied by some officers and soldiers, on October 19. From these facts, which are in perfect accord with historic truth, by the simple application of common sense free from any passion or prejudice whatever, it is concluded that there has not existed on the side either of the sectional government or of the national authorities any deliberate purpose of doing any injury to the prosperity and the business of the French Company of Venezuelan Railroads by delaying without any justifiable cause the payment of the amounts due.

The liability which by all possible law and by all principles universally

established affects the debtor who does not pay his obligations in due time is solely that of paying interest to his creditor for the time of the delay at the rate agreed upon and, in the absence of an agreement on this point, at the legal rate.

The provisions of the Venezuelan Civil Code, which in this matter agree with those of the French and Italian Civil Codes and with the civil law of all countries, establish that there exist obligations with penal clause when the debtor, to secure the fulfillment of an obligation agrees to give or to do something in case of failure or delay in the execution of such obligation, and that the penal clause is the compensation for damages growing out of the failure to fulfill the principal obligation. (Articles 1175 and 1178 of the Venezuelan Code of 1896).<sup>1</sup>

When the government of the State of Zulia made a compact with the French Company of Venezuelan Railroads for the service of transportation of troops, ammuniton, etc., and the requisitions which created the Government's debt, no penal clause was stipulated to secure the fulfillment of the contracted obligation, nor did the Government become bound to pay damages in case of delay in the payment different from those the law in all countries grant the creditor against the *debtor of an amount of money* — i.e., interest either in conformity with the contract or with the law.

The following provisions of the Venezuelan Civil Code mentioned, which agree with the identical prescriptions in the French Civil Code, from which they were adopted, are pertinent to the case:

ART. 1191. The debtor is not under obligation to pay damages when as the consequence of *fortuitous events of force majeure he has failed* to give or to perform that which he is bound to do, or has performed that which was forbidden.

ART. 1192. Damages are generally due to the creditor for the loss sustained or the benefits which he has been deprived of, according to the provisos and exceptions hereunder.

ART. 1193. The debtor is not liable except for such damages *as have been foreseen or that could have been foreseen* the time the contract was made, when the failure to fulfill the obligation is not due to fraud or deceit (*dolo*).

ART. 1194. Even in cases where the failure to execute an obligation *may be the result of fraud or deceit* on the part of the debtor the damages for the loss suffered by the creditor or from the loss of profits of which he might have been deprived, can not extend beyond the *immediate and direct consequences* of the failure to fulfill the obligation.

ART. 1196. When in the obligations *for a certain sum of money* there exists no special agreement, *such damages as are the result of delay in the execution* are indemnified by the payment of *interest at the legal rate*, except when otherwise specified. Such damages are due from the day of delay, the creditor not being under obligation to establish any loss by proof.<sup>2</sup>

<sup>1</sup> ART. 1175. Hay obligaciones con cláusula penal cuando el deudor, para asegurar el cumplimiento de una obligación, se compromete á dar ó hacer alguna cosa para el caso de inexecución ó retardo en el cumplimiento de la obligación.

ART. 1178. La cláusula penal es la compensación de los daños y perjuicios causados por la inexecución de la obligación principal.

El acreedor no puede reclamar á un mismo tiempo la cosa principal y la pena, si no la hubiere estipulado por el simple retardo.

<sup>2</sup> ART. 1191. El deudor no está obligado á pagar daños ó perjuicios cuando es á consecuencia de un caso fortuito ó de fuerza mayor que ha dejado de dar ó de hacer aquello á que estaba obligado ó que ha ejecutado lo que le estaba prohibido.

ART. 1192. Los daños y perjuicios son debidos generalmente al acreedor, por la pérdida que ha sufrido y por la utilidad de que ha sido privado, salvo las modificaciones y excepciones establecidas á continuación.

ART. 1193. El deudor no queda obligado sino por los daños y perjuicios que han sido previstos ó que han podido preverse al tiempo de la celebración del contrato, cuando la falta de cumplimiento de la obligación no proviene de dolo.

These prescriptions which are based on universal rules of civil and commercial law of all civilized countries are the only ones applicable to this case. And it is based upon such rules that I have held and do still hold that the Venezuelan Government is not liable to the French Company of Venezuelan Railroads for any other damages for failure to pay the amounts due on the contracts for services rendered, except the payment of the sum of money due for such services and the corresponding interest at the legal rate. To hold otherwise would be to apply to Venezuela a penalty which has not been established by any codes of any of the nations existing under international law. I, therefore, limit the liability of the Government of Venezuela on this account to the amount above mentioned — 241,357.70 bolivars — as principal and estimated interest on the debt.

As the final complement in the discussion of this part of the indemnification claim, I am pleased to quote the high authority of the opinion of my honorable and learned colleague in the American and Venezuelan Commission, Mr. William E. Bainbridge, in the case of Ford Dix against the Venezuelan Government:

Governments like individuals are responsible only for the proximate and natural consequences of their acts. International as well as municipal law denies compensation for *remote consequences* in the absence of *evidence of deliberate intention to injure*. In my judgment the loss complained of in this item of Dix's claim is too remote to entitle him to compensation. The military authorities, under the exigencies of war, took part of his cattle, and he is justly entitled to compensation for their actual value. But there is in the record no evidence of any *duress or constraint* on the part of the military to compel him to sell his remaining cattle to third parties at an inadequate price. Neither is there any special animus shown against Mr. Dix nor any *deliberate intention* to injure him because of his nationality. If the *disturbed state of the country* impelled Mr. Dix to sacrifice his property, he thereby suffered only one of those losses due to the existence of war for which there, is unfortunately, no redress. (Venezuelan Arbitrations of 1903, Ralston's Report, p. 9.)

The same reasoning is applicable to the necessity of the company to suspend operations, which the company made dependent from *force majeure*, because of the lack of revenues during four months by reason of the revolution and the failure of the Government to pay its debts to the company and because after September 27, 1899,

*the railroad line was in the hands of the insurgents, and until the day of the suspension (October 12) there were no hopes that the Government would recover the place.*

See the notice of the manager announcing to the public that traffic had been suspended published in the newspapers called *El Fonógrafo*, *El Anunciador*, and *La Compañía Francesa*.

The second charge made by the board of directors of the company, resuming the claim for indemnification demanded from the Government of Venezuela, January 18, 1900, reads as follows:

(b) The amount of 250,000 francs, our minimum estimate of the *indemnification*

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ART. 1194. Aunque la falta de cumplimiento de la obligación resulte de dolo del deudor los daños y perjuicios relativos á la pérdida sufrida por el acreedor y á los que son consecuencia inmediata y directa de la falta de cumplimiento de la obligación.

Art. 1196. A falta de convenio en las obligaciones que tienen por objeto una cantidad de dinero los daños y perjuicios resultantes del retardo en el cumplimiento, se satisfacen con el pago del interés legal, salvo disposiciones especiales.

due by the Government of Venezuela for *substantial repairs and damages caused because of its acts to the whole of our property during the last revolution.*

In my opinion of August 28, 1903, I granted the claimant company an indemnification of ten thousand (10,000) bolivars and interest from October 12, 1899, for damages caused the steamer *Santa Bárbara* while in the service of the government of the State of Zulia by reason of the revolutionary movement at that time. Said estimate is based on the documentary evidence produced by the company or, in other words, on the estimate of the damages suffered by the steamer, as directed to be made by the French consular agent in Maracaibo, Mr. A. J. d'Empaire, on January 2, 1903, Messrs. Eugene Creutzer, a French mechanical engineer, and Manuel María Soto, a captain in the Venezuelan merchant marine, being intrusted as experts with the appraisalment of said damages. The report of these experts to the consular agent January 2, 1900, which bears the signature of said consular agent, fixes the amount of damages at the sum of *ten thousand bolivars*. There is no other evidence on record purporting to establish the existence of damages to the railroad material of the company, while, on the contrary, from the correspondence of Mr. Decleva, acting as manager of the company, it appears — .

that peace and order reigned on the 7th of June, 1899, according to the reports received from the line.

Under date of June 18 the same manager reports to the company:

I am back after an uneventful trip. In *Santa Bárbara*, in *La Vigia*, along the line, *everything is quiet. The road is in good condition and the material complete.* All our engines have come back to the shops, *even those employed in the ballast work*, which I had pressed into service and kept *by order of the civil and military authorities.*

The only thing that the record establishes in reference to damages sustained by the maritime property of the company, besides the damages done to the steamer *Santa Bárbara*, valued at 10,000 bolivars, is the loss of the steamer *San Carlos y Mérida*, at anchor in the harbor of Maracaibo. The witnesses, Edmond Hainst, Antonio Martínez Peña, and José Vicente González declared at the inquest held by direction of the French consular agent —

that the steamer *San Carlos y Mérida* at anchor opposite the warehouse of McGregor & Co., and of Rafael Morales, had foundered during the evening of the 1st and the day of the 2d of December, 1899, because of the shots received in her hull, both on the port and starboard sides, during the engagement and shots exchanged between the forces under Gen. Cipriano Castro (on the Maracaibo side) and the forces under Gen. José Manuel Hernandez (on the Haticos side).

What is the liability affecting Venezuela for the above-mentioned events? The answer is the same Mr. Evarts, Secretary of State, gave Mr. Hoffman July 18, 1879 (Wharton's Int. Law. Dig., section 224):

As a principle of international law, the view that a foreigner domiciled in the territory of a belligerent can not expect exemption from the operations of a hostile force, is amply sustained by the precedents you cite, and many others. Great Britain admitted the doctrine as against her own subjects *residing in France* during the Franco-Prussian war; and we, too, have asserted it *successfully against similar claims* of foreigners residing in the Southern States *during the war of secession.*

I do not deem it necessary to quote numberless decisions of arbitration courts or commissions in support of the views of the eminent Secretary of State.

Taking as a basis the above-quoted principle, I have not been willing to admit liability on the part of Venezuela for the foundering of the steamer *San Carlos y Mérida*, which was not occupied by the Government forces, but was

anchored in the Maracaibo harbor, unfortunately placed between the belligerent forces during an engagement at a point where the cross fire damaged her hull to the extent that she foundered.

Under such circumstances, the indemnification I have granted for substantial damages to the company's property is limited to what has been established as affecting the responsibility of the Venezuelan Government — i.e., the damages sustained by the steamer *Santa Bárbara* while in the service of the local authorities of the State of Zulia, appraised by experts at the sum of ten thousand (10,000) bolivars. The interest on this sum at the rate of 3 per cent from the date of the return of said vessel, about the end of October, 1899, until the time before stated, represents an amount of 1,675 bolivars or a sum total for the whole item of 11,675 bolivars.

The third and last charge for indemnification contained in the report of the director of the company under discussion is as follows:

(c) The amount of 1,050,000 francs, which, at the rate of 105,000 francs per month, represents the amount of the indemnification which the Government of Venezuela owes us because of suppression *by its acts* of our traffic during the ten months elapsed between July, 1899, and May, 1900.

The above-mentioned allegation is based on the suppression of the traffic of the company, a fact which is attributed to an act of the Government of Venezuela. From all the documents submitted to this commission by the company, the only established fact is that the suspension of traffic from the month of July, 1899, to October 12, of the same year, was due to the state of revolution then existing in the Cordillera de los Andes and localities contiguous to the State of Zulia, such revolution causing interruption of the carrying trade and paralyzation of all such commercial transactions, and that such suspension of traffic from October 12 on was due to the determination taken by the manager of the operations of the company, as published in the newspapers in the State of Zulia, to such causes as were made public by Manager Simon — i.e., the lack of receipts. It is in no way established that the suspension of the railroad and steamer traffic operations since the month of July were due to the direct individual act of the Venezuelan Government, whether by government is understood the one which terminated on October 19, 1899, with the fall of Gen. Ignacio Andrade or the *de facto* government succeeding it under Gen. Cipriano Castro.

Neither the authorities of the government of General Andrade nor the revolutionary forces led by General Castro, which afterwards constituted the government, did ever perform any direct act which may render the Venezuelan Government liable for the suspension of traffic both by land and by water of the company during the months elapsed from July, 1899, to October 12, 1899, while it is fully established that the management directed the suspension of the operations of the lines, and this constitutes an act of its own volition.

Even in the event, *which is not the present case*, that the governmental authorities should have directed the traffic of the trains to stop temporarily because of the needs of war, such determination could not have made the Government of Venezuela incur a liability to indemnify the damages sustained.

There can be no reasonable doubt that it is the right of a government, in situations of danger or organized rebellion and revolution, to take such measures as it may deem proper to prevent the passage of persons, either for travel or business, from one point to another in the localities where there are armed and organized troops of insurrectionists, and to this end it certainly has the right and the power to suspend traffic upon any line of transportation; but this right is coupled with a corresponding duty, which is to make proper compensation to the company in cases other than those where the territory traversed by the railroad is the theater of active warlike operations between armed forces. (Opinion of the Hon. Henry

M. Duffield, umpire in the German-Venezuelan Claims Commission in the case of the Great Railroad of Venezuela against Venezuela, Ralston's Report, p. 636.)

That the authorities of the State of Zulia directed the suspension of traffic on the railroad line, as alleged, has not been established. But even in such case, the operations of war being active precisely within the territory over which the railroad runs, the right to suspend traffic rested with said authorities, the Government of Venezuela not having obligation on that score to indemnify.

The interruption of the ordinary course of business is an inevitable consequence of the state of war, to which both natives and foreigners must submit, and therefore the losses suffered under such circumstances do not create any liability for indemnification to the government of the territory where the war takes place. This is the same rule controlling the case of liability when the property of neutrals suffers a direct injury or is destroyed during an engagement of the belligerent forces.

No government compensates its subjects for losses or injuries suffered in the course of civil commotions \* \* \*. (Hall, 4th edition, p. 232.)

The reason for this is obvious. If the damages suffered by natives as well as aliens in consequence of a war were to be indemnified, the sum total would be so great that whatever the war might have left standing would not be sufficient to indemnify the claimants for direct damages. Payment would have to be made with their own property, and perhaps even this would not suffice.

If governments were under obligations to accept such liabilities as the French Company of Venezuelan Railroads has pretended should be charged against the Venezuelan Government because of the war, claiming for the value of the capital invested in the operation of the Santa Bárbara and El Vígía Railroad an indemnification of 18,000,000 francs, because the state of war compelled the company to suspend operations, suppressing all its revenues, and pretending besides that Venezuela should receive in exchange both the railroad and the maritime property of the company in such a condition as it is now, why should it not be admitted also that all railroad, maritime, commercial, industrial companies, even the undertakers and funeral directors who have been compelled to suspend in Venezuela their active business transactions on account of a state of war, are entitled to transfer to the State their several business properties in exchange for an indemnity equivalent to their working capital? The claim of the French Company of Venezuelan Railroads for 18,430,000 bolivars leads to such absurdity.

The foregoing statements are, I believe, sufficient to firmly establish that the lack of grounds to base the claim for an indemnification upon, larger than the two I have acknowledged, relieves the Venezuelan Government from other liabilities to the French Company of Venezuelan Railroads than —

First. Indemnity for transportation and requisitions as established and estimated interest, 241,357.70 bolivars.

Second. Indemnity for damages to the steamer *Santa Bárbara* and interest, 11,675 bolivars.

Or a sum of two hundred and fifty-three thousand and thirty-two bolivars, rejecting the other claims, as they are not fully established. In this connection I beg to reaffirm in each and every particular my opinion of August 28, 1903.<sup>1</sup>

Before closing this paper I desire to be allowed to make two remarks in reference to the opinion submitted by my learned colleague in support of his decision.

The first remark is that the claim my colleague quotes in his opinion of the

<sup>1</sup> See *supra*, pp. 288-317.

English Company of the Puerto Cabello and Valencia railroads,<sup>1</sup> which by the award of the umpire in the British-Venezuelan mixed commission obtained an indemnification of £231,794 7s. 11d., has no similarity whatever with the present claim, as my learned colleague avers, but, on the contrary, it essentially differs as regards the grounds upon which it rests. Such claim, as the honorable umpire knows better than we do, as he passed the final judgment upon the matter, was entered before the commission by the English Government in behalf of the Puerto Cabello and Valencia Railroad Company, demanding from the Venezuelan Government the amount of £319,381 4s. 9d. as arrears on the guaranty that the Venezuelan Government had given the English railroad company, and their interest, besides a small sum for freights. The English Government could not have submitted to an international arbitration court a claim similar to that submitted to this commission by the French Company of Venezuelan Railroads.

The second remark is that it was not Doctor Paúl who published a volume entitled "*Dictámenes del Arbitro Venezolano*" (Opinions of the Venezuelan Commissioner), among which is found that which my learned colleague, with a certain amount of fitness, perhaps, calls "a formal defense of the Venezuelan nation." It is the Venezuelan Government which made the publication, and it may be possible that such step has been taken with the purpose that the French commissioner or the counsel for the claimant companies may have an opportunity to learn as far in advance as possible the arguments therein contained, so as to be able to contradict them with convincing proofs and arguments before the umpire. I will simply say to my learned colleague that it is not our opinions which are to be submitted to the judgment of the honorable umpire. It is the mass of papers and documents around which the claimant has woven the net of its pretensions which will give no little trouble to the honorable umpire to unravel. It is the claims for indemnification against the Venezuelan Government which are to be sifted to attain the ends of justice.

I also submit herewith five exhibits translated into English, marked, respectively, with the numbers 2, 3, 4, 5, and 6, containing several reports from the railroad inspectors during different stages of the construction and operation of the road and during the suspension of traffic, as well as other communications from the company's agents, addressed to the department of promotion (ministerio de fomento) of the United States of Venezuela, relating to the facts dealt with in the present case.

NORTHFIELD, VT., *February 13, 1905.*

#### ADDITIONAL OPINION OF THE FRENCH COMMISSIONER

After having read the additional memoir presented by my honorable colleague, I can only maintain the position which I took at the meeting of the commission of August 28, 1903, and explained in the prior memoir.

Although Doctor Paúl speaks of my "arguments," I maintain that I have rendered my opinion according to my conscience, as my position as an "arbitrator" requires. The protocol of 1902 gives us the title of "arbitrators" and not "commissioners" or "advocates."

I have no arguments to furnish. I am satisfied to examine those of the company and its defender, Mr. Dacaigne.

I have judged them to be convincing. I have read the two memoirs presented by my honorable colleague, not to combat them, but to find reasons for changing my convictions. After having read them my conviction remains intact.

<sup>1</sup> *Supra*, p. 320, and vol. IX of these Reports, p. 510.

The Venezuelan Government has failed in its contractual obligations in never having paid to the company the guaranty of interest as agreed; it has imposed upon the company, which was forced to accept it, a leonine contract of which judges in equity could not recognize the existence any more than ordinary judges can accord value to a signature given under threat; it has paid the pittance which it has kindly given on this occasion in paper without value; it has used the materials of the company for its needs; it has deprived it of its ordinary resources and employees; it has not even paid the price for services demanded. Consequently it has obliged the company to suspend operations. It is, then, responsible for its ruin, and it owes it an equitable compensation. The manner which I have adopted for calculating this compensation seems to me to be the only one which meets the requirements of equity and avoids, as the spirit of the protocol desires, a new claim being held after the arbitral sentence is rendered. Besides this estimation is made in accordance with the terms of the contract, and in this mode of settlement the Venezuelan Government would find advantages, since it would acquire a concession and a line of railroad at a price inferior to the contract price estimated by itself.

My colleague considers that my decision is contrary to the protocol and that the commission could not pronounce the rescission of a contract. Such is not my opinion. What are the terms of the protocol?

The commission will unite for the purpose of examining "the claims for indemnities presented by Frenchmen." If the two arbitrators "do not agree upon the amount of indemnities to be allowed, the demands will be submitted by them to an umpire," who "will decide without appeal." The protocol says nothing else, and it would be to take from it all the efficacy which the signers wished to give it to restrain the powers of the umpire contrary to the letter and to the spirit of this diplomatic act. The protocol was intended to terminate all the differences existing between Frenchmen and the Government of Venezuela, and has placed no limitation upon the sovereign power of the arbitrators to weigh and decide and, in case of disagreement between the latter, that of the umpire. In pronouncing the rescission, besides, the commission would only cause a condition of fact to be registered, solemnly, and consecrated, the Venezuelan Government having treated the contract in question as nonexisting, since it has never executed its clauses.

Finally, I ought to remark to the honorable Mr. Plumley that Doctor Paúl has not always been of the opinion that the rescission of the contract was beyond the jurisdiction of the commission, since at the sitting of the commission of May 12, 1903, relative to the Pieri claim, he decided that this Frenchman should obtain an indemnity in exchange for the concession which he held of a contract with a municipality. The umpire can refer to the extract of the minutes of the said meeting, which he will find in the *dossier* of the Pieri claim.

As to the foundation of the claim, it is not for me to defend the company of which I am not the advocate but the judge; I can only pray the umpire to go over the *dossier* and the argument of Mr. Dacraigne.

It only remains for me to express a few ideas which are suggested to me by the additional memoir of my honorable colleague, additional memoir which, with the memoir printed in the "Dictámenes," form so well an argument in favor of the Venezuelan Government that the latter has presented no other defense.

In support of his opinions Doctor Paúl cites passages from known authorities and decisions of arbitrators whose science and impartiality I respect; he calls to his aid international law and the law of all countries. I reply that these authors, these arbitrators, and these laws agree in proclaiming that States, like individuals, are bound to keep their engagements solemnly made and to pay

their debts, and are responsible, like individuals, for damages which their faults have caused to others.

Doctor Paúl asks why the Venezuelan Government should not also reimburse their capital to all enterprises, "even funerals," which have suffered in Venezuela from operations of war. And to this question I make the same reply as he: We are agreed upon the above. It is not a question of that in the claim of the French Company of Venezuelan Railroads, which was bound to the Government by a formal contract and has rendered it service worthy of remuneration.

Doctor Paúl maintains that there is no possible comparison between this claim and that of the English Company of Railroads between Puerto Cabello and Valencia. It seems to me, however, that both cases relate to the nonpayment of a guaranty of interest. Only they did not dare, because of the easy access of English fleets to Puerto Cabello, to impose upon the English company the conditions which the French company was obliged to accept under penalty of obtaining nothing for the sums due it. A look cast upon the map of Venezuela is more instructive than all the explanations.

It is also known that France is opposed to using force against the weak to have her rights respected. Besides, the umpire knows better than anyone the claim of the English company, which I have merely heard spoken of, and he will be able, knowing the case, to decide if what has been granted the one can be refused the other because the other is less fortunate or less feared.

Doctor Paúl courteously observes to me that it is the Venezuelan Government that has had the "*Dictámenes del árbitro venezolano*" published, perhaps to permit the French arbitrator and the advocates of the parties to understand its arguments, and besides that the honorable umpire ought to pass, not upon our respective decisions, but upon the claims themselves, of which he ought to become conversant integrally.

On the first point, I reply to my honorable colleague that I have never criticized the publication of the "Dictámenes" — I have no authority at all to do so. I am content to state that this publication emphasizes the character of the arguments of the "Dictámenes" and gives to the French claimants the right of replying, as certain of them have done.

On the second point I am happy to share completely the opinion of my honorable colleague. It will be necessary to remember on this occasion that it is not the first time that we have agreed since we have already settled together, without recourse to an umpire, 72 claims out of the 80 that were submitted to us under the protocol of 1902.

NORTHFIELD, *February 14, 1905.*

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#### OPINION OF THE UMPIRE

July 25, 1887, the minister of public works of the United States of Venezuela, duly authorized, executed a contract with the Duke of Morny, a French citizen, which contract was duly approved by the Congress of that Republic August 3, 1888. It contained provisions which are summarized by the umpire as follows:

The Government of Venezuela conceded to the party above named the right to build a railroad from Mérida to the Lake of Maracaibo; canalizing the river Chamas, the Escalante, or any other navigable river whatsoever; the exploitation and the enjoyment of the revenues of the enterprise for a term of ninety-nine years; a strip of 500 meters of land on each side of the railroad track without payment therefor to be taken from the lands of the nation; the right to avail himself of the lands belonging to individuals which might become

necessary for the construction of the railroad, stations, and the like, in conformity with the laws governing the taking of lands for public use and subject to compensation therefor; the wood and timber necessary for the construction of the works to be taken from the national forest without compensation therefor; the right to introduce into the country free of import duties the engines, material, instruments, and everything necessary for the construction of the line, subject only to proceeding in reference thereto in conformity with the provisions of article 177 of the code of finances; the right of exemption from assessments at all times by the nation and the State; a right to extension of the time allowed for the beginning and the completion of the works when delay was caused by *force majeure*, the entire extension not to exceed one year; a guaranty of 7 per cent on the capital in shares, bonds, or obligations; the right to construct such branch lines as he should deem necessary; the privilege of transferring the contract thus executed to any other person or company at his pleasure on notice to the Venezuelan Government.

The Duke of Morny obligated himself in said contract to begin the said railroad and the canalization of the river, in case it be necessary, within one year from the date of the contract and to finish the line in three years therefrom; to yield up to the Government of Venezuela at the expiration of the said ninety-nine years, without indemnity therefor, the enterprise with all its annexes and properties; to carry the mail free of charge; to transport for one-half the established rates the employees of the Government, its soldiers, troops, and elements of war; to the resolution by the competent tribunals of the Republic, in conformity with its laws, of all doubts and controversies which might arise from the contract.

August 13, 1888, certain declarations and amplifications to the foregoing were made by Gen. Guzmán Blanco, envoy extraordinary and minister plenipotentiary for Venezuela, to and with the said Duke of Morny, which are summarized by the umpire as follows: The Government of Venezuela thereby and therein conceded to the other party that the railroad from Mérida to Lake Maracaibo was to be divided into two sections; the first section was to start from a point upon the river Escalante, which point the concessionary was to determine, and to be continued for a length of 60 kilometers in the direction of Mérida; the second section was to start from the terminal point of this first section and continue to the city of Mérida; an extension of the time fixed in said modification of the contract for the building of the first section equal to the delay suffered, if the delay was caused by *force majeure*; the guaranty of 7 per cent provided for in the original contract to begin when the first section was opened for exploitation; an extension of the time fixed in this modification to the original contract for the building of the second section was to be made equivalent to the delay suffered, if the delay was caused by *force majeure*; establishing the capital at an estimate of 300,000 bolivars per kilometer for the first section and at 350,000 bolivars per kilometer for the second section, the guaranty of 7 per cent to rest upon the amount of this estimate; to pay the said guaranty in three equal parts at equal periods during the year; to add to the material which was to be imported free of duty under the terms of the original contract the engines, material, and instruments necessary for the running of the railroad; and that during the period of twelve years from the date of the said modification of the original contract the Government would not establish a service of navigation to carry on traffic between the terminal point of the railroad or any points upon the Escalante and the different ports of the Lake of Maracaibo.

The concessionary was obligated therein to begin the work of building the first section of said railroad within six months from August 13, 1888, and to

complete the same within two years therefrom; to complete the construction of the second section within four years from the date named, and to introduce the material which was to come in duty free in conformity with the provisions of the law of finances provided for in such matters.

April 16, 1891, further modifications of the contract were made by the Congress of the United States of Venezuela by and with the representative of the French Company of Venezuelan Railroads, which latter had succeeded to the rights of the original concessionary, which modifications are summarized by the umpire as follows: The Republic ratified in behalf of said company the contract of August 13, 1888, and confirmed the original contracts except where they were contrary to the conditions named in that modification. The company renounced and declared null and void Article X of the contract of August 13, 1888, which gave exclusive navigation privileges on the river Escalante and the different ports of the Lake of Maracaibo. It was mutually stipulated that the concession was to be limited to the first section, which was to extend from Santa Bárbara to Camino Real, a point 1 kilometer distant from La Vigia. The guaranty of 7 per cent was to be reduced by the amount of the net benefits received by the company, these being composed of the net product of the receipts of every nature made by the exploitation of the railroad after deducting the general expenses of the company and of its management; the sums paid on account of said guaranty to be treated as advances only, to be returned as and when the benefits received by the company exceeded 7 per cent on the guaranteed capital by applying one-half of such excess in liquidation of said advances until all was reimbursed; that after said advances had been fully reimbursed the Government was to continue to share in said benefits to the extent of 20 per cent thereof. There was added to the provision in regard to the resolution of all doubts and controversies by the tribunals of the Republic the further agreement that in no case were these doubts and controversies to give place to international claims.

It will be observed that by the modification of the original contract made August 13, 1888, the capital of the company for the purpose of reckoning the guaranty was estimated at 18,000,000 francs.

Following this arrangement a French company was formed September 28, 1888, taking the name of French Company of Venezuelan Railroads, with headquarters at Paris, and its duration limited to ninety-nine years. The concessions obtained by the Duke of Morny were taken over by this company. The social fund was fixed at 300,000 francs, divided into 6,000 shares of 500 francs each; the other resources of the company necessary to the enterprise were to be raised by a loan. The laws of the company provided that from the guaranty of the Venezuelan Government of 7 per cent there should be set aside annually a sufficient sum to insure the payment of interest on the capital which was to be obtained by loans. This guaranty was reckoned to produce 126,000 francs annually on the estimated capital of 18,000,000 francs.

October 26, 1888, the company created 41,664 obligations of a nominal value of 500 francs, each representing 25 francs annual interest.

With the capital thus provided, a syndicate undertook to construct the railway, pay the interest in the meantime, and reserve finally to the company for current funds at the time the first section was ready for exploitation the sum of 300,000 francs. The building of the road was in progress from 1889 to 1892.

It is complained by the company that on April 16, 1891, the Government, by the rule of the stronger, compelled in the agreement of that date, the provisions of which have already been stated, the introduction of the clause into the original contract that there was to be deducted from the amount of the guaranty the actual net profits of the company.

September 29, 1891, the first section was nearly completed and about ready for use, when there occurred a very serious inundation, causing a considerable delay and the expenditure of a large sum of money to reconstruct the parts destroyed. It was April 1, 1892, when the company considered the work of construction completed and demanded of the Government its acceptance. But the State of Andes was then in revolt, while that of Zulia was loyal to the titular Government. A portion of the railroad was in each State. To whom should it apply? Which was its Government?

August 5, 1892, the company made publication in the local papers of the fact of the completion of the railroad and that it had begun business.

The company suffered badly from the insurrection, in requisitions from both sides, in the dispersions of its workmen, in the disappearance of its traffic, while the Government in the midst of this intestine war paid neither requisitions, damages, nor guaranties. The line was repaired from the resources of the company, but it thereby exhausted its capital, and November 1, 1892, judicial liquidation resulted. The creditors accepted the proposition made by the company to pay them pro rata and permitted it to continue its enterprise.

February 23, 1893, the engineer of the Government examined the line and declared it to be well constructed and advised that by April 1, 1893, it would be in a situation to be accepted by the Government. March 23, 1893, the decree of inauguration was published, and on May 10, 1893, the record was made of its definite acceptance by the Venezuelan Government, dated back to April 1 of that year. As a matter of fact, the line had been in operation since 1892, with receipts for that year aggregating 149,241.21 francs, for 1893 the receipts being 570,061.37 francs, and in 1894 they were 458,525.24 francs.

An earthquake in 1894 did great damage to the roadbed and to the bridges, which required large expenditures to restore. The receipts through its traffic were insufficient to meet these expenditures, and the national Government, though repeatedly urged so to do, paid neither guaranties nor indemnities nor requisitions. At the general meeting of the shareholders of the company, held June 30, 1894, its reports showed a claim against the Venezuelan Government amounting to 2,205,000 francs. In fact, the repairs which were required by the earthquake had been made only by the issue of bonds of the denomination of 500 francs, drawing interest at 6 per cent, to be reimbursed by the sums to be received from the respondent Government. On June 20, 1895, the report to the general meeting of the shareholders showed a claim against this Government of 5,820,785.47 francs. In 1894 the company issued 800 of the bonds, which have been mentioned, and in 1895 it made a further issue of 400. In the month of December of this last-named year requisitions by the national Government began again; the financial condition of the company became more strenuous. It sought diplomatic aid through its own Government, but obtained no results. December 31, 1895, it claimed of the Government of Venezuela as follows:

	<i>Bolívars</i>
For guaranty to December 31, 1895 . . . . .	4,725,000.00
Damage to the exploitation . . . . .	396,924.75
Damage for recruiting its workmen . . . . .	525,509.57
Requisitions . . . . .	96,320.00
Damage resulting from the nonpayment of the guaranty for the issue of bonds . . . . .	1,308,000.00
Total . . . . .	7,051,754.32

The years 1892 to 1894, both inclusive, were involved more or less in the successful Crespo revolution. It was February 20, 1894, that General Crespo

became constitutional President of the Republic for a term of four years. But it was not until the year 1895 that his authority was everywhere recognized, and up to that time there were occasional revolutionary outbreaks, entailing large expense upon the Government and lessening and interrupting its sources and means of revenue.

The answer of the national Government to the repeated and urgent requests of the company for the recognition and payment of its credits was always a lack of funds, of which fact there could be no real denial. The respondent Government had not, however, agreed to the sums demanded of it by the company.

By 1896 the financial condition of the national Government had greatly improved, and in April of that year, together with Mr. Charles Weber, the duly constituted representative of the French Company of Venezuelan Railroads, it took up the claims of that company. Substantially the same figures were presented to the respondent Government as have been here produced of date December 31, 1895. The consideration and discussion of these affairs resulted in a formal convention made April 18, 1896, when was brought in first a rehearsal of the salient matters of the previous contracts and then the statement of the claim of the company against the respondent Government. This statement is succeeded by the language which follows:

(c) The Government has refused the payment of this guaranty during the time between April 1, 1892 (date upon which the line would have been opened to traffic had it not been for the forced recruiting of workmen), and June 1, 1893, date of the official inauguration; and, furthermore, it has refused the payment of the amount of 2,326,751.32 bolivars, which treats of damages not well founded.

The company, although maintaining in principle the good foundation of the claim, shows itself disposed to make important concessions in view of arriving at an agreement, and after lengthy discussions upon the accounts presented the Government and the company by way of a transaction have agreed upon that which follows:

ART. 1. The company reduces to 1,950,000 bolivars the total amount of all its claims for the guaranty of 7 per cent, liquidated until December 31, 1895, for every other cause which it would have the right to invoke.

ART. 2. For the redemption of the obligation by which the Government has to continue to pay the same guaranty of 7 per cent upon 18,000,000 bolivars guaranteed capital during ninety-nine years, the term of the above-mentioned contract, the company consents to receive 2,500,000 bolivars. Articles 2, 3, and 4 of the said contract of June 17, 1891, become by this fact without force.

ART. 3. The payment of both these amounts is to be made by the Government simultaneously with the present act and by remitting to the representative of the company an order upon the Disconto Gesellschaft of Berlin for the amount of 4,450,000 bolivars in bonds at par of the Venezuelan loan of the Disconto Gesellschaft of 1896 bearing 5 per cent interest annually with 1 per cent amortization, the same order bearing moreover the signed approval of the agent of the Disconto at Caracas.

ART. 4. The representative of the company declares in consequence the nation to be free from every responsibility, as well upon the guaranty of 7 per cent already due as for the obligation to pay this same guaranty in the future, and he will repeat this same declaration in the receipt which he will give to the direction of the Disconto Gesellschaft.

ART. 5. The company binds itself within six months from this date to repair whatever deteriorations have been sustained by the railroad from the changing of the course of the river Chamas, and to keep the line in a good condition for use, in conformity with obligations assumed in the previous contracts, and submitting itself to the penalties which the law inflict in this matter.

ART. 6. In all that which is not opposed to the stipulations of this convention

the rights and obligations resulting for the company from anterior contracts to which reference has been made retain all their force and all their vigor.

Made in duplicate at Caracas, April 18, 1896.

Two days thereafter the ministers of finance and of public works for Venezuela made the following communication:

CARACAS, April 20, 1896.

TO THE DIRECTION OF THE DISCONTO GESELLSCHAFT, *Berlin*.

GENTLEMEN: In conformity with the provisions of article 5 of the contracts of the loans passed between our Government and your direction, the citizen President of the Republic informs you that, in accordance with the contract passed between the national Government and the French Company of Venezuelan Railroads, you will have to remit to the said company the sum of 4,450,000 bolivars in bonds of Venezuelan loan of 1896 at 5 per cent annual interest, with 1 per cent amortization.

It is to be noted that in giving you the receipt for this amount the French Company of Venezuelan Railroads is obliged to make the following declarations:

"That it recognizes as annulled all its credits against the Venezuelan Government for the guaranty of 7 per cent due up to December 31, 1895, and that it renounces absolutely this guaranty during the remainder of the ninety-nine years the term of its concession; that in consequence it declares the nation freed from all responsibilities."

June 27, 1896, there was a general meeting of the shareholders of the French Company of Venezuelan Railroads, and the council of administration made its report. In that report is found the following:

At the beginning of this year, 1896, the Venezuelan Government, being desirous of making a settlement of its debts with the different railroad companies of Venezuela, negotiated with the Bank of Berlin, the Disconto Gesellschaft, for the creation of a loan, called the Venezuelan loan of 1896, bearing 5 per cent annual interest and with 1 per cent amortization, and payable within the term of thirty-six years and a half. The loan was guaranteed by custom-house receipts. The nominal amount of this loan was fixed at 50,000,000 bolivars.

Each of the German, French, English, and other railroad companies were invited by the Venezuelan Government to negotiate simultaneously the payment of what was due them and the redemption of the guaranty which had been conceded. *Each of these companies, after lively debates, accepted the conditions imposed by the Venezuelan Government, harsh as they were, under penalty of seeing themselves eliminated forever from the only combination which might terminate their credit upon this Government.*

Like the other companies, we then accepted the conditions which were imposed upon us. However, we did not authorize our mandatory at Caracas to give our acceptance until after we had taken counsel and received the authority of the controllers appointed by the shareholders.

\* \* \* \* \*  
Seeing the necessity of keeping the social assets up to their full value and with the authority of the controllers appointed in execution of the concordat to represent the creditors, the company has had to issue up to this date 2,500 privileged bonds of 500 francs to procure funds for repairing the line, repairs which are not yet finished.

Recently the Venezuelan Government, having shown a desire to settle with the different companies of railroads in Venezuela, our company, following the example of the German, English, and other companies, sent to Venezuela its formal representatives, and after a long negotiation it succeeded in obtaining from the Government of Venezuela the remittance for the balance of credits and for the redemption of the guaranty for the future of its concession a net sum of 3,200,000 bolivars in bonds of Venezuelan loan of 5 per cent, 1896, above mentioned.

The able patronage of the Disconto Gesellschaft of Berlin assures the actual value of this title.

However grievous such a transaction has seemed to us, we had to resign ourselves, after having been authorized by the official representatives of the share-

holders to accept it, like other railroad companies, as the only means of obtaining any indemnity whatever. \* \* \*

We shall request of you, gentlemen, to ratify the transaction between the Venezuelan Government and your company.

After the reading of this report the shareholders passed the resolution which follows:

The special assembly, after having heard the report of the council of administration read, ratifies the transaction between the Venezuelan Government and the council of administration of the Company of Venezuelan Railroads, assuring regularly the debts of the said Government toward the said company and the redemption of the guaranty in favor of the said company by act of concession which had been attributed to it.

June 25, 1897, there was an annual meeting of the shareholders of the company, and among its proceedings is found a resolution which is here reproduced:

Second resolution. The general assembly, approving the measures taken by the council of administration following the disturbances caused by the inundations which succeeded the earthquake of 1894, authorizes it, so far as it has need, to realize in the best measures possible a complement of the loan voted in 1894, which will be represented by 1,500 privileged bonds of the nominal value of 500 francs, bearing 6 per cent annual interest and redeemable in at least ten years from January 15, 1897, raising thus from 2,500 to 4,000 the total number of these ten-year bonds.

June 30, 1898, there occurred an annual meeting of the shareholders of the company. There was a report of the management of the line for the year then past, from which it is learned that the exploitation suffered a loss of 10,401.75 francs, and that the finishing of the repairs, bridges, buildings, etc., amounted to 499,305.70 francs. There followed certain resolutions, the second of which is here quoted:

Second resolution. The general meeting of the shareholders authorizes the council of administration, first, to remit, July 1, 1898, the full amount of the bonds of the Venezuelan loan, 5 per cent, 1896, which the company possesses on deposit under its name at the Disconto Gesellschaft at Berlin, contra: (a) the remission of 3,619 ten-year privileged bonds, 6 per cent, of the company, (b) a balance in cash of 390,500 francs; second, to call on July 15, 1898, for the redemption at par of 500 francs on 381 privileged bonds, 6 per cent, of the following numbers, and to raise, to meet this payment, the sum of 190,500 francs of the 390,500 francs received as in article 1. The balance of 200,000 francs will be used as current fund. (Numbers of the bonds here given.)

June 29, 1899, there again occurred the company's annual meeting. The directors presented their report, from which is taken the following quotation:

Our railroad has given us an income of 8,966.23 francs, while our service of navigation has caused us a loss of 22,324.83 francs. There is, then, a net loss of 13,358.60 francs. We have finished the repairing of the damages which were caused by the earthquake of 1894 and by the floods which up to 1897 were the consequence. The special expenses paid for this in 1898 reached 149,191.86 francs, which were settled by means of funds at hand; the latter were reduced December 30 last to 51,344.86 francs. The somewhat unsatisfactory results are attributable almost exclusively to the consequences of the political crisis which had been going on in Venezuela for the greater part of the year. \* \* \* Among the 256,126.14 francs of the different debits found in the balance sheet which we are going to submit to you the Venezuelan Government is set down for 174,077.20 francs.

For some months quiet seems to have been reestablished in the country. We hope that with it the commercial situation will resume normal conditions and that our exploitation will profit from it.

The first months of 1899 seemed to justify this hope.

The reimbursement of our privileged bonds has been carried on regularly and in conformity with your decision of June 30, 1898.

Earlier in this opinion the gross receipts of the railroad for 1894 were stated. The net result for that year was 72,332.15 francs. In 1895 the net receipts were 101,676.97 francs and in 1896 they were 102,319.28 francs. In 1897 the respondent Government employed the line to transport its troops and materials, but paid nothing and did not answer the claims presented by the company. As a result the year 1897 showed a loss; similarly, the year 1898.

The 4,000 bonds issued by the company, under authorization which has been quoted, were largely held by the companies Dyle & Bacalan and of Tives-Lille, and with these companies it had always been understood that the payments made by the State were to be used first of all in payment of these bonds; it was for this reason and under the authority above quoted and by reason of the general inexecution of the engagements of the State toward the company, that in the month of June, 1898, the French Company of Venezuelan Railroads turned over to these financial companies the Venezuelan loan of 1896, which was arranged through the Disconto Gesellschaft, of Berlin. And, as has been seen in the quotation last made, there was left for the current use of the railroad company a balance of 200,000 francs. In June, 1898, there was a new revolutionary movement affecting especially the States of Zulia and Andes. The general in charge of the Federal forces drafted the workmen. The director, Mr. Brun, was shot at Santa Bárbara in the midst of a conflict, and died of his wounds; there were requisitions of material, of trains for the transfer of troops, of war material, etc. The passenger and freight service was paralyzed; the claims of the railroad received no attention from the Government; there was no payment for the services and sacrifices required of and imposed upon the company, and its very existence was seriously threatened. It appealed to its own Government, it rehearsed its wrongs and grievances but it obtained no relief. Just as the exploitation began again to yield some income and the revenues of the national Government began to quicken, the successful revolution of General Castro broke out. Requisitions were again in evidence and more than ever before. Destruction was manifest on all sides; grave losses were caused to the boats; while the revolutions took from it its traffic, the Government made requisitions and neither paid anything.

This successful revolution of General Castro which began in the spring of 1899 brought serious disaster to the railroad in many ways. A letter of date October 12, 1899, to the French minister of foreign affairs by Mr. Reynaud of the administrative board vividly portrays the situation. Selections therefrom are quoted:

The political and revolutionary crisis which exists in Venezuela has not diminished in intensity since the last communication which we had the honor of addressing to you August 23 last.

Our property and all our possessions — our railroad material and our boats — have not ceased for several months to be arbitrarily seized or sequestered by the authorities, now said to be legal, now revolutionary. The future of the exploitation of our railroad and boats is grievously compromised in the source of its receipts.

The harvests are destroyed, abandoned, or lost; the workmen are pursued and tracked in the forests; the owners and merchants in flight or ruin.

Finally, our resources are exhausted.

We have been obliged, then, to suspend our exploitation.

It was two days anterior to the date of the above letter that Mr. Simon, general manager of the railroad, informed the citizen president of Zulia in writing that "because of *force majeure*" all operations of the steamers and of

the railroad from Santa Bárbara to La Vigia were suspended. In this communication the *force majeure* referred to is thus explained:

1. All the resources which the company had, whether at Paris or at Maracaibo, have been completely exhausted in paying the expenses of this railroad and its steamer *Santa Bárbara* during all of the revolutions, and then the Venezuelan Government and the insurgents used these means of transfer until little by little they became masters of them.

2. Since September 27, 1899, the revolutionists have again taken possession of the line, and consequently we can have no receipts except from our steamers and of these the Government is constantly taking possession.

3. All our efforts with the national Government at Caracas, as well as with the government of Zulia, to recover the large sums which they owed the company, have had no success, not even for the little sums of 300 and 144 bolivars, which were to be paid October 3, 1899.

4. In these conditions if the company continued the exploitation it would be obliged to go into bankruptcy.

5. *It suspends its exploitations without renouncing its rights on that account upon the concession of the railroad from Santa Bárbara to La Vigia until the special settlement takes place between the French company and the Government.*

A communication to the same effect was sent to the national Government through its minister of public works. In it Mr. Simon stated that the revolution had made it impossible for the railroad to receive any benefit during the months of June, July, and August. It was there stated that in September there was a suspension of hostilities and there were some receipts; but that the new revolution broke out September 27, since which time the traffic had ceased. The use of the steamer plying between Santa Bárbara and Maracaibo had terminated, because of the order of the customs officer forbidding its use and of the confirmation of the same by the president of the State.

The situation is there summarized by Mr. Simon as follows:

1. It is not possible for the exploitation to gain any receipts since the revolutionists are masters; and up to this day, October 10, there is not hope that the Government can retake this city.

2. The Venezuelan Government can not pay the company any of its debts nor even give it an account nor make any promises for the future.

3. The company has no longer any resources, having exhausted everything by which it may meet expenses of the line, while it has made no receipts because of the frequent revolutions.

Considering that this state of affairs has caused it prejudices and enormous damages, and that if it continued its expenses it would be led into bankruptcy, the company sees itself because of *force majeure* obliged to suspend the exploitation of its line and its steamers until a settlement may be made with the national Government of the United States of Venezuela; that the company does not abandon its right upon the concession of the said railroad from Santa Bárbara to La Vigia.

October 22, 1899, by communication of Mr. Simon to the company at Paris it is learned that the archives and records of the company had been locked up in the safes and a detailed inventory had been given the consular agent of France at Maracaibo; that the entire personnel of the boats had been paid and discharged, and the copy of the notice to the public which had been given it through the newspapers was therein remitted. It is added that —

The lack of income during more than four months, together with the revolutions and lack of payment by the Government of its obligations to the company, are the reasons which lead the company to ask for a settlement with the national Government before continuing anew the exploitation.

It appears that since the 27th of September the railway is in the hands of the insurrectionists, and that until this date, October 12, there is no hope that the Government may recover this place.

The Government of France through its foreign office directed its consular agent at Maracaibo to safeguard the interest and properties of the railroad company during its suspension of activities.

December 2, 1899, there was an armed conflict on the shores of the bay of Maracaibo between the forces of General Castro and those of General Hernandez. A steamer of the company, the *San Carlos y Mérida*, was lying at anchor in the bay and the armed forces were so situated toward one another that the steamer lay in their line of fire; as a result the damage to the hull of the steamer was so serious that it sank during the afternoon of that day. These facts concerning the steamer are taken from the report of the French consular agent at Maracaibo in a communication made by him of date December 30, 1899.

January 2, 1900, the appraisers specially appointed for the purpose of estimating the damages suffered by the *Santa Bárbara* while in the service of the national Government made their report, naming these damages at 10,000 bolivars.

January 18, 1900, the French Company of Venezuelan Railroads addressed the minister of foreign affairs of France and referred to its communication of the previous month to the same official and asserted a claim which is reproduced in the additional opinion submitted by the honorable commissioner for Venezuela to the umpire at Northfield, Vt., February 13, 1905,<sup>1</sup> and it need not, therefore, be repeated here.

February 3, 1900, the railroad company addressed itself to the President of the Republic of Venezuela, informing him of the grave disasters which had overtaken the company and declaring that any considerable delay in the settlement of the sums due it from the national Government might prove fatal.

January 18, 1901, the French Company of Venezuelan Railroads, having received no payment from the respondent Government and no encouragement that payment would be made, came to believe that its efforts were forever compromised, and it then presented to the French minister of foreign affairs a claim for 18,000,000 francs, the *ensemble* of the losses which the action of the respondent Government was held to have brought upon it. To this was added the service of the boats, which had been destroyed or injured, and a part of the material of the dredging machine, which had been stolen, making a total of 483,900 francs, deduction having been made of 11,100 bolivars, that sum being the price for which the *Santa Bárbara* and the launch had been sold. This claim was brought to the attention of the consul-general of Venezuela at Paris, whose response was that the new president up to that time had been able to concern himself only with matters political and martial.

It is claimed on the part of the company that in March, 1901, the respondent Government had planned to cede or let the line and its accessories to a Mr. Bolaro, and to that end had appointed a commission for making estimates. The action of the Government met with a very vigorous protest from the company, and if results were intended there were none.

In behalf of the company there is also presented by Counselor Dacraigne in his very able and valuable brief the claim that it was ruined at the hands of the respondent Government; that this ruin was practically consummated by what he is pleased to denominate the culpable removal of the guaranty. He insists that the exchange made between the company and the Government was without any equivalent and was brought about only by such pressure that it was invalid and should be declared a nullity. He also asserts that it should be declared a nullity by default of execution, since the respondent Government

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<sup>1</sup> *Supra*, p. 324.

has not paid the arrears of the bonds which it has given the French company in exchange for its guaranty. The respondent Government, as the essential part of that exchange, was to furnish bonds bearing 5 per cent interest, the bonds having no other value than their interest-bearing qualities. The interest not being paid, the bonds were without value; hence there was, in fact, no consideration for the surrender of the guaranty by the company, and the respondent Government having thus failed to perform that which was essential in the contract for the surrender of the guaranty, the company has a right to demand the rescission of that portion of the convention of 1896. He includes in the right of rescission a claim for damages in behalf of the company, which is in the nature of a reimbursement of all the expenses which have been imposed upon it, with interest at 7 per cent. He urges that the guaranty be liquidated from May 10, 1893, up to the date of this award, less the sums paid thereon, with a charge of 7 per cent interest annually for the default. The claim for 18,000,000 francs is presented on behalf of the company in another view. The reasons given are that the respondent Government by requisitioning the material and the personnel of the company deprived it of its rights and its property. The Government had power to take it, but it is equity that the company be reimbursed for it. The damage thus consummated is estimated at the price set upon it by the Congress of Venezuela in 1891, which, it is urged, is the amount of the claim here presented.

Summarized, then, the claim of the French company, as presented by its counsel, is as follows:

1. For the loss of its line the sum of 18,000,000 francs, with interest at 7 per cent upon the capital of 15,000,000.

2. For the loss of its maritime exploitation, the sum of 483,000 francs, with interest at 7 per cent. The interest on both of these items should be reckoned from March 23, 1893.

This résumé of the facts appearing in this claim and forming the body of it is perhaps sufficient to make intelligent the opinions of the honorable commissioners, and later, the views and holdings of the umpire. He thinks that he can best make to appear the divergent paths by which the honorable commissioners approached the questions involved by quoting liberally the record of their proceedings, which is as follows:

The examination of the claim of the French Company of Venezuelan Railroads, presented at the sitting of May 19 last, and amounting to the sum of 18,483,000 bolivars, was then taken up.

The French arbitrator considering: That the nonexecution of the obligations contracted by the Venezuelan Government with the company and the nonpayment of sums which it owed, from the fact of its engagements and its requisitions carried on, have placed the company in the impossibility of continuing its exploitation; that the inspection of the line, of the material, and of the buildings demonstrates clearly that the company had not recoiled before any expense to assure in excellent condition the service of merchandise and travelers;

That the examination of accounts permits to establish that the exploitation would have been remunerative in spite of the obstacles presented by the civil war and the inclemencies of the climate if the Venezuelan Government had paid over the amounts due from it, and that consequently by the act of the Venezuelan Government the company has been deprived of the legitimate benefits which it had the right to hope for;

That according to the said contract the Venezuelan Government having accorded a guaranty of 7 per cent upon a kilomeric value of 300,000 bolivars, has itself implicitly recognized that the value of the exploitation was 18,000,000 bolivars;

That the Venezuelan Government seems to have had the intention to annul the contract and to accord the concession to a new enterprise;

That the company's claim for indemnity for the damages suffered by its maritime service from Maracaibo to Santa Bárbara is perfectly justified;

Decides that the Venezuelan Government ought to pay to the French Company of Venezuelan Railroads the sum of 18,483,000 bolivars demanded by it, on condition that the latter renounce the concession of the enterprise and abandon to the Venezuelan Government its line, its buildings of exploitation and habitation, its stores, and its terrestrial and maritime material in the condition in which they are found, by means of which payment, renunciation, and abandonment the two parties will be free from all their reciprocal engagements and obligations.

The Venezuelan arbitrator, considering on the contrary:

That the true reasons for the suspension of the exploitation of the line by the company are of economic order, the latter having been led to take this resolve because of the lack of traffic due to the troubled state of the country and by the impossibility in which its bad financial position had placed it to obtain new funds necessary to make repairs for damages caused by the inclemency of the weather to a line established under unfavorable conditions;

That the Venezuelan Government could be held responsible neither for damages caused to the material of the exploitation by a voluntary abandonment nor for those suffered from the fact of the troubled condition of the country or of accidents of war;

That the arrangement entered into by the company with the Venezuelan Government on the subject of the guaranty stipulated in the contract has been entirely carried out and that the company has received the sums accruing from the sale of the bonds which have been remitted to it in execution of the said arrangement;

That the Venezuelan Government has never refused to reimburse the company for the requisitions and damages caused by them to the material, and that the impossibility in which it finds itself of making this reimbursement as the result of the penury of the treasury in the course of the civil war obliges it only to pay interest after demand;

Decides that the claim of the company is without foundation.

It recognizes only the right to an indemnity of 10,000 bolivars for damages done to their steamer *Santa Bárbara* during the time when it was requisitioned, and reserved for it the privilege of claiming from the Venezuelan Government by presenting the necessary justifications, the sums due for the requisitions with interest corresponding. It equally reserves the right of the Venezuelan Government for the fact of the abandonment of the exploitation.

Thus disagreeing, the claim was presented to the umpire at a sitting of the honorable commission held at Northfield, Vt., February 14, 1905.

During the sitting of the honorable commission at Caracas and on August 28, 1903, the honorable commissioner for Venezuela presented an able memoir or opinion relating to this case, giving the reasons of fact and equity which prevented him from allowing any of the claim except the sum of 10,000 bolivars for the appraised injury done the steamer *Santa Bárbara* while in the service of the respondent Government. Many of the facts brought out in his opinion are not repeated in the statement of facts preceding, as reference may be had to them as thus set out in the opinion of the said honorable commissioner. The memoir has been of valued service to the umpire.

September 13, 1904, at Paris, the honorable commissioner for France wrote a memoir or opinion in regard to this claim for the consideration of the umpire, in which he reviewed the memoir or opinion of the honorable commissioner for Venezuela and wherein he gave more in detail than is set out in the records of the proceedings at Caracas, the belief which he entertained in reference to this claim and his inability to accede to the position of his honorable colleague. It has been of great value to the umpire in his study of the claim. The services of the eminent counsel of the company, Mr. Dacraigne, have been of large value in placing before the umpire in concrete form the facts of the case and their bearing upon the question in issue. Following the brief of Mr. Dacraigne is

an additional opinion by the honorable commissioner for Venezuela, in which he reviews the utterances of his honored colleague and the arguments of the company's learned counsel.

He also brings to the attention of the umpire the contents of the dossier, réquisitions, jacket No. 11, which, among other things, contains the required proofs from the company concerning its claims against the respondent Government for requisitions, transportation of troops and material, and other services rendered the respondent Government by the company after December 31, 1895, the date of the last settlement. As the honorable commissioner for Venezuela does not question, but, on the contrary, fully accepts the evidential force of the proofs thus adduced, they were not earlier brought into the statement of this case and are not here brought forward, except to name the annual balances, the total, and the conclusion and the allowance which are made by the honorable commissioner aforesaid.

The dates and respective balances are the following, as shown by the examination I have made of the bills in the record of the case:

	<i>Bolivars</i>
Balance approved by the legislature of the State of Zulia, February 27, 1894 . . . . .	2,994.85
Balance approved by the legislature of the State of Zulia, January 23, 1895 . . . . .	6,434.60
Invoice as per statement up to December 31, 1897 . . . . .	15,443.60
Invoice, etc., to May 30, 1898 . . . . .	3,886.00
Invoice, etc., to October 30, 1898 . . . . .	34,618.90
Invoice, etc., to March 3, 1899 . . . . .	6,532.00
Invoice, etc., to April 6, 1899 . . . . .	9,047.00
Invoice, etc., to September 30, 1899 . . . . .	114,679.00
Total . . . . .	193,635.95

An estimate of the interest on the several balances from their respective dates until that when the company may probably come into possession of the funds by virtue of the execution of the sentence which may be finally passed, a lapse of time which I believe to be reasonably within three months, taking into consideration any inevitable delay, will show that the company in this regard is entitled to the sum of 36,000 bolivars.

Between the amount of 193,635.95 bolivars, which is established by the company's statements, and that of 203,529.70 bolivars, balance in the company's statement of December 31, 1899, as due by the Venezuelan Government at that time, as shown in the report of the board of managers to the stockholders in the company to which I have made reference at the conclusion of my opinion of August 28, 1903, there is a difference of 10,393.75 bolivars, to which I find no other explanation in its support than that it represents the price the company has charged the Government of Venezuela for the service of the steamer *Santa Bárbara* during the days intervening between September 30, 1899, and the end of October of the same year, when it appears the steamer was returned to the company after having taken to the island of Curaçao Doctor Andrade, the president of the State after the so-called liberal (*restauradora*) revolution. Such amount even if it does not appear in a specified form, as it should do, I deem to be a fair compensation for the services rendered by the steamer *Santa Bárbara* to the local authorities during the month of October, as according to documents in the case the company had suspended since the 12th of the same month all operations in its railroad and steamer service, so that there were no expenses for maintenance of the service. On the aforesaid amount, which I recognize as also due by the Government of Venezuela, interest at the rate of 3 per cent should be added from October 30, 1899, to the date of the execution of the sentence as aforesaid, so that the amount of the indemnity increases to the sum of 1,767 bolivars.

As the honorable commissioner for France, in his supplementary statement

made at Northfield, Vt., on February 14, 1905,<sup>1</sup> reviews this additional opinion of his colleague, Doctor Paúl, and does not suggest any error in the figures presented by him as above set out, the umpire has accepted them without carefully studying the original proofs and has adopted them as a basis upon which that feature of the case can safely rest.

The French Company of Venezuelan Railroads contends for an allowance of 18,483,000 francs, (a) on the basis that the Venezuelan Government is responsible for the ruin of the company and that in equity this responsibility carries with it the rescission of the contracts signed between the said company and the respondent Government, as stated in the first paragraph of the opinion of the honorable commissioner for France; (b) on the basis that the French Company of Venezuelan Railroads renounces the concession of the enterprise and abandons to the Venezuelan Government its line, its buildings of exploitation and habitation, its stores, and its terrestrial and maritime material in the condition in which they are found by means of which — payment on the one hand, renunciation and abandonment on the other — the two parties will perform all their reciprocal obligations and engagements, as stated in the record of the proceedings of the honorable commission at Caracas in defining the position of the honorable commissioner for France in regard to the said claim. These two statements of the claim, although differing in form, are understood by the umpire and will be treated by him as in essence one and the same.

In event of failing to impress this view upon the honorable commission the company asks for a large allowance in the way of deferred guaranties and other losses, together with an allowance of the sums approved and accepted by the honorable commissioner for Venezuela. In order to reach the consideration of these deferred guaranties, it urges upon the honorable commission the duty to declare that portion of the convention of April 18, 1896, which refers to the redemption of the guaranty to be null and void, because it was obtained in a manner so conscienceless that it can not be sustained in the forum of equity. If this view is upheld, the honorable commission is asked to pass in detail upon the elements composing this claim.

To take these several propositions in their order, it becomes necessary to consider first the claim of 18,483,000 francs, which is the sum demanded provided the umpire decides in favor of the rescission of the contract.

It would seem to the umpire that the question first occurring is one of jurisdiction — in other words, of competency. For however deeply the sympathies of the trier may be stirred in behalf of those who have bravely struggled and who have seriously lost there is an imperative duty which is primary. That duty is to determine the limits which circumscribe him and keep him within the set and required bounds.

The limits of this honorable commission are found and only found in the instrument which created it, the protocol of February 19, 1902. An arbitral tribunal is one of large and exclusive powers within its prescribed limits, but it is as impotent as a morning mist when it is outside these limits. A reference to the convention which created this commission will disclose its purpose and purview.

Article I declares:

That the first two arbitrators shall meet \* \* \* for the purpose of examining in concert the demands for indemnity presented by Frenchmen for damages sustained in Venezuela, etc.

Article II provides that:

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<sup>1</sup> *Supra*, pp. 333-335.

Demands for indemnities other than those which are aimed at in Article I or based upon facts anterior to the 23d of May, 1899, will be examined in concert by, etc

Article II, then, would permit this liberal reading:

The arbitral tribunal here constituted shall meet for the purpose of examining in concert the demands for indemnity presented by Frenchmen for damages sustained in Venezuela, but exclusive of those which grew out of the "insurrection events" of 1892.

The sole scope and sweep of the authority given is to provide indemnities for damages suffered by Frenchmen in Venezuela. It is not defined but it is assumed that its methods of procedure will not contravene the general and established principles of the law of nations, nor its awards be opposed to justice and equity. This much can be assumed, but to assume that it has power to revoke, rescind, modify, or limit the terms of a contract, even so much as by a hair's breadth, is impossible. It was created for no such purpose; it was endowed with no such powers. So far as a Frenchman has suffered damages in Venezuela for which Venezuela is responsible, the indemnities may be stated and the decision be final. The arbitral tribunal thus constituted may, as a means to the end provided, ascertain and declare the responsibility of Venezuela, it may pass upon its own jurisdiction within the scope of its charter, but it can not step in the least outside the path prepared for it, which is and only is the path which leads from damages to indemnities. If the French Company of Venezuelan Railroads and the respondent Government did but agree that rescission should be had, or that abandonment should be made of the concessions and the properties of the company to Venezuela, then this honorable commission might be considered competent to pass upon and establish the indemnities thus required. Otherwise there is incompetency absolute and entire. This commission is not only destitute of primary authority which is enough, but it is equally destitute of all capacity to compel the parties to carry into effect any such award were it made, which is more.

The contracts in issue were mutual and reciprocal and neither party thereto can make abandonment thereof without the consent of the other. The United States of Venezuela does not consent. Therefore the French Company of Venezuelan Railroads can not, by right, abandon its contracts or its properties.

If it be held that the respondent Government has wrought the utter ruin of the company and that this was done in a manner and by means which charge upon the nation the full measure of responsibility, then there is a case for damages only, and the sum awarded might be — it is not said would be — the sum of 18,483,000 francs, the amount claimed. But it is always and only on the basis of indemnities for damages that this honorable commission has jurisdiction, and it is utterly powerless, even for good cause, to decree an unaccepted and unacceptable abandonment by either party of a mutual and reciprocal contract, or to award an act of rescission which has not, in effect, previously taken place.

The umpire finds ample warrant for his conclusions regarding his powers in the authorities to which he makes reference, and that their pertinency may at once appear he quotes briefly:

The authority of the arbitrator \* \* \* is derived exclusively from the submission, and every part of it, as well as the documents referred to therein, must be taken into consideration in order to determine the extent of such authority. *2 Am. and Eng. Encycl. of Law, 669 (2d ed.)*

It has been held that the arbitrator can consider only the precise question submitted to him, that he can neither modify the question nor add other controversies to it, no matter how cognate to the matter submitted. *Id., 671.*

However, it is within the arbitrator's power to award in regard to all matters which are necessarily or properly incidental to, or included within, the terms of the submission, etc. *Id.*

But he can not lawfully go beyond the terms of the submission in order to do general justice. *Id.*, 672.

For this honorable commission to order something to be done which would cause damage to the party obeying the order and then to award damages therefor would be opposed to the terms of the convention. It would be an independent act posterior to the convention, and were this to be done by the umpire it would require a payment by Venezuela to the claimant company for damages in fact suffered in the United States of America at the hands of the umpire.

A submission of all matters in difference means, as a rule, all matters in difference *down to the date* of the submission *but not after*. *Id.*, 610.

The umpire can not entirely ignore the restrictive features of the contract between the claimant company and the respondent Government, which in terms and in fact strictly required and still requires that all doubts and controversies arising from that contract should be resolved by the competent tribunals of the respondent Government. Certainly to consider and determine the question of its rescission is the most serious doubt, the most important controversy, which could grow out of or arise from the contract in question. A claim for damage may be regarded as ulterior to the contract, especially where the damage has accrued from the operation of the parties under the contract, but the question of its rescission is an entirely different proposition. The unrestricted agreement to submit to an arbitral tribunal the question of damages suffered by Frenchmen in Venezuela may properly be considered, if necessary as equivalent to a suspension of the provision in the contract, were the damages claimed to be such as arose or grew out of the contract; but the agreement to submit a question of damages arising through operations performed under a contract, in no sense suggests a purpose to arm that tribunal with plenary power to consider and settle the question involved in the rescission of a contract, and therefore does not suggest an intent on the part of the high contracting powers to ask on the one hand or to grant on the other the suspension of the restrictive features referred to, which are contained in said contract. What is here said concerning the matter of rescission applies with equal force to the matter of abandonment. It is therefore the deliberate and settled judgment of the umpire that he can not determine this claim on the basis of a declared and directed rescission or of abandonment, and can only decide the amount of the award, this to depend upon the ordinary bases of damages which have been suffered in Venezuela by the French Company of Venezuelan Railroads at the hands of those for whom the respondent Government is responsible.

By the claimant company the redemption of the guaranty as settled by the compact of April 16, 1896, is declared void in equity, (a) for want of adequate consideration and as being made against the desire of the company and under the irresistible compulsion of circumstances which were availed of by the respondent Government to drive a bargain so hard and so unconscionable that it should be set aside by this tribunal; (b) as a default of the Government in neglecting to meet its obligations of interest as they fell due upon the bonds which were given to redeem such guaranty, being a total failure to comply with and carry out the terms of that agreement which renders the agreement itself nugatory and void; and for these reasons the rescission thereof should be declared by this honorable commission.

The agreement effected to redeem this guaranty of the French Company

of Venezuelan Railroads was only a part of a general plan introduced by the United States of Venezuela in 1896, to be made applicable to all similar enterprises wherever located in that country and by whomsoever exploited. To this end it had arranged with the noted and conservative German house, the *Disconto Gesellschaft*, to float a loan of 50,000,000 bolivars, secured upon the custom-houses of the nation and bearing 5 per cent interest annually, the proceeds of said funds to be devoted to the purpose named.

It was accepted generally by the different guaranteed enterprises, the claimant company being one of the several.

Examination of the reports made by the company to the shareholders at its annual meetings for the years 1894, 1895, and 1896 shows a successive and continuing ability on the part of the claimant company to raise money by loans. June 27, 1896, was noteworthy in this regard, since at this annual meeting successful provision was made for floating a loan of 1,300,000 francs. In 1895, the year preceding the redemption of the guaranty, there was raised by loan 200,000 francs, and in the year 1897, a year and more succeeding the settlement, there was negotiated a loan of 1,500,000 francs. Hence it was not an overwhelming financial necessity which confronted the company nor an utter inability to obtain money otherwise which compelled the acceptance of the offered redemption.

The redemption of the guaranty on the terms provided did not mean, on the part of the claimant company, the relinquishment of 1,260,000 francs annually for the sum of 2,500,000 francs in hand. It was only the relinquishment of such sum, if any, as might remain when the net annual revenue was deducted from this annual guaranty.

The net revenue had been growing for the years prior to April 16, 1896. In 1894 it was 72,332.15 francs; in 1895, 101,676.97 francs. Both parties had contemplated and apparently believed that it would finally exceed the guaranty and had provided for that contingency, as will be seen by reference to the contracts which arranged to meet and eventually to cancel the guaranty which had theretofore been paid, directing that one-half of the net annual revenue in excess of 1,260,000 francs be used in payment, and also agreeing that after the said advances had been canceled fully the respondent Government should continue to enjoy 20 per cent of such excess in perpetuity. By this redemption the right of Venezuela to participate in any way in the net profits of the company was canceled. That this right was considered as of some value is evident or it never would have been placed in the contract. In fact, by its terms the annual guaranty was only in advance, an indebtedness of a peculiar character, payable only in certain contingencies and in a particular way, but still it was an indebtedness. By the agreement constituting the redemption these conditions were all changed, to the effect that the arrears then provided for and the 2,500,000 francs then paid were not debt producing, but debt reducing. They were gifts; purely and simply, so far as any duty of repayment was concerned. In another sense they were not gifts. They were the nation's estimate of the value of the railroad and the steamboats to its commerce and to its agriculture, also to the means of communication between different parts of the country. The transaction itself was open, the negotiations lengthy, the time for reflection ample. The cooperation of the directors of the company and of the representatives of the creditors was solicited and received, and all was done with due deliberation under circumstances which permitted entire freedom of will and of action. The approval just mentioned took recorded form on June 27, 1896, after a lapse of more than two months and after a full and explicit report of the action taken, with the reasons therefor fully set forth. It was referred to approvingly at the annual meeting of 1897, and on June 30, 1898, two years and two

months after the agreement of redemption was made, the bonds which had been issued in accordance with that agreement were appropriated by the deliberate action of the company to the payment of a special indebtedness. They were accepted by two of the vigilant and sagacious financial houses of France in place of the obligations of the company. There are apparent none of the features which accompany and signalize bargains which the courts undertake to set aside. The freedom of contracts is one of the bulwarks of business, and courts are loath to interfere where a contract is executed and where are lacking the elements of fraud or mistake, and where it rests upon the mutual assent of parties intelligent, competent, and free to contract.

It is elementary law that every person of sound and disposing mind and under no legal disability has the absolute right of disposing of his property in any way not expressly or impliedly forbidden by law and to any person legally capable of taking it.

Hence, where a person competent to convey has fairly and knowingly made a complete conveyance of his land to another person competent to receive it, and no fraud, accident, mistake, or undue influence was involved in the transaction, the fact that the conveyance was wholly voluntary and without consideration constitutes no ground for rescinding the conveyance and canceling the deed; and in such a case the fact that the disposition of the property was unwise, improvident, or absurd will not be considered by a court of equity. *24 Am. and Eng. Encycl. of Law, 611 (2d ed.)*.

Where the contract has been fully and voluntarily performed before relief by rescission is sought, it is only where the most forceful reasons exist for granting equitable relief that a court of equity or a court exercising equitable powers will interpose to decree the rescission of the contract, etc. Indeed it has been frequently held that nothing short of actual fraud or mistake will justify the court in granting rescission of an executed contract. *Id., 612*.

Although the consideration of simple contracts and of certain forms of real conveyances must be valuable, it is not essential that the consideration should be adequate in point of value. The law does not weigh the *quantum* of consideration, deeming it unwise to interfere with the facility of contracting and the free exercise of the judgment and will of the parties, but allows them to be the sole judges of the benefits to be derived from their bargains, provided there be no incompetency to contract and the agreement violates no rule of law. *6 Am. and Eng. Encycl. of Law, 694 (2d ed.)*.

The final appropriation and use of the redemption fund after such length of time, after such opportunity for observation, investigation, and reflection, without a murmur of dissent in the meanwhile or a request for rescission or an offer to restore the *statu quo* is too palpably a solemn acceptance to admit of doubt, while the absorption of the funds precludes return. There is also no offer to restore. If there were such offer this honorable commission has no power to compel its acceptance.

Moreover, in order to render valid the compromise of a claim, it is not essential that the matter should be really in doubt. It is sufficient if the parties consider it so far doubtful as to make it the subject of a compromise. *6 Am. and Eng. Encycl. of Law, 713 (2d ed.)*, citing *Union Bank v. Geary*, 5 Peters (U.S. Sup. Ct.), 99.

The parties to a contract may at any time rescind it, either in whole or in part, by mutual consent, and the surrender of their mutual rights is a sufficient consideration. *6 Am. and Eng. Encycl. of Law, 729 (2d ed.)*, note.

An agreement by one party to a contract, at the instance of the other party, to modify its terms, is a valuable consideration. *Id., 738*.

A prepayment of interest before it is due is a valuable consideration for an agreement to extend the time of payment. (Summarized.) *Id., 704*.

It is a valuable consideration if the promisee, having the right to refuse permission, is moved by the promise to allow a certain thing to be done. The question is not, did the promisor derive any benefit from the permission or did the promisee

suffer any detriment from giving it? but merely was it something the latter had the right to refuse.

Consideration arises from the permission, irrespective of the benefits derived from it. *Id.*, 741.

The umpire is unable to accept the contention of the claimant company that the respondent Government was the sole cause of its ruin. This is nowhere asserted, or even suggested, by its agents and managers during the progress of the events which culminated in its suspension, nor until the lapse of many months thereafter. It is entirely opposed to the expressions of Mr. Reynaud, of the administrative board of the company, in his careful and analytical statement of the claims of the company on February 3, 1900, since which time it is not claimed that there is to be found any direct injury received from the respondent Government, unless it occurs in its delay to pay its debts. The claim then put forth was (a) payment of 300,000 francs as the full amount due for expenses of transportation and requisitions on account and by order of the authorities of the nation and the States; (b) payment of the sum of 250,000 francs, estimated as the minimum amount of the indemnity due for damages which had been occasioned upon its property; (c) the sum of 105,000 francs a month on account from July 1, 1899, to indemnify the company for the loss which it had suffered since that date from the almost absolute suppression of its traffic and for the immobilization of its railroad and boats. This sum is obtained by taking the amount originally stipulated as an annual guaranty, viz, 126,000 francs, and dividing it by 12, the number of months in a year, the quotient being 105,000 francs. This communication from its authorized agent must be taken as the voice of the company speaking its honest and deliberate convictions and asserting its claims in their most broad and comprehensive sense. This statement was made when all the facts were fresh in the minds of both parties and when there were no reasons for concealment, reservation, or dissimulation. The umpire will accept it as the maximum of the claimant company's demands for those matters which had occurred at that time. He will allow so much of the 300,000 francs as he ascertains to be well founded. He will grant so much of the 250,000 francs as is determined to exist in a claim properly attributable to the respondent Government. He will allow nothing of the claim for 105,000 francs a month, as he finds no lawful responsibility in the respondent Government. It can not be charged with responsibility for the conditions which existed in 1899, prostrating business, paralyzing trade and commerce, and annihilating the products of agriculture; nor for the exhaustion and paralysis which followed; nor for its inability to pay its just debts; nor for the inability of the company to obtain money otherwise and elsewhere. All these are misfortunes incident to government, to business, and to human life. They do not beget claims for damages.

The claimant company was compelled by *force majeure* to desist from its exploitation in October, 1899; the respondent Government, from the same cause, had been prevented from paying its indebtedness to the claimant company. The umpire finds no purpose or intent on the part of the respondent Government to harm or injure the claimant company in any way or in any degree. Its acts and its neglects were caused and incited by entirely different reasons and motives. Its first duty was to itself. Its own preservation was paramount. Its revenues were properly devoted to that end. The appeal of the company for funds came to an empty treasury, or to one only adequate to the demands of the war budget. When the respondent Government used, even exclusively, the railroad and the steamboats it was not outside its contractual right nor beyond its privilege and the company's duty had there been no contract. When traffic ceased through the confusion and havoc of war, or because there were none

to ride and no products to be transported, it was a dire calamity to the country and to all its people; but it was a part of the assumed risks of the company when it entered upon its exploitation.

When revolution laid waste both country and village, or seized the railroad and its material, or placed its hands upon the boats and wrought serious injury to all, it is regrettable, deplorable, but it is not chargeable upon the respondent Government, unless the revolution was successful and unless the acts were such as to charge responsibility under the well-recognized rules of public law. These possible disordered conditions of a country are all discounted in advance by one who enters it for recreation or business. It is no reflection upon the respondent Government to say that the claimant company must have entered upon its exploitation in full view of the possibility, indeed, with the fair probability, that its enterprise would be obstructed occasionally by insurgent bands and revolutionary forces and by the incidents and conditions naturally resulting therefrom.

The honorable commissioner for Venezuela allows, as has already been shown in this opinion, 241,357.70 bolivars. This includes interest on the annual balances appearing in the claimant company's statement to the national and sectional governments, also interest for the use of the steamer *Santa Bárbara*.

The umpire sees no reference by the honorable commissioner in his additional opinion to the appraised damage done the steamer *Santa Bárbara*, which said honorable commissioner allowed in his original opinion. The umpire, by a cursory examination of the vouchers which support the claims allowed by the said commissioner, does not find that it is included therein. Hence the umpire concludes that there can be no mistake in adding that sum, with interest from October 1, 1899, which makes an amount of 11,750 francs. The sinking of the steamer *San Carlos y Mérida*, as stated by the consular agent of France, was, without doubt, an accident of war. No circumstance is suggested which takes it out of the usual rule of nonresponsibility on the part of the respondent Government, and hence it must be disallowed.

The injuries done the railroad, the buildings and the material, by use in war, must have been considerable, and since the revolution was successful, the respondent Government is properly chargeable for its use and for the injuries and damages which resulted. There is no question as to the liability of the respondent Government for the natural and consequential damages which resulted to the railroad properties while they were in the use and control of the titular Government. Hence there is unquestioned and complete responsibility on the part of the respondent Government for all the necessary, natural, and consequential injuries which resulted to the railroad and its properties when used by either the revolutionary or the governmental forces. The umpire is destitute of data upon which he can safely base his judgment as regards the just amount of that damage, but that it is considerable is unquestionable.

He will approach the subject, however, from another standpoint. It is not right that the claimant company be paid only the regular one-half rate for services performed at such times and under such circumstances. There is no clear proof just how much this service was, and any conclusion can in fact be only conjectural and at best only approximate. The umpire accepts as the best basis obtainable the last item of charge, viz, 114,679 bolivars. He assumes that this represented the usual charge to the Government at one-half rate. He considers full rate as none too much and he adds to the sum allowed by the honorable commissioner for Venezuela 114,679 francs and interest, which he reckons at 20,069 francs, making in all 134,748 francs. Where the respondent Government can be charged with no other offense than a neglect to pay its debts through inability so to do, no greater responsibility rests upon it than the

payment of interest for the delay thus caused. Such is the situation in this case, as it appears to the umpire.

The facts brought upon the record, the facts placed in this opinion, do not disclose any relation of the respondent Government to the claimant company which makes the former chargeable financially for the ruin of the latter; and the award can not, in justice and equity, be placed upon any such basis. The several sums allowed for the different causes mentioned constitute the maximum amount which can be named in the sentence. The aggregate of these sums is 387,875.70 francs, and the award will be prepared for that sum.

NORTHFIELD, *July 31, 1905.*



MIXED CLAIMS COMMISSION  
GERMANY-VENEZUELA  
CONSTITUTED UNDER THE PROTOCOLS  
OF 13 FEBRUARY AND 7 MAY 1903

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**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. 511-641.**



## PROTOCOL OF FEBRUARY 13, 1903<sup>1</sup>

*Whereas certain differences have arisen between the United States of Venezuela and Germany in connection with the claims of German subjects against the Venezuelan Government, the undersigned, Mr. Herbert W. Bowen, duly authorized by the Government of Venezuela, and Baron Speck von Sternburg His Imperial German Majesty's Envoy Extraordinary and Minister Plenipotentiary, duly authorized by the Imperial German Government, have agreed as follows:*

### ARTICLE I

The Venezuelan Government recognize in principle the justice of the claims of German subjects presented by the Imperial German Government.

### ARTICLE II

The German claims originating from the Venezuelan civil wars of 1898 to 1900 amount to 1,718,815.67 bolivars. The Venezuelan Government undertake to pay of said amount immediately in cash the sum of £5,500=137,500 bolivars (five thousand five hundred pounds=one hundred thirty-seven thousand five hundred bolivars) and for the payment of the rest to redeem five bills of exchange for the corresponding installments payable on the 15th of March, the 15th of April, the 15th of May, the 15th of June and the 15th of July, 1903, to the Imperial German Diplomatic Agent in Caracas. These bills shall be drawn immediately by Mr. Bowen and handed over to Baron Sternburg. Should the Venezuelan Government fail to redeem one of these bills the payment shall be made from the customs receipts of La Guaira and Puerto Cabello and the administration of both ports shall be put in charge of Belgian Custom house officials until the complete extinction of the said debts.

### ARTICLE III

The German claims not mentioned in the Articles II and VI, in particular the claims resulting from the present Venezuelan civil war, the claims of the Great Venezuelan Railroad Company against the Venezuelan Government for passages and freight, the claims of the Engineer Carl Henckel in Hamburg and of the Beton and Monierban Company Limited in Berlin for the construction of a slaughter house at Caracas are to be submitted to a Mixed Commission.

Said Commission shall decide both whether the different claims are materially well founded and also upon their amount. The Venezuelan Government admit their liability in cases where the claim is for injury to or a wrongful seizure of property and consequently the Commission will not have to decide the question of liability, but only whether the injury to or the seizure of property were wrongful acts and what amount of compensation is due.

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<sup>1</sup> For the German text see the Report mentioned on page 357.

## ARTICLE IV

The Mixed Commission mentioned in Article III shall have its seat in Caracas. It shall consist of two members, one of which is to be appointed by the Government of Venezuela, the other by the Imperial German Government. The appointments are to be made before May 1st, 1903. In each case where the two members come to an agreement on the claims their decision shall be considered as final; in cases of disagreement the claims shall be submitted to an umpire to be nominated by the President of the United States of America.

## ARTICLE V

For the purpose of paying the claims specified in Article III as well as similar claims preferred by other powers the Venezuelan Government shall remit to the representative of the Bank of England in Caracas in monthly installments, beginning from March 1st, 1903, 30 per cent. of the customs revenues of La Guaira and Puerto Cabello, which shall not be alienated to any other purpose. Should the Venezuelan Government fail to carry out this obligation, Belgian customs 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-mentioned claims shall have been discharged.

Any question as to the distribution of the custom revenues specified in the foregoing paragraph, as well as to the rights of Germany, Great Britain and Italy to a separate payment of their claims, shall be determined, in default of another agreement, by the permanent Tribunal of Arbitration at The Hague. All other powers interested may join as parties in the Arbitration proceedings against the above-mentioned three powers.

## ARTICLE VI

The Venezuelan Government undertake to make a new satisfactory arrangement to settle simultaneously the 5% Venezuelan Loan of 1896 which is chiefly in German hands and the entire exterior debt. In this arrangement the state revenues to be employed for the service of the debt are to be determined without prejudice to the obligations already existing.

## ARTICLE VII

The Venezuelan men-of-war and merchant vessels captured by the German naval forces shall be returned to the Venezuelan Government in their actual condition. No claims for indemnity can be based on the capture and on the holding of these vessels, neither will an indemnity be granted for injury to or destruction of the same.

## ARTICLE VIII

Immediately upon the signature of this Protocol the blockade of the Venezuelan ports shall be raised by the Imperial German Government in concert with the Governments of Great Britain and Italy. Also the diplomatic relations between the Imperial German and Venezuelan Governments will be resumed.

DONE in duplicate in English and German texts, at Washington this thirteenth day of February one thousand nine hundred and three.

H. W. BOWEN [SEAL]

H. STERNBURG [SEAL]

PROTOCOL, MAY 7, 1903 <sup>1</sup>

The Imperial German Minister Baron Speck von Sternburg as representative of the Imperial German Government, and Mr. Herbert W. Bowen as plenipotentiary of the Government of Venezuela, in order to carry out the provisions contained in articles III and IV of the German-Venezuelan protocol of February 13, 1903, have signed the following agreement with reference to the Mixed Commission which shall have to decide upon the German claims.

ARTICLE I

The members of the Mixed Commission who are to be appointed by the Imperial German Government and Government of Venezuela shall meet at Caracas June 1, 1903. The umpire who is to be nominated by the President of the United States of America shall join the Commission as soon as possible, and not later than on the first of June, 1903.

The umpire is to be consulted in the proceedings and decisions whenever the German and the Venezuelan Commissioners fail to agree or otherwise deem it appropriate. Whenever the umpire is present at the meeting he shall preside.

If after the convening of the Commission the umpire or either of the commissioners should be unable to fulfill his duties, his successor shall be appointed forthwith in the same manner as his predecessor.

The German and Venezuelan Commissioners shall each appoint a secretary versed in the German and Spanish languages who is to assist them in the transaction of the business of the commission.

ARTICLE II

Before assuming the functions of their office the umpire and both the commissioners shall make solemn oath or declaration carefully to examine and impartially decide according to the principles of justice and provisions of the protocol of the 13th of February, 1903, and of the present agreement, all claims submitted to them; the oath or declaration so made shall be embodied in the record of the proceedings.

The decisions of the Commission shall be based upon absolute equity, without regard to objections of a technical nature or of the provisions of local legislation. They shall be given in writing both in German and Spanish. The awarded amounts of indemnity shall be made payable in German gold or its equivalent in silver, at the rate of exchange at the time of the real payment at Caracas.

ARTICLE III

The claims shall be presented to the commissioners by the Imperial German Minister at Caracas before the first day of July, 1893. A reasonable extension of this term may in proper cases be granted by the Commissioners. The Commissioners shall be bound to decide upon every claim within six months from the day of its presentation, and in case of the disagreement of the German and the Venezuelan Commissioners, the umpire shall give his decision within six months after having been called upon.

The commissioners shall be bound before reaching a decision, to receive and carefully examine all evidence presented to them by the Imperial German Minister at Caracas, and by the Government of Venezuela, as well as oral or

<sup>1</sup> For the German text see the Report mentioned *supra*, p. 357

written arguments submitted by the agent of the Minister or of the Government.

The secretaries mentioned in Article I Section 4 of this agreement shall keep an accurate record of the proceedings of the Commission; which have to be drawn up in duplicate copies signed by the secretaries and members of the commission that have taken part in the proceedings. When the work of the commission comes to an end, a certified copy of each of these records is to be delivered to the Imperial German Government and to the Government of Venezuela.

#### ARTICLE IV

Except as herein stipulated all questions of procedure shall be left to the determination of the commissioners; in particular they shall be authorized to receive the declarations of the claimants or their respective agents, and to collect the necessary evidence.

#### ARTICLE V

The umpire shall be entitled to a reasonable remuneration for his services and expenses, which is to be paid in equal moieties by the Imperial German Government and by the Government of Venezuela as well as any other expenses of the said Commission.

The remunerations to be granted to the two other members of the Commission and to the secretaries are to be paid by the Government by whom they have been appointed. In the same way each Government will have to pay any other expenses which it may incur.

DONE in duplicate in German and English texts at Washington, the seventh day of May, one thousand nine hundred and three.

STERNBURG [SEAL.]

H. W. BOWEN [SEAL.]

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### PERSONNEL OF GERMAN-VENEZUELAN COMMISSION

*Umpire.* — Henry M. Duffield, of Detroit, Mich.

*German Commissioner.* — Hermann Paul Goetsch.

*Venezuelan Commissioner.* — Nicomedes Zuloaga.

*German Secretary.* — Paul Simmross.

*Venezuelan Secretary.* — Segundo Antonio Mendoza.

*Umpire's Secretary.* — Fernando G. Echeverría, of New York, N.Y.

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### RULES OF THE GERMAN-VENEZUELAN COMMISSION

#### I

The secretaries of the Commission shall keep a book in which they shall enter a list of all the claims as soon as they are formally presented. On each claim they shall make a note of the day on which it is presented to the Commission, and shall enter a minute of the claim in the register. The claims shall be numbered consecutively, beginning with No. 1, which shall be the number of the first claim presented.

#### II

The secretaries shall keep a book of awards which the Commissioners, or, in case of disagreement, the umpire and the Commissioners, shall sign.

The secretaries are the custodians of the papers, documents, and books of the Commission.

### III

The Commission shall at its sessions enter upon the consideration of each claim as soon as the Commissioners shall have studied the respective proofs thereof and declare that they are in a position to do so. When the Commissioners shall have studied several claims and their respective proofs, they shall be considered in the same order in which they may have been presented to the Commission, unless the Commissioners for special reasons decide otherwise.

### IV

Should the Venezuelan Commissioner ask, in the case of any claim, that a statement supplemental to the proofs be submitted, the German minister in Caracas shall be requested to supply it.

### V

At any time before the decision of a case the Government of Venezuela shall have the right through its agent of opposing the claim and of presenting the proofs and allegations he may consider proper, or ask a time within which to do so. The provisions of this article shall in no wise alter the time set forth in the convention of May 7 for the decision of all the claims.

### VI

With reference to the claims which in accordance with the protocol and the convention appear to be duly presented, the Commissioners have the right for the purpose of throwing more light on the matter to exact the presentation of documents or other supplemental proofs, provided that by so doing the period fixed by the convention on the 7th of May, 1903, for the settlement of the claims is not altered.

### VII

The sessions of the Commission shall be private, except when the Commissioners shall in special cases direct otherwise, and the proceedings shall not be made public by the Commission or its members until the Commissioners shall have made their reports to their respective Governments.

This rule shall in no manner curtail the right of said Governments or of its agents, to proceed in the manner they may consider most favorable to their interests, nor the right of the members of the Commission to make private use of any information they may think will aid them, in the better fulfillment of their duties, in throwing light on some fact, or even settling some point of law.

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## OPINIONS IN THE GERMAN-VENEZUELAN COMMISSION

CHRISTERN & CO., BECKER & CO., MAX FISCHBACH, RICHARD FRIEDERICY,  
OTTO KUMMEROW, AND A. DAUMEN CASES

No interest, *eo nomine*, will be allowed on claims based solely upon injuries to the person.

Claims based upon contracts in which a certain rate of interest is stipulated shall carry interest at that rate from the date of the breach. In all other contractual

claims interest will be computed at the rate of 3 per cent per annum from the date of the demand for payment of damages for the breach.<sup>1</sup>  
 Claims for wrongful seizures of or injuries to property shall bear interest only from the date of demand for payment of damages, and at the rate of 3 per cent per annum.<sup>2</sup>  
 Whenever interest is allowed it shall be computed to and including December 31, 1903.<sup>3</sup>  
 The Commission has no power under the protocols to provide for interest on awards.<sup>4</sup>

DUFFIELD, *Umpire* :

The Commissioners disagree as to the allowance of interest on the claims hereinafter mentioned, which have been referred to the umpire for decision.

The Commissioner for Germany is of the opinion that all claims should bear interest from their origin, while the Commissioner for Venezuela is of the opinion that no interest should be allowed except in cases arising upon contracts, and in such cases only from the date of the demand for payment of the claim, unless there is an express stipulation for interest in the contract. They also disagree as to the rate of interest, if any should be allowed.

Some phases only of the question are presented in the claims hereinafter mentioned, but as the question will necessarily come up for decision in all its phases during the progress of the Commission, it seems appropriate and convenient to determine the principles which shall govern.

The protocols provide:

Article III of the agreement of February 13, 1903:

That the Commission shall decide —

both whether the different claims are materially well founded and also upon their amount, [and in case of] injury to or a wrongful seizure of property \* \* \* whether the injury to or the seizure of property were wrongful acts, and what amount of compensation is due.

Article V:

For the purpose of paying the claims \* \* \* the Venezuelan Government shall remit to the representative of the Bank of England in Caracas, in monthly installments, beginning from March 1, 1903, 30 per cent of the customs revenues of La Guaira and Puerto Cabello. \* \* \*

Article II of the agreement of May 7, 1903:

The decisions of the Commission shall be based upon absolute equity without regard to objections of a technical nature or of the provisions of local legislation.

These words of the protocols must be interpreted according to the law of nations, and not according to any municipal code. Mr. Webster said in a similar case: "When two nations speak to each other they use the language of nations."

The importance of a correct decision has induced a careful examination of the subject, both in principle and upon precedents, which is the reason for the length of time that has been taken in the preparation of the opinion.

Primarily, interest was the sum due from a borrower to the lender for the use of a sum of money. In ancient times the strongest prejudice existed

<sup>1</sup> Vol. IX of these Reports, p. 122.

<sup>2</sup> *Ibid.*, p. 481.

<sup>3</sup> *Infra*, p. 499.

<sup>4</sup> Vol. IX of this Report, p. 470; *infra*, p. 492.

against its exaction, and as late as the reign of Edward VI an act of Parliament of Great Britain declared the "charging of interest a vice most odious and detestable, and contrary to the Word of God." This prejudice, however, has long since given way to the enlightened view that reasonable compensation for the use of money, like any other property, may justly be demanded.

Domat defines interest to be "the reparation or satisfaction which he who owes a sum of money is bound to make to his creditor for the damage which he does by not paying him the money that he owes him."

Pothier defines interest as including the loss which one has suffered and the gain that one has failed to make. The Roman law calls its two elements the "*lucrum cessans et damnum emergens*." The pay of both is necessary to a complete indemnity.

The rule is thus stated in Rutherford's Institutes (Book 1, ch. 17, sec. 5):

In estimating the damages which any one has sustained where such things as he has a perfect right to are unjustly taken from him or withheld or intercepted, we are to consider not only the value of the thing itself, but the value likewise of the fruits or profits that might have arisen from it. \* \* \* So that it is properly a damage to be deprived of them as it is to be deprived of the thing itself.

The jurisprudence of all civilized nations now recognizes this principle as between individuals in case of contract, and has extended it to compensation for the taking of or injury to property. The general language of the civil law accords with the Anglo-Saxon common law in this respect, and the French civil code enacts the principle. (Sedgwick on Damages, 8th ed., sec. 697.) It is certainly a reasonable presumption from this uniform international recognition of this right as between individuals, that the nations would recognize its justice between themselves.

As applied to the case of reprisals, in which great caution is enjoined to keep within the strictest principles of justice, Mr. Wheaton says, in his work on International Law (Lawrence's ed.), page 363:

If a nation has taken possession of what belongs to another, if it refuses to pay a debt, to repair an injury or to give adequate satisfaction for it, the latter may seize something belonging to the former and apply it to its own advantage till it obtains payment of what is due, *together with interest and damages*.

A report to the House of Representatives of the Forty-third Congress of the United States of America, second session (No. 134), published by authority of Congress in 1875, called "The Law of Claims Against Governments," contains an exhaustive discussion and examination of authorities on the question of interest on claims against governments. (See pp. 219 to 232.) Among other precedents there cited is the report of the Committee on Appropriations of the House of Representatives upon the question whether the United States of America should pay the sum due from it to the Choctaw Indians for lands ceded by them to the United States. The committee decided the question in the affirmative. In support of its decision it cites as precedents the allowance of interest upon claims under the treaty of 1794 between the United States and Great Britain; the treaty of 1795 between the United States and Spain; the convention with Mexico of 1839; the same of 1848; the convention with Colombia of 1864; the convention with Venezuela of 1866; by the Mixed American and Mexican Commission; by the United States to the State of Massachusetts; the American-British Mixed Commission under the treaty of 1871; the United States in dealing with the Indians; the United States in 53 cases of private claimants cited.

The principle of this report was approved by the Senate of the United States in the adoption of the report of its committee containing the following language:

Your committee have discussed this question with an anxious desire to come to such a conclusion in regard to it as would do no injustice to that Indian nation whose rights are involved here, nor to establish such a precedent as would be inconsistent with the practice or duty of the United States in such cases. Therefore your committee have considered it not only by the light of those principles of the public law — always in harmony with the highest demands of the most perfect justice — but also in the light of those numerous precedents which this Government, in its action in like cases, has furnished for our guidance. \* \* \* Your committee can not believe that the United States are prepared to repudiate these principles, or to admit that, because their obligation is held by a weak and powerless Indian nation, it is any the less sacred or binding than if held by a nation able to enforce its payment and secure complete indemnity under it. (H. R. Report No. 134, 43d Cong., 2d sess., p. 230; Lawrence, Law of Claims.)

Other instances are:

Two Cargoes of Flour — interest allowed against the Republic of Venezuela (Moore's History and Digest, p. 3545); Ward's case (id., 3734); Rochereau's case (id. 3742); finally, the Geneva arbitration (Alabama Claims Commission), which, because of the gravity of the questions at issue, and the character, ability, and learning of its members, representing the United States, Great Britain, Italy, Switzerland, and Brazil, was justly regarded as the greatest the world has ever seen. In the great case before it, as in this case, the treaty was silent as to interest. The Commission, on account of the importance and gravity of the question, called for a special argument thereon, and by a decision of four to five allowed interest on the claims.

The umpire is therefore of the opinion that interest is allowable upon all claims arising upon contracts, and on all claims for wrongful seizure of or injury to property.

Claims for injuries to the person, however, stand upon a different footing. Damages in such cases are necessarily unliquidated and their exact amount can not be precisely ascertained. In such cases as between individuals interest is not usually allowed. (Sedgwick on Damages, 8th ed., sec. 320.) In the case of *Lincoln v. Claffin*, 7 Wall., 132, 139, the Supreme Court of the United States speaking through Mr. Justice Field, said:

Interest is not allowable as a matter of law, except in cases of contract or the unlawful detention of money. In cases of tort its allowance as damages rests in the discretion of the jury.

Under nearly all systems of jurisprudence the damages in claims of this nature are left to a jury to assess, instead of to a single judge, upon the accepted theory that because of their peculiar character the united judgment of a number of men will more nearly approximate the exact compensatory amount than the judgment of a single mind. In many courts, and in all the courts with the practice of which the umpire is familiar, it is not the practice for the plaintiff to ask or the jury to assess interest per se. Doubtless the latter may and often do consider the lapse of time between the injury and the recovery of damages therefor in arriving at the amount of their verdict, but they do not specially compute or allow it eo nomine. The same course is open to the Commissioners and to umpire, and in their wise exercise of their discretion, in cases of this character, no practical injustice need be done in any case.

In the opinion of the umpire, therefore, *no interest should be allowed, as such, upon claims for purely personal injuries*, not involving the seizure of or injury to property.

The Commissioners further disagree upon the questions from what time interest shall accrue and the rate to be allowed. It is the opinion of the Commissioner for Germany that interest should begin to run from the date of breach

of contract, or date of wrongful seizure of or injury to property, but the Commissioner for Venezuela is of the contrary opinion except in cases of claims based upon contracts expressly stipulating for interest. In all cases he maintains that no interest is to be allowed until a proper demand for payment has been made on the Republic of Venezuela.

There is much force in the argument of the Commissioner for Germany that the government, as a principal, is presumed in law to have knowledge of all the acts of its officers, as its agents, and if the case was one between private parties it would be difficult to avoid the conclusions drawn by him. The umpire is of the opinion, however, that as to claims against governments it would be unjust to enforce so strict a rule of agency. Of necessity a national government must act through numerous officials, many of whom are very subordinate and quite remote from the seat of government. In the ordinary course of business a creditor under a contract, or a party injured by a tort, presents his claim to the central powers of the government and asks satisfaction thereof from some official whose special function it is to represent the government *in the premises*. It is generally presumed that governments are ready and willing to pay all just claims against them. This is a corollary to that other presumption of law which is of universal application — *omnia rite acta præsumentur*. If such is the case in respect of individuals it must certainly be true in respect of governments. The umpire is not prepared to go the full length of the argument of the Commissioner for Venezuela as to the formality necessary to constitute a sufficient demand in all cases, but he is of the opinion that some evidence of a demand upon the government for payment of a claim is necessary to start the running of interest in all cases which the Government of Venezuela has not either stipulated for interest or given an obligation from which an agreement to pay interest can fairly be implied. The sufficiency of the demand is to be decided according to the particular facts in each case.

The umpire is of the opinion that where no rate of interest is fixed by the terms of the contract interest should be computed at 3 per cent per annum in all cases, that being the rate fixed by the statute of Venezuela in like cases. It is not inconsistent with the language of the protocol to refer to the law of Venezuela fixing that rate. All foreigners residing in or doing business with a country are equally bound with its citizens to know the laws of the country. When they determine to reside in or do business in that country they should be and are prepared to accept the commercial laws of the country. Such general laws are not, in the opinion of the umpire, local legislation, within the meaning of the protocols. Certainly in a suit between a foreigner and a Venezuelan citizen arising upon a contract which is silent as to the rate of interest, the former could only recover against the latter the rate of interest prescribed by the law of Venezuela. There is no good reason for any different rule when the claim of the foreigner is against the Government.

The umpire agrees with the suggestion of the Commissioner for Germany that in all cases in which interest is allowed it should be computed up to a common date. While the precise date when the labors of the Commission will actually terminate can not now be certainly determined, in the opinion of the umpire substantial justice will be done by computing interest upon all claims up to and including December 31, 1903. In each case the amount of interest up to that date will be added to the principal sum, and an award made for the aggregate amount in gross.

Shall these awards bear interest? In the opinion of the Commissioner for Germany the arguments for such allowance, upon grounds of equity and justice to the claimants, are strongly put. On the other hand, the Commissioner for Venezuela presents with ability the equitable considerations in favor of the

Government of Venezuela, and insists that the Commission is without the power so to do. It must be conceded that the Commission can not exceed the powers conferred upon it by the high contracting parties, either expressly or by necessary implication. The Supreme Court of the United States so held in the recent case of *Colombia v. The Cauca Company*, decided May 18, 1903,<sup>1</sup> and reduced the award of the Commission in that case some \$160,000. It is material to remember, in considering this question, that while the amounts are for the ultimate benefit of the claimants, they are to be included in an aggregate sum of money to be paid by the Government of Venezuela to the Government of Germany. These two nations have stipulated, in the language quoted above, how this amount shall be paid, and partial payments have been already made and will continue to be made monthly. There is no express provision for interest in the stipulation. Is there any necessary implication to that effect? It is argued by the Commissioner for Germany that the agreement on the part of Germany to accept payment in subsequent accruing installments necessarily implies an understanding that the awards should bear interest, while the Commissioner for Venezuela insists that in making so particular a provision for the manner of payment the omission of any mention of interest is significant and decisive that no interest was intended to be allowed on the sum. It does not appear in the evidence whether the Bank of England is to pay interest on the successive payments of the customs receipts or not, and in the opinion of the umpire *it is immaterial*. If the bank does pay interest on these deposits it will increase the amount received by the Government of Germany for the benefit of its claimants. If it does not the Government of Venezuela still has paid and will continue to pay monthly installments in the manner and to the trustees named by the contracting Governments. It must be conceded that Venezuela can not under these circumstances be asked to pay interest on the full amount allowed without having credit for interest on these monthly partial payments. There is no provision made for a future settlement of these charges and credits of interest. No person is designated to compute the same or to settle any difference in the computation of the two Governments. The Chinese Indemnity Fund Commission of 1858 is a case directly in point. The treaty provided for the payment of the fund out of the Chinese customs receipts, as is the case here, but the Commission allowed no interest on awards. (Moore, p. 4627-4629.)

It is by no means settled that in cases where the convention fails to specifically provide for interest there is any power in the arbitrators to allow interest on awards. Referring to the decision of former arbitration commissions, the weight of precedent appears to be against the allowance. As opposed to the precedents cited by the Commissioner for Germany, in the following cases the awards did not carry interest: The Panama Riot Commission; the Mexican Claims Commission; the French Claims Commission of January 15, 1880; the French-American Claims Commission; the case of the Montijo; Ward's case; finally, in the Geneva arbitration of 1871 (Alabama Claims Commission), above referred to, no interest was allowed upon awards.

The umpire is influenced by these considerations to decide that it was not the intention of the high contracting parties that the Commission should allow interest on awards.

It only remains to apply these conclusions to the particular cases referred to the umpire.

The case of Becker & Co. is founded upon an order given in payment of certain blankets, in the following words:

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<sup>1</sup> 190 U.S., p. 524.

CARACAS, July 1, 1892 (29° and 34°)

*To the Citizen Administrator of Municipal Rents:*

To be charged to the expenses of war, according to the authorization of the President of the Republic, please pay to Messrs. O. Becker & Co., successors, the sum of 1,470 bolivars, the value of certain blankets taken by this office for the expeditionary army.

God and the federation.

PEDRO VICENTE MIJARES

There is no evidence of any demand for the payment of this order. Treating it as a draft, certainly a presentment and demand for acceptance is essential before interest will commence to run. Apart from the requirements of the civil law, in which the argument of the Commissioner for Venezuela finds considerable support, the umpire is of the opinion that according to the principles of commercial law the instrument would draw interest only from the date of demand for payment. It was decided by the Supreme Court of the United States that the presentment for payment of a drainage warrant, substantially similar to the order in this case, issued by the city of New Orleans, was necessary to start the running of interest. (*New Orleans v. Warner*, 176 United States Reports. p. 92.)<sup>1</sup>

In view of the full consideration given by the claimant for the order so many years ago, it would not be equitable to decide against any allowance of interest prior to the presentation of the claim to this Commission. The claimant will, therefore, be allowed a reasonable time to prove a demand for payment, so that interest may be computed from that date. The same course will be taken in the case of *A. Daumen*.

In the case of *Christern & Co.* simple interest at the rate of 3 per cent per annum will be allowed upon the sums hereafter found due by the Commissioners and the umpire from the dates of demand for payment of the several amounts, and a reasonable time will be allowed to prove such date.

The cases of *Fishbach*, *Friedericy*, and *Kummerow* are not yet ready for a decision on the merits. The umpire is waiting for further briefs from the Commissioners. In case of their allowance they will be governed as to interest by the conclusions reached in this case, so far as they may be applicable.

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KUMMEROW, OTTO REDLER & CO., FULDA, FISCHBACH, AND FRIEDERICY CASES<sup>2</sup>

(By the Umpire:)

The Government of Venezuela is liable, under her admissions in the protocol, for all claims for injuries to or wrongful seizures of property by revolutionists resulting from the recent civil war.

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<sup>1</sup> Under the provisions of an act of Congress, the United States courts administer, in cases at law, the practice of the several States in which they sit. In the State of Louisiana the civil law obtains. (Note by the umpire.)

<sup>2</sup> The Commissioners for Germany and Venezuela both filed opinions in these cases separately, the umpire rendering his opinion in the cases as grouped. The cases of *Henry Schussler*, *Carl Mohle* (see p. 413), *Gotz & Lange*, *E. Nicolai*, *Adolph Ermen*, *Paul Flothow*, and *Hugo Valentiner* (see p. 403) were also allowed by the umpire for the reasons set forth in the following opinion, the Venezuelan Commissioner holding as in these cases that the Venezuelan Government was not liable for revolutionary damages.

Such admission does not extend to injuries to or wrongful seizures of property at any other times or under any other conditions.

Such admission does not include injuries to the person.

As to these two last classes of claims her liability must be determined by general principles of international law, under which she is not liable, because the present civil war, from its outset, has gone beyond the control of the titular government.<sup>1</sup>

[KUMMEROW CASE]

GOETSCH, *Commissioner* :

By the sworn declarations of the witnesses, Páez, Ojada, and Infante, it is proved that in the months of May, June, and July, 1902, the objects specified in the claim and valued at 3,200 bolivars were taken from the claimant by revolutionary troops at his ranch "Mañongo." The witnesses worked and slept in the place where the events occurred, and were present at the act of confiscation. They state expressly that the authors were troops of the "*Liberadora*" revolution under the immediate orders of Generals Boggier, Bonito Estraña, Raimundo Tejado, and of the official Felipe Colmenares. The supposition that the authors of the confiscation were marauding robbers or highwaymen without any leader is therefore inadmissible. The nature of the objects taken shows that they were destined for revolutionary purposes — that is to say, to carry on war (beasts of burden, rifles, cartridges, field glasses, blankets, and clothing.)

The third article of the protocol of February 13, 1903, is of the following tenor:

The Venezuelan Government admit their liability in cases where the claim is for injury to, or a wrongful seizure of, property, and consequently the Commission will not have to decide the question of liability, but only whether the injury to, or seizure of, property were wrongful acts, and what amount of compensation is due.

By these clauses it has been agreed by contract between the German and Venezuelan Governments that Venezuela makes itself liable for the property of German subjects illegally confiscated by authorities or troops of the Government or authorities or troops of the revolution. If the Government of Venezuela were not liable for the damage caused by the revolution, this ought to have been expressly mentioned in Article III, which otherwise would have no meaning. I mention, moreover, Article I of the protocol by which the Government of Venezuela recognizes the German claims in principle, and therefore, also, the claims for the confiscation of property on the part of revolutionists. Although it is not shown by the proofs, it is nevertheless possible that small bands confiscated the German property in question. The mode of carrying on war here, the difficulty of obtaining resources, the desire to commence depredations, generally obliges the troops of the country to separate into small divisions where-by they do not lose their character of revolutionists, for whose illegal acts the Government of Venezuela is liable in accordance with the protocol. If, in Venezuela, these small detachments are known by the name of guerrillas, the Government will be liable for the damages of guerrillas, since "guerrilla" means nothing else but war on a small scale. The removal of liability of the Government of Venezuela could only be brought into question in treating of personal crimes of rebels or highwaymen, and this is not the case, as is shown by proofs.

Article III of the protocol, which governs the Commission, does not create

<sup>1</sup> Headnotes by the umpire.

a new right which is burdensome to Venezuela or in contradiction to the law of nations.

The law of nations recognizes, moreover, that those States in which revolutions are frequent, and whose governments are therefore subject to frequent changes, are liable for the acts of revolutionists, provided that the revolutionists are, because of the means at their command, the government de facto, so far as the one against which they are exercising their forces is concerned. This liability has been more than once recognized by the judgments of international commissions. Thus the Government of the United States of America has claimed damages and injuries from the Government of Venezuela because of the seizure of American vessels by *Venezuelan revolutionists*, and these have been allowed by a commission. (See Moore, *History and Digest of International Arbitrations* to which the United States has been a party, Washington, 1898, pp. 1693-1732; see especially pp. 1716-1722-1724.) Thus also the Government of the United States of America demanded an indemnity from the Government of Peru for the robbery committed against an American, Dr. Charles Easton, by a "body of partisans of the rebel chieftain seeking to overthrow the Government," and demanded that the Commission allow it, inclusive of interest at 6 per cent. (*History and Digest*, pp. 1629-1630.) This case is in every sense analogous to the present case of Kummerow. (See, moreover, Panama riot and other claims, Moore, p. 1631; case of Montijo, seizure of an American vessel by Colombian revolutionists, Moore, p. 1421, where the following opinion of the umpire is found: "But there is another and a stronger reason for such liability — this is, that the General Government \* \* \* failed in its duty to extend to citizens of the United States the protection which, both by the law of nations and the stipulation of said treaty, it was bound to do. The first duty of every government is to make itself respected both at home and abroad. \* \* \* If it does not do so, even by no fault of its own, it must make the only amends in its power, viz, compensate the sufferer.")

It is, therefore, beyond doubt that the Government of Venezuela is liable for the damages occasioned by revolutionists, not only by virtue of the precise terms of the protocol, but also by the law of nations, and above all by the decisions of international commissions of arbitration.

Incidentally it may be mentioned that in Germany such liability, by virtue of which a community (the city or the rural district) ought to indemnify the person who has been injured by revolt or riot, has been sanctioned by law.

The present case is analogous to the claim of Christern in Maracaibo (sackage of "El Finglado" by revolutionary troops at the command of Generals Marquez and Zuleta). According to the minutes of the fourth session, the honorable Venezuelan Commissioner has recognized in principle in this case the liability for damage occasioned by revolutionists, and it only remains for the honorable umpire to determine the amount of damage. The recognition has taken place in view of the provisions of the protocol. In the present case it will not be for the Commission to deliberate upon the liability of the Government of Venezuela. It has been materially settled by international law and formally settled by the protocol. The Commission ought preferably to decide upon the illegality of the confiscation and upon the amount of the corresponding indemnity. The illegality of this seizure is fully proved by the testimony of the witnesses, and with respect to the prices fixed for the objects taken, these appear acceptable and no objection has been made by the Venezuelan Commissioner in this respect. The costs of judicial proceedings (200 bolivars), paid by the claimant are a direct injury which the latter has received, and its return seems justified. (Art. 2 of the supplemental convention.) With respect to the interest, reference is made to the opinion contained in the claim of Christern.

The German Commissioner asks that the honorable umpire decide the admissibility of the claim, amounting to 3,200 bolivars, with interest at 6 per cent, beginning from August 1, 1902, until the complete extinguishment of the debt.

ZULOAGA, *Commissioner* :

In this claim of Kummerow, in my opinion, the facts are not proven, nor do I believe that the foundation upon which he bases it justifies the claim. The claim is founded upon the testimony of three witnesses, laborers of the claimant of such an ignorant class that they do not even know how to sign their names. The declarations are dictated in a common formula, and the estimate which they make of the value of the objects stolen proves by its uniformity that it proceeded from orders received, because of the circumstance that it is to be supposed on account of the class of work which they did they could not testify as to the existence in the possession of Kummerow of many of the objects which he says were stolen from him, nor of their value as expert valuers. To the foregoing is added the consideration that they omit all elements of time and other circumstances, which might serve to throw light upon the facts which they alleged. They say that the acts were performed during a period running over three months. It does not appear that any violence was employed, nor that the objects, if there were any, were cared for, not even that they were taken without the consent of their owner. Mr. Kummerow appears to have considered that the State is a sort of surety who pays with increase for every injury that he might suffer. To all this is added the consideration against the claim that the acts were performed by revolutionary bands, as he states. The very character of the acts which are relied upon, if they were committed, and it is of no importance to the case that the robber was called General This or That, since in Venezuela the name "general" in common speech is given in internal disturbances to every one who follows, of his own will, the rebellion against the constitutional authority. These detachments in general do not obey any central political chief, and only accident or circumstances make them join in an army, thus putting an end to the arbitrary proceedings. In the present war the revolutionists have shot down some of these ringleaders. For my part it is necessary to prove that these roving detachments constituted, properly speaking, the forces of the revolution, and if the claimant believes that this justifies his claim he ought to prove it fully.

But there is a further consideration. Since the German Commissioner believes the liability of the Government to be established by virtue of article III of the protocol, I ought to make an explanation concerning my way of understanding it. I confess that my first impression upon reading it was one of extreme uncertainty; but a more careful study of the subject convinced me that it can not in any way be contended that the Government is liable for every wrong committed against Germany.

It is not creditable that Germany seeks to impose on Venezuela rules which she does not consider just, and it is not possible that in order to apply exceptional rules in favor of Germany a mixed commission should be formed whose president and umpire has been named by the President of the United States. These ideas by themselves plainly show that article 3 of the protocol contains nothing distinct from the rules which in general these nations recognize upon this subject, but only a confirmation of those principles with the idea at most of going counter to the doctrine of absolute nonliability of governments in the matter of civil wars sustained by many governments and publicists. If any doubt might exist it would suffice to know that Venezuela is paying to-day the claims of all the powers with 30 per cent of the receipts of two of her custom-

houses, and this supposes that the nationals of all of them should be treated in the same manner and not with the inexplicable and unjust difference in favor of Germany. The Commissioner of Germany also quotes in support of his opinion article 1 of the protocol, which says that Venezuela recognizes in principle the justice of the claims of German subjects presented by the Imperial German Government; but it is to be borne in mind that that article refers to the claims already presented, which are those which article 2 of the protocol treats of—claims which the Government of Venezuela maintains in general were completely unjustified. This article which the German Commissioner relies upon has not, in my opinion, so far as Venezuela is concerned, any other meaning than the necessity to put an end to a state of war. To seek to find in it a pretext for supporting the new claims is to make the work of this Commission useless; it is to make the legation of Germany the exclusive judge of the justice of the claims.

These preliminary considerations having been established, I must seek in accordance with these ideas the principles which, according to international law, must serve to establish the liability of governments in cases of injury; and in order to do this it suffices to set forth those which Germany and the United States profess. Those of Germany appear from a treaty celebrated with Colombia, article 20 of which says:

It is also stipulated between the two contracting parties that the German Government will not seek to make the Colombian Government liable, *except there might be fault or want of diligence* of the Colombian authorities or of its agents for the damages, insults, or confiscations occasioned during the time of insurrection or civil war to German subjects in the territory of Colombia on the part of rebels or caused by the savage tribes outside the pale of the authority of the Government.

Those accepted by the United States appear in a note of the Department of State to the minister of the United States in Lima. In this note it is said:

In respect to the latter it is the doctrine of this Department that the Government can not be held to a strict accountability for losses inflicted by such violence. (In speaking of the liability of the Government for acts of insurgents whom it could not control and for the violence of mobs.)

This note relates to the destruction of a Peruvian ship in Chesapeake Bay.

The position the United States took on that subject was that such destruction having been effected by a sudden attack of insurgents, which could not by due diligence have been averted, the Government of the United States was not bound to make indemnity. (For. Rel. U.S. 1888, pp. 1377, 1378.)

The Commissioner of Germany has set up as a precedent in the case of the *Transportation Company*, but it is to be remarked that in it there are many other complex elements which might have been the efficient cause for the decision, since this is not set down as one of them. Venezuela was charged with negligence in punishing the guilty parties; there was a question of constitutionality and unconstitutionality and the failure to perform contracts made by Congress; they were not residents of the country; they were traveling about in a ship under the flag of the United States, etc. This decision which is cited I believe in no way establishes the principles sought to be maintained, and everything depends upon the appreciation that the judges might make of the facts alleged.

I consider that the protocol can not be interpreted except in accordance with what has already been set forth, and bearing that in mind I am of opinion that the claim of Kummerow ought to be rejected, it being well understood that I also consider that the damage and much less the fault of the Government of Venezuela is not proved.

The circumstances oblige me to make a general statement of the principles, although it may be that the umpire will not think it necessary to consider all of them in the case of Kummerow.

GOETSCH, *Commissioner* (second opinion).

The opinion of the Venezuelan Commissioner in this claim imposes the duty upon me of supplementing my opinion in various ways.

I. Now that the Venezuelan Commissioner seeks to deny, in the present case, the liability of the Government, founding his opinion upon the fact that the authors of the damage were *guerrillas*, it is necessary to make reference to two annexed official telegrams.<sup>1</sup>

<sup>1</sup> [Official bulletin of the State of Aragua, December 9, 1902. National telegraph from Miraflores to La Victoria.]

DECEMBER 9, 1902—6.40 p.m.

FOR THE PRESIDENT OF THE STATE:

In the most felonious and unjust manner the German and English ships of war have committed the most unusual assault likely to be recorded in history in the port of La Guaira, having captured, without previous notice of war, the steamers *Crespo*, *Ossun*, *Totumo*, and *Margarita*. Therefore, if the same thing should take place in that port, proceed so as to be able to prepare yourself immediately to repel force with force, holding myself responsible to all of you, together with your companions, that the national honor shall remain unsullied in every case. Also you shall proceed to take prisoners all the Germans and Englishmen who may be there, *without any exception, in order that if the foreign rapacity should be directed against you they shall be the first to be fired upon.*

*Thus also you will take possession of all their properties.*

Acknowledge receipt and fulfillment.

CIPRIANO CASTRO

[National telegraph from La Victoria to Caracas.]

DECEMBER 9, 1902

FOR GEN. CIPRIANO CASTRO, *Caracas*:

The constitutional President of the State, impressed by the contents of your telegram in which you announced the great assault committed to-day in the port of La Guaira against the national sovereignty by English and German men-of-war, has sent me notice by telegram to notify you that in any case the State of Aragua will show itself equal to its great duties in this new and tremendous test to which the destiny of our beloved Venezuela is subjected.

The Aragon people *en masse*, and as soon as they had notice of the nefarious occurrence, hastened to protest with strong words of devout patriotism against the foreigners who thus trample upon the principles of international law, proclaimed and observed by all the civilized nations of the globe. Likewise the Chief Executive charges me to say to you that he and his companions pledge themselves to you that the national honor will remain unsullied in any case, since they will follow you steadfastly along this line until they show not only to those who spurn our inalienable prerogatives as citizens of a free and independent nation, but also to the entire world, that we are the worthy descendants of the forefathers who instituted and crowned with success the great national emancipation.

Your positive orders concerning the most important affair to which this telegram relates have been communicated to all the districts of the State.

FRANCISCO E. RÁNGEL.

[Circular telegram.]

LA VICTORIA, December 9, 1902.

*To the Civil Chiefs of the State:*

Immediately after receiving this telegram—that is to say, without losing even a single moment—you shall proceed to place under arrest all the Germans and English-

It will be seen from these that in Venezuela this term is also in current use in the language to designate small bodies of the revolutionary army armed and in the field against the Government. The reasons already set forth in the first opinion fix the responsibility of the Government for the actions of these, unless the responsibility of the Government of Venezuela for damages by revolutions be excluded in principle.

II. Until now the Commissioner of Venezuela has not disputed this responsibility. Like his colleague, Doctor Paúl, a member of the French-Venezuelan Commission, he has recognized until now the responsibility of his Government for revolutionary acts. It so appears in the minutes of the fourth session in the conference concerning the claim of Christern, to which reference is now made; likewise in the conference concerning the claim of Ermen. He has been guided by this interpretation, as appears in the minutes, and his argument in that claim before the honorable umpire. It was there always maintained that in the case mentioned the responsibility of Venezuela should be denied because there was question of guerrillas and not of the regular troops of the revolution. Otherwise the supplemental proof of Mr. Ermen, agreed to by the parties, would be without reason. It is recently that the honorable Commissioner of Venezuela has modified his opinion. It is seldom that in a diplomatic international commission a question of international law already recognized and approved in principle should be disputed later. In the interest of uniformity of judgment of the Commission, it appears desirable that the question of law should not be determined in one way to-day and in another to-morrow.

In any case this change of judicial opinion of his Venezuelan colleague imposes upon the German Commissioner the special duty of showing the honorable umpire, in case he may deem this change of opinion allowable, that the first interpretation of the honorable Venezuelan Commissioner is the just one, and the one which corresponds to the tenor of the protocol and to the principles of international law, without any possible error.

III. The Commissioner of Venezuela asserts that Germany pursues special measures in demanding indemnity for its subjects for damages occasioned by the revolution. Such insinuations should be contradicted. The honorable Commissioner of Venezuela should not be ignorant of the fact that the third articles of the German, English, and Italian conventions with Venezuela contain the same provisions, and that France has also demanded revolutionary damages before the Commission.

In the French Commission the question has already been decided in favor of France, wherefore, as is stated, the Venezuelan Commissioner, and later the umpire of the Commission, have recognized in principle the liability of the Venezuelan Government in all cases. In my first opinion I have expressly shown that the Government of the United States of America has also collected these damages and that it has been allowed them by commissions of arbitration, not only with respect to Venezuela, but also with respect to many other South

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men who may be domiciled in each and every one of the municipalities which compose the district under your command. *You shall likewise proceed to take possession of the properties which belong to the above-mentioned German and English subjects.*

In order that you may understand the rapid and efficacious way in which you ought to fulfill this order, let it be sufficient for you to know that it has been communicated directly from the worthy President of the Republic, General Castro, as a reprisal of the grave assault committed to-day against the national sovereignty in the port of La Guaira by ships of Germany and England.

God and federation.

FRANCISCO E. RÁNGEL.

American States. In Germany itself there exists the same liability legally sanctioned.

To the reference which the honorable Commissioner of Venezuela makes to the German-Colombian treaty, it ought to be objected that the form which they care to give to their respective mutual relations, and if they desire to restrict certain international rules with respect to their citizens, is a matter of policy as between Germany and Colombia. No such treaty exists between Germany and Venezuela. Venezuela can not deduce for herself rights from the German-Colombian treaty, all the less since Colombia has made concessions to Germany in order to obtain the concession noted. The protocol, and in its absence the law of nations, ought to serve as a rule for Venezuela and for the Commission. And to the citation which the Commissioner of Venezuela makes, referring to the United States, in the case of the destruction of a Peruvian vessel in Chesapeake Bay, answer must be made that this case is not sufficient to alter the opinion of the German Commissioner. In the first place, it is known that the matter was afterwards adjusted through diplomatic channels and that Peru was indemnified. (See Moore, *History and Digest*, p. 1624.) The Mixed Commission which met in Lima only decided that it had no jurisdiction over the claim, and refrained from making an award upon its merits. Apart from this no analogy can be deduced from this case with the United States of America. These States are a powerful, flourishing nation, where order rules, the direction of which is intrusted to a strong hand and affords to foreigners and their interests the most absolute security, as the enormous amount of immigration proves, and where, from every point of view, revolutions like those which in Venezuela are the order of the day are impossible. Under these circumstances the case cited by the Venezuelan Commissioner has no other character than that of a commission of a common crime which the authorities of the United States could not foresee, and on account of which, therefore, liability did not attach to the Government. This is not so in Venezuela. One revolution is substituted for another. Revolution has been made a matter of politics. The confiscation of and damage to property of foreigners are here simply the means for the support of revolutions, and have as an object to bring these to a favorable end, although ordinarily they are only dedicated to the enrichment of a few revolutionary partisans.

Moreover, according to press notices of a recent date, the Government of the United States of America paid an indemnity to Italy for the lynching of Italian subjects.

Besides, the following reasons exist to sustain the responsibility of the Venezuelan nation as such:

(a) It has forbidden foreigners to mix in political affairs. This has been decreed anew in Venezuela by the law governing foreigners. If they take part in a revolutionary movement they must suffer severe penalties, and they may even be expelled. They are incapacitated — not so the Venezuelans — from defending their property against losses by force of arms or by their adoption of one of the parties. As a compensation for this the Government of Venezuela is under obligation to protect foreigners. If it does not do so, or if it is impossible for it to do so, there is nothing more just and equitable than to indemnify the person for the losses suffered.

(b) The confiscation of foreign property by revolutionists has as a consequence the enrichment of the national wealth of Venezuela at the cost of foreign property. The money, the cattle, the thing taken ought to accumulate somewhere. If the revolutionists surrender, if a reconciliation with the party in power is effected, as usually happens, a general amnesty is decreed, as, for example, in the recent case of the "Hernandistas." Frequently it happens that

revolutionary leaders surrender themselves to the Government and place their troops at the disposition of the latter against the revolution. In this case it never occurs to anyone to return the moneys, merchandise, or objects seized in support of the revolution to their rightful owner, nor does the Government take any proper means to return to foreigners their property or to cooperate in its return. It is therefore an obligation of the nation, founded upon the principles of equity, to make reparation to foreigners.

(c) But the real reason is the following: If the Commission denies the liability of the Government of Venezuela, all the foreign residents in Venezuela will be exposed to the mercy of future revolutionists. The decision in international law, of the Commission which denies the liability of the nation, would have in the future, as a consequence, a complete want of consideration for foreigners. The admissibility of enriching themselves at the cost of foreigners would be converted into a policy for the revolutions to come. The Commission would assume a grave responsibility in the eyes of history if it should determine to deny the liability of the Government for damages occasioned by revolutionists.

IV. The Venezuelan Commissioner is of opinion that according to international law, especially in accordance with the opinions of many jurists, professors on the subject, the liability of the Government for damages arising out of civil wars can not be established. Only conditionally and in special cases is this true. The difference rather ought to be established whether or not, in a civil war, the factions enjoy the rights of belligerents (as, for example, in the war in the United States between the North and South). In the first case the damages would fall upon everyone as "casualties of war." (See Moore, pp. 1716, 1718.) In the second case the liability of those states in which revolutions are frequent, as has been shown in the first opinion, is considered as obligatory. In the present case the liability is necessarily established by the circumstance that the actual revolution has not been recognized as a belligerent party by any of the powers.

V. The honorable umpire saw fit at the session of the 22d of the present month to ask a juridic declaration of the Commission, as explicit as possible, concerning the interpretation which article I of the protocol should receive. The declaration there contained by which the Government of Venezuela recognizes in principle the claims presented by the German Government refers, according to the opinion of the German Commissioner, to the claims contained in the ultimatum of the German Government, and published by the Government of Venezuela in its Yellow Book. Article I has been supplemented by article III. There the recognition in principle has been limited, in so far as it pertains to the facilities of the German-Venezuelan Commission, to decide also the material justice of the claims submitted to its jurisdiction. This right of the Commission to decide upon the material part of the claim is in its turn limited by the following paragraph, according to which the Government of Venezuela recognizes in principle its liability in the case of claims for illegal damages to and confiscation of property. It would be superfluous to establish this interpretation; moreover, it would be a pleonasm (a redundancy) if it had to be interpreted in the sense that the Government of Venezuela is liable for that which the *Government itself* had confiscated or illegally damaged. The extent of that liability is understood, and it does not require the solemn declaration of a treaty of peace to fix it.

The only object of this clause has been to assist the Commission placing beyond discussion and dispute by the Commission the liability even for damages of the revolution; a liability maintained in principle by the German Government, and up to now always disputed in principle by the Government of Venezuela.

Otherwise the provision would have no meaning. As for the rest, in the opinion it has already been thoroughly demonstrated, that it is the object of article III to give a conventional form to an international rule, disputed until now by Venezuela.

ZULOAGA, *Commissioner* (second opinion):

It is not true that I deny in principle that which has been admitted before. In the Christern case no question of law nor of fact was discussed, and the German Commissioner can not properly assert on account of any declaration of mine what the reasons were that induced me to allow it. I believe that it is useless to insist upon this disagreeable matter.

I have attempted, inspired in a large degree by the same idea which later the umpire has expressed in the Ermen case — that cases in the relation to revolutionary matters may be very different — not to treat of this the question except in so far as the case necessitates it.

In the Ermen case it appears to me that the question of liability for revolutionary damage is unimportant, since, from the way Ermen states that the act was committed, it is seen that there is question of a common fault which never involves the liability of the Government, be those who have committed the act who they may, to which is added the fact that Ermen himself could not say that they were revolutionists.

In the case of Kummerow I am inclined to believe the same, since in my judgment it is sufficient to notice that neither the acts are proved nor the violence shown. To reject these claims for those reasons does not mean to say that I do not reject them also for other reasons or because Venezuela is not liable in international law for the acts of *guerrillas* because of which claim is made.

The question with respect to *guerrillas* is in my opinion simple. The *guerrillas* may in reality belong to the revolutionary army, but they may also not belong to it, and, in general, they do not belong to it, and under this name bands of robbers are shielded who take advantage of the disturbed political situation of the country and make depredations, and in this case the liability of the Government would be as much involved as that of the German or English Governments would be for the acts of the highwaymen of Berlin or London or that of the Government of the United States for the acts of those who stop and rob the trains in the middle of the plains.

In a vast, unpopulated country like Venezuela the question of getting rid of *guerrillas* in certain cases is a different problem, because of the immensity of the forests and plains where they hide themselves. With respect to this, it is worth while to recollect an interesting incident of our history. The war of independence having been terminated, certain marauding bands of *guerrillas* continued in existence, and among them a band by the name of "Cisneros;" in vain it was pursued; it always escaped. In this state of affairs the President of the Republic, General Páez, resolved to go in person, and an interview was proposed in a forest. Cisneros answered that he would be alone in his den, and Páez went; there the bandit had everything ready to shoot him and drew up his forces and said to Páez that *he* (Páez) should give the order to *fire*; the extreme calmness of Páez saved him, and the bandit submitted himself to the authority of the Government.

In order that the revolutionary question might arise it would be necessary that the claimant should have proof (since it is a principle of law that the burden of proof rests upon the one who sets up the fact) that these *guerrillas* were regular forces of the revolution, as the German Commissioner himself desired that Ermen should prove. But regular forces are only those who are subject to the orders of the chiefs of the revolutionary movement. When this fact has been

proven, then in reality the question arises whether the Government is or is not liable for acts of revolutionists, and until then it seems to me that we are within the domain of common law and of ordinary punishment.

The principle of the liability of the state with respect to damages is, in the opinion of the authors (see Pradier-Fodéré), within the rule of common law that everyone is liable for his acts and those of his subordinates. But as the juridic organization of the state is complex and its acts must be governed by many political economic relations, etc., this principle must be restricted with respect to it. In Venezuela, for example, article 9. law of 1873 (Seijas, vol. 1, p. 57) says —

That it can not be contended that the nation should make indemnity for damages and injuries or confiscations which have not been committed by legitimate authorities *acting in their public capacity*.

The Government is therefore not liable unless it be proved that the authorities committed the injury acting in their public capacity. (See art. 11 of the decree of June 9, 1893, Official Compilation, vol. 16, p. 544.)

The protocol of February appears to have wished to abolish just this distinction, and thereby violence committed by the forces of the Government, which took advantage of their position, it appears to me, involve the liability of the Government.

In the question of a revolution it appears that, according to these same principles, the government is not and can not be liable for acts which are not its own but those of persons occasionally outside the pale of its authority. The rule, therefore, is the nonliability of the government. (See Seijas, vol. 1, p. 50.) This liability may in law be established according to the doctrines of some countries if it is shown that the state is negligent or blamable in a concrete case for not having furnished timely protection. But this is an exception, by virtue of which in judging the case only the negligence or culpability charged can be considered.

The German Commissioner is of opinion that the protocol of Washington has derogated these principles of the law of nations with respect to Venezuela, but such a thing does not appear. If it had been intended to make such a declaration of exception it would have been essential to state it clearly, and it is a fundamental principle of interpretation that the clauses making exceptions should be interpreted *restrictively*. Besides, article III of the treaty provides that the Commission must decide if the damage or seizure were unjust, and, in accordance with the principles of international law, it can not be said that the acts of the rebels were just or unjust. This is said of the acts of governments.

With respect to persons who are not the legitimate authorities there exists in Venezuela the right of direct action against them for the damages caused, as also for crimes committed — an action which those who have been injured may institute by appearing before the civil or criminal judge, according as the fact is or the relief which the claimant seeks. Article 11 of the law of 1873 says:

Everyone who, having no public capacity, may decree contributions or forced loans, or commit acts of spoliation of whatever nature, as well as those who execute them, shall be liable, directly and personally with their property, to the injured person. (See Seijas, vol. 1, p. 57.)

*The executive power* is not to intervene in this proceeding and would only be liable if they demanded justice before the judge which should have been impossible for a person to obtain on account of fraud, that is to say, the *denial of justice*. The law of Venezuela in these matters has its importance, since it is a principle of international law, as I understand, that the foreigner has no greater

right than which is granted to nationals, and it is worthy of note that Venezuela does not concede to Venezuelans the right to indemnity for damages committed by the revolution.

The Commissioner of Germany states that Germany is making no special contention, according to the interpretation which he gives to the protocol and the protocols of England and Italy; but I object, for it does not appear that those protocols were interpreted in the manner which he alleges. And nothing appears in the convention of France, and, as that of Paris, payment is to be made in diplomatic debt, not in gold, and there are other reasons or special advantages for Venezuela. The Venezuelan Commissioner might have had sufficient reasons for judging and determining in a different manner, if he did so (which I do not know); or rather to present the questions and their proceedings in other forms. With respect to the United States, I do not know that demands are on Venezuela such as the demand of the Commissioner of Germany and I believe that there will not be any such, bearing in mind the doctrine professed by that country. And since the United States and Spain, as well as other nations, share in the division of the 30 per cent pro rata, I do not understand how one nation can ask more than other nations, since the nations that did not join in the blockade did not insert the third clause, which, interpreted in the form the German Commissioner desires, would be a cause of preference. I consider that they did not believe that this article had such a meaning.

The German Commissioner then enters into considerations of a political nature with reference to Venezuela in order to justify his doctrine. These considerations are so devoid of international equity and contain such strong statements against my country that I prefer to abstain from answering them as they deserve, leaving them to the consideration of the umpire and making only a few concise remarks. If the Commission decides in accordance with the principles which I maintain it will do nothing but keep to the doctrine which, up to now, civilized nations and writers of public law have professed. I do not see why it should be charged with liability before history because it does not care to submit Venezuela to the special theories of the Commissioner of Germany.

The Germans then would enjoy, *as they have been enjoying*, more guaranties than those which the Venezuelans have. I say more guaranties, since, if they preserve their neutrality, they will only be molested occasionally. I shall ask, in my turn, if Venezuela has agreed to establish a mixed commission, and that commission has been established in order to judge in conformity with the principles of equity, what will history say if that commission, because of capricious reasons *of a political order*, should sanction principles contrary to the law of nations in order to apply them to Venezuela? Will it not say that it has disregarded its trust?

To the sketch which the Commissioner of Germany has made, supposing that the Venezuelans are enriching themselves at the cost of the Germans, I am going to oppose a parallel one. A civil war arises in Venezuela; the Venezuelan, more or less involved in the political strife, fears for his property, and if he has cattle or valuables in an insecure place he wishes to rid himself of them; but this operation is not easy. Then appears the neutral, the foreigner, especially those who by occupation are mere merchants, indifferent to the politics of the country. This latter, who solely thinks of his business, shielded by this especially favorable opportunity, realizes the profit in the negotiation, and obtains everything at a low price. Or even more, the same person has no resources, but he has the advantage that he is a foreigner. He insinuates to the Venezuelan that the goods should be placed in his name, and thereby he obtains an advantage; if the goods are lost, he will certainly make an advanta-

geous claim. Or in the midst of the conflict he will be the manager and partner of him who by violence may be able to take possession of the property of others, and by insatiable greed he will institute its destruction, and later, if he be the victim of the natural redress and should suffer the consequence of his acts, he will make there, in the interior of the country, with four witnesses at his command, a proof of violence, and who shall discover the truth? Nevertheless, it is not impossible that some time the corner of the veil which covers these things may be lifted, and it may well serve as an index of what may happen in the case of Otto Redler & Co. (Considerations like these can be found in Pradier-Fodéré). I do not attempt to make a charge against the claimants, nor a general observation concerning them; I speak of what at times happens.

As an opportune observation, it is well to note that the commerce of Venezuela has generally been carried on by Germans and they have entered into the country, driving out the Venezuelans who theretofore carried on this industry. Is not this the reason why the Venezuelans rob them?

The Commission says the convention of Washington shall proceed upon a basis of absolute equity, and if we adhere to this we must decide against the doctrine of the German Commissioner, returning his own argument, that it is not just to demand the same liability of a state of a political organization which is in a certain manner incomplete, as from another which, to its praise, has enjoyed a solid constitution. The man who comes to the United States, for example, has a right to expect more from that Government than the immigrant who comes to these countries whose historical condition is still that of political disturbances, and therefore if the liability is not to be equal the advantage must be with us. Liability is in direct proportion to capacity.

I repeat, and I desire that the umpire shall carefully investigate, this final portion of my opinion to which the absolute necessity of defense urges me, and remember that I would have desired to keep the discussion upon a more elevated plane.

The Commissioner of Germany says that amnesty in Venezuela frequently shields the acts of revolutionists, and it is natural, therefore, that the Government should be held liable for acts done by them. The honorable Commissioner is in error; amnesty only shields *political* crimes, but with respect to the liability at common law that a rebel might have incurred a perfect right of civil or criminal action against him remains to the injured party. This results from the general spirit of our laws.

I seek the truth loyally, and I do not attempt to deny the obligations contracted by Venezuela. The umpire will consider and decide in his high sense of equity, and I will conform my conduct to his judgment.

I am of opinion that the claim of Kummerow should be disallowed.

[OTTO REDLER & CO. CASE]

GOETSCH, *Commissioner* :

The claim of Redler & Co. is composed of three parts.

I. A claim for 7,647.68 bolivars. This sum was admitted by the Government of General Crespo, after his rise to the constitutional presidency of the Republic, as appears from document No. 1 (decree of the National Executive, signed Velutini). The recognition was published in the Official Gazette, No. 7147, of October 23, 1897. The recognition took place by virtue of a decree of June 9, 1893. It has emanated, therefore, from a legal act of Venezuela. This constitutes, according to the opinion of the German Commissioner, a final adjudication, coupled with the circumstance that Venezuela has not paid up to the present. It is not for the Mixed Commission to examine this

decision, nor to seek the origin of this debt; and still less to declare the determination of that Government without force. This would be equivalent to annulling the decree of June 9, 1903, which could not pertain to the jurisdiction of the Commission.

After the Government of General Crespo had become established in a legal and constitutional character, it acquired the right, not only by the constitution of Venezuela, but also by the laws of nations, to adjust, by means of legislation the claims arising out of the revolution. This right has not been disputed by governments subsequent to that of Crespo, and therefore they have recognized the decree and they have also issued similar decrees. If the German-Venezuelan Commission should alter the decree, it would intervene in the order of things legally constituted and would exceed its powers and create a disastrous juridic conflict.

A decree issued at a later date, in consideration of the financial situation of Venezuela, by which only the payment to the creditors of 15 per cent upon their claims is ordered, in no way impairs the legal right which the claimant has, since the debtor — in this case the Venezuelan nation — has no right to reduce at its discretion claims which have been recognized, to the injury of the creditor. Thus, the claimant has shown in a credible manner, in his letter of June 18 of the present year, that, notwithstanding his repeated attempts and owing to the revolution which afterwards arose against General Andrade, he could not obtain the payment of his recognized claim.

The claim of 7,647.68 bolivars appears, therefore, to be justified, as also the 6 per cent interest, counting from the 7th of October, 1893, the date of its presentation to the Commission, which then had jurisdiction, until the payment of the debt.

II. The second claim amounts to 3,732 bolivars. The juridic foundations which support this claim are the same as those in Case I, with the difference that there is no question of *res judicata*. But the claimant having presented his demand at a proper time, it is the fault of the Government then existing that until now no determination in the matter has been reached.

It is for the Venezuelan-German Commission to make satisfaction for the omission. The decree issued by the Government of General Crespo should serve as a guide which permits the determination of the claim. The amount of the claim, 3,732 bolivars, not having been disputed, and the legal relation being the same as that in Claim I, the demand should be allowed, including interest at 6 per cent annually, beginning with January 28, 1893, until the complete extinguishment of the debt.

III. The third claim amounts to 9,932.88 bolivars. Neither the agent of the Government of Venezuela nor the Venezuelan Commissioner disputes the amount of this claim. On the other hand, they deny to claimant, as they do also with respect to claims I and II, the right to present his claims before the Mixed Commission, arguing that because of active participation in the revolution of 1892 — that is to say, ten years ago — he has violated his neutrality, and has thereby lost his right to be protected by the German Government.

In the first place, the German Commissioner notes the lack of strict proof to sustain the objection that the claimant had violated his neutrality in 1892. Mr. Redler has never acknowledged that he knew that the merchandise sold by him was destined to aid the revolution. The sale was made to individuals. With respect to the sale to Ysava, it was only afterwards that the vendor learned that the merchandise was destined for General Crespo. (See letter of Redler, dated June 15, 1903.) In the second case also the sale was made to an individual. The circumstance that he made demand then upon Carlos Herrera for payment proves the good faith of Redler. (See letter of Redler, June 15, 1903.) In this

case also he learned later that the merchandise was for Crespo, for which reason his demand was rejected, and he was compelled to address himself to the Government. But even in the supposition, which is denied, that Redler did not observe the necessary caution, and has failed to observe the neutrality imposed on foreigners, the following observations should be taken into consideration:

The Government of that time would have had to submit Redler to trial and to demand an account of his actions. This has not been done. Moreover, the revolution succeeded and assumed the power. Afterwards amnesty was decreed and put into effect in favor of all the individuals and in relation to all the acts connected in any way with the revolution — a logical attitude, since the triumphant revolutionists could hardly impose punishment upon themselves. The decree of Crespo, dated June 9, 1893, by which all the claims of persons who had furnished aid and support to the revolution are recognized, gave legal expression to the foregoing conclusion.

A similar state of things exists now. All the persons who cooperated in the triumph of General Castro also resisted the laws of the country; but lawfully they must be considered as pardoned, for General Castro had legally attained the constitutional Presidency of the Republic. Thereby Redler, in consequence of the effective and legal amnesty, can not have lost his right to claim before a mixed commission. Moreover, ten years have passed since the pretended violation of neutrality. Therefore the offense made should be considered pardoned, and with it all the consequences which might have been derived therefrom disappear as the general principles of law provide.

It seems absurd to the German Commissioner to contend that the Commission should fulfill the office of a Venezuelan judge, imposing fines upon Mr. Redler for an action which took place ten years ago, and which in general has been wiped out by amnesty.

With reference to the third claim, it is also asked that Mr. Redler be allowed the sum of 9,932.88 bolivars, together with interest at 6 per cent, commencing from the 11th of August, 1902 (the report of the judge of Barquisimeto to the attorney-general of the State), until the extinguishment of the debt. The reasons which impose liability upon the Government of Venezuela in principle in the case have already been set forth in the claim of Kummerow. Reference is made to them.<sup>1</sup>

*ZULOAGA, Commissioner :*

Otto Redler & Co. claim (1) 7,647.68 bolivars, the value of the munitions of war furnished the revolution in 1892 upon the western coast, near Puerto Cabello. In the proof which they present General Mora says that this is proven by the account which was presented to him with the approval, at the foot, of the gentlemen who composed the revolutionary committee. This sum was acknowledged to be due by the Government and was to be paid in debt of the revolution. They claim, moreover, 3,732 bolivars as a balance of the price of supplies of war furnished also to the revolution in 1892, as appears from the receipt of the revolutionary committee, which is produced in copy. As appears from the receipts presented, Messrs. Redler & Co. were revolutionists in 1892, since they furnished munitions of war to the revolutionary parties.

The revolution in 1892 was successful, and the Government paid *those who aided its cause* (as Redler & Co.) with bonds of the revolution. In the Official Gazette, No. 7147, of October 23, 1897, which they cite, it appears *that the*

<sup>1</sup> See *supra*, pp. 370, 374.

*bonds that belonged to them were at their disposal*, because of the credit which had been recognized. From the moment that the claimants intervened in the revolution of the country they lost their neutrality and the right of diplomatic protection of their Government. This is a principle of international equity generally accepted. And it is, moreover, singular that protection to recover the value of munitions of war furnished revolutionists and to compel them to be paid for under more favorable conditions than the other aiders of the revolution.

The claimants, in their new application which they make, assert that they sold those supplies, some to Casimiro Ysava, who paid for them partly in cash, which is false, since in the certificate of the company it is said that the supplies were furnished to the revolution of the 20th of June and that a sum on account was paid on the 23d of June, three days after the sale. Carlos Herrera, from information which I have received (I do not assert it), appears to be an individual who at that time had been at arms against the Government. The explanation which the claimants make, even if it were true, would not in any way change the situation, since they themselves say that their credits are for supplies to the revolutionists.

I am of opinion, therefore, that the case of the two credits claimed ought to be disallowed and that, it appearing from them that Otto Redler & Co. had interfered in the political strifes of the country, the other claim referring to the sacking of their house in Barquisimeto ought not to be considered, because they lost their neutrality which gives them the right to claim before this Mixed Commission. It would be impossible to acknowledge the right to recover in persons who take part in the politics of the country if the violences which they suffer are unjust or the work of just retaliation on account of their partial conduct.

P.S. — I disallow these claims in the first place because I believe that there can not be admitted to Redler & Co. the right to present them, having lost their neutrality, against the claim of Barquisimeto. In case Redler had not lost that neutrality, the reasons set up by the agent of Venezuela and the general principle that it was an act of the revolution would prevail.

I do not find that the theory of amnesty is in any way applicable to this matter.

#### [FULDA CASE]

GOETSCH, *Commissioner* :

From the evidence it is proved that the claimant has suffered damages amounting to 5,000 bolivars occasioned by revolutionists. Neither the fact nor the amount of the damage have been disputed by the agent of the Government of Venezuela.

The German Commissioner is of the same opinion as before and refers to his opinion in the other claims, to the effect that Venezuela ought to repair the damage without considering whether or not it could have been avoided.

The agent of the Government of Venezuela objects that the Government was unable to protect Mr. Fulda against the injury of the revolutionists because this took place during the course of an international conflict; but with respect to this proofs have not been produced nor obtained.

The warlike attitude of the allies limited itself, as is well known, to the seizure of the Venezuelan ships to maintain an effective blockade of the ports of Venezuela without any resistance on the part of the latter. Therefore it is not seen why the state was prevented from properly protecting the resident foreigners in the interior where warlike action on the part of the allies was not conducted, not even expected.

Now, if what is proposed with reference to the international conflict is to

assert that the subjects of the State which finds itself at war with Venezuela can be deprived with impunity of their property so long as the war endures, this would be a doctrine which would be in conflict with the principles of the law of nations, as well as against those of civilized humanity.

The German Commissioner asks that the demand of Mr. Fulda for an indemnity amounting to 5,000 bolivars be allowed with interest at 6 per cent annually from the day upon which the injury was committed until the complete extinguishment of the debt.

GOETSCH, *Commissioner* (second opinion):

The umpire of the German and Venezuelan Commissions, the honorable General Duffield, desires to know the opinion of the Commissioners on the following questions growing out of the claims above mentioned:

I. Is it admissible that the liability of the Government of Venezuela should be limited to damages occasioned by revolutionists in such cases as the Government of Venezuela was able to prevent the damages and d'd not do so?

II. In case of an affirmative answer to the question contained in No. I, is it for the Government or claimant to furnish the proof that the Government was capable of preventing the injuries and d'd not do so?

The German Commissioner answers the question I negatively. Bearing in mind the clear provisions of the protocol of February 13 of the present year, he does not hesitate in saying, as his personal and juridic opinion, that in case the Commission should reach a contrary decision it might perchance be considered in contradiction to the terms and spirit of the treaty. Besides, in order to better sustain his opinion, he makes reference to the judgments before cited, of prior international commissions, in the judgments of which the culpability of the Government in no way entered. (See seizure of an American ship by Venezuelan revolutionists, Moore, 1693-1732; the case of Easton, Moore, 1629-30; and the seizure of the American ship *Montijo* by Colombian revolutionists, Moore, p. 1421.) In the last case cited it was said:

The first duty of every Government is to make itself respected both at home and abroad. If it does not do so, even if by no fault of its own, it must make the only amends in its power, viz, compensate the sufferer.

Besides, after this matter has been settled in the French Commission in favor of the French claimants, the German Commissioner, by virtue of the right of the most-favored nation, ought to insist energetically that the German claimants should not be treated worse than the French claimants, or than the American claimants have been in former cases. Do not equity and justice demand that all foreigners, so long as their governments insist upon it, should be treated alike in Venezuela?

III. If, notwithstanding all this, the honorable umpire should arrive at the conclusion that the question of blame is decisive of the case, the German Commissioner is of opinion that the burden of presenting proofs as to the lack of negligence falls on the Government. The German Commissioner agrees with the honorable umpire in the interpretation, which he has occasionally given orally, that in a constitutional state — and he desires to consider Venezuela as such — the ability of protecting its inhabitants is presupposed.

Besides this, it ought to be considered as an obligation that international law imposes upon all civilized nations, to offer protection to foreigners — an obligation from which Venezuela can not escape. All the less, since by the law of May 14, 1869, she has invited foreigners “to embark their capital and skill in Venezuelan commerce.” (Moore, p. 1702.) From the obligation of

furnishing protection springs the obligation of freeing itself from blame in case protection in a particular case was not possible.

In the oral discussion of the question the Venezuelan Commissioner set up the analogy of the civil law and deduced therefrom that the introduction of proofs belonged to the party demanding anything — that is to say, to the claimant. But there also exist in civil law “presumptions of law,” which shift the burden of proof (*pater est quem justæ nuptiæ demonstrant*. The responsibility of railroad companies etc.). According to this, presumption of international law should take the place of proof, or, what would be the same thing, the Venezuelan Government should only be able to avoid the liability by the production of counter proof. This in every case would be in accord with the protocol.

He who has recognized in principle his “liability” in cases of confiscation of or injury to property and wishes to free himself from the liability, conventionally assumed, is at least under the obligation to prove facts which would free him from such liability. Besides this, there is the following: The claimant would almost always be unable to present proofs that the Government could have protected him. He does not know the tactical and strategic dispositions and intentions of the Government, and as the peaceful citizen, in the generality of cases, he will not be able to know the objects, management, and movements of the revolutionary troops. On the other hand, it is easy for the Government to show in a particular case why a village should have to be abandoned to the revolution, or the troops and the police of the Government had to be withdrawn from it. Therefore it is equity which places the burden of proof upon the Government.

ZULOAGA, *Commissioner* :

I believe that the claim ought to be disallowed, because of the reasons set forth by the agent of Venezuela. The Commissioner of Germany says that it is well known that the warlike attitude of the allies was limited, after having made capture of the Venezuelan vessels, to making the blockade effective. It is also well known that General Castro, President of the Republic, had completely conquered the revolution in the action at La Victoria; that immediately, therefore, in order to be able to dispose of the remainder of the revolutionary armies, he divided the forces of the Government, sending a part to the east in order to stop the passage of General Rolando, who was marching toward that place, and another to the west in order to quickly overtake the rebels, Matos, Riera, and others; that in this state of things the international conflict arose and the Government prevented, on account of the losses of its ships, from concentrating its forces, Rolando was able to rally in the central region, and even to menace the capital, since the army of the Government had to go overland by forced marches for a great distance.

The Government did at that time everything that was reasonably possible to put a stop to the revolution, as well in a military manner as politically. If the international conflict had not arisen, very probably the revolution would have terminated last year.

The imputation which the Commissioner of Germany casts upon the honorable agent of Venezuela, that the latter might assert that subjects of a state which were not at war with Venezuela might be deprived of their property with impunity, is an uncalled-for accusation, since from the words of the agent of Venezuela it is not possible to loyally deduce what the Commissioner seeks to charge him with. This language of the Commissioner is very poorly suited to facilitating the labors of this Commission. I am of opinion that the claim of Fulda ought to be disallowed.

ZULOAGA, *Commissioner* (second opinion):

The Government is not liable to individuals for the damages which insurgents, revolutionists, or people in revolt, in whatever manner against the constituted authority may cause.

The Government should furnish protection and security, but it is in so far as the means at its disposition and the circumstances under which the acts have been committed permit. And the causes which may make a government more or less culpable are so many and so different that it would be impossible even to form general ideas about the matter. Besides, the circumstances which control in a disturbed society are so complex that it is a question of political tact, which is only exceptionally found in men of the government.

Extreme energy and implacable repression are at times the greatest errors and serve only to foster insurrection. Revolutions are not always occasioned by faults or errors of the Government or by the simple rebellious spirit of the revolutionists. They follow multiple causes, and not seldom upon the political horizon the cloud of revolution is seen and condenses itself without the patriotism of the best citizens of the Government or of the opposition being sufficient to restrain its violent effects, they having their source in such profound economic or political causes.

Europe itself, so proud to-day of the internal peace which its states have been happy to preserve during the second half of the past century, notwithstanding the powerful organization of its governments, sees with dread, to say the least, how each day the social revolution grows to which the entire working masses are affiliating themselves.

Governments are constituted to furnish protection, but not to guarantee it, and it is absolutely impossible that a tribunal such as this should undertake to investigate the causes of an injury upon general principles of internal politics, under the penalty of finally constituting itself as a judge, not of the *cases* for damages submitted to it, but of the Government or of the country itself, which would be an act of intervention contrary to the principles recognized by all states.

Nevertheless some governments and authorities maintain that for certain particular acts, taking into consideration the circumstances of the case, liability may be fastened upon the state for damages which an individual may suffer, if the facts show in a clear and evident manner that the state has been negligent in every way, in furnishing protection which he ought reasonably to expect from it. According to this theory the state is *not liable because of want of protection*, but for such culpable and grave negligence, which is equivalent to its own acts against private property.

He therefore who seeks to recover from a state for damages suffered under those conditions, in order that his action may prevail, has to prove (1) that he has suffered the damage and (2) that the state is in a certain manner liable for its negligence in the concrete case.

This is the doctrine of Fiore. He says:

It is not sufficient that a state should prove that it has suffered an injury resulting from an act of individuals who reside in another state in order to fasten the liability upon the latter, and to oblige it to make reparation; it is necessary that it prove that the prejudicial act is morally chargeable to the other state, or that that state ought or could have prevented it, and that voluntarily it has been negligent in doing so.<sup>1</sup>

But this is nothing except the application of the principles of common law that the burden of proof is upon the *claimant*.

<sup>1</sup> Fiore Droit Int. Pub., vol. I, p. 582, sec. 673.

In the application of these principles of indirect liability it is necessary to bear in mind that the government of a country during times of war finds itself confronted with greater difficulties and problems than in times of peace, and its special attention must be directed first to the reestablishment of the disturbed peace, and that liability is in direct proportion to capacity.

Fiore, speaking of neutrality, says:

The incapacity of a neutral state to prevent the violation of the duties of neutrality also excludes the liability of the Government, and therefore the right of the belligerent to consider the neutral state as liable by reason of the violation of the duties of neutrality.<sup>1</sup>

If this rule was concisely expressed concerning neutrality where the obligations of neutral governments are in a certain manner direct, what shall we say if in the case under consideration there is a question of the internal management of a state? This principle of the liability of a state for negligence would have to be further modified by the one which provides that foreigners can not assert more right in the territory than that which nationals may possess, and by the law of Venezuela the state is not liable for revolutionary damages.

Putting aside all this discussion and the principles of international law to which the necessity of interpreting the meaning of certain provisions of the protocol of Washington has brought us, and confining ourselves solely within the scope of absolute equity, I ask, would it be equitable that foreigners who live in the territory of Venezuela should withdraw themselves from the political conditions of the country, and that in advantage over the Venezuelans they should not only obtain an indemnity from the Government for damages which the latter might have caused them, but also for the damages of revolutionists, against whom the Government has had to contend and against whom it has had to employ all its energy and money and sacrifice the lives of not a few Venezuelans? Would it be equitable that between a Venezuelan and a foreigner the first might say: "My home is in mourning, since beloved members of my family have died in the defense of the Government and the constituted authorities; my ruin has been consummated, since I have not been able to carry on my business, or I have been the victim of passions of its opponents, because I have resisted them," and that the foreigner should say: "But I lose nothing, and I live in this community which is in conflict just as if in the best of times. I do not defend the Government, I am not under this obligation, but the Government pays me not only for the injury which it may cause me, but also for the injuries which its opponents occasion." I believe that in equity the claims of Kummerow and F. L. Fulda can not be admitted.

[FISCHBACH AND FRIEDERICY CASES.]

GOETSCH, *Commissioner*:

Various witnesses testify that both claimants were taken prisoners on October 20, 1902, near Carúpano by a revolutionary detachment, with the intention of taking money from them, and that to this end they were insulted, assaulted, robbed, bound to a post, threatened with death, and thrown into a house infected by smallpox, in order that the payment of the sum demanded might be accomplished. The claimants demand for this treatment an indemnity, to which Friedericcy especially adds the injury resulting in a rupture caused by the tying and other ill treatment to which he was subjected. The detachment in question was commanded by two officers, Gutierrez and Gonzalez,

<sup>1</sup> *Idem.* Sec. 1569.

and was distinguished, as one of the claimants states, by a white design with black letters thus: "Libertador Army." This proves that the authors were regular troops of the revolution, and not merely marauders or robbers. Both Commissioners ask the honorable umpire to decide for the present, in principle only, the question whether the Government of Venezuela is obliged to pay to the two claimants an indemnity for the ill treatment suffered. The question of the amount of this indemnity will be a matter for future consideration. It is recognized by the law of nations, and also it has been adjudged by international commissions of arbitration, that States may make themselves liable for the unlawful ill treatment and imprisonment of foreign subjects, and that they are obliged to pay a proportional indemnity. Thus it happened in the case of *Col. Lloyd Aspinwall*. "Something would seem to be due to the crew of the vessel as indemnification for ill treatment, as it were." (Moore, *History and Digest*, pp. 1015 and 1016.) (See also page 1171, Henry Dubo's claim for illegal arrest and imprisonment; also page 1579, the Santo case; 1653, No. 15, Charles Weile; page 1852, Van Bokkelen; see also page 1714 and page 1724, the arrest of the crew of the Venezuelan Steam Transportation Company.)

It is undoubted that the liability *extends* to the arrest and ill treatment suffered at the hands of the officials of the Government; but the liability *might also be extended* to the hands of officials or revolutionary troops.

The principles of international law and those derived from other sources which imply liability in cases of confiscation or damage of property by officers or troops of the revolution that have been already discussed in detail with respect to the claim of *Kummerow I* refer to said opinion.

These principles fix also the liability in cases of acts executed against the liberty and health of a person, inasmuch as these are properties more precious than material or monetary ones. Likewise, every Government is obliged to furnish protection to foreigners, whose liberty it ought to guarantee. By not doing so it makes itself liable and should make reparation to the person injured. (See Moore, p. 1444, and the Panama riot, p. 1362.) Neither the Government of Venezuela nor that of the revolution has instituted any sort of proceedings against the officials named and the detachment under their command in order to chastise them for the barbarous ill treatment and tying of which they made German subjects the victims. If with reference to this representation before the Government in Caracas it had been attempted, no other result would have been obtained than the statement that the Government had lost control in the neighborhood of Carúpano. In the claim of the Venezuela Steam Transportation Company, an indemnity was allowed by the Commission, at the solicitation of the Government of the United States of America, to the American sailors imprisoned by Venezuelan revolutionists. (Moore, *History and Digest*, p. 1714-1724.) The honorable umpire is therefore asked to declare in principle the liability of Venezuela in the present case also.

In any case the Government of Venezuela would be liable for the articles stolen, in accordance with article 3 of the protocol.

ZULOAGA, *Commissioner* :

The claims of Friedericy and Max Fischbach are founded, as they say, upon ill treatment which a revolutionary band inflicted upon them. Taking into consideration the facts, if they are proved, I find that they constitute a common injury received from a group of highway robbers, and I believe that the penalties of the case, as, for example, a fine, should be put into effect, but I do not understand why the act which constitutes the private wrong has to be gone into and pecuniary indemnity made by the State to the victims of the atrocity. There

are precedents, it is true, of indemnities claimed diplomatically for unlawful seizures, but as far as I have been able to see they have been committed by authorities in violation of the laws, and in that case the State is liable because its officials are the wrongdoers — because the one who commits the violation of the law is charged with furnishing protection. From this to seek to make the State a sort of surety against every sort of wrongdoing which individuals suffer in its domains there appears to me to be some difference. These acts, as the claimant himself states, are committed by a band of revolutionists — that is to say, by men who proceed upon their own account, without any other rule than to take advantage of the disturbed situation of the country to commit their depredations. Revolutions or political disturbances and their natural consequence of insecurity and violence are social epochs which in general all countries have passed through and against which none can provide nor believe that it may withhold itself definitely, and it is inadmissible that a State should be made liable for private acts, only because of the fact that they are committed during a revolution. By the Venezuelan law a criminal suit can be instituted (1) if the judge has knowledge of the fact; (2) by a *charge* made by the party aggrieved; (3) by information of any citizen to the judge of the act committed. It is therefore in the hands of Friedericy and Fischbach to accomplish the punishment of the guilty parties.

DUFFIELD, *Umpire*: <sup>1</sup>

The Commissioners disagree as to the liability of Venezuela under the protocol for acts of revolutionists in the recent civil war, and as to the responsibility of Venezuela for wrongful seizures of or injuries to property.

The Commissioner for Germany is of the opinion that under Articles I and III of the protocol of the 13th of February the Venezuelan Government is liable in these cases, because of the admission of liability of the Venezuelan Government in those articles, and also upon general principles of international law.

The Commissioner for Venezuela disagrees with the Commissioner for Germany, and is of the opinion that Article III of the protocol contains nothing which differs from the rules —

that nations have laid down in general as established in this connection, but is only a confirmation of those principles, with the intention at most, of contradicting the doctrine of absolute irresponsibility of governments in civil wars as held by many governments and sustained by international authorities.

He also is of the opinion that Article I of the protocol, in which the Government of Venezuela acknowledges in principle the justice of the claims of German subjects *presented* by the Imperial German Government —

refers to the claims already [then] presented, which are those of which Article II of the protocol treats, claims which the Government of Venezuela held were, in general, entirely unjustified.

It is insisted by the Commissioner for Germany that because of the admission made by the Venezuelan Commissioner of the justice in principle of two claims heretofore submitted to the umpire based upon acts of revolutionists, and in which the Commissioners only disagreed upon the question of amount, that the principle must be considered as settled by the Government of Venezuela in this and all future cases coming before this Commission. The umpire agrees

<sup>1</sup> For a French translation see Descamps-Renault, *Recueil international des traités du XX<sup>e</sup> siècle*, 1903, p. 769.

with this position of the Commissioner for Germany, in so far as the particular claims referred to are concerned. It has been held in former international commissions that there is no power vested in an umpire to grant a rehearing. In the present case the umpire is of the opinion that the true interpretation of the protocol does not authorize any rehearings, unless perhaps in extreme cases where the application is based upon newly discovered substantive and not cumulative evidence. He is unable, however, to go to the length urged by the Commissioner for Germany. It is undoubtedly true, as he says —

that in the interest of unity of decisions of the Commission a question of law should not be decided in one way to-day and in another way to-morrow.

But, as the Venezuelan Commissioner frankly says in his opinion in one of said former claims —

although I have accepted the claim in principle, a better study of the matter has convinced me that it is an error, and that the principles which are to govern me are those which appear in my opinion in the matter of Kummerow (claim No. 7),

in which he says —

I confess that my first impression upon reading it (Article III of the protocol) was one of extreme perplexity and uncertainty, but a more careful study of the matter convinced me that it could in no way contain a rule of exception which goes so far as to make the Government responsible for every injury done a German,

the umpire is of the opinion that it is not only the privilege but the duty of the Commissioner for Venezuela to present his more carefully studied opinion on the question, the more so because the first impression of the umpire upon reading it "was one of extreme perplexity and uncertainty," and because the question is complicated and not readily solved. Moreover, the question is one of great gravity and importance, and upon its correct decision will depend the allowance or disallowance of many claims involving in the aggregate a very large sum of money.

The disagreement between the commissioners is evidence that the language of the article appears to be susceptible of two contrary meanings, and in determining which is the correct construction regard must be had to the situation of the high contracting parties and the circumstances preceding and surrounding the execution of the protocol. (Opinion of Umpire Little in the United States and Venezuelan Commission, 1889 and 1890.) After a considerable period of diplomatic correspondence between the two Governments with reference to the claims of German subjects against the Republic of Venezuela, without reaching any agreement as to a satisfactory adjustment of the same, the German Government on the 7th day of December, 1902, submitted an ultimatum containing the following:

In addition, the manner in which the German claims arising from the wars have been treated by the Government of the Republic has led the Imperial Government to believe that the other credits also of her subjects against the Republic need her protection to obtain a just settlement. In that sense are to be considered the German claims arising from the present civil war, the credits of the German houses growing out of the construction of the slaughterhouse in Caracas, and the sums owing the Gran Ferrocarril de Venezuela for the interest and amortization of the bonds of the Venezuelan 5 per cent loan of 1896, which were delivered to it in the place of a guaranty of interest. Instructed by the Imperial Government, I must also ask the Venezuelan Government to immediately make a declaration to the effect that it recognizes in principle that these claims are well founded, and that it is ready to accept the decision of a mixed commission with the object of having them settled and assured in all their details. (P. 40 of Correspondence of the Department of Foreign Affairs of the United States of Venezuela, published

under the authority of an executive decree of the Republic of Venezuela, December, 1902.)<sup>1</sup>

A similar position was taken by the other allied powers, and on the 9th day of December, 1902, the allied powers established the blockade of the ports of Venezuela and seized certain of her war vessels.

The protocols of February 13 and May 7, 1903, were entered into by the parties while the war vessels and ports of Venezuela were still in the control of the allied powers, and as the only amicable mode of raising the blockade and restoring peaceful relations between the respective Governments.

Soon after the institution of the blockade the Government requested Mr. Bowen, envoy extraordinary and minister plenipotentiary of the United States to Venezuela, who was also the temporary representative of British and German interests in Venezuela, to propose to Great Britain and Germany that the claims for alleged "damages and injuries to British and German subjects be submitted to arbitration." With the consent of his Government he was soon after appointed such arbitrator and mediator.

The ability and diplomacy with which he performed the duties of his office have resulted in the meeting now in Caracas of international arbitration commissions between Venezuela and ten of the principal nations of the world, to adjust amicably and according to the principles of justice and equity their conflicting claims; the most notable instance of international arbitration in the history of the world.

In the correspondence which took place during these negotiations the following statements by the representatives of the respective Governments are material:

To the request of the Government of Venezuela through Mr. Bowen, that those Governments would refer "the settlement of claims for alleged damages to the subjects of the two nations during the civil war" to arbitration (Mr. Bowen's pamphlet, *Venezuelan Protocols*, p. 2),<sup>2</sup> the Government of Great Britain and the German Government replied through the Secretary of State for the United States, December 22, 1902.<sup>3</sup>

His Majesty's Government have, in consultation with the German Government, taken into their careful consideration the proposal communicated by the United States Government at the instance of that of Venezuela. The proposal is as follows:

"That the present difficulty respecting the manner of settling claims for injuries to British and German subjects during the insurrection be submitted to arbitration. The scope and intention of this proposal would obviously require further explanation. Its effect would apparently be to refer to arbitration only such claims as had reference to injuries resulting from the recent insurrection. This formula would evidently include a part only of the claims put forward by the two Governments, and we are left in doubt as to the manner in which the remaining claims are to be dealt with. \* \* \*"

His Majesty's Government desire, moreover, to draw attention to the circumstances under which arbitration is now proposed to them. The Venezuelan Government have during the last six months had ample opportunities for submitting such a proposal. On July 29, and again on November 11, it was intimated to them in the clearest language that unless His Majesty's Government received satisfactory assurances from them, and unless some steps were taken to compensate the parties injured by their conduct, it would become necessary for His Majesty's Government to enforce their just demands. No attention was paid to these solemn warnings, and in consequence of the manner in which they were disregarded, His Majesty's

<sup>1</sup> See the original Report, Appendix, p. 971.

<sup>2</sup> Idem, Appendix, p. 1029.

<sup>3</sup> Idem, Appendix, p. 1033.

Government found themselves reluctantly compelled to have recourse to the measures of coercion which are now in progress. His Majesty's Government have, moreover, already agreed that in the event of the Venezuelan Government making a declaration that they will recognize the principle of the justice of the British claims and that they will at once pay compensation in the shipping cases and in the cases where British subjects have been falsely imprisoned and maltreated, His Majesty's Government will be ready, so far as the remaining claims are concerned, to accept the decision of a mixed commission, which will determine the amount to be paid and the security to be given for payment. A corresponding intimation has been made by the German Government. This mode of procedure seemed to both Governments to provide a reasonable and adequate mode of disposing of their claims. They have, however, no objection to substitute for the special commission a reference to arbitration with certain essential reservations. These reservations are, so far as the British claims are concerned, as follows:

1. The claims, small as has already been pointed out in pecuniary amount, arising out of the seizure and plundering of British vessels and outrages on their crews and the maltreatment and false imprisonment of British subjects, are not to be referred to arbitration.

2. In cases where the claims is [are] for injury to, or wrongful seizure of, property the questions which the arbitrators will have to decide will only be (*a*) whether the injury took place and whether the sentence [seizure] was wrongful, and (*b*) if so, what amount of compensation is due. That in such cases a liability exists must be admitted in principle.

3. In the case of claims other than the above we are ready to accept arbitration without any reserve.

This was sent from Washington December 27, 1902, by cipher cable, and on the 31st of December, 1902, President Castro wrote to Mr. Bowen:<sup>1</sup>

I recognize in principle the claims which the allied powers have presented to Venezuela. They would already have been settled if it had not been that the civil war required all the attention and resources of the Government. To-day the Government bows to superior force, and desires to send Mr. Bowen to Washington at once to confer there with the representatives of the powers that have claims against Venezuela, in order to arrange either an immediate settlement of all the claims or the preliminaries for a reference to the tribunal of The Hague or to an American Republic to be selected by the allied powers and by the Government of Venezuela.

The reply of the German Government, through the United States ambassador at Berlin, to the Secretary of State, and by him to Mr. Bowen, on the date of January 6, 1903, stated among other things:<sup>2</sup>

The German Government learns with satisfaction that the Venezuelan Government has accepted its demands in principle. Before further negotiations can be undertaken with Venezuela, however, it seems necessary that the President of Venezuela should make a definite statement as to the unconditional acceptance of the three preliminary conditions set forth in the German memorandum of December 22, 1902.

On the following day President Castro wrote to Mr. Bowen:<sup>3</sup>

MR. MINISTER: The Venezuelan Government accepts the conditions of Great Britain and Germany; requests you to go immediately to Washington for the purpose of conferring there with the diplomatic representatives of Great Britain and Germany and with the diplomatic representatives of other nations that have claims against Venezuela, and to arrange either an immediate settlement of said claims or the preliminaries for submitting them to arbitration.

<sup>1</sup> *Idem*, Appendix, p. 1034.

<sup>2</sup> *Idem*, Appendix, p. 1035.

<sup>3</sup> *Idem*, Appendix, p. 1036.

At the instance of the German Government Mr. Bowen, under his authority from Venezuela, signed the document of January 24, 1903, containing this language: <sup>1</sup>

II. All the other claims which have already been brought to the knowledge of the Venezuelan Government, in the ultimatum delivered by the imperial minister resident at Caracas — i.e., claims resulting from the present civil war, further claims resulting from the construction of the slaughterhouse at Caracas, as well as the claims of the German Great Venezuelan Railroad for the nonpayment of the guaranteed interest — are to be submitted to a mixed commission should an immediate settlement not be possible.

III. The said commission will have to decide both about the fact whether said claims are materially founded and about the manner in which they will have to be settled or which guaranty will have to be offered for their settlement. Inasmuch as these claims result from damages inflicted on property, or the illegal seizure of such property, the Venezuelan Government has to acknowledge its liability in principle, so that such liability in itself will not be an object of arbitration and the decision of the commission will only extend to the question whether the inflicting of damages or the seizure of such property was illegal. The commission will also have to fix the amount of indemnity.

From these documents it clearly appears that Germany and Great Britain insisted upon the admission of the justice in principle of the claims of their subjects already presented, and specifically demanded that in respect to claims for injuries to or wrongful seizures of property arising from the present civil war, \* \* \* the questions which the arbitrators will have to decide will only be (a) whether the injury took place and whether the sentence [seizure] was wrongful, and (b) if so, what amount of compensation is due. That in such cases the liability exists must be admitted in principle. Three. In the case of claims other than the above we [they] are ready to accept arbitration without any reserve.

The result was the execution of the protocols of February 13 and May 7, 1903, under which this Commission is acting.

All of the protocols between Venezuela and the peace powers are in the same language, mutatis mutandis, as the United States protocol. (Note to the United States protocol in Mr. Bowen's pamphlet, p. 30.)<sup>2</sup>

It is therefore too plain to need argument that if any effect whatever is to be given to Articles I and III of the German-Venezuelan protocol, the rule of liability must be different from that under the protocols of the peace powers.

The umpire, therefore, agrees with the argument of the Commissioner for Germany that Articles I and III of the protocol can not be treated as merely superfluous or redundant. Certainly the admission which was required as a sine qua non to any arbitration, which was the consideration to the allied powers for returning to Venezuela the control of her war vessels and her ports, can not be disregarded in determining her liability.

Marshall, Chief Justice, says, speaking for the United States Supreme Court, in the *Nereide*, 9 Cranch, 419:

Treaties are formed upon deliberate reflection. Diplomatic men read the public treaties made by other nations, and can not be supposed either to omit or insert an article common in public treaties without being aware of the effect of such omission or insertion; neither the one nor the other is to be ascribed to inattention.

This must be equally true in the case of the insertion of an article most uncommon, if not unprecedented, in treaties, and which contains a general ad-

<sup>1</sup> Idem, Appendix, p. 1037.

<sup>2</sup> Idem, Appendix, p. 1047.

mission of liability. A fortiori in this case, where an admission of liability is contained only in the protocols of those Governments which still held control of the war vessels and ports of Venezuela.

It is therefore the plain duty of the umpire, under the protocol, to treat those provisions in Articles I and III as substantive and material, and to give them the interpretation which they should have in the light of the circumstances immediately preceding and surrounding their execution.

The umpire agrees in opinion with the Venezuelan Commissioner that the fair construction of Article I, in which the Venezuelan Government "recognizes in principle the justice of claims of German subjects 'presented' by the Imperial German Government," is to restrict it to claims which had been presented at the time of the execution of the protocol. This is its literal wording, and Article II restricts the claims to "those originating from the Venezuelan civil wars of 1898 to 1900" and provides for their payment *modo et forma*. Moreover, there is a plain inference, from the special admission of liability in Article III in cases of wrongful seizures of or injuries to property, that the parties did not consider that Article I covered that class of claims. It is therefore necessary to determine the true intent and meaning of these words in Article III.

The German claims not mentioned in Articles II and VI, in particular the claims resulting from the present Venezuelan civil war, the claims of the Great Venezuelan Railroad Company against the Venezuelan Government for passages and freight, the claims of the engineer, Carl Henckel, in Hamburg, and of the Beton and Monierban Company (Limited), in Berlin, for the construction of a slaughterhouse at Caracas are to be submitted to a mixed commission.

Said commission shall decide both whether the different claims are materially well founded and also upon their amount. The Venezuelan Government admit their liability in cases where the claim is for injury to or a wrongful seizure of property, and consequently the commission will not have to decide the question of liability, but only whether the injury to or the seizure of property were wrongful acts and what amount of compensation is due.

In the opinion of the Commissioner for Venezuela the words of the article can not be literally interpreted —

because [he says] that it would then make Venezuela admit her liability for any common crime committed by an individual upon a German subject, and that inasmuch as it is self-evident that this class of seizures or of injuries to property, while within the literal wording of the provisions, is not within its reason, it is the duty of the Commission to classify these wrongful seizures of or injuries to property.

And he suggests this classification: That the admission of liability includes all injuries to or wrongful seizures of property by the governmental troops or Government officials, but that it *does not include* wrongful seizures of or injuries to property by revolutionists.

The umpire agrees that the admission does not embrace common individual crimes not resulting from insurrectionary events, because it is quite apparent that with respect to wrongful seizures of or injuries to property the high contracting parties had in mind only those occurring during the present civil war. (See the ultimatum of Germany, above quoted, and the British memorandum of December 22, speaking also for Germany in regard to the terms of arbitration.<sup>1</sup>)

The umpire can not agree with the opinion of the Venezuelan Commissioner that the admission of liability by Venezuela is restricted to wrongful seizures of or injuries to property inflicted by the authorities of Venezuela acting in their

<sup>1</sup> *Idem*, Appendix, p. 1033.

official character. The Commissioner in support of this position quotes from Seijas the law of Venezuela of 1873, which enacts that the nation will not be expected to indemnify for injuries, damages, or seizures which were not caused by the legitimate authorities, acting in their public character, and he says —

the protocol of February seems to have wished to abolish this just distinction, and for the reason that injuries inflicted by the forces of the Government, taking advantage of their position, it seems to me, makes the Government responsible;

and he continues:

In the matter of the revolution [revolutionists] it results, according to those same principles, that the Government is not and can not be responsible for acts which are not its acts, but the acts of persons temporarily withdrawn from its control.

And that this rule of nonliability is —

not only declared by the act referred to, but by the consensus of opinion of international law writers and precedents.

His argument, in brief, is that Venezuela only admitted, first, that German subjects would not be compelled to regard the provisions of the law of February 14, 1873, and present their claims to her *courts*; second, that said law should not be the test of liability in cases of injuries to or wrongful seizures of property, although he insists that the law declares the international rule of liability. It is to be remarked in passing that his statement is not accurate, because he does not deny the liability of Venezuela for acts committed by revolutionists who afterwards succeeded in establishing a new government, thus making the wrongfulness of the seizure depend not upon the act itself, but the result of the revolution.

It is plain that the admission was not demanded by Germany for the first reason, because that purpose was contemplated and actually consummated by the submission to arbitration and is explicitly stated in the first paragraph of Article III. As to the second, passing, for further consideration later in this opinion, the correctness of an interpretation of general words of admission of liability which permits their restriction to one of several grounds of liability, it is equally clear that this purpose is fully accomplished by the provision in the protocol with reference to local legislation.

It is now argued in behalf of Venezuela that her law in respect to acts of revolutionists declared the recognized rule of international law. It would seem logically to follow that her admission of liability would be as broad as the statute. And if the statute and the rule of international law were equally broad, her admission would cover both. It certainly can not be argued that while she admitted in general words her liability, contrary to the conditions of the rule laid down in her own statute, she may now claim nonliability under a rule of international law which she alleges is recognized by the consensus of opinion of all authorities on international law. Manifestly this is no admission at all.

From what has been shown by the correspondence it plainly appears that the principal bone of contention between the parties was their disagreement as to Venezuela's liability for injuries to or wrongful seizures of property resulting from the present Venezuelan civil war. Venezuela claimed nonliability because of her statute which she then insisted and still insists declared the correct international-law rule of liability. Germany denied this. Venezuela, from the necessity of the situation, receded from her position and admitted her liability. Now she contends: "I did not admit my liability under international law, although I did admit my liability under my statute, which declared the same principle of immunity I am now contending for. I did admit my liability under my statute, but I did not admit it under the principles of international

law unanimously conceded, notwithstanding the rule of liability is the same in both."

Coming now to the final argument of the Commissioner for Venezuela, that international law absolves Venezuela from liability for acts of revolutionists and that her admission must be interpreted in the light of this rule —

Is his premise well founded? International law is not law in its usually defined sense. It is not a rule of conduct prescribed by a sovereign power. It is merely a body of rules established in custom or by treaty by which the intercourse between civilized nations is governed. Its principles are ascertained by the agreement of independent nations upon rules which they consider just and fair in regulating their dealings with each other in peace and in war. They reach this agreement by comparing the opinions of text writers and in precedents in modern times, and these ultimately appeal to the principles of natural reason and morality and common sense. It therefore rests solely upon agreement. Obedience to it is voluntary only and can not be enforced by a common sovereign power. Any nation has the power and the right to dissent from a rule or principle of international law, even though it is accepted by all the other nations. Its obedience to the rule can only be compelled by an appeal to its reason and love of justice or by the superior force of the particular nation or nations whose interests are involved.

Applying this inherent nature of international law to the question under discussion, it follows that neither Germany nor Venezuela was by force of law compelled to accept the other's judgment as to a principle of international law upon which they differed. Each nation held to its own opinion of what the correct rule of international law was in the premises — Germany, that Venezuela was liable for injuries arising from insurrectionary events, and Venezuela that she was not. Arbitration is proposed by Venezuela. This, if accepted, would unquestionably leave the question of liability to be decided upon principles of international law. But Germany says, "No! I will not refer these claims to arbitration unless Venezuela first admits her liability." Now, Venezuela having by her admission regained control of her ports and her war vessels, contends that she admitted liability only in cases where she was legally liable. Certainly, this position can not be maintained. She was always liable for claims for which she was legally liable. Hence she admitted nothing. And yet we have seen of what momentous consequence this admission was to her. It is perfectly plain that Germany would never have released the ships and ports from which they were in position to make payment of the claims of their subjects if Venezuela had then interpreted her admission as she now seeks to do, or if Germany had had any conception that such interpretation would be sought to be given to words admitting liability generally.

The case of Venezuela falls within the rule stated by Vattel:

If one who can and should clearly and completely explain has not done so, it is to his damage; he will not be allowed afterwards to bring forward restrictions [limitations] which he has not expressed. (Vattel, book 2, sec. 264.)

Here Germany requires from Venezuela an admission of liability in as broad terms as can be used. Venezuela could and should have explained her understanding of them. Not having done so then, she can not do so now. When Venezuela admits, without qualification, her liability for wrongful seizures of or injuries to property growing out of insurrectionary events during the civil war, she must be held to admit her liability for all wrongful seizures of persons and property during that period and under those conditions.

Moreover, substantially all the authorities on international law agree that a nation is *responsible* for acts of revolutionists under certain conditions — such

as lack of diligence, or negligence in failing to prevent such acts, when possible, or as far as possible to punish the wrongdoer and make reparation for the injury. *There is*, therefore, a rule of international law under which Venezuela would be held liable in certain cases for acts of revolutionists. And there are some very respectable authorities which hold that a nation situated with respect to revolutions as Venezuela has been for the past decade and more, and with the consequent disordered condition of the State, is not to be given the benefit of such exemption from liability. These considerations may be presumed to have been in the mind of either or both of the contracting parties, and to have induced the insertion in the protocol of the admission of liability.

The case, therefore, is one in which two nations who are presumably aware of this diversity of opinion among nations as well as between themselves as to the liability of governments for the acts of revolutionists enter into a solemn agreement containing an express admission of liability for *all wrongful seizures of or injuries to* property growing out of insurrectionary events in a civil war. Can there be any other conclusion than that they intended to settle themselves this question of liability and not leave it to be determined as a commission might decide, one way or another? Whatever strength the argument might have if there was the unanimity of opinion claimed, and therefore the admission of liability might be interpreted as a mere declaration of an existing uniformly recognized principle of international law, the argument fails when it appears in the case before us that there is a contrariety of opinion on the subject. Moreover, the well-recognized canons of construction prohibit a restricted interpretation of this article. It is a uniform rule of construction that effect should be given to every clause and sentence of an agreement. The result of the construction insisted upon by the Commissioner for Venezuela would be to give the same meaning to the German protocol and to those of the peace powers, in effect striking out Article III. It is a conceded principle of interpretation that an admission is taken most strongly against the party making it. (Vattel, above quoted.) Finally, it is a rule of construction of treaties, sustained by the highest authorities, that if a clause in a treaty is susceptible of two interpretations, one broad and the other restrictive, the courts will give the clause the former interpretation in favor of private rights. In the case of *Shanks v. Dupont* (3 Peters, 242, 250) the Supreme Court of the United States, in construing the treaty of the United States with Great Britain of 1794, confirmed this rule. Mr. Justice Story delivered the opinion of the court. In it he said:

If a treaty admits of two interpretations, and one is limited and the other liberal, *one which will further and the other exclude private rights*, why should not the most liberal exposition be adopted? \* \* \* This part of the stipulation, then, being for the benefit of British subjects who became aliens by the events of the war, there is no reason why all persons should not be embraced in it who sustained the character of British subjects, although we might also have treated them as American citizens. \* \* \* In either view of this case, and we think both are sustained by principles of public law, as well as of the common law, and by the soundest rule of interpretation applicable to treaties between independent states, the objections taken to the right of recovery of the plaintiffs can not prevail.

The rule is again affirmed by the same court, speaking through Mr. Justice Swayne, in this language:

Where a treaty admits of two constructions, one restrictive as to the rights that may be claimed under it and the other liberal, the latter is to be preferred. (*Hauenstein v. Lynham*, 100 U.S., 483.)

The principle was recognized by the Commission under the United States and Venezuelan convention, in *Aspinwall v. The United States of Venezuela*.

The Commissioner (Little), speaking for the Commission, says,<sup>1</sup> this doctrine — is thoroughly embedded in the jurisprudence of the United States, and is believed to be, internationally, a sound one. \* \* \* [And] this finds support, if any were needed, in what Grotius says: “In the things which are not odious, words are to be taken according to the general propriety (*totam proprietatem*) of popular use, and, if there are several senses, according to that which is widest.” (*De Jure Belli ac Pacis*, book 2, chap. 16, par. XII.)

In discussing the language of the treaty of 1819 between the United States and Spain, which it was contended did not include claims on torts, Mr. John Quincy Adams, Secretary of State, referring to the fact that in the course of the negotiations a proposal was made to omit the renunciation which included the latter class of these claims, said:<sup>2</sup>

As there is no limitation in the words of this renunciation, with regard to the nature of the transactions in which the claims originated, whether by contract or by tort, so none was intended. They were claims, of all of which it was believed that the only possible chance of obtaining any satisfaction to the claimants, consisted in the execution of the treaty.

It has been suggested that this interpretation will extend the liability of Venezuela to all injuries, because the word “wrongful” does not precede the word “injury;” that the clause must in that case be read “The Venezuelan Government admit their liability where the claim is for *any injury* to property,” whether accidental or justifiable. Even if the word “injury” is taken in its generic or popular sense, the umpire is of the opinion that this interpretation is forced and untenable. The word “injury” when used in a legal or moral sense involves intentional wrongdoing.

“Injury in morals and jurisprudence is the intentional doing of wrong.” (Fleming, Webster’s Unabridged Dictionary, “injury.”)

Again it is suggested that the word “wrongful” must be interpreted by reference to international law, and that Venezuela admits liability only for those seizures and injuries which are wrongful in the light of international law. This is incorrect. The admission is confined to property rights and must be read in that connection. It clearly means that the injury or the seizure shall be wrongful in respect to the right of property of the owner — *his title to the property* — and that any act which violates that right is wrongful. This right of property or title must be decided by municipal or local law, because it is derived from and is conferred by that law. One does not derive his title to property in any country through international law, but through the local law of the country. That law confers, permeates, and restricts his title. He takes his title subject to any and all the qualifications and limitations of the local law at the time of its acquisition.

It is also suggested that if Venezuela is held liable for injuries caused by the acts of insurrectionists, it will tend to discourage future revolutions. If the suggestion were pertinent, it might be possible to argue the opposite result; that, in the language of an eminent representative of the United States, “revolutions might then become a pastime for foreigners.” But it is not pertinent. The functions of the Commission are strictly judicial. They have nothing to do with questions of statecraft and diplomacy. Their simple duty is to determine the rights of the parties according to justice and equity. They must not be influenced in reaching their conclusions by theories or predictions as to the possible effect of their decisions upon the political future of Venezuela. It is none of their concern. *Fiat justitia ruat cœlum.*

<sup>1</sup> Moore’s Arbitrations, 3624.

<sup>2</sup> Moore’s Arbitrations, 4504.

In view of these considerations, the umpire is of the opinion that the admission of liability in Article III extends to claims of German subjects for wrongful seizures of or injuries to property resulting from the present Venezuelan civil war, whether they are the result of acts of governmental troops or of Government officials or of revolutionists.

This, however, does not dispose of the entire question. First, the admission of liability in Article III does not include injuries to the person; it covers only seizures of or injuries to property. Second, of these it only includes those resulting from the present Venezuelan civil war. The liability in these two classes of claims must be determined, therefore, upon the general principles of international law, because under the language of the protocol, read in the light of the British and German memorandum of December 22, 1902, *they* are referred to "arbitration without any reserve."

In thus determining them it is not, however, necessary to discuss the general question of the character and extent of the liability of a nation for acts of insurgents. There is diversity of opinion among the authorities on the question.

In the opinion of the umpire, however, the modern doctrine, almost universally recognized, is that a nation is not liable for acts of revolutionists when the revolution has gone beyond the control of the titular government. It is not necessary that either a state of war, in an international sense, should exist or any recognition of belligerency. Immunity follows inability.

This rule was very recently affirmed and approved by the United States Spanish Treaty Claims Commission sitting at Washington April 28, 1903 (Opinion No. 8).

Judicial cognizance can properly be taken of the condition of Venezuela during the present civil war. And there can be no doubt that from its outset it went beyond the power of the Government to control. It was complicated by the action of the allied powers in seizing the forts and war vessels of Venezuela; and if it is now fully suppressed (as is to be hoped), its extinction was only within a few days past. During all this period considerable portions of the country and some of its principal cities have been held by revolutionary forces. Large bodies of organized revolutionist troops have traversed the country, and in their train have followed the usual marauding and pillage by small bands of guerrillas and brigands. The supreme efforts of the Government were necessary and were directed to putting down the rebellion. Under such circumstances it would be contrary to established principles of international law and to justice and equity to hold the Government responsible.

It only remains to apply these conclusions to the particular claims submitted for decision.

The claim of Otto Kummerow is for property taken by the revolutionists from his residence in Naguanagua in May, June, and July, 1902.

It is specially objected to by the Venezuelan Commissioner on the ground that the testimony is insufficient to establish it, because the witnesses are servants on the claimant's farm and are so ignorant that they can not sign their names; that their testimony is word for word the same, and their appraisals of the value are precisely alike. From these facts he urges that their testimony is not to be received. He also claims that the time and other circumstances of the occurrence are too generally stated, and that the entire list of articles taken are said to have been taken in the course of three months, without any specification as to the dates or the number of seizures or as to what articles were taken at each seizure. He further objects that there is no evidence of any violence or even that they were taken without the consent of the owner, and finally that the acts were committed by revolutionary guerrillas as shown by the character of the acts mentioned. In reply to the last objection the Commissioner for

Germany insists that the witnesses testified expressly that they were revolutionists and give the names of their officers. No reply is made by him to the other objection to the credibility of the witnesses.

In the opinion of the umpire the proof fails to make out a case. While he can not agree with the argument of the Commissioner for Venezuela that the witnesses are to be discredited because they are ignorant farm hands or servants, the vague generality and at the same time verbatim identity of their testimony mark the case as one which might easily be manufactured.

In view of these facts, and the further fact that as to many of the articles it is obvious that the witnesses were not competent judges of their value, the umpire is compelled to disallow the claim for lack of sufficient proof.

Certainly if evidence of this character is to be received, there would seem to be no protection whatever for Venezuela as against manufactured claims, and it is significant in this connection that the claimant claims to have gone to considerable expense in the employment of an attorney, whose first and natural duty should have been to have presented the case of the claimant in a more satisfactory manner.

The first item of the claim of Otto Redler & Co. is for 9,932.85 bolivars, for the sacking of their store on the 26th of June, 1902, by revolutionists under the command of Gen. Lidano Mendoza.

The injuries occurred during the siege of Barquisimeto, which lasted from the middle of June, 1902, until June 26, when the revolutionists occupied the city. The house of the claimants was occupied by forces of the revolutionists under the command of Col. Manuel R. Vilaro, whose troops by night and day took away many articles of gold, hardware, and brass ware.

The proof seems to be complete as to the taking of the articles and the fact of the sacking of the store, and a district judge who took the testimony certifies that he has carefully examined the books of the firm, and the balance sheet shows the loss of 9,932.85 bolivars as correct.

This item of the claim falls within the ruling of the umpire upon the liability of Venezuela under her admission in Article III of the protocol.

The second item of 7,647.68 bolivars is for goods supplied the revolutionary forces under General Crespo, and it is not disputed that the government established by General Crespo, of which he was the constitutional President, acknowledged the claim. It is claimed, however, in defense of this item that the claimants were aiding the revolutionists by supplying them with munitions of war, and that having been shown thereby to have been revolutionists they have forfeited their claim. While, on the other hand, it is contended on the part of Venezuela that the authority of the revolutionary committee, upon whose action is based the third item of the claim for 3,732 bolivars, is not shown. It is further contended, as to the second item of 7,747.68 bolivars, that Venezuela offered to pay the claimant in bonds or evidences of debt, and that the claimant should have taken it, and not having done so can not now assert his claim.

The umpire is of the opinion, first, that it does not clearly appear that the claimant knew, in the case of one of the sales at least, that the purchasers were revolutionists. But in his judgment this whole claim of defense is disposed by the fact that these revolutionary forces were successful, and that Venezuela is estopped to refuse compensation for goods received from the claimants which materially assisted in the establishment of the Crespo government, whose title was never attacked. They are likewise estopped from claiming any pains or penalties or forfeitures against foreigners on the ground that the foreigners assisted the Crespo party in obtaining possession of the government.

The third item of the claim of 3,732 bolivars is based upon the same fact as

the second, although it does not clearly appear whether this item of the claim was recognized, as the second was, by the decree of the Crespo government. The same objection therefore obtains against the claim of defense to this item.

The umpire can not agree with the position taken on behalf of Venezuela that the claimants were bound to take bonds of Venezuela in payment of their claim. Even if the Government had tendered them cash in payment of their claim and the tender had been refused, its only effect would be to stop interest. But certainly if Redler & Co. had a claim, as has been adjudged, they were not bound to take in satisfaction thereof anything but cash.

It results, therefore, that the claim of Redler & Co. will be allowed for the full amount claimed, namely, 17,050.05 marks, with interest at 3 per cent per annum from the time of the presentation of the claim to the Commission up to and including the 31st day of December, 1903.

The claim of Luis Fulda is for property taken, a portion by "Venezuelan forces under the command of Gen. Nicolás Rolando" and a portion by forces of General Matos. Both the Commissioners, however, agree that the property was taken by revolutionary forces. Neither the fact nor the amount of the damage is denied by the Venezuelan Commissioner. It nowhere appears in the evidence when these injuries happened, but in the brief of the Venezuelan agent it is stated as a ground of defense that the international conflict, meaning the seizure of the war vessels and ports of Venezuela by the allied powers, had commenced at that time. This statement is not denied by the Commissioner for Germany.

The claims therefore fall within the above ruling of the umpire as to the extent of the admission of liability by Venezuela for acts of insurgents growing out of the present civil war, and as there appears to be no dispute as to the amount, it will be allowed at the sum of 5,000 bolivars, with interest at 3 per cent per annum from the date of the presentation of the claim to the Commission up to and including December 31, 1903.

The claim of Max Fischbach is for 19,200 marks for gross personal injuries committed by bands of revolutionists on October 24, 1902, in Los Azufrales, in Carúpano. They took away from him his watch and kept him until some friends came along and ransomed him and his fellow-sufferer Friedericy by the payment of 10 pesos. On the day of making the declaration of his claim, November 20, 1902, he alleges that he was still suffering from the effects of his injuries.

The claim of Richard Friedericy is based on practically the same assault by the same parties, because he protested against the treatment of Fischbach. He claims he was recovering from a rupture and his treatment brought back his troubles, from which he was still suffering on November 20, 1902. He claims the same amount, 19,200 marks.

These two claims are not within Venezuela's admission of liability, save as respects the watch taken from Fischbach, as to the value of which no evidence is given and no specific claim made, and the money taken from them both.

The claims for personal injuries will be, therefore, disallowed, and each claimant awarded the sum of 5 pesos, with interest at the rate of 3 per cent per annum from the date of the presentation of their claims to the Commission up to and including December 31, 1903.

The umpire is under appreciated obligation to the commissioners for their painstaking and able expositions in presenting the important questions arising in these cases.

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## VALENTINER CASE

Damages for loss of crop because laborers who were hired to gather it were drafted by Venezuelan troops held to be remote damages and disallowed.

Costs of preparation for suit also disallowed.

Damages occasioned by revolutionary troops allowed because of admissions in protocol.

Where constitution provides against drafting of Venezuelans for army except upon previous proclamation as to the portion of the territory in which guaranties of constitution are to be suspended, the draft held to be presumed to have been legal in the absence of any proof that such proclamation was made.

Opinion of witnesses as to nationality of persons incompetent evidence.

DUFFIELD, *Umpire* :

The evidence in this case satisfactorily establishes that on the 22d of December, 1901, a detachment of Government troops, under the command of Capt. Pedro Gonzalez, sent out by the jefe civil of Guarenas with orders to recruit soldiers, came to the coffee hacienda, "La Hondonada," owned by the claimant. The laborers, who were taken away by the force, were 63 Venezuelans and also some foreigners. They had all been hired under valid contract by the agent of the claimant to pick the crop of coffee on the hacienda, which was then ready to gather. The superintendent of the hacienda informed the officer in command of the patrol of these facts, and that if the men were taken away the crop would be lost, to which the officer answered that he must obey orders. It is also satisfactorily established by the evidence that it was impossible to secure new men for twenty-five days after the draft, even in Caracas, and that during this time a great part of the coffee ripened and fell and was lost, the amount so lost being more than 400 quintals, which the testimony shows was worth 45 bolivars a quintal.

The Commissioner for Germany is of the opinion that the claimant is entitled to recover the amount. He is also of the opinion that the claimant is entitled to damages for four huts burned by the revolutionists of the Matos revolution, worth 800 bolivars, and for legal expenses in the matter of preparation of his claim for presentation, 312.60 bolivars.

The Commissioner for Venezuela differs in opinion with the Commissioner for Germany, and is of the opinion that there can be no recovery against Venezuela for the loss of the coffee crop. He does not refer in his opinion to the destruction of the huts or to the question of legal expenses, but he admits that Venezuela should pay for the value of a mule which the claimant alleges he lost, and 50 pesos which the claimant asks for wood burned by the forces of the Government.

It is argued by the Commissioner for Germany, in support of the claim for loss of the coffee crop, that the recruiting officer had no authority to take from the plantation either Venezuelan or foreign laborers, and that such taking was "usurpation of the rights of the claimant," and that, inasmuch as the testimony shows clearly that claimant could not for twenty-five days replace the laborers who were so illegally drafted, the loss of the crop was a natural and proximate consequence of said illegal draft.

In opposition to this position, the Commissioner for Venezuela insists that the evidence shows the drafting of the 63 Venezuelans and only 6 foreigners, so called; that the Venezuelans were liable to draft, and that there is no evidence of the foreign citizenship of the so-called foreigners, and that there is no evidence that the so-called foreigners did not gather the coffee, meaning that there is no testimony showing how long they remained away from the plantation, and there

is some testimony that some of them returned very shortly; and, finally, that the loss of the crop is an indirect damage, and remote and consequential.

The umpire is of the opinion that under the testimony in the case the loss of the crop is not a proper element of damage. It is extremely doubtful, in his opinion, whether it would be even if all the laborers who had been engaged to gather it had been illegally taken from the plantation.

It has been held repeatedly that the loss of future crops is too remote to constitute an element of damage where the owner was prevented by the wrongful act of another from planting and harvesting them. So, too, where the seller of an agricultural machine fails to deliver it within the time stipulated, it is held that the loss of crops through the deprivation of the use of the machine is not a proper element of damage against him. Also, where the owner of a crop is deprived of an animal with which to harvest them. But it does not appear in this case whether the deprivation of an animal was by a tortfeasor or because of a breach of contract.

The same is held where the crop is lost by the loss of a servant or a slave. But it is, however, held in the latter case that where the owner of the crop can procure no other assistance he may recover compensation for the loss. (Sedgwick on Damages, Vol. I, p. 298, sec. 202, and the cases cited.) And it was held in *McDaniel v. Crabtree*, 21 Arkansas, 431, that where the defendant wrongfully seized the plaintiff's negro the profits of a crop plaintiff expected to plant and cultivate by means of the negro were too uncertain to afford ground of recovery.

On the other hand, in an action of contract, it was held in Louisiana, in which the civil law obtains, that on the failure to deliver a sugar mill the purchaser may recover compensation for the crop lost. (*Goodloe v. Rogers*, 9 Louisiana Annual, 273.)

In *Sledge v. Reid*, 73 North Carolina, 440, the defendant wrongfully seized the plaintiff's mule, which the latter intended to use to cultivate his crop. The loss of his crop was held both too uncertain and too remote for compensation. But Mr. Sedgwick says of this case (Sedgwick on Damages, vol. 1, sec. 191):

If the mule were intended to be used for the harvesting of a crop already matured, the loss would not be too uncertain.

Access can not be had to these cases cited to ascertain the condition of the crops at the time of the injury or breach of contract. But in the case here presented there are so many elements of uncertainty dependent upon conditions of weather, health, and industry of laborers preparing the crop for shipment and transportation, and ultimate realization on the crop, that the umpire is inclined to the opinion that the damage would be too remote.

However, the number of so-called foreigners drafted, at most only six, less than 10 per cent of the number of the Venezuelans drafted, will not warrant the charge against Venezuela if the draft of the Venezuelans was legitimate.

It is claimed by the Commissioner for Germany that under article 17, paragraph 5, of the constitution of Venezuela, the 63 Venezuelans were not legally liable to draft. On the other hand, the Commissioner for Venezuela insists that according to article 89, paragraph 20, subdivision 7, and paragraph 21, such draft was legitimate. To this the Commissioner for Germany agrees, provided that the previous declaration, required by subdivision 7 of paragraph 20 of article 89, had been made affecting the territory in which the plantation "La Hondonada" was situated, but he insists that such previous declaration is not proven, and that in the absence of that proof it must be presumed that the draft in question was contrary to the constitution and illegal.

The umpire can not agree with this latter contention. It being conceded

that given the prerequisite of an antecedent declaration of suspension of the constitution, embracing the locus in quo, the draft would be legal, the umpire is of the opinion that under the general presumption of law, in the absence of any testimony to the contrary, the draft must be considered lawful. *Omnia rite acta præsumentur*. This universally accepted rule of law should apply with even greater force to the acts of a government than those of private persons. Moreover, it seems at least doubtful whether the provision in subdivision 7 of paragraph 20 of article 89, read in connection with paragraph 21, is mandatory and not merely directory.

Furthermore, the evidence does not satisfactorily establish the nationality of the so-called foreigners. Certainly the testimony of the witnesses in their depositions taken under the commission, does not prove the fact, except as to Beauregard, who testifies as to his own nationality. The opinion of witnesses as to the citizenship of an individual is clearly incompetent to prove the fact. The letter attached to the "expediente," even if admissible in evidence, which is doubtful, because unsworn to and unauthenticated, and the signatures of Serrano, Mosquera, and Pereira not proven, is open to the same objection.

It results, therefore, that the proof fails to make out a case of illegal draft of any of the laborers of the claimant, except Beauregard; but as to him the proof shows he was absent from the plantation but a short time, and there is nothing in the evidence from which the amount of the value of his services, over and above his wages, can be computed. This item of the claim must be disallowed.

The item of legal costs and preparation of his claim for presentation is also disallowed.

*As a general rule, costs and expenses of litigation, other than the usual and ordinary court costs, are not recoverable in an action for damages, nor are such costs even recoverable in a subsequent action.*

Accordingly, it has been held that the mere fact that a party deems it necessary to resort to law to enforce or protect his rights does not, in general, give him the right to recover as damages the fees he may have paid legal counsel in the cause,<sup>1</sup> in the absence of a contract stipulation therefor, or provision of statute permitting. (American and English Encyclopedia of Law, 2d ed., Vol. VIII, p. 673.)

It results from these conclusions, therefore, that the claimant can only be allowed for the value of four huts burned, 800 bolivars; and wood, also burned, 50 pesos; and a mule taken by revolutionists, 160 pesos, aggregating 1,640 bolivars, with interest from the date of the presentation of the claim, July 1, 1903, to up to December 31 proximo, inclusive, at 3 per cent per annum.

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VAN DISSEL & CO. CASE

(By the Umpire:)

Meaning of the words "present Venezuelan civil war."  
Venezuela not liable for revolutionary damages under principles of international law.

GOETSCH, *Commissioner*.

The Coramissioners agree that on July 30 and 31, 1901, a detachment of troops under the orders of Gen. Juan Marquez confiscated from the claimant firm 158 mules, of which there were afterwards returned to the house 43, 9, 3, and 4 — in all 59 — so that there was a loss of 99 animals (6 saddle mules and 93 pack mules).

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<sup>1</sup> *Flanders v. Tweed*, 15 Wall., 450; *Day v. Woodworth*, 13 How., 363; *Arcambel v. Wiseman*, 3 Dall., 306.

They disagree (*a*) upon the question whether Venezuela is responsible for the loss, (*b*) the Venezuelan Commissioner denies the responsibility of Venezuela:

First, because there is question of an invasion of Colombian troops; and, second, because there is question of an incident which ought not to be considered, "as of the last civil war," in the sense in which the decision of General Duffield gives to this phrase.

I. The political event upon which the claim is based forms an epoch in the revolution against President Castro — an epoch which the honorable umpire describes in his personal opinion relative to the historical events in Venezuela, as follows:

*In July, 1901, General Rángel Garbiras, as provisional leader of the Nationalist party during the imprisonment of General Hernandez, organized an army of about 4,000 Venezuelans and troops of the regular army of Colombia and invaded Táchira by way of Encontrados and overland to the city of San Cristóbal.*

A detachment of these troops under the orders of Juan Marquez marched to the north and committed various depredations along the route to Encontrados, and at this last-named place also. Amongst others this detachment sacked, on July 27, 1901, the mercantile establishment "El Finglado," belonging to the firm of Christern & Co., and, moreover, they confiscated the mules mentioned in the claim of Van Dissel & Co. It is clear from every point of view, according to what has been stated, that there is no question of a warlike attack on the part of Colombia, but of a revolutionary uprising of Venezuelans who had fled into Colombian territory and lived in the frontier districts. They were the "Nationalistas," partisans of General Hernandez, and authors of the movement. The generals in chief, Rángel Garbiras, Juan Marquez, and Trinidad Zuleta, are Venezuelans. It is not impossible, and it is even probable, that among the invading revolutionists there were some Colombians, which in no way modifies the fact that there was question of a revolutionary movement of Venezuelans, who perhaps in attending to their own interests and political outlook, knew how to attract some Colombians to their flag. It has not been alleged or proved that the Colombian Government had any knowledge of the invasion, and even less that it had set it on foot. This is the view taken by the Government of Venezuela, who replied to an inquiry of England (see the English Blue Book, p. 55) on the 20th of November, 1901 — that is to say, that at the root of the invasion of Garbiras there was not a state of war existing with Colombia. Venezuela would not have received quietly a warlike attack from Colombia and would have replied to its neighbor by warlike measures. In the case of Christern & Co. the Commissioner of Venezuela has taken for granted that the act was committed by Venezuelan revolutionists. Since there is question of the same time, of the same troops, and of the same generals, it can not be seen why the authors of the deed could have suddenly become Colombian troops as against Messrs. Van Dissel & Co. Besides, all the witnesses testify that they were Venezuelan revolutionists.

II. As is seen from a study of the protocol of February 13, 1903. the Government of the German Empire took exclusively upon itself the adjustment of the claims arising out of the civil war of 1898-1900, or, say, the revolution organized at the time when Castro was seeking power, and, as far as they were at that time presented, held them to be fixed (Art. II), while the other claims, especially those arising out of the last civil war, were submitted for their decision to the Mixed Commission (Art. III). The German Commissioner has not the least doubt that under the term "last civil war" the revolutionary movements organized *against* President Castro ought to be included, the consequences of which have not yet been adjusted. It is this and nothing else which was in-

tended to be expressed. Since how can it be supposed that the Government of the German Empire could only have had in mind the Matos revolution, and that there could not have entered into its scheme the demand of satisfaction for the other damages which had occurred in the intermediate interval? (That is to say, from the time that Castro assumed power up to the uprising of Matos.) It was its idea to clear the table (to liquidate), and that all the claims of German subjects not adjusted up to date should be decided by the Commission.

There is no doubt that this was the intention of the Government of Venezuela. The same reason supports the interpretation that of the revolution and revolutionists against General Castro, enumerated one by one by the honorable umpire and of the individual existence of which perchance the German Government did not have notice, were united by the German and Venezuelan Governments under the term "last civil war." If the opinion of the Venezuelan Commissioner is to be considered correct, according to which only the uprising of Matos should be considered as "the last civil war," this interpretation would in no way modify, because of its slight importance, the judgment of the German Commissioner, who would demonstrate the liability of Venezuela in the present case by a different sort of reasoning.

The first paragraph of article III says:

The German claims not mentioned in the Articles II and VI, in particular the claims resulting from the present Venezuelan civil war, \* \* \* are to be submitted to a mixed commission.

The words "in particular" show that outside of the claims of the "last civil war" ready to be submitted to the jurisdiction of the Commission all those claims remaining which have not yet been adjusted; that is to say, in a given case also the claims for the intermediate period (until the uprising of General Matos). The German Commissioner understanding until now that these claims refer to claims for the failure to fulfill agreements, or claims during the period prior to 1898, but at the same time he asserts that in case the interpretation of Dr. Zuloaga should be correct, there shall be included also claims which bear no relation to the revolution of Matos, but to the revolutions of the intermediate time (Hernandez, Garbiras, Paredes, Peraza, and Acosta).

The second paragraph of Article III refers entirely to the first paragraph. If in the second paragraph the Government of Venezuela has recognized in principle its responsibility with relation to claims for damage to or illegal confiscation of property, its admission refers to the claims of which the first paragraph of Article III speaks — that is to say, to those German claims not mentioned in Articles II and VI — therefore, *in particular* to the claims of the present civil war, to those of the *intermediate interval*, and, therefore, to the claims arising out of the invasion of Garbiras and Vargas. Therefore, in the present case also, the liability of Venezuela should be fixed, being based upon contracted obligations.

III. The German Commissioner can not estimate by his own experience the value of the animals confiscated. He must bear in mind the sworn statements of the witnesses, who are agreed that the prices mentioned are reasonable.

Besides, the firm of Van Dissel enjoys such a reputation for honesty and respectability that it is not to be supposed that they would demand false or exaggerated prices. Add to this that the mountain mules must be selected animals of great strength in order to resist the fatigue incident to an exceptionally mountainous and muddy region. Finally, it is necessary not to lose sight of the fact that the house suffered a considerable indirect damage because of the confiscation of the animals (as all the witnesses testify) and that the direct

damage will require many years to be liquidated. All this should be taken into account in valuing the mules.

The prices indicated by the Commissioner of Venezuela are not in the first place sworn to, and besides they are given by individuals who did not know the animals in question, while the sworn witnesses ought to have known the exact value of them. Lastly, the prices refer to regions which are not in the mountains of Maracaibo, the high price which is paid in the mountains for mules being well known.

The German Commissioner therefore asks that the honorable umpire shall award the claimant firm the whole of the sum claimed, amounting to 51,000 bolivars, together with interests at 3 per cent per annum from the date of the presentation of the claim to December 31, 1903.

ZULOAGA, *Commissioner*:

Van Dissel & Co. make claim for 100 mules, which they say the troops of a commander, Juan Marquez, took on the 30th and 31st days of July, 1901, in a pasture field near El Azufre, in the jurisdiction of Michelena, State of Los Andes, and that they took them to Colombia via San Faustino. This claim is based upon acts of an obscure origin, with which the Government of Venezuela charges the Government of Colombia, since it was an invasion of the territory of Venezuela by revolutionary forces which, generally speaking, were battalions of the Colombian army, as appears even from the deposition itself presented as the testimony of the witness, David García. I do not understand how, under these circumstances, liability can be attached to the Government of Venezuela.

Nor even in the case that this act against the property of Van Dissel & Co. could be considered as the work of an internal revolution would the Government of Venezuela be liable, since it is an act of revolutionists, and besides, according to the interpretation given to the protocol by the honorable president of the Commission, the admission of the liability of Venezuela for acts of revolutionists is limited to the *present war*, which can not be any other except that which had for its leader Gen. M. A. Matos, a political movement perfectly well defined and distinct from every former revolution. I therefore reject the claim upon its merits; but it is also to be observed that mules, in the poor state which those which are the subject of this claim were, are not worth more than 80 pesos, or, say, 320 bolivars, as may be learned from the statements of informed people. The value of things at current prices should naturally govern the arbitrators, and with relation to them they are not to be governed by the declaration of witnesses who are set up as experts. Moreover, in the matter of experts it is universally determined that the judge is at full liberty to accept the valuation or not, and a judge of equity has that right all the more.

DUFFIELD, *Umpire*:

The claimants in this case base their claim upon injuries to and seizures of property belonging to them at their farm, El Azufre, in the jurisdiction of Michelena, State of Los Andes, by the troops of General Garbiras in July, 1901.

The Commissioner for Germany is of the opinion that the acts complained of occurred during the present Venezuelan civil war, as described in the protocol, while the Commissioner for Venezuela insists that these words in the protocol embrace only the so-called Matos revolution, which originated in or about December, 1901.

The importance of a correct interpretation of the words "present Venezuelan civil war" is self-evident. To arrive at a proper interpretation of them it is

material and necessary to ascertain the political situation in Venezuela at and prior to the execution of the protocol. The following statement of the various revolts against the Government, which was established in October, 1899, by General Castro, is accepted as substantially correct by both Commissioners.

General Castro entered Caracas October 22, 1899; assumed power October 23, 1899, as "director y jefe de la revolución restauradora." Shortly thereafter he declared himself "supreme chief of Republic" and appointed a cabinet.

General Hernandez on October 27, 1899, secretly left Caracas, and on October 28, 1899, issued a manifesto against the Castro government. He was defeated and captured and imprisoned until December 11, 1902, when he was released and came to parley with (then) President Castro.

Gen. Antonio Paredes, military governor of Puerto Cabello, initiated a revolt in November, 1899, but on November 11 and 12, 1899, he was completely defeated, and imprisoned until December 11, 1902.

December 14, 1900, Gen. Celestino Peraza issued a proclamation inciting an insurrection against the Castro government. There was no serious fighting, and he was soon defeated, captured, and imprisoned until December 11, 1902.

October 24, 1900, Gen. Pedro Julian Acosta revolted in Yrapa, and after a number of minor engagements in the States of Cumana and Margarita in February, 1901, he was captured and imprisoned and has not been released.

In July, 1901, General Garbiras, as provisional leader of the nationalist party during the imprisonment of General Hernandez, organized an army of about 4,000 Venezuelans and troops of the regular army of Colombia, and invaded Táchira by way of Encontrados and by roads to the city of San Cristóbal. A small skirmish took place at Encontrados July 28, 1901, which resulted in favor of the Government, but on the 28th and 29th he was defeated in a serious engagement at San Cristóbal, lasting from 2 p.m., July 28, until 4 p.m., July 29, between the main body of the Garbiras army and the Government troops under Gen. Celestino Castro, commander in chief of the army under appointment by General Castro.

August 8, 1901, another armed force invaded Venezuela from Colombia, via San Faustino, but was repulsed at Las Cumbres by Gen. Ruben Cardenas.

Finally, in February, 1902, Gen. Ránel Garbiras, with other leaders and a Colombian battalion of the line, again invaded Venezuela, via San Antonio simultaneously with other officers from other points, but they were all defeated with heavy losses.

During the blockade Gen. Ránel Garbiras issued a manifesto early in 1903, abandoning his pretensions and being still a refugee in Colombia.

Gen. Horacio Ducharme, nationalist leader in the east, and his brother Alejandro joined in this movement from September 30, 1901, to the beginning of November, 1901, when the eastern section of the country was pacified.

In the beginning of October, 1901, Gen. Rafael Montilla revolted in the State of Lara and occupied Coro with a considerable army, but was defeated October 25, 1901, by Gen. Rafael Gonzales Pacheco, president of the State. He took refuge in the mountains of Guaito until the revolution of Matos gained head, when he joined it and participated until the end.

At the end of October, 1901, Gen. Juan Pietri issued a revolutionary proclamation, dated at La Sierra, Carabobo, although he had not then reached that point. He was almost immediately captured, brought to Caracas, and set at liberty in the Plaza Bolívar, while the revolutionists were routed at Guigue, in the State of Carabobo. Pietri again left Caracas by stealth toward the end of December, 1901, presumably to join General Matos's army or raise his own

standard, but he was again captured December 31, 1901, and imprisoned until the blockade, when he was released.

November 21, 1901, a number of citizens of Caracas, including Gen. Ramón Guerra, minister of war and navy, who had lent their support secretly to Gen. Manuel Antonio Matos, who was then in Paris stirring up and providing means for an insurrection, of which he was to be the head, uniting the liberal elements and the nationalists, whose leader, Hernandez, was still in prison on the fortress of San Carlos.

December 19 Gen. Luciano Mendoza, whose term as provisional president of the State of Aragua was drawing to a close, and who was supposed to be about to assume the constitutional presidency of Carabobo, went to Vil de Cura gathering some 300 men whom he had gotten in readiness. He counted on various uprisings on the same day in Carabobo, Cojedes, Lara, and Coro, but Gen. J. V. Gomez pursued him with vigor and dispersed his forces at or near Cojedes, and drove him into hiding.

At the end of December, 1901, General Matos circulated a proclamation dated on board the *Libertador*, formerly the *Ban Righ*, and declared by the National Government to be a pirate vessel. The forces of Gen. Antonio Fernandez in Aragua and the rebels in Coro were defeated and destroyed; but early in January, 1902, bodies of revolutionists began to rise in the east, relying on the Matos support and that of the steamer *Libertador* with General Matos on board, which on the 7th of February, 1902, engaged and destroyed the national steamer *Crespo*.

February 14 Gen. Gregorio Riera landed at Cauca and issued a proclamation, and engaged in battle the Government troops under Gen. Ramón Ayala. General Gomez came to his assistance and the revolutionists in Coro were annihilated.

As early as March, 1902, the eastern portion of Venezuela was in arms in support of the revolution. Gen. Domingo Monagas, in Barcelona, and Gen. Nicolás Rolando, in Maturín and Cumaná, commanded troops. They gained signal victories at La Sutela of Barcelona, March 27, San Augustin del Pilar on April 2, and Guanaguana April 22. Gen. Calixto Escalante, who conducted the military expedition in the east, was completely routed and with many officers was taken prisoner. Rolando occupied Carúpano and defeated General Gomez in a hard battle. General Matos then came to Carúpano and began his march to the center, via Maturín and Carúpano. Meantime, in Lara and Yaracuy, General Amabile Solagure had acquired strength and was enlisting support with southwestern states to the movement in connection with General Montilla in Lara and Generals Mendoza and Batalla in the west.

By this time the occupation of Ciudad Bolívar by Col. Ramón Farreras and his possession of the State of Guayana, after serious engagements at Ciudad Bolívar, San Felix, and other points, had occurred.

While the forces near La Guaira, in the valleys of the Tuy and the Guarico, had been organized in expectation of the coming army of the east in Coro, General Riera obtained decisive victories which made him master of that state, and General Ayala was a captive in Barcelona.

During these events General Castro sent General Velutini to Barcelona to check the advance of General Matos's army, but the Government forces under Gen. M. Castro were defeated by the army of the east under General Rolando. President Castro thereupon took personal command of the army, and on August 18, with a considerable army, started for San Casimiro, where he was joined by other troops, and moved rapidly to Cua, but removed to Ocumare because of the defection of the troops under Gen. P. Perez Crespo, and remained until the beginning of September, 1902, when he returned to Valencia to meet the

revolutionist forces from the west, who, by a succession of victories, had control of the states of Coro, Barquisimeto, Cojodes, Portuguesa, and Yaracuy. In spite of General Castro's efforts to prevent it, the revolutionist armies united at San Sebastian and he fell back to Victoria. The united armies of the insurgents here attacked him vigorously from October 13 to November 2, but were compelled by the strong defense to withdraw from the field, and Matos took passage for Curaçao. Many revolutionists then surrendered themselves and the Government regained its coast and interior towns.

But in January, 1903, a reorganization of the revolutionists was consummated with considerable forces in Critinuco and Barlereuto under General Ronaldo; in Guarico, General Fernandez; in Coro, Gen. Gregorio S. Riera; in Barquisimeto and Yaracuy, under Generals Peñalosa, Solaguie, and Montilla. And after the signing of the protocols with the allied powers, February 13 of the present year, the struggle began again. It was only finally quelled by the taking by General Gomez of Ciudad Bolívar in the closing days of the present month.

It is claimed by the Commissioner for Venezuela that the words "the present civil war" in the protocol must refer to the revolution of Matos (so called) only. Is this correct? It is, literally, because at the date of the execution of the protocol there was no other revolution actively and aggressively prosecuted. But may not the parties to the protocol have used these words in a broader sense to indicate all the revolutions which had broken out against the Castro government?

From this statement it appears that prior to the Matos revolution a number of separate and disconnected revolts occurred, most of them of comparatively small importance; two of them in the year 1899, two in 1900, and four, including the Garbiras insurrection, in 1901; but all of these, except the Garbiras movement, were almost immediately suppressed. Of these revolutions that of General Ducharme alone appears to have been in answer to the call of General Garbiras. Of the leaders in these separate revolts, General Hernandez, General Paredes, General Peraza, and General Acosta were captured, and except General Acosta, who is still a prisoner, were imprisoned until December 11, 1902, when they were released by the Venezuelan Government at the time of the blockade by the allied forces. General Ducharme, being hard pressed, reembarked for Trinidad in November, 1901.

The insurrection headed by Gen. Ramón Garbiras in July, 1901, was organized and set out from the neighboring Republic of Colombia, and contained many troops of the regular Colombian national army. It was believed by the Government of Venezuela, and so announced by it in a proclamation addressed to the other nations of the world, dated August 16, 1901, that there was either complicity on the part of the Government of Colombia or an entirely unjustifiable lack of effort to prevent participation in it by its regularly enlisted troops. Notwithstanding the fact that General Garbiras had invaded Táchira by way of Encontrados, and thence by road had proceeded to the city of San Cristóbal with an army of about 4,000 Venezuelans and troops of the regular army of Colombia, on the 28th and 29th of the same month he was defeated in a serious battle at San Cristóbal by the Government troops under Gen. Celestino Castro, commander in chief of the Venezuelan army, and retired to Colombia. It was in this invasion that the injuries complained of occurred.

The so-called Matos revolution was announced by the proclamation of Gen. Manuel Antonio Matos in December, 1901, dated and issued on board the steamer *Libertador*, formerly the *Ban Righ*, then cruising in Venezuelan waters. She was denounced by a decree of the Venezuelan Government dated December 30, 1901, and in February, 1902, she engaged and destroyed the

Government steamer *Crespo*. This proclamation, which was extensively circulated by General Matos, was the culmination of an agitation begun by him in Paris some months previously, looking to an extensive insurrection which he was to lead. He hoped to unite upon him as their leader the liberal elements and the followers of General Hernandez, called Nationalistas, whose chief was still a prisoner in the fortress of San Carlos. To this end he had advanced liberally of his means, which were large, and had enlisted the support of the Venezuelan minister of war and navy and a number of the citizens of Caracas. He did not profess or declare any connection with a prior insurrection, or any intention to support the cause of any former leader, but to initiate and successfully carry through a new and independent revolution.

Yielding to public opinion, and attentive to the honor which a large number of my distinguished compatriots have conferred on me, by designating me in their generosity to lead this redemptory crusade, I hasten to comply, and to bring with me the necessary elements of war to strengthen your desires, render them irresistible, and at the same time to serve as a tie of union to all Venezuelans, in order to save our beloved country from ruin. (From Venezuelan Herald of December 31, 1901.)

Through the entire period of December, 1901, until his defeat and proclamation of peace, from Curaçao, whither he had fled after his defeat in June, 1903, there is no indication whatever that the movement he was conducting had the slightest connection with any of the previous revolts. Although he naturally hoped and probably expected to bring together all the dissatisfied elements in the Republic under his banner, it was with a like hope and expectation that they would abandon their former chiefs and adopt him as their leader.

None of these former revolutions compared with the Matos movement in importance or in their chances of success. None of them were still active. All of them had been suppressed. And with the exception of the followers of Hernandez, who was himself in prison, there were no considerable numbers of organized revolutionists. All of their chiefs were imprisoned. General Garbiras only avoided imprisonment by flight into Colombia.

It appears, therefore, that at the time of the signing of the protocol there was no existing civil war with any leader or any organization save that of Matos, and that all previous revolts had been put down by August, 1901, except the comparatively insignificant movement of General Ducharme, Nationalist leader in the east, which existed from September 30 to the beginning of November, 1901, at which date the entire eastern section of the country was pacified, and two small desultory events, one by Gen. Rafael Montijo, in the State of Lara, which was quelled in a few weeks by the president of that State, and one by General Pietri, who was defeated and captured before he reached the point from which his proclamation of revolution was dated, and his followers at the same time routed at Guigue, in the State of Carabobo.

If there were any connection shown between the Matos revolution and these prior ones, there would be much force in the argument of the Commissioner for Germany that the high contracting parties had in contemplation, by the words "present Venezuelan civil war," all the insurrections against the Castro Government, but in the light of the facts stated above it clearly appears that the Matos revolution was independent.

Taking the words in their literal sense, in which they must be interpreted unless some special reasons require otherwise, they refer to the one civil war then pending in Venezuela.

The umpire is therefore of the opinion that the admission of Venezuela in the protocol of liability for injuries to and wrongful seizures of property does not embrace the insurrection headed by General Garbiras, in which the claimant

suffered from acts of revolutionists. It is true that in February, 1902, General Garbiras, with other leaders and 4,000 soldiers, including the Colombian battalion of the line, again invaded Venezuela, via San Antonio, simultaneously with forces from other points, but they were all defeated very soon after.

As to this claim, therefore, the liability of Venezuela must be determined by the general principles of international law, and under them the umpire is of the opinion that no liability exists.

As has been shown above, the forces which committed the injuries in this case were composed in large part of the national troops of Colombia; that the expedition was organized in Colombia; that the Government of Venezuela had no warning from Colombia of its preparation and no reason to expect it, because her relations with Colombia were then friendly and included an interchange of diplomatic representatives, that the expedition penetrated only a short distance into Venezuela coming by way of Encontrados by water, with San Cristóbal as its objective point, and that the Government took such prompt and vigorous means in opposition to it that, although General Garbiras had an army of some 4,000 men, many of which were the trained troops of the Colombian regular army, he was defeated and driven out of the country in less than a month.

Even if the question is to be answered upon the assumption that it is the duty of a government to protect foreigners absolutely from acts of revolutionists by preventive measures, and it is doubtful if the rule goes so far, Venezuela can not be held liable here, because the uprising did not begin in her territory, but in a neighboring state, which gave it immunity from any surveillance or repression, if not a fostering support.

Under these circumstances, in the opinion of the umpire, it would be contrary to justice and equity and at variance with the principles of international law to hold Venezuela liable in this case.

It is not intended by this opinion to decide that Venezuela may not be liable for acts of revolutionists in an insurrection prior to the Matos movement where that insurrection is shown to be associated with and a part of that movement.

It results, therefore, that the claim must be disallowed.

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#### MOHLE CASE

Damages occasioned by revolutionary troops allowed because of admissions in protocol.

Doubt expressed by umpire whether he can accept statements of revolutionary authorities who are not experts or agents of the Government as to value of property taken.

Evidence as to values of like articles in another case before the Commission followed by umpire in the fixing of prices.

#### DUFFIELD, *Umpire*:

In this claim the Commissioners differ in opinion. The acts upon which it is based occurred during the revolution of General Matos, and the injuries complained of were done by his troops. Under the decision of the umpire in the case of Kummerow, the Government of Venezuela is liable by reason of its admission of liability in the protocol, the Matos revolution being embraced in the present civil war.

The Commissioner for Venezuela, while denying the liability of Venezuela, admits the committing of the injuries, but insists that the values of the property

are exaggerated by the claimant, and contends that if Venezuela is liable it is only for 11,923.72 bolivars, for the reason that the appraisal of values made by the revolutionist officials who took the property can in nowise bind Venezuela and is no evidence of value. But the Commissioner for Germany, while admitting that they do not conclude Venezuela, insists that they are competent evidence of value, and is of the opinion that the full amount claimed should be allowed.

The Commissioner for Venezuela lists the articles taken at what he says are current prices, and is of the opinion that if any award is made it should be on this basis.

The umpire is of the opinion that, perhaps, under the Fennerstein Champagne cases, in the Supreme Court of the United States,<sup>1</sup> current prices are admissible in evidence. But there is, in his opinion, much force in the objection made by the Commissioner for Germany as to their accuracy in the appraisal of such property as is here in question. Moreover, the current prices which the Commissioner for Venezuela mentioned are not verified by price lists or any other evidence.

On the other hand, the umpire is extremely doubtful whether he would be authorized to follow the appraisal made by the revolutionist officials, who are not agents of Venezuela, and not shown to be familiar with the value of any of the property, except, perhaps, the horses. In this uncertainty he deemed it entirely proper to refer to the evidence put in the claim of Van Dissel by the Commissioner for Venezuela, stating the values of property of like character with that the values of which are disputed in this case. The competency of this evidence was not questioned by the Commissioner for Germany in that case.

Upon this basis the claimant will therefore be allowed for his items of damage as follows.

The following items the values of which are undisputed:

	<i>Bolivars</i>
Fence . . . . .	1,200.00
1 saddle horse . . . . .	800.00
Medicine . . . . .	158.00
1 horse . . . . .	180.00
Medicine . . . . .	74.52
Do . . . . .	166.00
Do . . . . .	44.00
Do . . . . .	197.60
Do . . . . .	194.56
	3,014.88

And the following items, the value of which is disputed, but are fixed by the umpire, as follows:

	<i>Bolivars</i>
125 head of cattle, at 63 bolivars . . . . .	7,875.00
9 donkeys, at 40 bolivars . . . . .	360.00
24 head small cattle, at 40 bolivars . . . . .	960.00
10 horses, at 240 bolivars, 2,400 bolivars; less 3 horses returned, 720 bolivars . . . . .	1,680.00
8 head of cattle, at 63 bolivars . . . . .	504.00
1 cow and 1 bull . . . . .	130.00
1 cow . . . . .	60.00
1 head of cattle. . . . .	48.00
	11,617.00

<sup>1</sup> 3 Wall., 70 U.S., p. 145.

Total, 14,631.88 bolivars, with interest at the rate of 3 per cent per annum from July 15, 1903, up to and including December 31, 1903.

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RICHTER CASE

Discussion of facts

DUFFIELD, *Umpire*:

The Commissioners disagree only as to the amount which should be awarded to the claimant. The claim is for injury to and taking of property of the claimant at his hacienda, Tucua, in the district of Mariño, in the State of Aragua. His original claim was for 19,262 pesos (77,048 bolivars), which sum, less 400 bolivars, viz, 76,648 bolivars, the Commissioner for Germany is of the opinion should be allowed at its full amount, with interest.

The Commissioner for Venezuela, however, is of the opinion that only 22,000 bolivars should be allowed. He bases this claim upon the following grounds: First, that the claimant claimed as lost things of which there is no proof, as, for instance, two trunks and a valise with clothes and jewels, which he values at 500 pesos; cash, 200 pesos; destruction of houses, which he values in different lots at more than 2,000 pesos. He is also of the opinion that the claimant largely exaggerates the value of the property, specifying growing crops of cane ready to cut as valued at 800 pesos per tablón, when it is not worth more than 200 pesos; also a 7-months' cane growth at 500 pesos per tablón, when it is not worth more than 150 pesos. He also thinks it a grave circumstance, indicating bad faith on the claimant's part, and an intention to make his claim as large as possible, that the claimant, after —

this Commission decided that he should make his proof anew and before the judge of the court of first instance of La Victoria, the agent of the Government of Venezuela being present, the claimant, without waiting for a note to reach that judge, named two experts to judge of his list of prices.

Taking these objections in their order, the umpire is of opinion that there is proof of the loss of two trunks and the valise with clothes and jewels, and cash, and the destruction of the houses which the claimant values at more than 2,000 pesos. The list of articles taken, which the claimant made the basis of his claim, was, by order of the judge, annexed to the moving papers. And the witness Torealba testifies of his own knowledge that among the losses of the claimant were animals kept for working and breeding purposes, beasts, furniture, personal effects, cash, houses and huts on the hacienda, and a great number of working implements.

As to the exaggeration of values, the umpire finds no specific evidence to confirm the general statement in the opinion of the Commissioner. The testimony of the experts is not contradicted by any other specific evidence, and the appraisal is approved of by the judge after a personal survey of the premises. They are accredited by their appointment by the judge, and the umpire has found nothing in the case to indicate any lack of good faith and honesty on their part.

The objection by the Commissioner for Venezuela that two of the witnesses testify from notoriety and not from personal knowledge is not supported by the proof as to all the matters testified to by them while it is warranted as to certain matters. If they were the only witnesses there would be force in the objection to the extent that their testimony is based upon notoriety or hearsay. But the witness Torealba does testify from personal knowledge and is not contradicted.

The objection as to the exaggerated values is based upon the unsworn statement of the agent of Venezuela. It is not supported by the oath of any witness or corroborated by a detailed statement of particulars upon which the umpire can form any judgment except as to the value of the growing cane and the oxen. As to these a letter from a reputable commission house, dealers in and familiar with the value of these articles, is put in evidence, in which the value of a tablon (10,000 square varas) of cane, in the neighborhood of La Victoria, ready to be cut, is appraised at 800 bolivars, and a tablon of cane 7 months' old is appraised at 600 bolivars, and a pair of oxen at 400 bolivars, as against the claimant's figures on a tablon of cane ready to cut of 800 pesos (3,200 bolivars) and a tablon of cane 7 months' old, 500 pesos (2,000 bolivars). The discrepancy is so large that it is not reconcilable by mere difference of judgment. But on the one hand is the testimony of witnesses who swear they knew the property, while on the other the testimony is based on general market values. Ordinarily the first-mentioned testimony should govern, and if the witnesses had testified more in detail, and especially if they had testified as to a personal knowledge of the crops before their destruction, the umpire would have felt bound to accept their appraisal. In the absence, however, of such particularization, and considering the entire disinterestedness of the commission house in its appraisal, the umpire is convinced that there must be an error in the claimant's figures, notwithstanding their corroboration by the witnesses. For example, he claims for one tablon of "young" cane growth, one-half of which he claims was destroyed, as much as the commission house values a tablon of 7-months growth. For three other tablons of "young" cane growth, destroyed in whole or in part, he claims 500 pesos per tablon. For a tablon of 2-months growth he claims 300 pesos. In the opinion of the umpire these valuations are exaggerated and should be reduced. The umpire is of opinion that a fair value of a yoke of oxen would be 125 pesos. The umpire also allows the expenses of the additional testimony called for by the commissioners, 50 pesos, or 200 bolivars. The total cane destroyed is allowed at 6,500 pesos (26,300 bolivars).

While the testimony therefore is meager, and is especially so as to values, in the absence of any proofs to the contrary the umpire believes it his duty to accept it, save in the particulars above specified. The objection based upon the alleged lack of good faith and apparent intent of the claimant to recover an exaggerated and unjustifiable amount of damages by asking a different judge to select the experts would have had great weight with the umpire if the facts warranted it. But the umpire is unable to find any such proof in the "expediente" or in the proceedings of the Commission. First, it is inaccurate to say that the claimant had knowledge that this Commission decided that new proof must be made before the judge of the court of first instance of La Victoria. The record of the eighth session reads as follows in this respect:

And that he [the claimant] prove also, by means of a formal amplification of the proofs presented, the amount of the damages which he says he has suffered, with the intervention, if possible, of the representative of the agent of the Government of Venezuela, for which purpose the Venezuelan Commissioner will take charge of the steps necessary to be taken and will present at the next session informal letters, which he will address for the purpose to the judicial authorities in whose jurisdiction the above-mentioned properties are situated.

It appears by the records of the next sessions that such letters were not presented. The Commissioner for Germany states that in a letter dated the 27th of June last, a copy of which is attached to his opinion, he stated to the claimant that —

the Commissioner for Venezuela will address a letter to the judges having jurisdiction, so that you will not meet with difficulties in the examination of the witnesses or experts you may present.

That the claimant on receipt of this letter asked the Commissioner for Germany if he could go to Tucua to gather proof, and if the communication had yet been sent to the judge, to which the Commissioner replied that it had left, having been shown by the Commissioner for Venezuela the draft of his note to the judge. It is also stated that the claimant had twice demanded that the President of the State of Aragua should name an agent to represent the Government.

It seems to the umpire that this conduct of the claimant is entirely consistent with good faith on his part. The agent of the Government was present at the examination of the experts and made no objection to the irregularity of the appointment. He was the legal representative for Venezuela and acted for her in the premises, and therefore had authority to waive any such irregularity and by his conduct in making no objection did so waive it. Moreover, it will be borne in mind that the only irregularity was the appointment of the experts, and that the taking of the testimony was before the judge agreed to by the parties.

It is quite clear to the umpire that the understanding evidenced by the record of the eighth session was not to dispense with or throw out the testimony of the witnesses taken in 1902, but to amplify the proof with respect to values, and give the Government of Venezuela an opportunity to be present when testimony as to values was taken. This seems to have been done.

The umpire is therefore of the opinion that the claimant is not entitled to recover, under the proofs, the amount found due him by the Commissioner for Germany. It would undoubtedly have been more satisfactory if the claimant had made a more full presentation of evidence, both as to the property taken and as to its value. On the other hand, the character of the occupation of the hacienda by the troops of the Government was, at least to the claimant, a notorious event, and this may have induced him to think that comparatively little testimony was needed. It is also a fact of which the umpire can take judicial cognizance that occupation by troops of a property of this nature is always very destructive and damaging, especially to growing crops.

The claimant is therefore allowed the sum of 49,288 bolivars, with interest from the 22d of June, 1903, up to and including the 31st of December, 1903, at 3 per cent per annum.

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#### METZGER CASE

Law of domicile rules as to class of claims for damages to decedent which will survive to his estate.

Under the law of Venezuela the heirs may recover for bodily injuries, but not for damages to personal feelings or reputation.

#### DUFFIELD, *Umpire*:

The claimant alleges that on the 28th of May, 1902, while lawfully going from his house to his office, in Carúpano, he was assaulted by an officer of the Venezuelan army because the claimant would not give up the mule he was riding. The officer attempted to take the mule by force, and upon the claimant resisting another officer struck him two severe blows on the shoulder with a saber, inflicting serious injury. His life was also threatened, and he was subjected to other indignities.

If the occurrence had not arisen out of the demand for the mule it might be held that this was a purely wanton assault by the officer, for which, as the

Venezuelan Commissioner contends, the Government of Venezuela could not be liable under the circumstances in the case.

But it is so notoriously the practice of army officers to impress property of this kind for the use of the Government, that I think Venezuela must be held liable for the act of the officer, if proven. It is said by Hall (4th ed., p. 226) that a government's —

administrative officials, and its naval and military commanders are engaged in carrying out the policy and the particular orders of the government, and they are under the immediate and disciplinary control of the executive. \* \* \* Where, consequently, acts or omissions which are productive of injury, in reasonable measure, to a foreign State or its subjects, are committed by persons of the classes mentioned, their Government is bound to disavow them, and to inflict punishment and give reparation when necessary.

It is contended, however, by the Commissioner for Venezuela, in opposition to the opinion of the Commissioner for Germany, that Venezuela is liable, that the "expediente" does not prove the case. He objects to the form of the testimony of the witnesses, and "their omission to explain the facts." He also claims that "Buran did not see what took place, as is inferred from the letter of the claimant on his complaint," and also that the testimony of the witnesses and the statement of the claimant conflict. Certainly the certificate signed by the two witnesses is irregular in form, and if the case stood only on it the umpire is of the opinion that it is insufficient. It has been held, however, in this Commission that under the protocol the declaration of the claimant is competent evidence.

The letter of the complainant, in the opinion of the umpire, is not susceptible of the inference that Buran did not see what took place. That letter simply named two witnesses. It is true that Buran was not one of them. He, however, took the place of one who was named and presumably for some reason did not testify. Neither do the testimony of the witnesses and the statement of the claimant disagree. The former is, as has been said, scarcely competent evidence, and is confined to the mere statement of the injuries. In this particular respect there is no discrepancy, the only difference being that the complainant amplifies, and properly so, the statement of facts.

Considering the case made by the proofs in its entirety, and especially the letter from General Velutini, in which he states that the "assailant of Mr. Metzger is still in prison expiating his crime," the umpire is of opinion that, notwithstanding the irregularities and insufficiencies pointed out by the Commissioner for Venezuela in the testimony, the fact of the injury itself is established.

The Commissioner for Venezuela, however, insists that the right of action does not survive and pass to the heirs of Metzger, who are, as shown by the proofs, his mother, sister, and brother, all of whom are German subjects. It is conceded that under the laws of Germany such right of action does not survive, but the German Commissioner is of the opinion that this is not a claim between an individual and Venezuela, but "an international demand which the German Empire makes." In the opinion of the umpire this position is not maintainable. A similar question arose before the American and British Claims Commission in the cases of McHugh, No. 357, Elizabeth Sherman, No. 359, and Elizabeth Brain, 447. (Moore's Digest of International Arbitration, vol. 4, p. 3278.) The United States demurred to the claim, insisting that the right of action did not survive, and that that was the law of both Great Britain and the United States. In the McHugh case the demurrer was sustained, apparently because he left only collateral relatives not dependent upon him for support. In the other two cases the demurrers were overruled, Mr. Commissioner Frazer dissenting. Upon the final hearing upon the merits,

however, the claim of Mrs. Sherman was disallowed unanimously, and although an award was made in favor of Mrs. Brain it was only on account of property taken from her husband and included no damages for his imprisonment. (Moore, etc., p. 3280). All the Commissioners seem to have agreed with Mr. Commissioner Frazer in the opinion that under the treaty only claims "on the part of citizens or subjects of the respective countries are submitted to the Government." The protocol under which this Commission is acting is substantially similar, and the umpire agrees with the reasoning of Mr. Commissioner Frazer, and is of the opinion that the claim now before this Commission is not a claim of the German Nation but a claim of an individual.

The Venezuelan code gives the injured party a right to recover his damages in a civil action in all cases of torts. (Código Civ., Arts. 1116, 1118.)

ART. 1116. Every act of a man which causes injury to another makes him through whose fault the injury happened liable to make reparation for the same.

ART. 1118. He is also liable not only for the injury which he caused by his own act, but also for that caused by the act of persons for whom he is responsible, or by the things which he has in his care.

This is in addition to fine and punishment in a criminal prosecution.

The heirs of a decedent succeed to all his property rights at the moment of his death, and no actual taking of possession is necessary. (Id., Arts. 894 and 896.)

ART. 894. Succession is opened at the moment of death at the place of the last domicile of the deceased.

ART. 896. Possession of the property of the deceased passes by law to the heir without the necessity of taking physical possession.

A right of action for damages for personal injuries is property. A fortiori is the claim in this case which had been presented and proved before the death of Metzger.

It appears, therefore, that under the laws of Venezuela the right of action for personal injuries does survive and pass to the heirs of the deceased, in so far as damages for corporeal injuries is concerned. This, in the opinion of the umpire, presents a different case from the above cited. The question is ably and, in the opinion of the umpire, convincingly argued in the opinion of Mr. Commissioner Frazer. Following its reasoning, the umpire is of the opinion that the law of the domicile determines the rights. Metzger, therefore, being domiciled at the time of his death in Venezuela, his heirs will take according to Venezuelan law, and they may recover in this case such damages as are just for corporeal injuries, including the expense and loss of time which naturally followed the injury, but not for the damages to his feelings and reputation. Neither can anything be allowed in the way of punitive or exemplary damages against Venezuela, because it appears, as above stated, that the general commanding the army promptly took action against the offender and punished him by imprisonment.

The claimant states his damages at 20,000 bolivars, and the Commissioner for Germany is of the opinion that he should be allowed one-half that sum, or 10,000 bolivars. There is no evidence in the "expediente" to show how severe his wounds were, nor any evidence of medical or surgical treatment or of any expense on account of same, and the clear presumption from the proofs is that the injuries were not permanent and did not in any way conduce to his death. As has been said, the action of the Venezuelan Government in promptly arresting and punishing the offender relieves her from any liability for a malicious injury, and the damages which Metzger might have recovered, if still living, because of the insults and indignities and damages to his reputation

and standing in the community, not passing to his heirs under either the German or the Venezuelan law, which excludes all damages save those based on corporeal injuries, the umpire is of the opinion that the amount allowed by the German Commissioner is not warranted. If the claimant had, as was his duty, particularized the nature, extent, and severity of his wounds, it would be much easier to make a satisfactory assessment, and if the amount allowed should not be full compensation, it is because of this lack of evidence.

Basing the amount to be awarded upon the grounds above stated, in the opinion of the umpire the sum of 3,000 bolivars is ample. It results that the claimant will be allowed 3,000 bolivars without interest.

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#### BISCHOFF CASE

Damages allowed for unreasonable detention of property, and injuries resulting thereto during that time, where original taking was lawful.

#### *DUFFIELD, Umpire:*

This claim is based on the taking of a carriage belonging to the claimant, at Caracas, in August, 1898, during an epidemic of smallpox. Information came to the police that the carriage had carried two persons afflicted with the disease, and the police conveyed it to the house of detention, where it remained for a considerable time. During this time it was exposed to the weather, and the claimant alleges it was substantially injured. Upon ascertaining that the information upon which they had acted was false, the police offered to return the carriage to the claimant, and the claimant refused to accept it unless they would pay for damage done to it. The claimant also asks 18,000 bolivars for injury to his business, counsel fees, 40 bolivars, and legal costs, 25 bolivars.

The Commissioner for Venezuela is of the opinion that there is no liability under this state of facts. The Commissioner for Germany, however, while admitting "that the taking was made in good faith, and because of the smallpox epidemic then existing was justified," is of the opinion that the claimant was not bound to accept the return of the carriage, and that Venezuela is liable for its value.

It seems to be well settled by the authorities that in the case of an original wrongful taking of personal property the owner is not bound to receive the property in an injured condition.

Where the owner of personal property has been tortiously deprived of it, he is not, it has been held, bound to accept its return or restoration, if proposed, but may stand upon his legal rights. (American and English Ency. of Law, 2d ed., Vol. VIII, p. 692, and cases cited.)

But this principle only applies in cases of wrongful taking. The case shows, and the Commissioner for Germany admits, that the carriage was taken in the proper exercise of discretion by the police authorities. Certainly during an epidemic of an infectious disease there can be no liability for the reasonable exercise of police power, even though a mistake is made. But it is held in a number of cases before arbitration commissions involving the taking and detention of property, where the original taking was lawful, that the defendant government is liable for damages for the detention of the property for an unreasonable length of time and injuries to the same during that period. (Moore, Vol. 4, pp. 3235 and 3265.)

In the case at bar the umpire is of opinion that these are the only damages

recoverable. As the claimant presents no evidence of the amount of these injuries he can not recover on the case as made. His mistake in refusing to accept the carriage was a mistake of law and not of fact, and, in strict right, he perhaps can not demand an opportunity to show the amount of these injuries. The case, however, is a hard one, inasmuch as he has lost his carriage through the mistaken though lawful action of the police, and has undoubtedly suffered damage to his business, which, however, is not legally recoverable. Under the words of the protocol providing for the examination and decision of claims "according to principles of justice," and that "the decisions of the Commission shall be based upon absolute equity," in the opinion of the umpire it is a proper case in which to allow the claimant an opportunity to show his actual damage. If the Commissioners can not agree upon this amount without further proof the claimant will be allowed five days in which to make the same.

It results, of course, that there can be no allowance made for extrajudicial or other legal costs. In any event, the former are not recoverable under the opinion of the umpire rendered in the case of Hugo Valentiner. As to the latter, the umpire is of opinion that there is no power in the Commission to allow the costs of proving the claim. In all civil actions costs are created by statute, and only such are allowed as the statute provides for. It is true in the claim of Richter the claimant was allowed the costs of the additional testimony, but that was because the Commission itself had directed him to take it.

An entry will be made in the record in accordance with the above opinion.

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FLOTHOW CASE

Meaning of protocol in the provision for extending time for submission of claims

DUFFIELD, *Umpire* :

In this case the opinion of the Commissioner for Germany is that the case should be received by the Commission and acted upon notwithstanding the fact that the time fixed by the protocol has expired, as has also the extended term fixed by the Commissioners at the seventh session, June 22, 1903. The Commissioner for Venezuela disagrees with this conclusion and is of the opinion that the extension of time made at the seventh session of the Commission, on the 22d day of June, 1903, exhausted the power of the Commissioner to make further extension, and that, moreover, the period covered by that extension having expired, the Commission has no power to create a new term.

The extension of the term at the seventh session was made by the agreement of the Commission without consultation with the umpire.

There is a decided misunderstanding by the Commissioners as to their action on the 22d of June, 1903, and even as to the accuracy of the record of that date. Fortunately it is not necessary to decide this difference. It appears upon a careful examination of the protocols that the translation into English which the Commission have been using contains a material error in the first paragraph of Article III of the additional agreement of May 7, 1903, the language of the translation being:

The claims shall be presented to the Commissioners by the Imperial German minister at Caracas before the 1st day of July, 1903. A reasonable extension of this term may eventually be granted by the Commissioners —

while the original English duplicate, signed by Mr. Bowen and Baron von Sternberg, reads:

The claims shall be presented to the Commissioners by the imperial German minister at Caracas before the 1st day of July, 1903. A reasonable extension of this term may in proper cases be granted by the Commissioners.

If the former translation were correct, there would be much force in the argument of the Commissioner for Venezuela. The Commission, however, must accept the language of the protocol signed by the representatives of the two countries. Under its language no authority is given to the Commission to make a general extension of the term for the presentation of claims. This is the necessary and only inference from the words "in proper cases." The umpire is therefore of the opinion that the action of the Commissioners on June 22 does not affect the power of the Commission to consider on its merits the application of the claimant for permission to present his claim.

In the German text of the original protocol, signed by Baron von Sternberg and Mr. Bowen, the word "Commission" is used instead of the word "Commissioners" in the clause providing for the extension in proper cases. Basing his argument upon the English translation, the Commissioner for Venezuela has suggested that this may be a case in which the umpire, in case of disagreement of the Commissioners, has no power to decide. Even if the German original did not differ from the English, the umpire is of opinion that the word "Commissioners" as used in this article should properly be interpreted to mean the Commission. In other parts of the protocol the words "Commissioners" and "Commission" seem to have been used synonymously, and it is obvious that if the umpire had no authority to decide what is a reasonable extension in case of disagreement of the Commissioners, it would be entirely in the power of the Venezuelan Commissioner to prevent any extension that did not seem to him reasonable. Such an intention on the part of the representatives of the two countries can not, in the opinion of the umpire, be fairly presumed. Moreover, in the original protocol of February 13, 1903, to which the agreement of May 7 was supplemental, it is provided in Article IV: "in each case where the two members come to an agreement on the claim, their decision shall be final. In cases of disagreement *the claims* shall be submitted to the decision of an umpire to be nominated by the President of the United States of America." The claimant asks leave to present his claim upon the following grounds: It is based upon alleged injuries to and wrongful seizures of property on his breeding ranch, some of which occurred as late as May, 1903. This property was in charge of an agent of the owner, the latter having left Venezuela in 1901 and removed to Madrid with his family, where he still lives. It appears that the agent took the proofs which are offered in support of the claim in the latter part of June. They seem to be in proper form, although perhaps the evidence of the agent's authority may be subject to technical objections. Possibly on this account or for prudential reasons the agent deemed it necessary to send it on to his principal for approval. For some reason which does not appear they were sent to Germany and did not reach the claimant until about July 31, 1903. This occasioned the delay.

Under these circumstances the umpire is of the opinion that the case falls within the provision in the additional agreement of May 7, and is a proper one in which to grant an extension of the term fixed by the representatives of the two Governments.

While there is force in the objection of the Commissioner for Venezuela that the claimant may be presumed to have had knowledge of the protocol of February, it appears that the two Governments did not consider their convention complete as to modes of procedure and other matters provided for by the additional agreement of May 7. The earliest date, therefore, at which it would seem to have been incumbent on claimant to set about preparing his claim and

proofs would be May, 1903, and as it also appears in this case that the injuries and seizure of property continued into that month, the case does not show, in the opinion of the umpire, an unreasonable delay on the part of the claimant.

In accordance with these conclusions, the claim will be admitted for the consideration and such disposition as the proof may warrant.

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BREWER, MOLLER & CO. CASE <sup>1</sup>

Taxes apparently legally levied and paid without protest can not be recovered

DUFFIELD. *Umpire* :

The claimants ask to be allowed the sum of 20,283.20 marks which they have paid on account of taxes assessed against them by the municipality of San Cristóbal. They introduce in evidence a resolution of the municipal council of the district, dated the 28th day of September, 1902. This resolution recites that in the exercise of their authority under article 32 of the law providing for taxation for municipal purposes they have assessed the warehouses of the first class the sum of 3,000 bolivars every three months, and directs the junta clasificadora — board of assessors — to make the proper assessment and classification. Under this municipal action the claimants paid the sum above mentioned. They now seek to recover it from the Republic of Venezuela.

The Commissioners disagree as to the liability of Venezuela.

The umpire is unable to see any ground whatever on which to sustain this claim. The uniform presumption of the regularity and validity of all acts of public officials applies to this case, and there is not the slightest evidence or attempt to prove that these taxes were illegally levied. There is a statement in the expediente that only warehouses owned by Germans fell under the operation of this law. If it were shown that this tax was specially levied upon Germans owning warehouses, because they were Germans, or that for any other reason they were unlawfully classified, the allegation might need further consideration; but it so clearly appears that the tax is a general one, and that the classification is made upon a basis of the values of property, that it excludes any such inference. Moreover, the claimants do not appear to have raised any objection to the classification, but paid the taxes voluntarily. It is a settled law that the voluntary payment of taxes purporting to be levied under a valid law waives all irregularities in the assessment. It is very doubtful if the Republic of Venezuela could under any circumstances be made liable to the amount of irregular or illegal taxes collected by one of the municipal districts. But it is not necessary to decide this, as upon the whole case as made there is an absolute want of equity in the claim, even as against the municipal district of San Cristóbal.

It results that the claim must be wholly disallowed.

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CHRISTERN & CO. CASE

Beckman case affirmed (see p. 598).

In the absence of specified rate of interest only legal rate recoverable. Compound interest refused.

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<sup>1</sup> The cases of Adolph Noack and Steinworth & Co. were also disallowed for the reasons given in the following opinion.

*DUFFIELD, Umpire:*

The claimant asks the sum of 21,256.12 bolivars. This sum is made up of 2,800 bolivars for cattle taken by the Government, 7,996.71 bolivars for war duties, so called, being an increase of 30 per cent of the previous customs duties imposed by a decree of the National Government dated the 16th of February, 1903, and 10,459.41 bolivars for a debt of the State of Zulia.

The Commissioners disagree as the liability of Venezuela for the first and third items, but agree to the disallowance of the second item.

The umpire is of the opinion that the proofs do not make out a case of vested right in the claimants under the customs law which they count upon, and that the decision of the Commissioners in respect of this item is correct.

The Commissioner does not dispute the fact or the value of the cattle taken by the Government of Venezuela, but he claims that Venezuela is discharged from liability because of a novation between the claimants and the State of Zulia. Granting this premise, the umpire is of the opinion that the Government of Venezuela is still liable for the claim. His reasons for this conclusion are stated in full in the case of Beckman.<sup>1</sup>

The decision in that case also decides the liability of Venezuela for the loan to the State of Zulia. The Commissioner for Germany, however, allows the claimants the full amount of this item of their claim, 10,459.41 bolivars, with the usual interest. This amount includes interest at 1 per cent a month, compounded with yearly rests, and increases the original amount of the item thereby 4,589.37 bolivars. The umpire is unable to concur in this finding. He does not find any warrant or authority in the proofs for compounding interest. Neither do the proofs show that under the agreement made on the 14th of February, 1900, between the representatives of the government of Zulia and the parties who made the war loan for the purpose of adjusting the amount due, of which the claimants' share was 11,625.04 bolivars, there was any agreement for any rate of interest on the amount then agreed upon. There is also an entire absence of proof as to the rate of interest which the original loan was to bear. It is too clear to need argument that if no rate of interest is agreed upon by the parties, only the legal rate can be allowed. This rate in Venezuela is 3 per cent per annum. Instead, therefore, of allowing the sum named by the Commissioner for Germany, the item is allowed at the sum of 6,083.22 bolivars, being the original amount of loan, 11,254.04 bolivars, with interest at 3 per cent from February 14, 1900, to December 31, 1903, less the payments made thereon and interest on those payments.

For the same reasons the umpire concurs in the decision of the Commissioner for Germany as to the first item, and awards therefor the sum of 2,800 bolivars, with interest from the date of the presentation of the claim, August 3, 1903, up to and including December 31, 1903. Total amount awarded claimants, 8,917.74 bolivars.

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#### ORINOCO ASPHALT CASE

A government has no right to close ports of the country which are in the hands of insurgents unless it can maintain the blockade by force.<sup>2</sup>

*DUFFIELD, Umpire:*

The Commissioners have agreed upon the allowance of the first six items

<sup>1</sup> See *infra*, p. 436.

<sup>2</sup> See *Topaze* case, Vol. IX of these Reports, p. 389; *De Caro* case, *infra*, p. 635; *Martini* case, *infra*, p. 644.

of the claim, at 4,414.82 bolivars. They disagree upon items 7 and 8. These are based upon the alleged refusal of the Venezuelan consul at Trinidad, for the period between April and October, 1902 — twenty-two weeks — to give clearance papers to the boats of the company, *Ibis* and *Explorador*, from Port of Spain, Trinidad, where the principal office of the company is, to the Island of Pedernales, where its mines are, in consequence of which the said boats were forced to lie in Port of Spain for the period in question, and communication between the mines and the outside world was cut off. In addition to its rights under international law, the company asserts the concession to it from the Government of Venezuela to maintain communication between its mines and Trinidad by means of its boats used for that purpose, and in support of it sets up an Executive decree of February 7, 1901; it also claims a right under the laws of Venezuela — la ley XVI de Hacienda, Artículo 39. The damages arising from this act of the Government are presented in detail.

The Commissioner for Venezuela maintains that his Government is not liable, because in April, 1902, revolutionary forces occupied the country about Pedernales, where the mine of Pedernales is, and Guiria, where the custom-house of Venezuela for that territory is situated, and the Venezuelan consul refused to clear the boats on that account. He insists that the action of the consul was justified because the —

boats which were cleared from Guiria would serve the revolution which took them: and besides, if the revolution collected duties it would bring them in money resources, and that the Government of Venezuela had declared the blockade of these regions, and the consul in Trinidad obeyed the Government's decrees. That because of the war, guarantees were suspended, and in such a period free transit or free traffic especially suffers when it is a traffic of boats which may serve or do serve the revolutionists, and that in no event would Venezuela consuls clear boats for places occupied by the rebels.

The first contention of the Commissioner for Germany, based upon an alleged concession to the company, is not supported by the facts. Article 1 of the Executive decree of the 7th of February, 1901, is as follows:

ARTICLE 1. The port of Pedernales, on the island of the same name in the delta of the Orinoco, is established only for the exportation of asphalt and petroleum which is taken from the mines belonging to the Orinoco Asphalt Company.

In the opinion of the umpire, this is in no legal sense a legal concession; no consideration appears to have been given for it. It is a mere privilege or favor shown to the company, by which, instead of clearing for or from Guiria, they may clear from Port of Spain to the island where their works are, and *vice versa*. So far as this decree goes, the umpire is clearly of the opinion that it might be at any time revoked by the Government of Venezuela.

The argument that any special rights were conferred upon the company or any other importers by article 39 of the sixteenth law of hacienda is not, in the opinion of the umpire, maintainable. The law merely provides and prescribes the official duties of consuls, for the ordinary breach of which it would seem clear that Venezuela would not be liable, and that the party injured thereby must look to the consul and his bond for indemnification.

The case, therefore, must be decided upon general principles of international law, whether Venezuela, even though her ports were in the possession of revolutionists, might lawfully close them to traffic with neutrals. That she did so in this case, and that the consul acted under her instructions, is not disputed.

It is said in Wharton's Digest of International Law, section 361, that the received tenets of international law do not admit that a decree of a sovereign

government closing certain national ports in the possession of foreign enemies or of insurgents has any international effect, unless sustained by a blockading force sufficient to practically close such port.

Mr. Lawrence, in a note on Wheaton, Bk. IV, chapter 4, paragraph 5, states the rule and the reasons for it as follows:

Nor does the law of blockade differ in civil war from what it is in foreign war. Trade between foreigners and a port in possession of one of the parties to the contest can not be prevented by a municipal interdict of the other. For this on principle the most obvious reason exists. The waters adjacent to the coast of a country are deemed within its jurisdictional limit only because they can be commanded from the shore. It thence follows that whenever the dominion over the land is lost by its passing under the control of another power, whether in foreign war or civil war, the sovereignty over the waters capable of being controlled from the land likewise ceases.

In 1861 New Granada being in a state of civil war, its Government announced that certain ports would be closed, not by blockade, but by order, and it was held that the method was one which could not be adopted against a foreign enemy holding the ports in question, and consequently could not be adopted against a domestic enemy. Lord John Russell said on this subject that —

“it was perfectly competent for the government of a country in a state of tranquillity to say which ports should be open to trade and which should be closed; but in the event of insurrection or civil war in that country, it was not competent for its government to close ports which were de facto in the hands of the insurrectionists, and that such a proceeding would be an invasion of the international law relating to blockades.” Subsequently the Government of the United States proposed to adopt the same measure against the ports of the Southern States, upon which Lord John Russell wrote to Lord Lyons that “Her Majesty’s Government entirely concur with the French Government in the opinion that a decree closing the southern ports would be entirely illegal, and would be an evasion of that recognized maxim of the law of nations that the ports of a belligerent can only be closed by an effective blockade.” In neither case was the order carried out. In 1885 the President of Colombia, during the existence of civil war, declared [certain ports] to be closed without instituting a blockade. Mr. Bayard, Secretary of State for the United States, in a despatch of April 24th of that year fully adopted the principle of the illegitimateness of such closure, and refused to acknowledge that which had been declared by Colombia. (Hall, p. 37, note.)

In the case of the *Only Son* the umpire of the United States and British Commission of 1863 allowed the claim of the owners of the schooner of that name for the wrongful act of the collector of customs at Halifax, Nova Scotia, compelling the master of the schooner to enter his vessel and pay duty on his cargo, instead of reporting for a market and proceeding elsewhere if he thought it advisable. In the preceding diplomatic correspondence the British Government had acknowledged its liability, but claimed that no loss was suffered. (Moore on Arbitration, pp. 3404-3405.)

In the case of the *William Lee*, a whaling ship detained for three months by the refusal of the port to give a clearance, the claimant was allowed \$22,000. (Moore, pp. 3405-3406.)

In the case of the *Labuan*, United States and British Claims Commission, 1871, the claimant was allowed by the unanimous judgment of the Commission \$37,392 because the custom-house officials at New York refused his vessel a clearance from November 5 to December 13, 1862. The action of the customhouse in New York was in pursuance of instructions from the United States Government, which claimed the right to detain the ship, in common with other vessels of great speed destined for ports in the Gulf of Mexico, in order to prevent the transmission of information relative to the departure or

proposed departure of a military expedition fitted out by the authorities of the United States. The contention of the claimant's counsel was that the refusal to clear the vessel was in effect taking private property for public use, and, while it may have been justified by the necessity of the case, it involved the obligation of compensation, citing 3 Phillimore, 42. and Dana's Wheaton, 152, note. (Moore, pp. 3791-3793.)

The umpire is therefore of the opinion that the Government of Venezuela was not justified in directing its consul at the Port of Spain to refuse clearances to the ships of the claimant company. It appears from the case, however, that the Venezuelan consul at the Port of Spain offered to clear —

the boats belonging to that company, which she intends shall carry provisions to the laborers in the mines. \* \* \* But under the written conditions sent by the Government \* \* \* that that company must pay into this consulate, upon the delivery of the clearance of this boat, the amount of all the duties which it would have to pay at the custom-house at Guirna.

This conditional permission was not accepted, and the claimant was justified in refusing it.

It results that the claimant company is entitled to recover such damages as they have established by their proof, which are:

Item 7a, 640 bolivars for the loss of freight for the lighter *Ibis*, 40 tons capacity one trip in the month of April.

Item 8a, for loss of freight of lighter *Ibis*, twenty-two weeks, 22 voyages, at 1,248 bolivars the round trip, 27,456 bolivars. It is held by the courts of England and the United States that damages in cases of demurrage, which is entirely analogous to the claimant's claim, if it is not in fact demurrage, are measured by the value of the use of the vessel. (Re *Trent v. Humber Company*, Eng. Law Reports, 4th Chancery, 112; The *Pietro G.*, 39th Federal Reporter, U.S., 366.) The United States Supreme Court have held, in *The Potomac v. Conor* (105 U.S., 630), that the average of net profits on the trip for the season may be adopted as the measure of damages for the loss of the use of the vessel resulting from collision. This latter case, however, was the case of a merchant vessel doing a general carrying business. The *Ibis*, it appears, was the company's own property and engaged in transporting the company's freight. It is quite certain that it would have had full freight from Pedernales to Trinidad on every voyage, and, taking into consideration the carrying on the return trip of supplies for the mines and food for the men, as well as machinery, it is fair and reasonable to believe that she would have had full freight on her return trip. The umpire therefore agrees with the Commissioner for Germany in the allowance of items 7 and 8a, viz. 624 bolivars and 27,456 bolivars.

Item 8b, for injuries occasioned to the *Ibis* by her long stay in salt water, 728 bolivars, is certainly a proper charge. It is held by the Supreme Court of the United States, if a vessel is capable of being repaired and restored to her original condition, the cost of such necessary repairs is a correct rule of damage. (*The Granite State*, 3 Wall., 310; *The Baltimore*, 8 Wall., 377.)

Item 8c, 4,520.66 bolivars for the wages of the captain and crew of the *Explorador* during the time she was detained in Port of Spain, seems reasonable in amount, and no reason is presented in the opinion of the Commissioner for Venezuela why it should not be allowed. The umpire agrees in the allowance by the Commissioner for Germany of this item.

The same is true of item 8d, which is like 8b except that it is for the *Explorador* instead of the *Ibis*. For the reasons stated in the other item, the amount is allowed, 829.74 bolivars.

Item 8h, 161,200 bolivars, is made up by the claimant as follows: By reason

of the action of Venezuela, through her consul in Trinidad, the *Explorador* and the *Ibis* were practically put out of commission from the latter part of April to some time in October, 1902 — twenty-two weeks. As the claimant was unable to use the boats, and presumably for the same reason which prevented their use could not have obtained the services of any other vessels, even if they could have cleared for Pedernales, which under the decree establishing that port is doubtful, all operations at the mines were stopped because the character of the asphalt was such that any long exposure depreciated its quality and value. The claimant therefore charges for one hundred and twelve working days during this period, and claims that the normal production of the mines was 30 tons a day, and they could have produced during those days 3,360 tons, which was worth \$25 United States gold (130 bolivars) a ton, which was the average price for the whole of that year, aggregating 436,800 bolivars, less the expense of production, transportation, and exportation, 275,600 bolivars, leaving a balance of 161,200 bolivars. It will be seen, however, that this makes no deduction for the value of 3,360 tons of asphalt at the mine; but this asphalt was never removed, and is still presumably as good in its natural state as it was during the period in question. There is no claim that the market value of the asphalt has fallen, and for three months of the year 1902 the claimant's basis of \$25 United States gold (130 bolivars) per ton would govern. There is no evidence of the value of the asphalt at the mines in its natural state, although in its trial balance of December, 1901, the company puts in the item of real estate, including the asphalt mine at 405,326 marks. It seems very clear that the principal sum of 161,200 bolivars can not be recovered.

In the absence of any testimony on which any definite appraisal of the value of the asphalt at the mines can be based, the claimant has not shown the actual amount of his damage. In the opinion of the umpire a fair, and perhaps the only, measure of damage is interest on the amount for which the product of the mines would have sold during the period of stoppage of traffic. Perhaps mathematical accuracy might require this interest to be calculated for the average time, but under all the circumstances of the case the umpire is of opinion that it is just to allow interest for the entire period. The award made by the Commissioner for Germany on this item will therefore be reduced to interest for one hundred and fifty-four days at 5 per cent on 161,200 bolivars, namely, 3,447.84 bolivars.

On these figures the aggregate sum of 42,027.78 bolivars is awarded to the claimant, which includes the 4,466 bolivars agreed to by the commissioners for items 1-6, inclusive, with interest at 3 per cent per annum on 37,606.46 bolivars from the date of the presentation of the claim, August 10, 1903, to and including December 31, 1903.

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#### WENZEL CASE

Amnesty granted by the Chief Executive of Venezuela, being in excess of his powers, does not make the State liable for damages inflicted by the persons pardoned

DUFFIELD, *Umpire*:

This claim is for 19,801.31 marks. The commissioners agree that certain items of the claim should be disallowed, but disagree as to item 4, for injuries to property inflicted by the revolutionist forces under General Hernandez in November, 1899, and March 1900, for which damages are claimed in the sum of 15,035 bolivars.

The Commissioner for Germany is of the opinion that this item should be

allowed at its full amount, with interest, while the Commissioner for Venezuela is of the opinion that it should be entirely disallowed. The Commissioner for Venezuela is of the opinion that because the acts complained of were those of revolutionists Venezuela is not liable and because the claim is covered by the decision of the umpire in the case of Van Dissel & Co. In the claim of Van Dissel & Co. the acts of revolutionists under General Garbiras were under question, and the opinion specially confined the effect of the decision to that revolution saying: "It is not intended by this opinion to decide that Venezuela may not be liable for acts of revolutionists in an insurrection prior to the Matos movement." Following this decision, the claim of John Roehl, No. 31, was disallowed. In that case the injuries complained of were by Hernandez revolutionists. The case, however, was presented to the umpire for a formal decision, the commissioners agreeing upon the amount and that it was controlled by the Van Dissel case.

In the present case the Commissioner for Germany insists that Venezuela is liable for the acts in question, first, because the admission in Article III of the protocol should receive a broader construction than given to it by the umpire in the Van Dissel case,<sup>1</sup> and, second, because a general amnesty was granted to the Hernandez revolutionists and General Hernandez himself is now representing the Government of Venezuela as its minister to the United States.

The umpire is unable to agree with the Commissioner for Germany in his construction of Article III, but adheres to his former opinion. The second point, however, is for the first time raised in this Commission. The precedents of former arbitral commissions seem to be in favor of the contention of the Commissioner for Germany. In the *Mantijo* case the Hon. Robert Bunch, British minister to Bogotá, was the umpire. It was argued by the arbitrator for Colombia on this point that as a general amnesty in favor of Messrs. Herrera, Díaz, and all other persons concerned in the attempted revolution of April and May, 1871, was subsequently granted by the President of the State of Panama in the exercise of his constitutional powers, no judicial proceedings could be instituted against them as revolutionists, and consequently for injuries done by them nothing could be recovered from them by either foreigner or native.

To this argument the umpire noted two objections:

The first is that, even in the absence of any express stipulation to that effect, the grantor of an amnesty assumes as his own the liabilities previously incurred by the objects of his pardon toward persons or things over which the grantor has no control. In the present case it will scarcely be contended that the captors of the *Mantijo* had any right beyond that emanating from a revolutionary movement to take the vessel from the dominion of her owners. \* \* \*

If no amnesty had ever been granted, and had Herrera, Díaz, and their associates been honestly and effectively proceeded against in the courts of the Republic and cast in damages toward the owner, the aspect of the case would have entirely changed. It would have been at least an open question whether their possible or even notorious inability to pay those damages would have rendered Colombia at large responsible for their act. But the amnesty deprived the Messrs. Schuber of the power of trying the question. Therefore the President of Panama, having no right to dispose of interests, which were not his property, and which, on the contrary, he was bound by a public treaty to protect, assumed the responsibility to the owners of those interests of the persons

<sup>1</sup> See *supra*, p. 405.

by whom they had been injured. It is an old saying that one must be just before one is generous. In Spanish the version is "*La bolsa ajena es muy franca.*"

The distinguished rank of the umpire as a diplomat and the legal ability which is shown in all his opinions, as well as the reasons given for his conclusions, make his opinion worthy of the most serious consideration. (Moore on Arbitration, 1421, 1427, 1438. See also decision of the Mixed Commission on the *Col. Lloyd Aspinwall* case; Moore, 1015-1016.)

But it must be borne in mind that it appeared in that case that a treaty of peace was made by the president of the State of Panama with Herrera, chief of the revolutionists, by Article VII of which a complete amnesty was reciprocally granted and "the Government assumes as its own the expense of the steamers and other vehicles which the revolution has had to make use of up to that date." (Moore, p. 1428.) The decision might well have put in this provision, and that portion of the opinion as to the effect of amnesty generally may be treated as obiter dictum.

Venezuela was held liable in damages by the United States and the Venezuelan Commission, under the convention of December 5, 1885, for not punishing the insurgents who attacked General García's forces on board the American steamer *Apure* in 1865. The Commission held that there was not a state of war in Venezuela, although there was an armed conflict between the president of the State of Apure and his enemies under Generals Sosa and Mendez. (Opinions, pp. 481-482; Moore's Arbitrations, p. 2967.)

Mr. Commissioner Little said:

The criminals were the conspirators upon the shore. Venezuela's responsibility and liability in the matter are to be determined and measured by her conduct in ascertaining and bringing to justice the guilty parties. If she did all that could be reasonably required in that behalf, she is to be held blameless; otherwise, not. Without entering upon a discussion of the investigation instituted and conducted by her, \* \* \* it was notorious who they were. It does not seem that any attempt was made before any local authority to bring them or any of the band to justice. Had there been a well-directed effort of that kind, or had the Government's investigation disclosed their innocence and failed to discover those actually guilty, its responsibility would perhaps have ended, assuming the investigation, as I do, was a fair and just one. But neither of these things appears to have occurred. \* \* \* On the whole, however, considering the heinous character of the offense, it may fairly be said that Venezuela here fell short of her entire duty.<sup>1</sup>

Mr. Commissioner Findlay said:

A State, however, is liable for wrongs inflicted upon the citizens of another State in any case where the offender is permitted to go at large without being called to account or punished for his offense or some honest endeavor made for his arrest and punishment. (Opinions, p. 486; Moore's Arbitrations, p. 2969.)

It must be borne in mind that this case was a seizure of an American steamer, which may be distinguished from injuries or seizures of property by movements of opposing troops in active operations. (See brief of counsel for claimant in the Venezuelan Transportation Company case.)

In the United States and Venezuelan Claims Commission in 1895, in the case of the Venezuelan Steam Transportation Company, the Commissioners awarded the claimant damages for injuries to the steamers belonging to the claimant inflicted by insurgent authorities.<sup>2</sup> (See Report of Commission.)

In an exceedingly able opinion, Mr. Commissioner Andrade dissents from

<sup>1</sup> See discussion of this point in Poggioli case, *infra*, p. 669.

<sup>2</sup> Upon this point see comments of Umpire Plumley, Vol. IX of these Reports, p. 432.

the award of the Commission. But in the course of his reasoning he does not deny the above rule, but impliedly, if not expressly, admits it. He says:

As a general rule the private acts of citizens do not compromise the liability of the State, save when it can prevent these and fails to do so, or when, after their consummation, it approves or ratifies them in some way. (Moore, p. 1730.)

In the case before him, however, he claimed that if for reasons of state Venezuela thought proper, in 1873, to seal the national peace with forgiveness for all political offenses, no other sovereignty has the right to call her to account for that sovereign act.

In the opinion of the umpire, while this statement is true, it does not follow, and the learned Commissioner seems to have refrained from saying, that the consequences of such forgiveness of political offenses which have injured neutrals may not be a liability on the part of the State. In that case, however, the revolutionists who committed the injuries succeeded and their leader, General Blanco, established a constitutional government.

There are no reasons stated by the majority of the Commissioners for the award, but from the brief of counsel for the claimants it appears that it may have passed on other grounds, viz., the culpable failure of the Venezuelan Government to take adequate measures to prevent the seizure of the company's steamers, although they knew that they were in danger, and that they were carrying Venezuelan mails under the United States flag; that the Government allowed the town of Bolivar to remain for nearly six months in the hands of the "Blues," and permitted them to move quietly away when the Government forces approached; that a fort near the mouth of the Orinoco was held against the Venezuelan Government as late as January, 1872, by a "Blue" officer and his wife with two old-fashioned smoothbore guns, equally dangerous at both ends; and that the right granted the company by the Venezuelan Congress to fly the flag of the United States on their vessels was a pledge by the people of Venezuela that they would not violate any of the rights and privileges of the vessels or their officers under its protection. And special stress was laid by counsel upon the distinction between injuries to persons or property in the theater of active hostilities, "for which," they say, "governments are not responsible, and deliberate seizures of neutral vessels under the flag of their country."

The case of *Divine* (Moore, p. 2980) is contra. The claim was for setting fire to a house and all its contents in Matamoras, Mexico, in 1851.

The city [says Moore] had been in the possession of General Avalos, military commander of the State of Tamaulipas, and General Carvajal had placed himself at the head of a movement to displace his authority. Carvajal besieged the city, and at length assaulted it. In the course of the assault the house in question was destroyed, though the American consul, at the risk of his life, placed himself between the combatants, and, displaying the American flag, besought them to spare the property.

Mr. Ashton, agent of the United States, in his brief to support the claim, established that General Carvajal, having been conquered in Tamaulipas, was pardoned by means of a general amnesty and restored to his civil rights; was afterwards a brigadier-general and civil and military governor of Tamaulipas and other States, and was afterwards, in 1864, sent to the United States as commissioner with extraordinary powers, and was named and continued to be a major-general in the Mexican army. Under these circumstances Mr. Ashton sustained the liability of the Mexican Government.

The umpire, Sir Edward Thornton, said:

It is alleged by the claimants themselves that the destruction of the property on account of which the claim is made was due to the acts of rebels, and for this reason alone the umpire is of opinion that the Mexican Government can not be called upon to make compensation for the damage done. \* \* \* It is urged [he adds] that the Mexican Government granted an amnesty to Carvajal, and therefore made itself responsible for his acts. Other governments, including that of the United States, have pardoned rebels, but they have not on this account engaged to reimburse to private individuals the losses caused by those rebels.

But it is further contended by the Commissioner for Venezuela that there was no amnesty granted to the Hernandez revolutionists, and the imprisonment of General Hernandez, the leader, lends this position some support.

In connection with the release of General Hernandez, General Castro, on the 9th of December, 1902, issued a proclamation in which, after denouncing the action of the allied powers in seizing the war ships and ports of Venezuela, and calling on all Venezuelans to lay aside all differences and rally to the defense of their country, said:

And seeing that this [the country] can not be great and powerful except in the pure air of brotherhood of all its sons — and circumstances demand the union of them all — in the name of my sentiments and her necessities above expressed, I open the doors of all the prisons of the Republic to the political prisoners who are still confined therein. I likewise open the doors of the country to Venezuelans who for the same reasons are in foreign lands, and I restore to the enjoyment of the constitutional guaranties property of all revolutionists which was embargoed for reasons of public order.

It is contended by the Commissioner for Venezuela, first, that this language can not be interpreted as an amnesty; and, second, that under the constitution of Venezuela the President has no power to grant amnesty. In the opinion of the umpire a general pardon of past offenses by a government is an amnesty, which is commonly defined to be an act of oblivion. Its effect is that the crimes and offenses named in the act are obliterated, and they can never again be charged against the guilty parties. Where no offenses are named in the act the amnesty is general. The preamble of this proclamation would seem to necessitate an interpretation of the paragraph above quoted, which absolves from all punishment in the courts or by the authorities of Venezuela all political prisoners in Venezuela and all political offenders in other countries for any act committed by them while in rebellion.

Under a system of Government in which the Executive has the pardoning power it might be difficult to sustain the contention of the Commissioner for Venezuela. But it is not necessary to decide this question. The constitution of Venezuela is peculiar in this respect, and in the opinion of the umpire it sustains the position of the Commissioner for Venezuela. It confers no power upon the Executive to grant amnesties, but in express terms gives the legislative branch of the Government that power. Article 54, section 21, of the constitution of Venezuela of 1901 provides:

The Congress of the United States of Venezuela shall have the following powers:  
\* \* \* to grant amnesties.

General Hernandez on the 2d of March, 1898, organized an insurrectionary movement which extended to all the States of the Republic. It ended with the capture of General Hernandez at La Vega on the 12th of June. It comprised eighty-four armed encounters, in one of which General Crespo was killed — the battle of Carmelora, in the year 1898. General Hernandez was captured and imprisoned at San Carlos fortress. The revolution of the restoration under General Castro began on May 23, 1899, on which day, after his first battle at

Tonono, he issued a manifesto, taking for the standard of his armed movement the restoration of the constitution he alleged had been violated by the high powers of the nation. General Hernandez was still in prison in San Carlos fortress, but many of his followers joined in the Castro insurrection. On the day after General Castro made his triumphal entry into Caracas, he set at liberty the political prisoners whom the government of Andrade had imprisoned, and among them General Hernandez, leader of the first nationalist revolution, and appointed the latter his minister of public works. A few days thereafter Hernandez left Caracas by stealth, accompanied by the forces of Gen. Samuel Acosta, his companion in arms in the first nationalist revolution, and proclaimed a revolution against the government of General Castro. It was in this last revolution that the injuries complained of occurred. He was again defeated, and on May 27, 1900, imprisoned in the fortress of San Carlos for some time. He remained there until the 11th of December, 1902, when he was set at liberty under the proclamation above referred to and came to Caracas, to parley with General Castro. He has since then supported the Government and has been sent to represent it as minister to the United States.

The claim therefore falls within the decisions in the cases of Van Dissel & Co., No. 11, and John Roehl, No. 31, and is disallowed.

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BREWER, MOLLER & CO. CASE (second case)

Beckman case (*infra*, p. 436) affirmed.

Faber case (*infra*, p. 438) affirmed.

Meaning of "local legislation" and "technical objections," as set forth in protocol.

DUFFIELD, *Umpire*:

The claim in this case is for 843,705.36 bolivars, made up of the following items:

1. War duties.
2. Acts of piracy.
3. There is no proof of item 3 and no reference to it in the expediente.
4. The debt of the State of Zulia.
- 5 and 6. Injuries to and seizures of property by Government troops and revolutionists.

Part of 7 and all of 8. Damages caused by the closing of ports on the Catatumbo and Zulia rivers.

Part of 7. Stoppage of mails in connection with the closing of the ports on the Catatumbo River.

9. Share of claimant in the claim of the Lake Maracaibo and Catatumbo River Navigation Company.

Of these items 1 and 2 were disallowed by agreement of the Commissioners; 5 and 6 allowed by agreement of the Commissioners at 33,958 bolivars.

Item 4, for the debt of the State of Zulia, is allowed by the umpire under the decision in the case of Beckman & Co., No. 47, in the sum of 53,296.67 bolivars.<sup>1</sup>

Part of 7 and all of 8 are disallowed by the umpire under the ruling in the case of George Faber, No. 53.<sup>2</sup>

The remaining portion of item 7, for damages alleged to have been suffered by the interruption of the postal service in connection with the closing of the ports on the Catatumbo River, 75,000 marks, is, in the opinion of the Commis-

<sup>1</sup> See *infra*, p. 436.

<sup>2</sup> See *infra*, p. 438.

sioner for Germany, a valid claim against Venezuela and should be allowed. He is of the opinion that the stoppage of the mails is in violation of the International Postal Union treaty of Washington.

It appears from the statement of the claim that following the closure of the ports on the rivers Zulia and Catatumbo this stoppage of mails occurred. It is evident that the established postal route between Maracaibo and Cucuta was necessarily abrogated by this action of the Government of Venezuela, and it is difficult to see how a claim can be sustained before this Commission on this ground. However, it clearly appears from the "expediente" that there is no proof of any special elements or items of damage to the claimants upon which any calculation or legal estimate of the amount of damage they suffered in consequence can be made. In the absence of any such proof, therefore, the sum claimed can not be allowed.

Item 9, 98,240 bolivars is for the claimant's share, 25 per cent of the credit which the Lake Maracaibo and Catatumbo River Navigation Company have against the Government of Venezuela. It is agreed by the Commissioners that this credit amounts to 162,218.03 bolivars. But it is claimed by the Commissioner for Venezuela that claimants have no legal interest therein. In support of this contention he cites the Venezuelan Code of Commerce, page 388, articles 242-247. The first five articles describe "Associations of accounts in participation" (Asociaciones de cuentas en participación), and the rights and liabilities of persons interested therein. Article 247 exempts these associations from the formal requisites required from companies by articles 162, 163, and 168.

By article 242 the party giving participation in the profits or losses of his business on one or more operations thereof is the managing agent, and by article 244 the persons participating in the profits or losses have no right of property in the effects and property of the association, not even in that which they themselves have contributed. Their only right is to have an account of what they have contributed in the losses or profits of the operation. By article 245, in case of failure, they are placed in the column of creditors in case their contribution of capital exceeds its proportion of losses.

It is agreed by the Commissioners that there is no regularly formed association or partnership known as "Lake Maracaibo and River Catatumbo Navigation Company," but that the concern popularly so known is in reality Piñedo, García & Co., Brewer, Moller & Co., Luciano Añez & Co., and Van Dissel & Co. On the 1st of October, 1900, they formed this association by the articles of agreement marked "Exhibit 6" in the "expediente." Under them Piñedo, García & Co. are made administrators and have entire charge of the management of the business and the control and conduct of its properties, and in all respects appear to be the "merchant" — "comerciante" — described in article 246 of the code of commerce above referred to. Under these circumstances the umpire is clearly of the opinion that none of the other parties to the agreement of October 1 have, in the language of article 244, "any right of property in the effects of the association, not even in those in which they themselves have contributed."

But it is claimed by the Commissioner for Germany that under the precedents of decisions by former international tribunals co-owners of property such as the "owners of commercial funds may enforce their several interests in a claim in a diplomatic proceeding," and that the objection of the Venezuelan Commissioner that "the company can only figure as an entity," and that it is inadmissible to award their parts to each of the partners, is a technical objection, lacking support in international law; and, further, that the provisions of Vene-

zuela are not binding on this Commission under the protocol which requires that it disregard provisions of local legislation.

Taking up these objections in their inverse order —

First. The umpire is of the opinion that the articles of the code in question are not local legislation within the meaning of the protocol. The parties to the protocol primarily intended by these words, it is quite evident, that Venezuela should be estopped from insisting upon the general provision in her law requiring foreigners as well as citizens to present their claims against the Government to the courts of Venezuela. Incidentally, of course, like provisions of local legislation were intended to be excluded; but it can not be presumed that all the laws of Venezuela with reference to the formation of corporations or of partnerships, or of limited associations, or in respect to the rights and obligations of holders of real estate were so included. Neither can it be reasonably presumed that it was intended to estop Venezuela from invoking the provision of local legislation to which foreigners, by associating themselves with Venezuelans, and by their voluntary and solemnly executed consent, had agreed. A fortiori must this be the case under circumstances like those under consideration, where, by the agreement between the foreigners and the Venezuelan citizens, the foreigners expressly stipulate that all right of property in the effects of the association shall be vested in the Venezuelan citizen.

Second. The umpire is unable to regard the objection of the Commissioner for Venezuela as a technical one, in the sense of the protocol. Certainly under the protocol this Commission can not take jurisdiction of a claim which is not owned by a German subject, and if, as has been stated, Piñedo, García & Co. were the owners in law of the property, and their German associates have only a right to an accounting for their contribution and its profits, they are not the legal owners of the debt or of any interest therein.

It appears by the code of commerce above cited that in case of failure of the "merchant" — *comerciante* — with whom they are associated they would be required to suffer the loss of their entire contribution of capital, if that should be the proportion of the total losses, after which they would be considered creditors pro tanto their contribution. It is therefore in law entirely uncertain whether they will receive, upon an accounting, any part of the claim against the Government.

In a case where all of the parties interested are foreigners, and therefore all of them are competent to associate themselves together in such a manner as has here been done, without need of or regard to the provisions of Venezuelan legislation, quite a different question would arise. The question, however, does not arise in this case, and it is not necessary for the umpire to decide it. He therefore expresses no opinion upon it. The item will therefore be disallowed without prejudice.

The claimant will therefore be allowed the amount of items 5 and 6, agreed to by the Commissioners at 33,958 bolivars, and 53,296.67 bolivars, allowed by the umpire on account of the debt of the State of Zulia, aggregating 87,254.67 bolivars, without interest.

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CHRISTERN & CO. (LIQUIDATORS) CASE

Assignees for the benefit of creditors considered purchasers for value and entitled to recover, although claim in its origin was not entirely German.

DUFFIELD, *Umpire*:

It is conceded that the claimants are the properly appointed and lawfully authorized assignees for the benefit of the creditors — *liquidadores* — of Minlos.

Witzke & Co., of Maracaibo. The latter have a claim against the State of Zulia under an agreement entered into between the representative of that State and Brewer, Moller & Co., dated January 2, 1902, adjusting the amount of the debt of the State with the various members "of the commerce" — *del comercio* — of Maracaibo, for a loan enforced by the State of Zulia on behalf of and for the benefit of the Venezuelan Government.

The validity of the claim as respects Minlos, Witzke & Co. is adjudged by the decision of the umpire in the case of Beckman & Co.,<sup>1</sup> No. 47, but it is claimed by the Commissioner for Venezuela that Christern & Co. can not recover in this case because one of the two partners of Minlos, Witzke & Co. was a Dane. The umpire is unable to perceive the force of this objection. By an instrument attached to the "expediente" Christern & Co., whom it is conceded are German subjects, are vested with a full and absolute title, legal and equitable, to the share of Minlos, Witzke & Co., in the fund in question. It is true Christern & Co. hold it in trust for the creditors of Minlos, Witzke & Co., and of course any surplus thereafter will go to the latter. But that does not affect the title which Christern & Co. have to the fund. It is a familiar rule of law that assignees for the benefit of creditors are bona fide purchasers for value, and that after the assignment the assignors have no title whatever to the assigned property, and Christern & Co. stand in this position. Certainly if Minlos, Witzke & Co. had sold and conveyed this claim to Christern & Co. the fact that one of the former was a Danish subject could not affect the latter's right to recover. It is true that the debt was of such a nature as to be non-negotiable in the sense of the law merchant, and that Venezuela would, as against any subsequent holder of the debt, avail herself of any defense she might have against the original holder; yet it was assignable in law and capable of having the entire legal and equitable title to it transferred and conveyed.

In the opinion of the umpire, therefore, it is clear that Christern & Co. are the legal owners of the claim and, being German subjects, are entitled to an award by this Commission for the amount thereof.

The claim is therefore allowed at the sum of 28,135.85 bolivars, which includes interest up to and including the 31st of December, 1903.

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#### BECKMAN & CO. CASE

Central Government liable for forced loan by one of the constituent states the proceeds of which were used for the defense of the entire nation.

Where no rate of interest is specified only the legal rate is recoverable.

DUFFIELD, *Umpire*:

The claim is for 227,756.54 bolivars, composed of the following items:

	<i>Bolwars</i>	<i>Marks</i>
A. Debt of the Government of the State of Zulia . . . . .	13,584.62	10,867.70
B. War duties on importations . . . . .	10,772.24	8,617.79
C. Export duties . . . . .	19,749.24	15,799.39
D. Loss on coffee and hides caused by prolonged storage . . . . .	25,014.36	20,011.49
E. Interest on capital lying idle . . . . .	50,496.08	40,396.86
F. Loss caused by the suspension of mail service . . . . .	50,000.00	40,000.00
G. Losses in salaries, rent, etc. . . . .	58,140.00	46,512.00

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<sup>1</sup> See *infra*, p. 436.

As to the first item (A) there is no disputed question of fact. The State of Zulia confessedly owes the claimant the sum of 13,584.62 bolivars. The amount due the claimant was agreed upon and officially published in detail in the Official Gazette of the State of Zulia of the 16th of February, 1900, together with the stipulation of the Government for its liquidation in monthly payments. Since the 20th of August, 1901, these payments have been suspended, and there remains of the original debt due the claimant the sum stated above.

The Commissioner for Venezuela denies the liability of his Government, because, in his opinion, the debt is that of one of the States of the Republic of Venezuela and that the latter can not be held responsible. The expediente shows that the origin of the debt was forced loans made by the State of Zulia for the benefit of the National Government, and presumably by its direction. At all events, there is no denial that the money was expended for the benefit of the National Government, with its knowledge.

It is argued by the Commissioner for Germany that in any event the National Government is responsible for the debt of one of its States, and in support of this contention is cited the very able opinion of Mr. Robert Bunch in the *Montijo* case. (Moore on Arbitration, 1421-1447.)

In the opinion of the umpire it is not necessary in this case to decide the question. He prefers to put his opinion upon the concrete base, which is that in the efforts of Venezuela to suppress insurrection and put down rebellion he called upon the State of Zulia for assistance. In pursuance of this call the State enforced the loans in question. It now finds itself either unable or indisposed to make any more payments to the creditors on this account.

Under these circumstances, in the opinion of the umpire, it would be inequitable and unjust to the State of Zulia, as well as to the claimants, to remit the claimants to a suit at law against her. Morally and equitably, if not *stricto jure*, the Government of Venezuela is bound to repay the State of Zulia these moneys which were advanced for the common defense of the nation. The citizens of the State of Zulia can properly be called upon to pay their quota of the national debt, but it is manifestly unjust to assess upon them the entire amount of these forced loans, and absolve the other citizens of the Republic of Venezuela from the payment of their own proportion thereof.

The Commissioner for Germany, however, allows the claimant the full amount of this item of his claim, 13,584.62 bolivars, with the usual interest. This amount includes interest at 1 per cent per month, compounded with yearly rests, and increases the original amount of the item thereby 5,147.26 bolivars. The umpire is unable to concur in this finding. He does not find any warrant or authority in the proofs for compounding interest. Neither do the proofs show that under the agreement made on the 14th of February, 1900, between the representative of the government of Zulia and the parties who made the war loan for the purpose of adjusting the amount due, of which the claimant's share was 15,417.36 bolivars, there was any agreement for any rate of interest on the amount then agreed upon. There is also an entire absence of proof as to the rate of interest which the original loan was to bear. It is too clear to need argument that if no rate of interest is agreed upon by the parties only the legal rate can be allowed. This rate in Venezuela is 3 per cent per annum. Instead, therefore, of allowing the sum named by the Commissioner for Germany, the item is allowed at the sum of 12,186.54 bolivars, being the original amount of the loan, 15,417.36 bolivars, with interest from February 14, 1900, to December 31, 1903, less the payments made thereon and interest on those payments.

The umpire agrees with the Commissioners in the disallowance of Claim B,

10,772.24 bolivars, for the reasons stated in his opinion in the case of Christern & Co., No. 50.<sup>1</sup>

Item C of the claim for 19,749.24 bolivars, in the opinion of the Commissioner for Germany, should be allowed at its full amount, but he gives no reason for that opinion. The Commissioner for Venezuela, without giving any reasons therefor, is of the opinion that this item should be disallowed. It appears from the expediente that the Government of Venezuela on the 16th of February, 1903, imposed an export duty of 2 bolivars on each 50 kilograms of coffee and 4 bolivars on each 46 kilograms of hides. It is not contended by the claimant that this duty in and of itself would have been injurious to them or was an unlawful exercise of power by the Government; but they claim that because of the closure of the river by the Government decree of the 15th of January, 1903, the duties fell upon coffee which would otherwise have been exported prior to the date of the decree. This claim, therefore, depends for its allowance upon the decision of the question of the liability of Venezuela for closing the River Zulia, and is disallowed for the reasons stated in the opinion in the case of Faber, No. 53.<sup>2</sup>

The remaining items of the claim — namely, D, E, F, and G — for injury to coffee and hides caused by the prolonged storage of the same, and interest on the capital lying idle during the closure, and loss caused by the suspension of mail service, and loss on account of salaries, rent, etc., also depend on the decision of the same question, and are disallowed.

The claim is therefore allowed at the sum of 12,186.54 bolivars, which includes interest to December 31, 1903.

#### FABER CASE

(By the Umpire:)

Consular certificates admissible as evidence.<sup>3</sup>

International mixed commissions not bound by strict technical rules of evidence.

<sup>1</sup> *Supra*, p. 423.

<sup>2</sup> See below.

<sup>3</sup> The question as to what papers are receivable in evidence before international commissions was extensively discussed by counsel for the claimant and respondent governments before the United States and Chilean Claims Commission of 1897, the briefs being summarized as follows:

The position of counsel for the United States upon this question is:

(1) That this Commission must receive as *evidence* all written documents and statements which are presented by either Government and must consider them in arriving at its conclusions.

(2) That these documents and statements are to be given such weight as they seem to be entitled to, both intrinsically and in view of surrounding circumstances and other facts proven in the case; and

(3) That the mere fact that they are *ex parte* may possibly affect their *weight* when contradicted by other proof, but can not possibly affect their *admissibility* as legal evidence.

Reliance was placed upon Article V of the treaty, stating that—

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

The United States counsel conceded that the civil law upon this subject was not as strict as the common law, as might be seen in the following citations:

French Civil Code, articles 1317-1333; Code of Civil Procedure (in force in Spain, Cuba, Porto Rico, and the Philippines), articles 577, 595, 601; Mexican Code of Civil Procedure, article 289; Colombian Civil Code, articles 1758-1766; Chilean Civil Code, articles 1699-1707; Louisiana Civil Code, articles 2234 (2231) to 2251; Walton's Civil Law in Spain and Spanish America, pages 346-348.

States through the territory of which navigable streams flow, although these streams rise in the territory of other States, have the right to close these rivers to navi-

Footnote 3 (continued).

It was, however, contended further that all Government reports were so closely related to the claims as to be almost part of the *res gestæ*.

Citations were made from the Claims Treaty of 1794 with Great Britain. Treaties and Conventions between the United States and Other Powers, pages 383 and 384; the treaty of 1819 with Spain (*Ibid.*, 1020); treaty of 1834 with Spain (*Ibid.*, 1024); treaty of 1853 with Great Britain (*Ibid.*, 446); claims convention of 1868 with Mexico (*Ibid.*, 701); treaty of 1857 with New Granada (*Ibid.*, 211); claims convention of 1866 with Venezuela, and that of 1885 providing for a rehearing (28 Stat. L., 1057), and claims convention of 1880 with France, act of Congress approved March 3, 1849, to settle claims of American citizens against Mexico (9 Stat. L., 393), and act of June 19, 1878, authorizing the Court of Claims to take jurisdiction of the Caldera claims (20 Stat. L., 172), for the purpose of showing that the universal diplomatic rule was that the commissioners should receive all documents or statements which might be presented to them on behalf of their respective Governments. Reference was had to the Caldera case, 15 Court of Claims Reports, 546-606, for the purpose of showing that—

International tribunals are not bound by local restraints. They always exercise great latitude in such matters (Meade's case, 2 Court of Claims Reports, 271), and give to affidavits, and sometimes even to unverified statements, the force of depositions.

The Meade's case, above cited, was quoted as authority for the fact that the adjustment of international claims should not and could not be subjected to the narrow technical rules of ordinary tribunals.

The Treaty of Washington of May 8, 1871, Article XXIV, was cited to show that the Commissioners "shall be bound to receive such oral or written testimony as either government shall present," and that, as appears by Moore, page 728, the Commission decided that *ex parte* affidavits should be admitted.

Moore, pages 1435 and 1753, was cited as equally conclusive, the first reference being to the Montijo case and the second being to the claims of Pelletier and Lazare.

To the third point attention was called to the convention between the United States and Chile of November 10, 1858 (Moore, p. 4690), where the decision was of necessity made solely upon *ex parte* testimony.

Reliance was placed upon the Walker case in the Chilean Commission. All such letters as were introduced were strictly *ex parte*, and a decision of the Commission, dated December 22, 1897, was to the effect that a lengthy affidavit by Bacigaluppi was evidence, and in the Levek case Chile had introduced a letter.

Reference was made to the fact that some question arose before the former Chilean Commission, as shown by pages 152 to 155 of the agent's report, being raised in the Murphy case, and the Commission ruled that it was "at liberty to take affidavits into consideration and to attribute to them a limited value or no value whatever, according to circumstances," and to the fact that in the Read case, No. 13, agent's report, general affidavits were accepted as the foundation for an award.

Upon the same subject-matter, the agent for Chile filed a brief, in which, after citing the opinion of Mr. Hale, agent of the United States before the Anglo-American Commission, as shown on page 4 of his report, with relation to the disadvantage of the Government in defending claims, he maintained:

First. That the officers before whom the various affidavits filed in those cases were taken were not duly authorized to certify to the affidavits, and

Second. That affidavits can not be considered as evidence by this Commission. The Commission is governed by the rules of law existing in the two countries, which in this case are in harmony in regard to the nature of the evidence by which claims may be supported or refuted.

His brief further cited Article V of the convention of August 7, 1892, authorizing the Commissioners to decide "upon such evidence information only as shall be furnished by or on behalf of the respective government," arguing that this emphasized the evidential character of the information to be furnished. He further cited the seventh article of the rules of procedure of the Commission established in 1893, showing that the claimant "shall be required to establish" all the material allegations

gation at their discretion, and no appeal will lie therefrom. This doctrine would seem to apply even though these rivers emptied directly into the sea instead of

Footnote 3 (continued)

of the petition "by legal and sufficient evidence." He relied upon Article XV of the rules of 1893, as follows:

The rules of evidence as to the competency, relevancy, and effect of the same shall be determined by the Commission, with reference to the convention under which it is created, the laws of the two nations, the public laws, and these rules.

From this he argued that the claimants should support the facts upon which their allegations were founded with legal and sufficient evidence. He argued against the propriety of accepting affidavits taken before ministers of the United States, secretaries of legation, or consuls, citing Calvo, *Droit International*, section 612, third edition; Heffter, *Le Droit International Public*, section 216, No. 2; Bluntschli, *Le Droit International Codifié*, article 221, and Field's *International Code*, article 172.

As fortifying the opinion that *ex parte* proofs should have no legal weight, the Chilean agent quoted Greenleaf, volume 1, chapter 3, section 446, page 541, and as showing the necessity for notification to the other side, so that the witnesses might be cross-examined, he cited the Laws of Chile, *Prontuario de los Juicios*, law xxiii, title 16, paragraph 3.

As indicating the little weight to be given to *ex parte* evidence and the necessity for cross-examination are cited *People v. Cole*, 43 New York, 508; Revised Statutes, United States, chapter 17, title "Evidence;" Foster's Federal Practice, second edition, pages 502 and 1267; Greenleaf's Evidence, section 321, page 414; volume 1, section 164; Best on Evidence, page 83; Wharton's Law of Evidence, section 177; Wharton's Book 3, section 110, chapter 13, and sections 872, 873, 875, 879, 881, and 882 of the New York Code of Procedure; as also A. 425, A. 426, A. 430, A. 434 of the Code of Procedure of Louisiana, and section 2033 of the Code of Procedure of California.

As showing that affidavits are not receivable in the Court of Claims, section 1083 of the Revised Statutes is cited, and 2 Court of Claims, 345, as well as the rules of procedure of that court.

As showing that *ex parte* affidavits were excluded by the Court of Claims, citation is made of *Main v. U. S.*, 21 Court of Claims Reports, page 54.

Attention is called to the Shrigley case before the prior Commission (Moore, 3711), in which depositions, not taken in accordance with the rules of the Commission, were suppressed, and showing that there was no appearance on the part of the claimant or notice for taking depositions.

The case of Murphy (Moore, 2262) was relied upon as showing that the kind of evidence under discussion should be received "not as evidence but only as elements which in certain cases may contribute to a limited extent, collateral or secondary, to confirm or strengthen a conviction appearing to be based on proofs of a more conclusive character," and the decision in the Thorndike case (Moore, p. 2274) is referred to as indicating the opinion of the Commission that such evidence lacked sufficient legal weight to warrant a decision against the respondent.

The French-American Commission, sitting in Washington from 1881 to 1884, it is said, citing from the Murphy case, adopted the same principle.

The agent admitted that official communications written in the discharge of official business should necessarily be admitted in evidence.

The agent for the United States replied to the foregoing brief, contending that the following propositions had been established:

1. The Commission is "bound to receive and consider all written documents or statements" presented by either Government as evidence.
2. This *ipso facto* makes all such writings, whether affidavits or mere letters, *legal evidence*, no matter what the ordinary rules of law may be concerning them, but leaves it open for the Commission to attach such weight to them as they intrinsically seem to deserve.
3. This rule, as established by the convention, is different (and is conceded by both sides to be different) from the rule either of the common or the civil law upon the subject, although the civil law seems to be much more liberal in this respect than the common law, as witness the case cited in the preceding brief from 159 United States Reports, page 204.

debouching into an inland lake, as in the case under consideration, wholly within the territory of the State seeking to control the navigation of these rivers. This doctrine being applicable to the inhabitants of the State at the headwaters of the streams is all the more applicable to domiciled foreigners.<sup>1</sup>

GOETSCH, *Commissioner* :

The Department of Santander of the Republic of Colombia, with its capital at San José de Cúcuta, has been very poorly endowed by nature, since it lacks means, which pass exclusively through Colombian territory, to establish commercial communication with the ocean. The commercial traffic of the Department with the rest of the world can not be effected except through the port of Maracaibo — that is to say, by passing over Venezuelan territory. The traffic from the capital, San José, to the Atlantic Ocean takes place in the

Footnote 3 (continued).

4. The rule now contended for by the United States is the only rule in diplomatic settlements, and the usual rule in commissions such as this, as witness the authorities, decisions, and citations from the proceedings of other commissions, and of the Court of Claims set out in the former brief.

5. The former commission under the present convention held in the Murphy case that *ex parte* affidavits were admissible, and in fact *used them as evidence*, but considered that the ones on file in that case were intrinsically improbable, and therefore a majority of the commission declined to permit their judgment to be controlled by them. In the Reed case, afterwards decided by the same commission, they *unanimously* treated similar documents as evidence, and believed the statements contained in them, and decided the case accordingly.

6. It is manifest, therefore, that the objection now made by the agent for Chile can not properly avail to destroy the effect of all affidavits and writings as evidence. It is likewise manifest that all such papers must be considered by the Commission, and each one weighed as to its individual merits and inherent probability.

Referring to the French-American Commission, he stated that upon verifying the reference all that appears is as follows:

The affidavit of Philibert Rozier referred to in the motion of the United States assistant counsel is stricken from the record.

He argued that it did not appear officially why it was so stricken out.

He further contended that letters and telegrams sent from one official to another were literally *ex parte* statements, and that all writings submitted by either Government should be received in evidence, carefully weighed as to their convincing force, and permitted to influence its decision much or little, or not at all, according as that convincing force is found to be present or absent in each particular case.

A majority of the commission made an award on the evidence in question in favor of the claimant.

<sup>1</sup> For a very interesting and exhaustive discussion of this question we refer to an article by Ernest Nys, published in the *Revue de Droit International et de Législation Comparée*, 1903, 2d series, Vol. V, p. 517, stating the limitations of the doctrine as laid down by the umpire, and citing:

*Revue de Droit International et de Législation comparée*, 1901, Vol. III, 2d ser.; Magnette, *Joseph II et la liberté de l'Escaut*, 1897, pp. 17, et seq., 46; Charles de Martens, *Causes Célèbres du Droit des Gens*, 2d ed., Vol. III, p. 338 et seq.; Henry Wheaton, *Hist. of the Progress of the Law of Nations in Europe and America*, Vol. II, p. 192; Grandgaignage, *Histoire du péage de l'Escaut*, pp. 88, 89; Ed. Engelhardt, *Du Régime Conventioneel des Fleuves Internationaux*, pp. 24, 25, 27, 172, 182, 219; E. Carathéodory, *Le Droit International concernant les Grands Cours d'eau*, 1861, pp. 107, 116, 117; Wheaton, *Elements of International Law*, Vol. II, p. 86; Crommelin, *De Verplichtingen van Nederland als Neutrale Mogendheid ten Opzicht der Schelde*, p. 71; *Revue de Droit International et de Législation Comparée*, 1886, Vol. XVIII, p. 159, et seq.; *Annuaire de l'Institut de Droit International*, Vol. VIII, p. 272; Pierre Orban, *Etude du Droit Fluvial International*, 1896, p. 140; Baron Guillaume, *L'Escaut Depuis 1830*, Vol. I, pp. 353, 400; Bonfils, *Manuel de Droit International Public*, 2d ed., No. 524; Bluntschli, *Le Droit International Codifié*, art. 769; Piédelièvre, *Précis de Droit International Public ou Droit des Gens*, Vol. II, p. 375. See also Rivier, *Principes du Droit des Gens*, Vol. I, pp. 221, 225.

following manner: From Cúcuta to the Colombian port Villamizar by rail (the frontier custom-house upon the Zulia River); from Villamizar by the navigable river Zulia to its mouth in the Catatumbo River, near Encontrados (the frontier custom-house of Venezuela); from Encontrados continuing along the Catatumbo River as far as its mouth, in Lake Maracaibo; thence by Lake Maracaibo to the city of Maracaibo. A few leagues farther down from the port of Villamizar the Zulia River crosses the frontier line of Venezuela. At the Venezuelan railroad station El Guayabo the railroad from Uracá to Encontrados touches. The Lake Maracaibo and the Catatumbo River as far as Encontrados are navigable by steamers of considerable draft, while the river Zulia from Encontrados to the port of Villamizar only permits the passage of small steamers of a slight draft and other lighter vessels.

From time immemorial the Department of Santander has used that highway for the exportation of its national products, principally coffee and hides, and for the importation from abroad of those necessities which it is not able to produce. The importance of the commercial traffic by this route is shown by the fact that the commerce duties of Colombia received in Villamizar amount to from 680,000 to 800,000 bolivars.

A very considerable portion of this commercial traffic is carried on by German firms and German capital. We are treating here of the firms of Van Dissel & Co., Brewer, Moller & Co., Beckman & Co., Steinworth & Co., and Faber & Co., of Hamburg, respectively, from Maracaibo and San José de Cúcuta, besides the German stores in Maracaibo. This last enterprise is an exclusively German house, and performs its navigation by the lake and the rivers, with proper steamers and steel lighters, and in company with another transportation company, in which the firm of Brewer, Moller & Co. have an interest of 50 per cent, while all the other German firms, which almost all have their principal houses in Hamburg, busy themselves with the exportation of coffee and other products from Santander and the importation of merchandise to said Department. The German capital in these enterprises amounts to many millions of marks. These commercial relations, existing from very remote periods, were destroyed at a blow by an executive decree of the Government of Venezuela dated September 11, 1900. The decree is of the following tenor:

Commencing upon the day of the promulgation of this decree, the clearance of vessels which carry on river commerce along the Zulia and Catatumbo rivers is suspended in the coastwise custom-house at the port of Encontrados.

Because of this prohibition of the clearance of all vessels the commercial blockade with respect to the Department of Santander was established *de facto*. No vessel could thereafter pass by Encontrados either going up or coming down the river. Commerce was totally destroyed.

The Government of the German Empire has protested before the Government of Venezuela against said measure, which very seriously injured German interests. The officer at the imperial legation at Caracas, under the date of February 4, 1901, protested, as is seen by the following extract:

Mr. Minister EDUARDO BLANCO, etc.:

From an order received, I have the honor to notify your excellency that, according to the interpretation of the Imperial Government, the closing of the Catatumbo and Zulia rivers, because it interrupts the German commerce with Colombia, is contrary to the principles of international law, and that therefore the German Government should reserve to itself the right to hold Venezuela liable for the injuries resulting on account of said measure.

In his answer, dated February 16, 1901, the minister of foreign relations in Venezuela has upheld the legality of this measure, alleging the sovereignty

of Venezuela as an independent state, but has agreed upon the existence of the commercial blockade as such, as follows:

Upon the stopping, temporarily, of the passage of commerce upon the Zulia and Cataturbo. \* \* \*

To this the German legation replied, under date of February 19, 1901, repeating the protest already quoted.

Upon the 4th of March, 1901, the Government of Venezuela modified said decree as follows:

River commerce is permitted upon the rivers Zulia and Catatumbo, but only in lighters or canoes, and while new fears of disturbance of the public order should not require the contrary.

But after a few days the primitive state was restored by a decree of July 29, 1901, and by it the commercial blockade was restored by the decree of July 29, 1901, and reestablished in its full extent. The decree reads as follows:

The decree of March 4, 1901, which permitted river commerce along the Zulia and Catatumbo rivers from Encontrados by lighters and canoes, is revoked, the decree of September 11, 1900, remaining in its full force and effect.

Under date of June 14, 1902, the following decree was issued:

Until the definite reopening of the port of Encontrados the way of Urena is temporarily open for the passage of merchandise between Cúcuta and Maracaibo, and vice versa, the way of Encontrados being open only for the coastwise service.

Finally, what follows was ordered by a decree of January 13, 1903:

ARTICLE 1. The decree of July 29, 1901, by which traffic between Encontrados and Puerto Villamizar was absolutely forbidden, is revoked.

ART. 2. The decree of March 4, 1901, which permitted traffic between Puerto Villamizar and Encontrados by means of lighters and canoes only, is made effective.

The traffic by lighters and canoes, to which the foregoing article refers, shall be carried on by Guayabo, transporting by rail the merchandises which are exported.

ART. 3. Navigation of steam and sailing vessels, carrying merchandises in transit for Colombia, shall hereafter be permitted only by the ports of Maracaibo and Encontrados in accordance with the laws which are in force in the premises.

Lastly, another decree, under date of April 3, 1903, was issued, the second article of which reads as follows:

The effects of article 2 of the decree of January 15, already cited, are revoked with relation to the importation of merchandise in transit for Colombia by said route, until the causes which make said transportation undesirable may be removed.

This state has continued until the present day.

By the commercial blockade established there, which now can not be considered as totally removed, but which in any case was maintained in full force for about two years, the interests of German firms and those of German commerce have suffered serious injury, as has already been shown.

The damages consisted principally in the following: The crops of coffee bought of German houses in Cúcuta could not be exported during the time of the blockade, which lasted two years. The coffee had to undergo a long storage in Villamizar, exposed to the warm climate and extreme humidity, which occasioned a loss of a part of it and the payment of high rates of insurance. The capital invested in coffee ceased to produce interest, thus also the capital invested in German houses in Cúcuta could not be utilized later on and could not produce profit, while the general expenses continued to run, such as the salaries of employees, the rent of the commercial establishments, etc. The

imported merchandise from Europe and the United States suffered like injury, which could not be transported from Maracaibo to Santander, these latter remaining stored in Maracaibo, where they suffered deterioration in part, and later it was necessary to sell them at a loss. A part of the general expense of the business of Maracaibo was disbursed without return. The vessels and steel lighters belonging to the transportation companies of German houses, which carried the commerce to Villamizar, could not fulfill their object, and remained loaded, without being used, and were injured to some extent by the brackish water of Lake Maracaibo. All these injuries are immediate consequences of the stoppage of the commercial traffic.

Let us pass on to prove how Venezuela may be made liable for them.

(a) In the first place it is undeniable that a sovereign state holds absolute authority over its rivers and water courses until these touch the frontiers of other states. This principle is nevertheless limited in two senses by international law. When a river constitutes the only way of communication, indispensable for the subsistence of another nation, or part of it, its use can not be entirely prohibited. (See Heffter's *International Law of Europe*, Berlin, 1867, sec. 77.) Besides, the use of navigable rivers for traffic with other friendly peoples when they cross independent states can not be prohibited when their use is not offensive. After all a state can not deny to another nation the inoffensive use of routes by land or water within its territory without committing an act of hostility, and no State can exclude another from commercial communication with the market of a third without committing an offense and injury unless the latter desires and puts in force the exclusion. (See Heffter, p. 63; Puffendorf, *T.N.*, III, 3, 6; Groot, *T.*, 2, 13; Vattel, II, 123, 132-134.) These international maxims are the creation of close association between nations. They have been applied in treaties of distinct periods. (Treaty of peace of Paris, 1814, art. 5; the official record of the Congress of Vienna, art. 8, 117-118; art. 15 of the treaty of peace of Paris, dated March 30, 1856; art. 1 of the provision of navigation for the Danube, dated November 7, 1857; treaty between Spain and Portugal, August 13, 1835, concerning the free navigation of the Duero; treaty of reciprocity between Canada and the United States dated June 5, 1850; art. 4 of the treaty of the Republic of Argentina with other powers dated July 10, 1853; and others.)

On account of everything that has been said it is considered as an international doctrine that the navigation of rivers which flow through portions of several States together with their affluents shall be free from the point where they first become navigable to where they empty into the sea, so far as commerce is concerned — provided this latter be in itself free — should not be denied to anybody; besides, each riparian state shall exercise its authority within the limits of its fluvial domain, impeding as little as possible the liberty of navigation. (See with respect to this Phillimore, pp. 189, 191, 192, 195, 204, 207, 209, et seq; Grotius, *Book II*, chap. 2, sec. 12; Wheaton, *Pt. II*, chap. 4, sec. 11; Heffter, pp. 63, 147; Carathéodory, *International Law Concerning Large Water Courses*, pp. 155-158; Moore, 1718.)

As there was no war between Colombia and Venezuela the latter had no right to prohibit the foreign commerce with a Colombian port.

The principles above stated have not been limited to the territory of European states, but have found application in states and circumstances outside of Europe. It was especially the part of England at a former time to make this principle respected and to defend it energetically against Spain with respect to the traffic on the Mississippi. (Phillimore, sec. 170.) Thus also the United States of America have invoked against England the application of the principles above set forth and attained their recognition with respect to the commerce of

the St. Lawrence River, the mouth of which is situated exclusively in Canadian territory. It is true that England maintained at first an interpretation of the expression of natural right should not be given to the principles of the treaty of Vienna but that they should be considered as the conventional arrangement of an exceptional privilege granted by the contracting parties, and the enjoyment of which did not belong to a third noncontracting party. Nevertheless this attitude of England was not in harmony with her own opinion in the claim of the Mississippi (see Phillimore, sec. 170), and it was also rejected by the United States with reason and success. Secretary of State Clay, in Washington, ordered the American minister, Gallatin, under date of June 15, 1826, in London, to oppose the following to the English pretension (see Mr. Secretary Clay's letter to Mr. Gallatin, American minister in London, June 19, 1826, session 1827-28, No. 43, Am. State Papers, For. Rel., vol. 6, p. 764); that the provisions of the treaties should not be considered as of a merely conventional character, since ordinarily it would be necessary to give them a positive and natural right in order to settle differences; that the right to navigate the ocean had also been the subject of rules and divers treaties; that the provisions of Vienna and other similar ones should rather be considered as an homage which men render to the great Lawgiver of the Universe by which His works should be free from the chains that human caprice strive to put upon them. Also, among other German publicists this opinion prevails. Thus Wurm (see *Five Letters upon Free River Navigation*), has called the treaties above-mentioned a concentration of the great principles which are gradually illuminating the reason of nations. (See also Carathéodory, pp. 139-141.) England was compelled to yield, although only after some years, by a treaty signed on June 5, 1854, by Lord Elgin, which recognized in article 4 the freedom of navigation upon the St. Lawrence River. (*Treaties and Conventions between the United States and Other Powers*, p. 451.) The Argentine Republic took a similar course upon another occasion by confirming by a treaty of July 18, 1853, the freedom of navigation of the Paraná and the Uruguay for the ships of all nations.

If these principles are applied to the present case, it follows that the blockade of commercial traffic upon the navigable rivers Catatumbo and Zulia, which cross the territories of Venezuela and Colombia, was an act contrary to the law of nations, and therefore illegal. As is seen from the correspondence exchanged with the German legation, Venezuela based her proceeding upon the declaration that her relations with Colombia were at that time strained and that the closing of the rivers was a necessary measure for the national safety. Nevertheless, this excuse is not admissible. There has not existed a true state of war between Colombia and Venezuela, and Venezuela herself (November 20, 1901), in answer to an inquiry of England, expressly stated that a state of war did not exist. (See the English blue book of Venezuela, No. 1, 1903, p. 55.) But neither should there have occurred, even in the case of a state of war or the probability of warlike complications, a complete commercial blockade, or say, total interruption of neutral commerce upon navigable rivers. (See Wurm, *Freedom of River Navigation*, p. 55, et seq.; art. 131 of the convention between the German and French Governments upon the control of the navigation of the Rhine, dated August 15, 1804; the Clayton-Bulwer treaty between the United States and England; art. 6 of the treaty between Argentina and the United States of America, England, and France, dated July 10, 1853.)

Venezuela, if she had the right to control the commerce upon the Zulia and Catatumbo, as her safety required in view of the strained relations with the neighbor Republic, could have inspected and regulated the commerce of merchants — the first in order to prevent the transporting of Venezuelan

revolutionists or Colombian troops, and the second in order to submit to register vessels suspected of transporting arms or contraband.

To exercise greater control, she could compel vessels or steel lighters to be accompanied by constabulary or troops as far as the Venezuelan frontier, and to receive them there again upon their homeward journey. The absolute blockade, or, say, the prohibition thereby resulting to the exportation of coffee, which was German property, and to the importation of German merchandise, appears to be an act not justified by the circumstances, and therefore inadmissible and illegal according to international law.

(c) The Government of the German Empire, because of what has been said, was entirely right in protesting to the Government of Venezuela against the commercial blockade, and to reserve to herself the right of enforcing an indemnity, since a state which, by an illegal act, injures the legal interests of foreign subjects should make reparation for the damage caused.

The Government of Venezuela has expressly recognized its liability in the protocol of peace for claims presented up to that date, and therefore also for claims arising out of the commercial blockade. Because of what precedes the German Commissioner asks of the honorable umpire that he fix the liability of Venezuela in principle for such damages as may be proved to have been suffered by subjects of the German Empire because of the commercial blockade.

*ZULOAGA. Commissioner :*

In the extreme west of the Republic of Venezuela is the lake of Maracaibo, a beautiful sheet of fresh water, entirely surrounded by Venezuelan territory. The lake communicates with the port of Maracaibo, or the Gulf of Venezuela, by a narrow channel, about 1,500 meters wide, which forms the two islands of Zapara and San Carlos. In the eastern extremity of the latter is situated the fortress of San Carlos, which guards and defends the entrance to the lake. Although it is not provided yet with modern pieces of artillery, it serves its purpose when necessary, and up to now no other ships except those which the master of the country has seen fit to allow to enter have plowed the lake. The whole of Lake Maracaibo belongs absolutely to Venezuela, and it has not occurred to any nation to throw doubt upon this.

The navigation of this lake, which is interior navigation, has never been done except by Venezuelan ships. On the northern part of it is found the city of Maracaibo, the only port of that region equipped for foreign commerce. Here only foreign ships touch, which must not have more than 10 feet draft, without running a great risk of stranding on the bar. There at the foot of the lake toward the south the river Catatumbo empties, which river belongs almost exclusively to Venezuela, since only a small portion of it belongs to Colombia. The Catatumbo has, generally speaking, in Venezuelan territory a depth of 5 feet. It has never been navigated except by Venezuelan river boats. At a distance of about 100 kilometers from its mouth in Lake Maracaibo the Catatumbo receives the waters of the Zulia, a river which rises in Colombia, in the State of Santander, which ordinarily has not more than 2 feet of water, especially in Colombia, and in summer still less. This river has never been navigated in Venezuelan territory except by Venezuelan vessels (boats or small steam launches).

The commerce which Colombia carries on upon this river has had a certain development since 1875, when the wagon road from Cúcuta to Villamizar was built, and later, during the years 1881 to 1882, when the railroad was built between the same places. Colombia has never been able to consider that she has a perfect right to carry on commerce through the Zulia and Catatumbo, since at present she has no treaty with Venezuela, and Venezuela has not

recognized that right directly or indirectly. By Law XXIII of the Code of Hacienda, Venezuela has allowed commerce in transit from Colombia, but in a precarious manner as to the latter Republic, because article 1 of that law expressly says that the passage of merchandise by the port of Maracaibo destined for Catatumbo is *permitted*.

Transitory commerce can therefore be prohibited by Venezuela at any time, as she is not obliged by any treaty to permit it. That commerce in transit Venezuela regulates in a detailed manner, and the importation of foreign merchandise through the port of Maracaibo is subject (art. 2, Law XXIII, cited) to all the formalities required and penalties established in the law of the government of customs for merchandise coming from foreign countries destined for Venezuela and to the provisions which are therein set forth. This commerce in transit is carried into the interior of Venezuela by two roads, either by the river Catatumbo, and later shipped over the railroad of Táchira, or in barges or small steam launches on the Zulia, which in reality can not properly be done except in the rainy season, when the river is sufficiently deep.

Venezuela, as a sovereign nation, regulates this commerce in transit in its territory as it sees fit; it determines the roads which must be used; it establishes the rules and prescriptions which it believes proper for its security or its interests. It is a matter exclusively its own, concerning which it has to give account to nobody. In the exercise of its right by virtue of necessities of public safety and order, well recognized and well appreciated by this Commission, the Venezuelan Government has issued a series of decrees regulating this transit, especially concerning the navigation on the Zulia. These decrees are those of September 11, 1900; March 4, 1900; July 29, 1901; June 14, 1902; January 15, 1903, and April 3, 1903. By virtue of them commerce upon the river as far as Colombia has sometimes been stopped. Other times it has been permitted by barges and canoes, but not by steam launches. This happened especially after the invasion of Rangel Garbiras with Colombian troops on the 25th of July, 1901, and because of the necessity to guard this road, so important to the defense of the territory.

Colombia at first sought to obtain from Venezuela the revocation of the decree that prohibited traffic upon the Zulia, but Venezuela answered her that she could not allow this traffic while the motives of public order which had given rise to the decree existed. After that the breaking off of diplomatic relations between Venezuela and said Republic took place, and such a serious aspect was assumed that the frontiers were guarded by armies of the respective States, and only the civil war which existed in both countries avoided, perhaps, the great calamity of a war being declared between the two sister nations. The matter of commerce in transit between the two nations is still complicated, on account of questions of boundary not yet settled, and it occupies the attention of both countries.

In this condition of affairs Germany intervened and pretends to assume for herself the cause of Colombia and force Venezuela to open the Zulia route, under the pretext that there are some German merchants in Cúcuta who are injured by the Venezuelan decrees. It is impossible to imagine intervention by a third party more unreasonable and unlawful.

The question is between Venezuela and Colombia, and if decided can only be decided by those two countries alone and exclusively, and I must emphatically deny the allegation of the Commissioner for Germany and affirm that it is entirely contrary to the tenor and spirit of the Washington protocol and the powers vested by it in this Commission; that according to this treaty Germany is not authorized to put in dispute any matter which may compromise the sovereignty of Venezuela nor put in dispute her present legal status which

gives her exclusive sovereignty over her rivers and lakes. To sustain a claim for injuries to Cúcuta merchants with the reasons adduced, to the effect that the river Zulia must be opened to international commerce, is to surreptitiously introduce questions as to the sovereignty of Venezuela into a tribunal which is called upon to take cognizance only of matters of fact, in conformity with absolute equity, which precisely supposes the exclusion of those questions which exact another kind of study and another standard of judgment.

If there should possibly be a controversy between Venezuela and Colombia in regard to the matter, the consequence of this surreptitious intervention of Germany would lead to a legal precedent being found in the question which is submitted to the umpire, a precedent which would be a very singular one in the relations between the two republics, whichever way it might be decided.

But in this matter there can be no controversy. The right of Venezuela is clear, and the action of Germany appears to tend towards nothing less than to make Venezuela tributary to Columbia by virtue of supposed principles of international law concerning the navigation of rivers.

I reject, therefore, expressly and categorically, all this argument of the German Commissioner as unfounded, and since the question of George Faber has been submitted to the umpire, I maintain that he has no jurisdiction to take cognizance of the matter in the form which the Commissioner of Germany contends, because this Commission has no power to overlook the rights of Venezuela.

Venezuela exercising her right has regulated, in the manner which it has considered proper, the commerce in its territory in its passage to Colombia. Therefore no liability of the State ensues for consequent damages which an individual might suffer by virtue of these general provisions. If some Germans have suffered material damages, perchance Venezuela and its Government have suffered greater ones in enforcing decrees which it judges necessary for the moment. When the German Empire, by virtue of its political policy, curtails amicable relations with any nation said measure of reprisal undoubtedly injures individual interests, and I do not believe that thereby it is obligated to make any reparation.

To the argument of the German Commissioner sustaining the claim of George Faber, who says that he has been injured by the decrees which have regulated the commerce in transit, it is sufficient for me to set up the right of Venezuela to enforce laws and regulations in her territory as she sees fit.

Nevertheless, in order to show to what extent the argument of the Commissioner of Germany is without foundation and to what extent the condition set up by Germany is unjustly oppressive, I am going to make some general observations.

That argument has as a foundation that, in accordance with the principles of international law, the navigation of international rivers is free, and that Venezuela in shutting off the commerce on the portion of the river flowing into the ocean (at the mouth of the river) has violated the law of nations.

In order that this reasoning might have any force it would be necessary in the first place for the river Zulia to be considered as an international river, but this river does not flow into any open sea — an essential condition in the case — but into the Catatumbo River and the Catatumbo into Lake Maracaibo exclusively the territory of Venezuela, and closed in accordance with international law to international commerce. It would be necessary, in the second place, that the river should, properly speaking, be navigable, and such a thing could never be said of a river which has a depth of 2 feet, and even less, in the dry season.

The Rhine has a depth at Bazel of from  $1\frac{1}{2}$  to 3 meters, and it is only, properly

speaking, navigable from that place. The depth farther down is several meters. The Danube has, even in Donauwerth, a depth of 2 meters and 2.35 meters, and nearly 50 meters in the port of Hierro. These rivers are, properly speaking, navigable. Lastly, it would be necessary that Germany should have been navigating the Zulia with German vessels, in order to carry on commerce with Colombia, and this is not only not alleged, but is not physically possible, because a trans-Atlantic steamer could not navigate even the Cataturabo. The pretense therefore narrows itself down to holding that Venezuela is obliged to carry on with *Venezuelan vessels* the commerce in transit with Colombia upon the river Zulia because there are in Cúcuta and in Maracaibo some merchants to whom this would be convenient, and therefore Germany demands it of Venezuela, making her liable in case she does not agree to it.

The theory that navigable international rivers are free to navigation has not been admitted as a general rule of the law of nations. No nation up to now has recognized this absolute principle or this obligation as a perfect one, and in the cases where it has been agreed to by nations it has always been by virtue of special treaties by which free commerce, such as the Commissioner of Germany desires to establish, has never been admitted. Not even in the Danube does such a rule appear to have been established, since in accordance with the treaty of Vienna of 1837 the free navigation does not exist except with vessels which enter from the sea to the Danube, or if they come from the Danube to the sea. (Bluntschli, *International Law codified*, sec. 314; Pradier-Fodéré, vol. 2, p. 295.)

To admit, as the greater part of the authorities do, says Pradier-Fodéré,

that navigable rivers which are in communication with the open sea (which is not so in this case)

or which separate or traverse various states are to-day open in the time of peace to the ships of all nations would be to accept hope for reality. The reality is that absolute freedom of rivers, that which is based upon the equality of all nations and which comprises all the direct tributaries of the sea, is not only not generally recognized and adopted, but it is still in dispute. (Pradier-Fodéré, vol. 2, p. 300, sec. 749.)

And Fiore, after discussing the diverse and contradictory opinions of the authors, says:

These few citations suffice to show how divergent the opinions of the authors are, who in a large part are our contemporaries, with respect to the navigation of rivers, and how little the theory can serve to regulate the practice. They recognize the right to use the navigable river for the interests of commerce, but they declare this right to be imperfect, and they accord to states through whose territory they pass the right to declare themselves proprietors of that portion of the river which has its bed in their territory and to dictate conditions to those who desire to navigate it.<sup>1</sup>

The theory of free navigation of rivers (which strictly can not be understood to be what has been asserted in this case) is not, therefore, recognized as a principle of international law, and, in any case, Venezuela has not recognized it with respect to Colombia, and it is proper to bear in mind here the ideas of the Hon. Mr. Duffield, umpire of this Commission, in one of his former opinions:<sup>2</sup>

<sup>1</sup> Sec. 773.

<sup>2</sup> *Supra* p. 397.

International law is not law in its usually defined sense. It is not a rule of conduct prescribed by a sovereign power. It is merely a body of rules established in custom or by treaty by which the intercourse between civilized nations is governed. Its principles are ascertained by the agreement of independent nations upon rules which they consider just and fair in regulating their dealings with each other in peace and in war. They reach this agreement by comparing the opinions of text writers and in precedents in modern times, and these ultimately appeal to the principles of natural reason and morality and common sense. It therefore rests solely upon agreement. Obedience to it is voluntary only, and can not be enforced by a common sovereign power. Any nation has the power and the right to dissent from a rule or principle of international law, even though it is accepted by all the other nations. Its obedience to the rule can only be compelled by an appeal to its reason and love of justice, or by the superior force of the particular nation or nations whose interests are involved.

In conclusion we must say that the theory of the free navigation of rivers is in no way applicable to the case under consideration, and that it is a measure of interior order of Venezuela which the latter has decreed in her territory by virtue of her sovereignty. To overlook this right is to do her an injury, and it is then not *Venezuela* who has violated the law of nations, closing the passage of the Zulia, which many motives of political well-being dictate, but *Germany* overlooking the legitimate rights of a sovereign nation. (Bluntschli, International Law Codified, art. 81 and art. 472.)

The obligation of observing justice with respect to other nations, at all times and under all circumstances, constitutes for a state one of those perfect and imperative duties which none can deny. (Calvo, Mutual Duties of States.)

The liberty of commerce has been invoked, but "the liberty of commerce is not an absolute principle; it may be subject to various restrictions." It is not possible, for example, *to seek to carry on commerce in the territory of a state against its will*; and the exercise of the right to carry on commerce necessarily presupposes the express or tacit consent of the state in whose territory one proposes to institute traffic by way of land or sea. The internal political policy of each state dictates means that must be taken. Should it open its territory freely to foreign commerce? Should it make this commerce subject to justified conditions on account of considerations of public interest, and to limitations, for example, established on account of a fiscal interest or an object of safety and health, etc.? It is impossible not to admit that every state has the right to regulate every class of commerce in accordance with its intention, and it is necessary to conclude that it is entirely free to establish every measure that it may believe conducive to this end. The territorial sovereign may prohibit the injurious branches of commerce; subject the traffic of foreigners to certain rules; *close places or provinces to foreign commerce*; impede the importation or exportation of certain merchandise; favor the national products, imposing upon foreign products different duties; raise or lower the tariff as it believes proper; determine the way of importation or exportation; map out the road which foreign products must follow into its territory, submit them to the necessity of bond; decide of the desirability to favor foreign duties by treaty, by the creation of free ports or like establishments; to accept for itself certain relations which do not affect either the right of independence or the progress of interior development of the state, etc. In its turn each state which carries on commerce itself or by means of its nationals outside of its boundaries ought to submit itself to the restrictions which that sovereign may make upon the liberty of commerce. To respect the rights of others is to assure the respect of one's own rights. *Not to trample upon the liberty of others is to give more force to one's own liberty.*

The case that is submitted to the umpire is the claim of George Faber, of Cúcuta. (In the claims of the firms in Maracaibo the claim is even more unjust, if possible, since they are individuals domiciled in Venezuela and subject to all provisions of public order.) Is it worth while for me to make an examination of the proof of the claimant Faber, when I reject the principle upon which it is based? Since the Commissioner of Germany appears to accept the truth of the facts, I shall make some passing observations concerning them.

The claim is proved by the declaration of two witnesses of Cúcuta, who say that they have seen the books of the house of Faber, and that the data upon which the claim is based is in accord with these books, and that the estimates which are made correspond, according to their understanding, to the truth. The books of merchants are evidence against them, but not in their favor. (1273, Venezuelan Code of Commerce.) This is a general principle of law, and it is natural, since it is not possible to believe that a person can make proof alone. Amongst merchants their books are of value, because each one presents his own; but in a particular case their books can not be presented in opposition to the state, and still less in opposition to a foreign state. I do not know who Faber is, and whether this proof is or is not ad hoc. Besides, the consul is not the legitimate authority in Colombia to certify to an acknowledgment. The local authorities are such, and we do not even know who these witnesses are who say they have seen the books. For my part, I consider this a claim which has been submitted absolutely without proofs, and it might be said that it is not, properly speaking, a claim in form, as it evidently is not. With respect to several items, such as one which refers to the correspondence which is said to have been withheld, I do not believe it worth while to make a further examination; but I should observe that if the road through Villamizar was closed, there were others, and therefore the fact itself upon which the claim is sought to be sustained is false.

GOETSCH, *Commissioner* (second opinion):

The German Commissioner believes that he has exhausted the question of international law in his opinion, which is in the hands of the honorable umpire, and it only remains for him to answer the opinion of the Commissioner of Venezuela, as follows: The fact that Lake Maracaibo is exclusively within Venezuelan territory in no way changes its condition as a natural continuation of the rivers Zulia and Catatumbo, the waters of which, accompanied by the vessels which float thereon, lead to the ocean. The question as to whether by international law a foreign flag is authorized to use a lake or river, when there is no question of coastwise trade, is not to be decided here. Rather there is under discussion only the question of the right to restrict neutral commerce from passing thereby to a part of Colombia which has no other means of communication.

The depths of the waters of both rivers is a matter of small importance so long as their courses shall be considered as navigable in international law, as is undoubtedly so, since small steamers navigate them as far as Port Villamizar in Colombia. This international river route which unites two independent states has been considered before as such by Venezuela, and upon it commerce and traffic from time immemorial have had a right to pass, as is seen from the report delivered to the honorable umpire, published by Venezuela, at Madrid, 1884, page 10.

It is seen, moreover, from the Yellow Book, likewise in the hands of the Hon. General Duffield (Caracas, 1900, correspondence of the legation of Colombia, pp. 3, 4, 7, 13, 14, 15, 16, 23, 25, 27, 29, 42, 51), that the least doubt

does not exist on the part of the Colombian Government with respect to the judicial question, and that it has always contended for itself the right of free river navigation.

From the right which Venezuela has to supervise and regulate commerce in transit with Colombia in the interest of her own safety, and because of her traffic, as is provided in the code of Hacienda, the right to decree the complete commercial blockade can not be deduced.

The insinuation that Germany in representing the respective claims of her subjects is partial in favor of Colombia and proposes to take the chestnuts out of the fire for that Republic should be disputed. If a measure directed in the first place against Colombia injures German interests — and it *does* injure them seriously — it is only duty which compels the German Empire, and which the constitution imposes upon the Imperial Government, to secure protection of the rights of its subjects abroad. From a note of protest upon the matter in question, addressed to the Government of Venezuela by the Imperial Legation, it will be seen, moreover, that Germany only desired to make Venezuela liable for the blockade in so far as injuries to German commerce and interest might result therefrom. It has always been a political principle of the German Empire not to interfere in differences of two foreign nations.

With respect to the objection to the jurisdiction made by the Commissioner of Venezuela, it is proper for this Commission not to annul the decrees of the Government of Venezuela which order the commercial blockade, but to submit to a determination whether Venezuela shall pay the damages which the German firms claiming because of the blockade have suffered.

These claims are of the same character as all the others. They are demands for indemnity directed against the Republic. By article III of the protocol of February 13 of the present year there were submitted to this Commission for its decision German claims against Venezuela which were not made special exceptions.

The Government of His Majesty the Emperor of Germany, long before the conclusion of the treaty in question, had called the attention of the Government of Venezuela to the injuries suffered by German interests because of the commercial blockade and to the prospective claims. The contracting parties therefore ought to have further limited in the protocol the jurisdiction of this Commission in order that the objection to the jurisdiction made by the Commissioner of Venezuela could be considered justified. The Commissioners, therefore, and the umpire, because they have not reached an agreement, have the right and are bound to determine the claims in question in order to bring within the scope of their deliberations the admissibility of the acts of the Government of Venezuela.

In order to substantiate his opinion the Commissioner of Venezuela makes reference to an opinion rendered in another case by the honorable arbitrator in accordance with which international law is not a law nor a rule which can be imposed upon a state whose opinion differs from general international law. This in itself will not be disputed, but since Germany and Venezuela have agreed to adjust the claims of the subjects of Germany by means of arbitration, it is the duty of this Commission to apply to the different cases the law of nations, such as the Commission and not Venezuela understands it to be. By the treaty Venezuela has renounced the right to decide the claims in such a manner as she understands international law. Let it be further considered that equity is to serve as a rule for the decisions of this Commission. The German claims are equitable, since the claimants have suffered serious injury, because of the governmental measure adopted exclusively in the interest of Venezuela.

The fact that Germany is not a riparian state of the rivers Zulia and Cata-

tumbo appears of little importance, since the commerce upon international rivers is open for all nations, according to the opinions of the best known jurists in international law. Besides, the German claimant firms are located in Colombia and Venezuela. All the firms in Maracaibo have branches in Cúcuta. There is question, therefore, of the rights of the inhabitants of the riparian states, since foreigners enjoy the same rights as Venezuelans and Colombians with respect to commercial law and navigation in Colombia and Venezuela. The common neutral use of the waterways which unite Venezuela and Colombia can not be denied them, a right which on the part of Colombia has been exercised since time immemorial and which Colombia has claimed for herself even after the decree of the commercial blockade.

To the final objection of the Venezuelan Commissioner, that there remained open to the firms an overland route, answer should be made that the same objection was made without success by England with respect to the United States of America, upon the opening of the St. Lawrence River. Overland communication is not a river route. By the report, a copy of which is presented herewith, it is seen, moreover, that freights overland were not open except by a decree of June 14, 1902, and they were so high that the adoption of this means of communication was equivalent to a complete stoppage.

With respect to the claim itself of G. Faber, it is seen, from the nature of the matter, that the damages suffered by German firms because of the commercial blockade could be individually proved and judicially substantiated only with difficulty. The principal proofs would consist of the books of the houses and the declarations of the claimants, and to give credit to these is a right which the supplemental convention gives to the Commission, as the honorable umpire has decided upon various occasions. The firm of Faber & Co. is a respectable German house of Cúcuta, the head of which is the consul of Germany. The items contained in its books merit entire belief, since it can not be supposed that the firm would have falsified its books for the purpose of presenting a possible future claim. The exactness of the data furnished by the firm upon which the amount of indemnity is based has been certified to by two experts, after an examination of the books. The German Commissioner, therefore, does not doubt that the facts upon which the estimation of the damage is based are true. The Venezuelan Commissioner objects that, according to the laws of Venezuela, the books of a commercial establishment are only regarded as proof when they serve to give evidence against the merchant. In accordance with the supplemental convention, Venezuelan legislation shall not be considered. Besides, by virtue of the principle of free estimation of proof, which no doubt also serves as a rule for a Venezuelan judge, it ought to be denied that in no case can the books of commercial houses be presented as means of arriving at the truth in favor of merchants. Everything depends upon the circumstances of the particular case. The judge *may* give credit to the items of the books; he *must* do so in so far as they militate against the merchant.

I. With respect to the different parts of the claim, I reject the first part, not because I consider the demand unjust, but because it is impossible to determine approximately that a portion of the labor of the employees was superfluous because of the commercial blockade.

II. What has been said with respect to item 1 is also applicable to item 5. It can not be calculated or estimated that part of the stores could not be utilized because of the blockade.

III. I consider item No. 3 well founded. The loss of interest upon money invested in crops of coffee which existed before the blockade was made effective is a true damage occasioned by the blockade, which must have resulted and

ought to have been foreseen. The blockade had as an object the damaging of the Colombian exportation to force this State to make concessions in the question of boundaries and other matters. The injury arising for this reason and occasioned to German property ought, therefore, to be repaired. As the claimant asserts, and as it is also well known, money in Venezuela and Colombia can only be procured at the rate of 12 per cent, and the loss of interest estimated at 12 per cent does not seem exaggerated.

IV. The extension of insurance against fire upon the coffee held in Puerto Villamizar, an extension which was made necessary by the commercial blockade, ought likewise to be considered as a direct damage occasioned by the Venezuelan attitude, and therefore to be satisfied.

V. The same is true of the damage which the claimant house suffered from the storing of green coffee in Villamizar. The truth of the facts is moreover proved by the certificates of the Chamber of Commerce of Maracaibo and well-known merchants of that place. Reference is made for the present to the respective documents in the record relative to the claims of Beckman & Co., Brewer, Moller & Co., and Van Dissel & Co.

VI. What has been said under III is also true with respect to part VI and VII of the claim.

VIII. The duty of exportation upon coffee seems to me to be established with the object of burdening coffee which came from Colombia for exportation after the special reopening of the traffic upon the Zulia and Catatumbo rivers. It is clear also that if this Colombian coffee could have been exported in time, which was not possible because of the commercial blockade, it would not have had to pay the Venezuelan duty, since the duty was not established until February of the present year. I believe, therefore, that this claim can be maintained also. Nevertheless, if the honorable umpire considers it as a remote damage, I shall be obliged to agree in the rejection of the demand.

IX. The stoppage of all postal correspondence coming from and going to Cúcuta is the direct consequence of the commercial blockade, and, like it, is an illegal act. The stoppage of the mail, which is more clearly proven by the certificate of the German consul in Maracaibo under date of August 14 of the present year, is in violation of the treaty of the Universal Postal Union, to which Venezuela and Colombia are parties. The fact does not require any proof that commercial interests must have suffered serious injury because of this stoppage. I have attempted to obtain from the claimants detailed specifications of this damage and the Imperial German consul has answered me as follows:

After having conferred with the interested parties with respect to the proof of the amount of damage occasioned by the interruption of the postal services, I take the liberty of communicating to you their opinion \* \* \* that it is very hard, and perhaps impossible, to obtain it in any concrete form. One of them lost one or more credits abroad, which were withdrawn because dispatches could not be sent to cover them, nor \* \* \* could he even answer the letters of demand and warning \* \* \* which did not reach his hands. Another, who had a branch house or friendly relations along the coast, found himself obliged to satisfy at a great loss the demands of his creditors and was hardly able thus to preserve his credit. From a third proofs and valuable documents were stolen. Under these circumstances the interested parties believe that the umpire ought to decide this point, taking into consideration all circumstances possible, the importance and extent of the commercial enterprises and each one of the commercial houses, as a civil judge does in cases of a demand for indemnity for a wanton killing or for the loss of a member of any house because of negligence. It would, for example, be nearly impossible to prove the exact value of a man's arm.

These remarks contain a great deal of truth. As a member of a tribunal

of equity I believe that I am authorized to allow to the claimant a round sum, which I estimate according to my best endeavor and understanding at 10,000 bolivars, for the illegal stoppage of the commercial correspondence contrary to the treaty of the Universal Postal Union.

Because of what has been set forth, I ask the honorable umpire that he allow the claimant the following sums, together with the usual interest, that is to say 21,724.76 bolivars, 1,200 bolivars, 10,112 bolivars, 14,211 bolivars, 5,182.23 bolivars, 16,103.38 bolivars, and 10,000 bolivars.

ZULOAGA, *Commissioner* (second opinion):

Articles 1 and 2 of Law XIV of the Code of Hacienda fixes what ports in Venezuela are opened for foreign commerce, exportation and importation, and those opened for exportation. In the western part of the Republic the port so qualified is Maracaibo. In article 10 of that law the National Executive is authorized to suppress and to remove these custom-houses already set up, which, by reason of contraband trade, or for any other causes prejudicial to the public treasury, may make it necessary in his opinion to adopt this measure.

Law XVIII regulates coastwise commerce — that is, interior maritime or coastwise commerce. This can not be carried on in conformity with article 1 of that law except in national vessels.

The interior commerce of the country along its navigable rivers is not, properly speaking, regulated; since these rivers are considered public highways, it is governed by the general laws of transportation (code of commerce).

The commerce which is carried on on Lake Maracaibo is coastwise commerce (art. 28, Law XXVIII), and therefore it can not be effected except in national vessels. The port of Encontrados is a coastwise port. (Art. 3, Law XIV.)

The rules concerning the register of vessels as national are those which appear in Law XXXIII. Foreigners (art. 24) may own national vessels, but the captain must be Venezuelan (art. 10), and for no reason can they make claims which could not be made by any Venezuelan owner and master of vessels. (Art. 24, above cited.)

The coastwise commerce of the Catatumbo is carried on in the manner and form which the Government of Venezuela considers proper, since it has its own interior commerce. There is this circumstance, that communication by the river Zulia as far as Colombia does not appear by the laws of Venezuela to be the most approved, but that of San Antonio does. The National Government, because of reasons of public order, can naturally regulate all the interior commerce, and respecting all other matters relating to the frontier the National Executive has the power which No. 14 of law 89 of the constitution gives him "to preserve the nation from every foreign attack."

The decrees which the Government has issued closing to the commerce of Colombia the way along the upper part of the Zulia are not only the exercise of its own right, but also, as has been shown many times to this Commission, a duty imposed by the circumstances. Venezuela had been fearing an invasion from Colombia, and the way of the Zulia is particularly dangerous in case of an invasion. If river commerce were permitted, the steam launches and lighters which carry on this commerce could go over to Colombia, and at a given moment might serve very efficiently for invasion, taking possession in the first place of the railroad of Táchira in Encontrados, and later threatening the lake. The Government, according to the circumstances and the gravity of the situation, has forbidden all traffic, or has only permitted it to be carried on in lighters or has permitted launches to ascend. It has tried to reconcile the interest which commerce might have with the public safety. Besides the protest

of the Government after the revolution of Rángel Garbiras, I find in the record of one of the claims a letter of Gen. Celistino Castro, chief of the volunteers, to one of the claimants, which I present with this argument, showing clearly the situation with respect to Colombia during the past months.

It is inexplicable that the measures adopted by the Government in these circumstances could give rise to the least objection, and for my part it seems still more inexplicable that the claimants should strive to prove that Venezuela was closed to commerce in transit with Colombia (which was certainly her right) when precisely the contrary appears; that is, that the Government had attempted to facilitate the passage of commerce, and that it had always done so in one way or another. The key to all this has been made plain to me at last by the study of two claims — that of the German warehouses and that of the navigation company of the lake and Catatumbo River. The claimants, because the Zulia was closed to traffic, are interested in these enterprises, and the foundation in reality has no other cause than the direct interest of these companies in the navigation of the Zulia.

In the claim of Faber, who is not domiciled in Venezuela, I have already stated the considerations which I believed pertinent. In the claim of Beckman & Co., of Maracaibo, I should further call attention to the fact that this is an individual domiciled in Venezuela, and therefore subject to its police laws and decrees of public safety.

I do not accept that distinction or difference which the Commissioner of Germany wishes to establish with respect to the *German* commerce of Cúcuta and the *German* commerce of Maracaibo, from which it would not appear that both places were German colonies. The commerce of Cúcuta is *Colombian* commerce, no matter what the nationality of some of the merchants there may be, just as the commerce of Maracaibo is *Venezuelan*. There are no colonies in this country. The injustice of the claims of Faber and Beckman submitted to the umpire is flagrant, and a further explanation is unnecessary.

Germany considered it proper in diplomatic notes to protest against the closure of traffic by the Zulia, and Venezuela answered, setting up her entire right to govern her own territory as she might consider proper. Venezuela does not need to concern herself in this Commission with a protest of powerful Germany. The greater the power of the nation may be the greater should be its justice, which is the very essence of modern civilization, and it is just this impartiality and justice which constitutes the honor of the international tribunal and elevates the mission of the umpire. Nevertheless, I must doubt that the Government of the Empire had an exact knowledge of the facts, since if they had been revealed to it in such a definite manner as they appear before this Commission, it is not to be believed that it would have assumed the attitude which it adopted.

I do not believe that I ought to concern myself in any way with the proofs presented by the claimants. If I did so briefly in my first opinion I did so only with the object of showing how strange it is that a claim should be sustained which has no foundation in law or fact. The right of Venezuela to reject these claims is too clear for me to occupy myself in discussing their amount.

There remains for me one last consideration. In his first opinion the German Commissioner insisted that these claims ought to be considered as admitted by Venezuela by virtue of article I of the protocol. This is to return to the question already decided by the umpire contrary to the opinion sustained by the German Commissioner.

The umpire agrees in opinion with the Venezuelan Commission that the fair construction of Article I, in which the Venezuelan Government "recognizes in principle the justice of claims of German subjects 'presented' by the Imperial

German Government," is to restrict it to claims which had been presented at the time of the execution of the protocol. This is its literal wording, and Article II restricts the claims to "those originating from the Venezuelan civil wars of 1898 to 1900" and provides for their payment *modo et forma*.<sup>1</sup>

There are 22 records of claims for injuries already paid. Those of Faber and Beckman were not among them, and they could not have appeared before this Commission. It appears useless to continue to argue further upon a point already decided.

Faber makes, moreover, a claim for supposed damages because of the interruption of his correspondence. If Venezuela had prevented this postal correspondence with Colombia (which does not appear), it is her right (*Bluntschli, Droit International Codifié, art. 500*), and she need not render account to individuals, and if any sack of mail of other countries might have been lost in this territory it is a subject to be treated of by the respective postal offices. It is not the business of individuals, and I understand that there is in the treaty of the Postal Union no clause to make an office liable in case of loss. There are many causes which might occasion it.

DUFFIELD, *Umpire*:

This is one of several claims which grow out of the suspension of river traffic on the river Zulia by Executive decrees of Venezuela in 1900, 1901, and 1902. The claimant Faber is a German subject who resides and has his place of business in Cúcuta, in Colombia.

The Commissioners radically disagree as to the liability of Venezuela. The Commissioner for Venezuela first objects to the jurisdiction of the Commission or the power of the umpire to decide the question of Venezuela's right to control and, if in her judgment necessary, to suspend the navigation of the rivers in question. After explaining the discussion of this question between the two Republics, as shown by the published official diplomatic correspondence, and pointing out that the matter is additionally complicated by disputed questions of boundary in the territory tributary to these rivers, he says:

In this condition of affairs Germany intervened and pretends to assume for herself the cause of Colombia and force Venezuela to open the Zulia route under the pretext that there are some German merchants in Cúcuta who are injured by the Venezuelan decrees. It is impossible to imagine intervention by a third party more unreasonable and unlawful.

The question is between Venezuela and Colombia, and if decided can only be decided by those two countries alone and exclusively, and I must emphatically deny the allegation of the Commissioner for Germany, and affirm that it is entirely contrary to the tenor and spirit of the Washington protocol and the powers vested by it in this Commission; that, according to this treaty Germany is not authorized to put in dispute any matter which may compromise the sovereignty of Venezuela, nor put in dispute her present legal status which gives her exclusive sovereignty over her rivers and lakes. To sustain a claim for injuries to Cúcuta merchants with the reasons adduced, to the effect that the river Zulia must be opened to international commerce, is to surreptitiously introduce questions as to the sovereignty of Venezuela into a tribunal which is called upon to take cognizance only of matters of fact, in conformity with absolute equity, which precisely supposes the exclusion of those questions which exact another kind of study and another standard of judgment.

If there should possibly be a controversy between Venezuela and Colombia in regard to the matter, the consequence of this surreptitious intervention of Germany would lead to a legal precedent being found in the question which is submitted to

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<sup>1</sup> *Supra*, p. 395.

the umpire — a precedent which would be a very singular one in the relations between the two Republics, whichever way it might be decided.

He also, without waiving in the least, but reiterating his objection and protest to the jurisdiction of the Commission over the claim, contends that the decree is a lawful exercise by Venezuela of sovereignty over that which is in her own territory and under her absolute dominion. He claims that under the recognized principles of international law governing such cases Venezuela has a general right to regulate and control the use of those portions of any rivers which are in her territory, even though they may come from or flow into the domain of another nation.

In addition, he contends that the laws of Venezuela confine river navigation to Venezuelan boats, and that such legislation is a lawful exercise of sovereignty by Venezuela; that neither the Zulia nor the Catatumbo has ever been navigated by German boats; that the draft of water in the Zulia River in only 2 feet, and in summer much less, until it flows into the Catatumbo, which has a normal depth of 5 feet about 100 kilometers above Lake Maracaibo; that Lake Maracaibo "is absolutely Venezuelan, and it has occurred to no nation to doubt it."

He also insists that the proofs are insufficient, because they consist of the testimony of two witnesses, of Cúcuta, who say that they have seen the books of Faber's house; "that the data on which the claim is supported agree with those books, and that the appraisals made, in their opinion, correspond with the truth;" that under article 1293 of the código civil the —

books of merchants are evidence against them, and not in their favor, [and] that this is a general principle of law also, that a consul is not a proper authority in Colombia to legalize documents, which can be done only by the local authorities, and that no official can certify conclusions of law, and that the claim is absolutely without proof.

Taking up these objections in their inverse order, the objection to the inadmissibility of the consular certificate because of want of authority in that office to certify documents or copies thereof, is not well taken. It was decided by the Mixed Commission under the treaty of Ghent that a certificate of a British consul, or any British functionary, should be received in evidence.

It is true this was done in the formulating of rules of procedure and in specifying what the Commission would receive as evidence. It is well known to be the settled practice of consuls to certify copies of documents and private agreements.

The other objection to the admissibility and effect of the certificate, that it certifies to conclusions of law only, and not to facts, and that the only proof of the claimant consists in the testimony of two witnesses who say that they have seen the books of Faber's house, and testify to their conclusions therefrom, raises a more difficult question.

The language of the protocol commands the Commission —

to receive and carefully examine all evidence presented to them by the Imperial German minister at Caracas and the Government of Venezuela. [And] In particular they shall be authorized to receive the declaration of claimants or their respective agents and to collect the necessary evidence.

If the word "evidence" as used in the protocol is to be interpreted in its usually accepted legal sense in law, namely, such testimony as is admissible under the rules of either the civil or common law, the objection of the Commissioner is well taken. It has been held, however, by a former justice of the Supreme Court of the United States, in the case of *Pelletier* (Moore, p. 1752), that the technical rules of the common law in respect to evidence were not

adapted to the proceedings before a mixed commission, and that "he would feel disposed to act upon whatever evidence satisfied his mind as to the actual facts."

Judge J. C. Bancroft Davis said, in *Caldera* cases (15 C. Cls. R. 546):<sup>1</sup>

In the means by which justice is to be attained the court is freed from the technical rules of evidence imposed by the common law, and is permitted to ascertain truth by any method which produces *moral conviction*.

This proposition is self-evident. \* \* \*

In its wider and universal sense it [evidence] embraces all means by which any alleged fact, the truth of which is submitted to examination, may be established or disproved. (1 *Green. Ev.*, sec. 1.)

International tribunals are not bound by local restraints; they always exercise great latitude in such matters (*Meade's case*, 2 C. Cls. R., 271), and give to affidavits, and sometimes even to unverified statements, the force of depositions.

In deference to these decisions, and because of the character of the conclusions of fact which the consul and the witnesses erroneously substitute for copies of the papers, and because of the provision in the protocol requiring the Commissioners to disregard objections of a technical nature, and, further, because there is no doubt in the mind of the umpire as to the truth or correctness of these conclusions, which do not involve any question of law, the umpire will accept the same as proof.

Coming now to the main objection of the Commissioner for Venezuela, first, the umpire is unable to sustain the claim that —

the question is between Venezuela and Colombia, and if decided can only be decided by those countries alone and exclusively, and that according to the protocol Germany is not authorized to put in dispute any matter which may compromise the sovereignty of Venezuela.

While it would be regrettable that any decision of the Commission might have a direct bearing upon an international dispute between Colombia and Venezuela, certainly if a case arose in which a German subject had been deprived of property or rights of property by an act of Venezuela the jurisdiction of this Commission over his claim would be as complete as its jurisdiction over any other claim. This Commission does not decide the dispute between Venezuela and Colombia. Incidental to its decision on the merits of the claim it may have to express its opinion on the question between them. While it is true that such opinion would probably be quoted by the State in whose favor it would happen to be, it would have no authoritative force, and be only entitled to such consideration as the logic of its reasoning might give.

As to the main objection of the Commissioner for Venezuela that her acts in closing the ports in question were fully within the attributes of her sovereignty, the Commissioner for Germany insists to the contrary. In the course of a very able discussion of the question, to which he has brought great research, he maintains:<sup>2</sup>

To begin, it can not be denied that a sovereign state possesses absolute authority over its rivers and water courses as far as the boundary lines of other states. This principle is nevertheless limited in two ways in international law. When a river is the only route of communication and indispensable to the existence of another state or part of it, its use can not be entirely prohibited. (Citing *Heffter*, *Int. Law of Europe*, Berlin, 1857, p. 147.)

<sup>1</sup> Dissenting opinion, p. 606.

<sup>2</sup> See *supra*, p. 443.

He also cites Heffter, Puffendorf, Groot, and Vattel, that a state can not deny to another nation without committing an act of hostility, and no state can prevent another from getting its commerce to the market of a third without giving offense and inflicting injury, and he claims that "these international maxims whose object is to draw nations together have been at different times embraced in treaties," a number of which he cites, and concludes:

It must be considered as an international doctrine that the navigation of rivers passing through the territory of several states together with all their affluents, must be free from the point where they begin to be navigable to the point where they empty into the sea.<sup>1</sup>

The respect due the Government of Germany, which presents the claim as a proper one in case the facts alleged in support of it are proven, and the rights of the claimant in the large amount involved, together with those of others in like situation (2,401,685 marks), calls for the most careful consideration by the umpire of the respective opinions of the Commissioners, each of whom has filed responding opinions, and necessitates a discussion of their different contentions.

The general subject of the free use of rivers running to the sea has been very much discussed by writers on international law from the earliest times.

The territory of the Republic of Colombia encompasses the Republic of Venezuela on the north, west, and south. Its boundary begins at Point Peret, on the western shore of the Gulf of Maracaibo, thence running in a southerly direction along the Sierra of Periga to a little south of San José de Cúcuta, where it turns and continues in an easterly direction to the Orinoco; thence up the Orinoco, which for this distance forms the boundary between the two Republics; and thence in a generally southern direction to the northern boundary of Brazil.

The principal commercial waterways, domestic and oceanic, of Colombia are the Magdalena and its main affluent, the Cauca, which flow almost the entire length of Colombia northward to the sea, and the rivers Meta and Guaviare, rising in the oriental Cordilleras and flowing eastward until they reach the Orinoco, on the boundary line between Venezuela and Colombia, and thence by that stream through the territory of Venezuela to the sea. In addition, Colombia possesses a great extent of coast line, on both the Atlantic and Pacific oceans.

Venezuela is not so well equipped by nature for ocean commerce. Its main arteries east of the Andes Mountains and north of the numerous sierras on the boundary of Brazil are the Orinoco river and its affluent, the Apure. In the western portion of the Republic the only avenue of oceanic commerce is through the Gulf of Maracaibo, the western shore of which as far into the gulf as Calabozo Bay is Colombian territory, thence through Lake Maracaibo and the Catatumbo River, which is only navigable for vessels of 5 feet draft of water, to about 6 miles above Encontrados, at or near which point the Zulia River flows into the Catatumbo. The Zulia has normal depth of water of 2 feet, and is navigable for small steam vessels and lighters and canoes as far up as Port Villamizar.

The Catatumbo River rises in Colombia a short distance from the Venezuelan boundary. Thereafter it continues in the territory of the latter exclusively until it discharges into Lake Maracaibo. The Gulf of Maracaibo is from 250 to 300 miles east of the mouth of the Magdalena River. The western shore of the Gulf of Maracaibo, from Point Gallinas to Calabozo Bay, is Colom-

<sup>1</sup> *Supra*, p. 444.

bian territory. The point at which Lake Maracaibo empties into the Gulf of Maracaibo is, however, entirely within Venezuelan territory. The depth of water at this point is 10½ feet. The bar at the point where the Catatumbo River enters Lake Maracaibo has a normal depth of but 5 feet. The Catatumbo River from Lake Maracaibo to Lake Encontrados has a normal depth of not to exceed 5 feet. It is not accurate, therefore, to say that the Zulia River is indispensable to the existence of Santander, or that it is the only route of communication of Santander through the Republic of Colombia to the sea. The Magdalena River, which furnishes a route to the sea for most of the fertile part of Colombia, is navigable to Honda, a point more than a hundred miles south (inland) of the latitude of the port of Villamizar, and is navigable from Honda to the ocean for larger-draft vessels.

Normal physical conditions require freight from San José de Cúcuta and the Caribbean Sea to be carried as follows: From Cúcuta to Puerto Villamizar on the Zulia River, by Colombia Railroad, the termini of which are Puerto Villamizar and a point in Colombia on the Táchira River, opposite San Antonio. At Puerto Villamizar it must be reshipped onto small stern-wheel steamers of not more than 2 feet draft of water; or lighters, with a capacity of 400 quintals, called *bongos*, which are propelled by poling; or canoes, and carried to Encontrados. Here it is reshipped onto lake-going vessels, which carry it to Maracaibo, where it is again reshipped onto seagoing vessels.

There are two railroads which can be made use of in the carriage of freight for the territory tributary to the Zulia and Catatumbo rivers — the Táchira Railroad, which is entirely within Venezuela, with its termini at Encontrados and Uraica and La Fria; the Cúcuta Railroad, above mentioned, which is entirely in Colombia, with its termini at Cúcuta and Puerto Villamizar; also, a highway called the Urena road, leading from Colombia into Venezuela and crossing the boundary of the two Republics near Urena, in Venezuela.

The effect of the several decrees of Venezuela, translations of which are appended, was as follows:

The decree of September 11, 1900, suspended all river traffic above Encontrados, whether bound up or down; that of March 4, 1901, modified this suspension so as to permit "commerce to be carried on on the rivers Zulia and Catatumbo," but only by means of lighters and canoes, so long as new fears of public troubles do not exist to the contrary, "but did not permit the use of steam vessels;" that of July 29, 1901, "revoked the decree of the 4th of March, 1901, and revived the decree of September 11, 1900," suspending all river traffic above Encontrados. This condition of affairs continued until the decree of June 14, 1902, which "temporarily permitted transportation of merchandise over the Urena road between Cúcuta and Maracaibo, and vice versa, the Encontrados way being left open for river trade only."

The decree of January 15, 1903, however, by —

Article I. revoked the absolute prohibition of traffic between Encontrados and Puerto Villamizar prescribed by the decree of July 29, 1901;

Article II, revived the permission of traffic by means of lighters (*bongos*) and canoes, but limited it to the El Guayabo, whence it must be by rail;

Article III, permitted steam and sailing vessels to carry merchandise en route for Colombia only between Maracaibo and Encontrados.

Finally, the decree of April 3, 1903, by —

Article II. abrogated the provisions of Article II of the decree of January 15, 1903, in respect to the importation of merchandise en route for Colombia "until the objections to said importations are removed." This decree has not at any time been modified and is still in force. The present situation, therefore, only permits navigation of steam and sailing vessels en route for Colombia between

Maracaibo and Encontrados (Art. III of decree of January 15, 1903) and the transportation of merchandise over the Urena road between Cúcuta and Maracaibo (decree of June 14, 1902).

There had been in the year 1899 much discussion between the two Republics as to their respective rights on the Orinoco River. It terminated without reaching any satisfactory understanding, and is still unadjusted. The situation of the Orinoco River, however, is materially different from the Catatumbo and Zulia. The former river rises in Brazil and forms the boundary line between Venezuela and Colombia, as above stated, and thence runs entirely in Venezuelan territory, to the sea. The two Republics, as to that portion of it which forms their boundaries, about 200 miles in length, are coriparian proprietors, a relation they do not at any point sustain as to either the Catatumbo or Zulia rivers.

The Catatumbo, so far as it is navigable, is entirely within the boundaries of Venezuela after the confluence of the Zulia with it.

On account of these and other differences in the situation and the physical conditions of the two rivers and those of the Orinoco, this decision is not intended to, and must not be considered as even intimating any opinion in respect to the Orinoco River.

We are met on the threshold of the discussion with the fact that no direct oceanic navigation was interrupted. Physical limitations deprive Colombia of the enjoyment of direct oceanic traffic through Venezuelan territory. No sea-going vessels can thus pass into Colombian territory. All must stop at Maracaibo, where all ocean freight must be reshipped. The case, therefore, is not one in which a foreigner is deprived by the act of Venezuela of the use of waters to which nature has given him direct access. That right Venezuela has not attempted to restrict. She permits him to carry his goods in the vessel in which they entered her territory as far as nature permits him. But the claimant insists that because of the nature of his business he suffers damage because goods are not permitted to be twice reshipped in the territory of Venezuela and thus transported into Colombia. Obviously this is a very different matter. First, it of necessity involves the use of land of Venezuela not incidental to navigation merely, but for the transshipment, carriage, and handling of freight on her shores. Second, it extends the claim of free navigation of rivers to a new case, for which I have found no precedent.

It is one thing for a foreigner to claim, "I have a right to navigation for my vessels wherever natural conditions permit, and Venezuela can not restrict it." But it is quite another thing to claim, "I have a right to send my goods over the inland waters of Venezuela, reshipping them into smaller and smaller vessels as often as the lessening depth of water may require." The question seems to be one of regulating commerce, rather than restricting internal navigation. It also appears that the laws of Venezuela with reference to internal navigation over its rivers and lakes require a nationalization of the vessels engaged therein. They also define interior maritime commerce of coast or river trade to be that which is established between ports and points on the banks of the rivers or shores of Venezuela in national boats with foreign merchandise which has paid duty, or fruits or other productions of the country. Another provision of law requires captains of vessels engaged in this trade to be Venezuelan citizens.

That these provisions were within the proper exercise of Venezuela's sovereignty can not be doubted. It results, therefore, that in the lawful exercise of such sovereignty she has excluded from her internal commerce boats of other nationalities and required even the boats of Venezuelan nationality to be commanded by Venezuelans.

For a considerable period before the decree of September 11, 1900, was issued there were internal political disturbances in the territory tributary to the Catatumbo and Zulia rivers. The relations between Venezuela and Colombia were at the same time seriously strained, and the former complained that revolutionist plans and movements found moral and material support on Colombian territory, which afforded a secure base of operations for them.

In this state of affairs the various decrees complained of were promulgated. It is evident that their purpose was to control the passage of vessels, especially steamers, to and fro between Colombia and Venezuela. The language of some of the decrees intimate fears of hostile forces entering Venezuela in that way. In July, 1901, Gen. Rángel Garbiras had begun his insurrection, which at one time seemed threatening, from Colombia. A part of his forces came into Venezuela by way of the Zulia and Catatumbo rivers. It may be reasonably presumed that this was the cause of the decree of July 29, 1901, revoking the permission given in that of March 4, 1901.

The concrete question, therefore, in the case is whether, under these physical and political conditions, Venezuela had the right to suspend the traffic on these rivers by the closing of these ports. She was in full possession of them and they were actually under her sovereignty. This distinguishes the case from that of the Orinoco Asphalt Company, just decided.<sup>1</sup>

As has been shown above, there is no substantial contradiction of authorities as to the rights of a state to regulate, and, if necessary to the peace, safety, and convenience of her own citizens, to prohibit temporarily navigation on rivers which flow to the sea. What is necessary to peace, safety, and convenience of her own citizens she must judge, and it seems to the umpire quite clear that in any case calling for an exercise of that judgment her decision is final. That a case for the exercise of this discretion did exist at the dates of the various decrees complained of is obvious, and in the opinion of the umpire the decision of Venezuela in the premises can not be reviewed by this Commission or any other tribunal. Being of the opinion that the closing of the ports of the Catatumbo and Zulia rivers under the circumstances which existed at the time was a lawful exercise of sovereignty by the Republic of Venezuela, the claim is disallowed.

A complete examination of the question leads back to the differing theories of the true source of natural law. It would extend this opinion to too great a length to discuss them, but a brief statement of them is pertinent.

Some philosophers, while admitting that human ideas of right spring solely from revelation, do not agree that natural law is but the consequence of revelation of divine or moral law. (Statel. Rechts philosophie, V. I.)

Others derive their idea of natural law from the most abstract theories of reason, without taking into account the continual changes of social relations, which, being the practical basis of that law, necessarily exert an influence on the idea itself. (Grotius-Kant.)

While others, still, putting aside both the abstract and objective idea of a Supreme Being, discuss the source of natural law in the supreme and absolute faculty of the abstraction they call *esprit du monde*. (Hegel.) They construct the moral and material world by the dialectic process of an abstract idea, and define the state as the realization of God in the world. The consequence is the complete absorption of the citizen in the state and the individual in the "pantheistic chaos of universal reason," which, on the other hand, has no conscience of its own. Still another school recognizes natural law as the science which

<sup>1</sup> See *supra*, p. 424.

exhibits the first principles of right founded in the nature of man and conceived by reason. (Ahrens.)

But when the crucial question comes, from what authority natural law is derived, each publicist seeks to solve it in his own way.

The theory of Grotius was that on the establishment of separate property which he conceived grew by agreement out of an original community of goods, there were reserved for the public benefit certain of the preexisting natural rights, and that one of these was the passage over territory, whether by land or by water, and whether in the form of navigation of rivers for commercial purposes, or of an army over neutral ground, which he held to be an innocent use, the concession of which it was not competent to a nation to refuse.

It is on this doctrine that some writers on international law uphold the principle of the freedom of river navigation.

Gronovius and Barbeyrac, in their notes to Grotius, consider the right of levying dues for permission to navigate rivers. This would seem to imply the right to prohibit navigation. It has been decided by the Supreme Court of the United States in the lottery cases that the right to regulate commerce includes the right to prohibit.

Bluntschli (par. 314) broadly states that water courses which flow into the sea, and navigable rivers which are in communication with an independent sea, are open to the commerce of all nations, but he restricts the right to the time of peace.

Calvo holds that where a river traverses more than one territory the right of navigation and of commerce on it is common to all who *inhabit its banks*, but when it is wholly within the territory of a single state it is considered as within the exclusive sovereignty of that state, He limits the exercise of that sovereignty to fiscal regulations, but seems to subordinate the right of property to that of navigation.

Fiore (758-768) agrees in the main with Calvo, that in the case of a river flowing through one state only, that state may close the river if it chooses.

It is difficult to sustain the distinction of a navigable river running into the sea.

Heffter, paragraph 77, says that each of the proprietors of a river flowing through several states, the same as the sole proprietor of a river, can, stricti jure, regulate the proper use of the waters, and restrict it to the inhabitants of the country and exclude others. But, on the other hand, he agrees with Grotius, Puffendorf, and Vattel, at least in principle, that the privilege of innocent use should not be refused absolutely to any nation and its subjects in the interest of universal commerce.

Wheaton (Elements of International Law, pt. 2, ch. 4, par. 11, Lawrence's ed.) declares that the right of navigation, for commercial purposes, of a river which flows through the territories of different states, is common to all the nations inhabiting *the different parts of its banks*. But this right of innocent passage being what the text writers call an *imperfect right*, its exercise is necessarily modified by the *safety and convenience* of the state affected by it, and can only be effectively secured by mutual convention regulating the mode of its exercise, citing Grotius, Vattel, and Puffendorf.

Halleck says (vol. 1, p. 147, chap. 6, sec. 23) that the right of navigation for commercial purposes is common to *all the nations inhabiting the banks of a navigable river*, subject to such provisions as are necessary to secure the *safety and convenience* of the several states affected.

De Martens, Précis, paragraph 84, recognizes, as a general rule, that the exclusive right of each nation to its territory authorizes a country to close its entry to strangers, but that it is wrong to refuse them innocent passage. It is

for the state to judge what passage is innocent. But he seems to think that the geographical position of another state may give it a right to demand, and in case of need to *force, a passage* for its commerce.

Woolsey, paragraph 62, says:

When a river rises within the bounds of one state and empties into the sea in another, international law allows to the inhabitants of the upper waters only a moral claim or imperfect right to its navigation.

Phillimore, in speaking of the refusal of England to open the St. Lawrence unconditionally to the United States, says (pt. 1, Par. CLXX):

It seems difficult to deny that Great Britain may have grounded her refusal on strict law; but it is at least equally difficult to deny that by so doing she put in force an extreme and hard law,

not consistent with her conduct with respect to the Mississippi.

Klüber, paragraph 76, considers that the independence of the states is to be particularly noted in the free and exclusive usage of the right over water courses — at least in the territory of the state in which the water course flows into the sea, navigable rivers, channels, and lakes are situate. \* \* \*

And that —

a state can not be accused of injustice *if it forbids all passage of foreign vessels on its water courses.*

flowing to the sea, rivers, channels, or lakes in its territory.

Twiss, Volume I, section 145, page 233, second edition, declares that —

a nation having physical possession of both banks of a river is held to be in juridical possession of the stream of water contained within its banks, and may rightfully exclude at its pleasure every other nation from the use of the stream whilst it is passing through its territory.

It is to be observed that distinctions are drawn by some of the above text writers, some declaring that the right of innocent use is confined to time of peace; others that only the inhabitants of those countries through which the river passes have the right of innocent use, while still others sustain the right without any limitation, save the right of the state to make necessary and proper regulations in respect to the use of the stream within its boundaries.

The theory of Grotius, mentioned above, has been said to be the “root of such legal authority as is now possessed by the principle of the freedom of river navigation.” (Hall’s *Treatise on International Law*, p. 137.) It does not appear to have been adopted by the best annotators on international law. Hall says: “It can no longer be accepted as an argumentative starting point.” (Hall’s *Treatise on International Law*, p. 139.)

Phillimore speaks of it as a “fiction which this great man believed,” and says:

But as the basis of this opinion clearly was, and is now universally acknowledged to be a fiction, this reason, built upon the supposition of its being a truth, can be of no avail. (Phillimore’s *Com. on International Law*, p. 190, Sec. CLVII.)

The other theory, also of Grotius, was because the use of rivers belonged to the class of things “*utilitatis innoxie*,” the value of streams being in no way whatever diminished to the proprietors by this innocent use of them by others, inasmuch as the use of them is inexhaustible. (Vattel, Bk. I, chap. 23.)

This right of mere passage by one nation over the domain of another, whether it be an arm of the sea, or lake or river, or even the land, is considered by him as one of strict law, and not of comity. It is said on the other hand that it is

not founded on any sound or satisfactory reason, and is at variance with that of almost all other jurists. (Phillimore, *ubi sup.*)

The same view was taken by Grotius, but the great weight of authority since Vattel is that the state through which a river flows is to be the sole judge of the right of foreigners to the use of such river. (Wheaton's International Law, Vol. I, p. 229, cited from Wharton, Vol. I, sec. 30, p. 97.)

Still another ground is asserted as a basis for this free use of rivers, viz., that conceding the proprietary rights of the state over that portion of the river within its boundaries, nevertheless these should be subordinated to the general interests of mankind, as the proprietary rights of individuals in organized communities are governed by the requirements of the general good. It is pertinently remarked by an eminent jurist that this —

involved the broad assertion that the opening of all waterways to the general commerce of nations is an end which the human race has declared to be as important to it as those ends to which the rights of the individual are sacrificed by civil communities, are to the latter. (Hall, p. 139.)

Most of the advocates of the innocent use of rivers base their claim upon the grounds that the inhabitants of lands traversed by another portion of the stream have a special right of use of the other portions because such use is highly advantageous to them. If the proprietary right of the state to the portion of the river within its boundaries be conceded, as it must be generally, there can be no logical defense of this position. It certainly is a novel proposition that because one may be so situated that the use of the property of another will be of special advantage to him he may on that ground demand such use *as a right*. The rights of an individual are not created or determined by his wants or even his necessities. The starving man who takes the bread of another without right is none the less a thief, legally, although the immorality of the act is so slight as to justify it. Wants or necessities of individuals can not create legal rights for them, or infringe the existing rights of others. (Hall, p. 149.)

It seems difficult upon principle to support the right to the free use of rivers as a right *stricti juris*. While this is not expressly admitted, it is tacitly conceded by nearly all the advocates. They define this right of use as an "imperfect right." The term is an anomaly. The fallacy is thus aptly stated by a learned authority on international law:

A right, it is alleged, exists; but it is an imperfect one, and therefore its enjoyment may always be subjected to such conditions as are required in the judgment of the state whose property is affected, and for sufficient cause it may be denied altogether. (Hall, p. 140.)

Woolsey terms it "only a moral or imperfect right to navigation."

However, it is no longer to be doubted that the reason of the thing and the opinion of other jurists, spoken generally, seem to agree in holding that the *right* can only be what is called (however improperly) by Vattel and other writers imperfect, and that the state through whose domain the passage is to be made "*must be the sole judge* as to whether it is innocent or injurious in its character." (Phillimore, CLVII, citing Puffendorf, Wheaton's Elements of International Law, Hesty's Law of Nations, Wolff's Institutes, Vattel.)

From this review of the authorities it seems that even in respect of rivers capable of navigation by sea-going vessels carrying oceanic commerce the weight of authority sustains the right of Venezuela to make the decrees complained of. But in the opinion of the umpire there are other considerations which control the decision in this case.

If the case before the umpire turned upon this general question of inter-

national law, the umpire is inclined to the opinion that he would be compelled to sustain the right of Venezuela to the complete control of navigation of the Catatumbo and Zulia rivers. In his opinion it is not necessary to decide the case on this ground. As has been shown above, there is no contradiction of authority as to the right of Venezuela to regulate, and, if necessary to the peace, safety, or convenience of her own citizens, to prohibit altogether navigation on these rivers. It is also equally without doubt that her judgment in the premises can not be reviewed by this Commission or any other tribunal. That a case for the exercise of discretion did exist is obvious.

The other claimants who ask damages for the closing of these ports are all residents of and doing business in Maracaibo, in Venezuela. There was suggestion in the discussion of the case that there might be different rule as between a Venezuelan resident and a resident of Colombia, but in the opinion of the umpire, given a common German nationality, there is no such difference.

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PLANTAGEN GESELLSCHAFT CASE

Evidential value of letters and unauthenticated receipts.<sup>1</sup> Valentin case affirmed.<sup>2</sup>

DUFFIELD, *Umpire*:

This claim is for 387,143.39 marks, and is founded on the alleged injuries to the haciendas of the claimants during the last civil wars. It appears that these haciendas were in the neighborhood of active military operations and the scene of considerable fighting. Part I of the claim in the amount of 369,968 marks and Part II in the amount of 7,354 marks are almost entirely made up of claims for consequential damages — loss of crops already planted, prevention of planting of other crops, inability to protect the growing crops from birds which destroyed them because of the impossibility of working and the frequent drafting of the laborers.

The Commissioners disagree as to the liability of Venezuela for these damages, and the case is governed by the decision of the umpire in the case of Hugo Valentin No. 12 (see p. 403).

The Commissioner for Germany, however, is of the opinion that there are certain "direct injuries proven, and although their value is not fixed, he leaves it to the umpire for reasons of equity to grant to the claimant an indemnification amounting in round figures to 20,000 bolivars." In the opinion of the umpire there is proof of very considerable injuries to the property of the claimant, for which the umpire would certainly have allowed him damages if he adduced any proof as to the amount of values. In the absence, however, of such proof, notwithstanding the hardship of the case, the umpire sees no legal or legitimate way of arriving at the sum of 20,000 bolivars. There is the testimony, however, of two witnesses, Oropeza and another, as to the destruction of 231,230 4-year-old coffee plants, a fair valuation of which, in the opinion of the umpire, is 20,000 bolivars, and this sum will be allowed the claimant.

Of Part III of the claim, 9,820.45 marks, the Commissioner for Venezuela allows 1,472 marks for property taken from a driver of the claimant company on the January 4, 1903, but denies the liability of Venezuela for the remainder of the part. His reasons therefor are as follows:

That the item of 5,504 marks is only proven by the letter or statement of

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<sup>1</sup> See *supra*, p. 438, and note.

<sup>2</sup> *Supra*, p. 403.

the manager of the hacienda, and that the prices which the claimant places on the animals which he says were lost are in general double their value. The Commissioner for Germany insists that the proof is sufficient, and fixes the value of the property taken upon the basis allowed by the Commission in the claim of Steinworth & Co., No. 55, and other claims, at 3,744 marks.

While the proofs as to these items are very meager, the umpire concurs in the opinion of the Commissioner for Germany and awards the claimant on account thereof 3,744 marks.

That the items for injuries from February 7, 1902, to January 31, 1903, 2,563.90 marks, are not proven, because the receipts purporting to be therefor are not authenticated. He also criticises them because they are stamped with the seal of the Jefatura Civil of Carayaca. In view of the fact that the evidence fully establishes the occupation of the hacienda by both Government forces and revolutionists, and the taking of property therefrom, the umpire is unable to agree with the Commissioner for Venezuela and disregard these receipts as evidence, and the claim will be allowed for the sums named in the receipts, which is the amount claimed.

The entire claim, therefore, is allowed at the sum of 30,098 bolivars, which includes interest up to December 31, 1903.

#### THE GREAT VENEZUELAN RAILROAD CASE

An agreement between the Government and the railroad company to the effect that if the railroad will carry troops and munitions of war the Government will see that the railroad is indemnified for all damages resulting therefrom is absolutely void, as it is against public policy, and because the railroad company as a quasi public corporation is bound to carry all persons and freight, not in themselves obnoxious, which may be presented to it.

Kummerow case<sup>1</sup> affirmed.

Only legal rate of interest as provided by Venezuelan laws will be allowed on claims. Government of Venezuela not liable for damages caused by guerrillas.

No damages allowed for suspension of traffic over railroad during period of active operations in the field through which the railroad passed because this was justified as a military necessity.

DUFFIELD, *Umpire* :

This claim is for the aggregate sum of 931,186.50 bolivars. It is made up of four claims, each of which is again divided into items, and some of those items into parts, as hereinafter particularly stated:

Claim I is for . . . . .	<i>Bolvars</i>	190,250.86
Embraced in —		
Item 1 for . . . . .	<i>Bolvars</i>	142,615.00
Item 2 for . . . . .		47,635.86
Claim II is for . . . . .		40,594.77
Embraced in —		
Item 1 for . . . . .		37,181.50
Item 2 for . . . . .		3,413.27
Claim III is for . . . . .		225,991.63
Embraced in —		
Item 1 for . . . . .		213,199.65
Item 2 for . . . . .		12,791.98

<sup>1</sup> *Supra*, p. 369.

Claim IV is for . . . . .	790,346.60
Embraced in —	
Item 1 for . . . . .	789,500.53
Item 2 for . . . . .	846.07
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Aggregating . . . . .	931,186.50

## CLAIM I

Item 1 of this claim, 142,615 bolivars, is divided into two parts. The first part is for 6,215 bolivars, for damages for injuries caused by the derailment near Cagua of a special night train from Maracay to Cagua, on December 19, 1901. The second part is for 136,400 bolivars, for damages for the suspension of all traffic on the railroad from December 23, 1901, to January 9, 1902, by an order of the department of public works (ministerio de obras publicas) of December 23, 1901, published in the Official Gazette of the 26th of December, 1901, No. 2481.

Item 2, 47,635.86 bolivars, is for interest to July, 1903, at 12 per cent per annum on item 1.

## CLAIM II

Item 1, 37,181.50 bolivars, is composed of parts "a" and "b." Part "a," 10,181.50 bolivars, is for damages and injuries owing to the transportation by the railroad of troops and munitions of war. Part "b," 27,000 bolivars, is for damages and injuries to the steam tramway from Guigue and to the steamer *Lake Valencia* between December 30, 1901, and October 1, 1902.

Item 2, 3,413.27 bolivars, is for interest at 12 per cent per annum to July, 1903, on item 1.

## CLAIM III

Item 1, 213,199.65 bolivars, is composed of parts "a" and "b." Part "a" is for 169,767.40 bolivars for damages and injuries to the railroad owing to transportation of troops and munitions of war and for the enforced suspension and interruption of traffic from October 1 to December 1, 1902. Part "b" is for 43,432.25 bolivars for damages and injuries to the road owing to transportation of troops and for the enforced suspension and interruption of traffic to the end of 1902.

Item 2, 12,791.98 bolivars, is for interest at 12 per cent per annum to July, 1903, on item 1.

## CLAIM IV

Item 1, 789,500.53 bolivars, is made up of two parts. The first part, 537,632.90 bolivars, is for fares and freight in 1899 and the balance due on the order of the board of public works (ministerio de obras publicas), dated July 12, 1900, on the Bank of Venezuela. In the statement of the claim there is no division of this part showing how much of it is fares and freights and how much balance due on the order. The second part, 251,867.63 bolivars, is interest on the above part.

Item 2, 12,791.98 bolivars, is composed of two parts. The first part, 557.45 bolivars, is for fares of the government of the Federal district, charged to the National Government under the authority of its note of October 7, 1901. The second part, 288.62 bolivars, is for interest on the said first part.

The Commissioners agree upon the allowance of claim IV at the sum of 575,056 bolivars, which includes interest to the 31st of December, 1903. (Vide acts of the sixteenth session, July 27.) Upon all of the other items they disagree

The first opinion of the Commissioner for Venezuela was completed before

that of the Commissioner for Germany, and is referred to therein. It is not disputed that the official of the railroad company in charge at Maracay refused the request of General Bello, commandant at arms at that place, for a train to Cagua on the night of the 19th of December, 1901, at 9.30, and General Bello was only able to obtain it by force a little after 2 o'clock on the morning of the 20th. Even then —

neither the engineer nor the company rendered any assistance to the chief of the Government, who was starting out for no less a purpose than to destroy the revolution at its root and to capture its principal military chief.

Prior to this the company, on the 16th of the same month, through its managing director, sent to the minister of public works a letter in which he stated that he had received an anonymous letter — published in full in the Official Gazette of the 26th of December, 1901, No. 8421 — containing, among other things, the following:

The transportation over the railroad belonging to your company may bring many injuries upon your line and may be the cause of many misfortunes.

#### THE PARTIES INTERESTED

In the correspondence between the railroad and the Government at this time, which is found in the Official Gazette of the 26th and 28th of December, 1901, and January 13, 1902, the managing director of the railroad company writes that he has received an anonymous letter threatening his company with injuries in case it transported any troops or material of war for the Government, and requests the minister of public works to forward the note to the President of the Republic in order that he might order the stoppage of transportation of war material and troops over the line, or, if that was impossible, to satisfactorily guarantee the company reparation for all the injuries and losses that might come to it because of such transportation. To this note the minister of public works replied, criticising the managing director for taking so much notice of an anonymous letter and that the time of conflict, which in his imagination had begun, or which he knew from his knowledge of affairs was about to begin, should seem to him a propitious time to collect from the Government sums which former administrations owed, administrations the company had not refused to serve with transportation without guaranties, and of which the present Government had paid up to August, 1901, nearly 400,000 bolivars and had always paid the railroad its own obligations.

On the 22d of December, 1901, the managing director of the railroad declined to fill an order for the transportation of a detachment of troops. In connection with this refusal the managing director sent to the minister of public works a letter, from one Rodriguez, calling himself "chief of greater state, of division 'Caracas.'" in which he threatened damage to the railroad if they carried troops or munitions of war for the Government.

On the 23d of December the prefect of police, and subsequently the governor of the district at Caracas, stopped a train and ordered the suspension of all trains. To the complaint of the managing director for this action the minister of public works replied, stating there was no revolution at the time of the director's first letter, and commenting upon the director's knowledge of what afterwards happened, and saying that the Government finds it necessary to order that if it can not get service from the railroad the railroad shall not give it to others, and that on account of his conduct the Government considered the managing director hostile to the interests of public peace.

After considerable acrimonious correspondence, and a request by the Government to the Berlin directors of the railroad to substitute another managing

director, because the Government considered the present one to have taken a hostile attitude, even before the revolution, to which the Berlin directors did not accede, saying they did not believe the managing director was a revolutionist, and asking proof of his illegal conduct, the parties entered into an agreement on the 9th day of January, 1902. The agreement was executed by the minister of public works on the part of the Government and the managing director on the part of the railroad. In it the company "acknowledges the obligation of transporting troops and material of war for the Government," and the Government obliges itself in cases of war to indemnify the railroad for the losses which it may suffer because of such transportation, including pensions to Venezuelans, according to Venezuelan law, and to foreigners in a gross sum equal to nine years' salary, and agrees to order the opening of traffic on the railroad.

The conclusion which the Commissioner for Venezuela wishes should be deduced from these facts is not clearly stated in his opinion, but as he says, "for these reasons I disallow the entire claim I, 142,615 bolivars," it is fair to infer that he is of the opinion that this conduct on the part of the managing director absolved the Government from all liability for the derailment of the train from Maracay to Cagua and for the suspension of traffic.

The Commissioner for Germany is, however, of the opinion that there is no evidence of the charge that the railroad or its managing director were in any wise connected or in complicity with the revolutionists, and he somewhat warmly resents this imputation against the company. While he does not expressly make the claim, it is fairly inferable that he bases the right of the company to damages for the suspension of traffic upon the agreement of the Government to guarantee the company as above stated. This agreement, he says, was made through the exchange of diplomatic notes, the imperial legation reserving to the railroad the right to collect for injuries and losses owing to the suspension of traffic. The actual agreement, however, makes no reference to either diplomatic notes or to a reservation of a right to collect for injuries and losses owing to the suspension of traffic.

The umpire is unable to concur in the opinion of either of the Commissioners. In his opinion there is not sufficient proof to establish any complicity of the managing director with the revolutionists, although his peculiar if not inexplicable conduct in the transaction might naturally lead the Government to suspect it. On the other hand, the umpire is clearly of the opinion that the contract between the minister of public works and the railroad, in which the minister attempts to bind the Government for all the injuries which the railroad may suffer because of its performance of a lawful act, if not duty, in transporting troops and material of war to enable the Government to put down a rebellion, is utterly invalid — first, because it is contrary to public policy and conflicts with the highest law of any nation, the safety of its people; and, second, because it is the duty of a railroad company which exercises public functions, and it a quasi public corporation, to carry all freight and passengers not in themselves obnoxious which may be offered for transportation. Moreover, the company was bound by its express agreement to carry troops and munitions of war in the article of its concession which stipulated the rates of fares and freights to be paid. It is utterly inconsistent with the constitutional powers of a government and with the most sacred rights of its people to hold that a railroad company may, upon the mere basis of threats of persons, anonymous or not, to commit unlawful acts, decline to perform a lawful act. Revolutions are unlawful — are positively illegal; their object is to break down the *de jure* and *de facto* government and to destroy the existing system of law; their leaders and followers are by the laws of all civilized nations guilty of the

highest crime known to the law, treason, and until success, therefore, anyone who aids or abets a revolution is a violator of the law and any citizen who omits or fails to assist the government violates his duty as a citizen. And while a corporation has no political status, one created by a government with special and quasi public privileges owes the legal duty to that government to exercise its franchise in the latter's behalf and for its assistance.

For these reasons the railroad company, in the opinion of the umpire, can base no claim upon its agreement.

The liability of Venezuela, therefore, for the suspension of traffic in 1901 must depend upon general principles of law. There can be no reasonable doubt that it is the right of a government, in situations of danger or organized rebellion and revolution, to take such measures as it may deem proper to prevent the passage of persons, either for travel or business, from one point to another in the localities where there are armed and organized troops of insurrectionists, and to this end it certainly has the power and the right to suspend traffic upon any line of transportation; but this right is coupled with a corresponding duty, which is to make proper compensation to the company in cases other than those where the territory traversed by the railroad is the theater of active warlike operations between armed forces.

The Commissioner for Venezuela does not specifically claim that Venezuela had the right to suspend traffic over the railroad because the latter had lent itself to, if not associated itself with, the revolutionary movement of Matos, but he distinctly claims that the railroad had so associated itself, and that therefore, inasmuch as the railroad was carrying goods for the revolutionists, and also persons who were enabled by such facilities of travel to assist the revolutionists and do great harm to the Government, it was in the power of the latter, for which it refused to carry troops or munitions of war —

to order that if no service could be given it, as the requirements of public safety and order demanded and in accordance with its contract with the company, neither could there be any service for individuals or enemies of public peace.

Reduced to a legal proposition, his position is, that because of the unauthorized refusal of the company to exercise its functions at the demand of the Government the latter could abrogate its contract with the company pro tanto and suspend the exercise of its franchise. In effect this is to claim that the company had put itself in the position in which an alien enemy is regarded in international law, and thereby had lost, at least temporarily, the right of enjoyment of its otherwise lawful privileges.

Whether this position could be successfully maintained if the facts warranted its premises is doubtful, but in the opinion of the umpire the testimony does not make out such a case. There is some evidence tending to show support of the revolutionists by individual employees of the company, but the umpire concurs in the view of the Commissioner for Germany that so far as the company and its principal management were concerned there is not sufficient evidence against them. The testimony shows that in the few cases in which such individual action is shown such individuals were immediately and definitely discharged from the service of the company, or only reemployed when the Government withdrew its objection. He can not, however, assent to the proposition of the Commissioner for Germany that because the Government then was not constitutionally organized, but only provisionally exercising the power into which it had come by force of arms, it did not have in the premises the legal rights of a constitutional government. In the opinion of the umpire, it was a de jure as well as a de facto government. In deciding this claim, therefore, the company must be acquitted from any such charge, and the question of the liability

of Venezuela for the damages for the suspension of traffic must be determined without regard to such charge.

The same considerations lead to the conclusion also that the liability of Venezuela for injuries to and seizures of property of the railroad company by revolutionists must be determined in the same way. The claimant charges that the injuries to its property were in consequence of its transportation of troops and munitions of war for the Government. In the opinion of the umpire, however, this claim is not substantiated by the testimony. The mere fact that revolutionists destroyed the railroad at various points connected with active military operations raises no presumption that such injuries were in retaliation of or punishment for the lawful exercise of the company's powers in carrying Government troops and munitions of war. The irresistible presumption is that the revolutionists would destroy the railroad wherever and whenever they thought such destruction would place obstacles in the way of the successful military operations of the Government. The liability of Venezuela, therefore, must depend upon the general principles of international law, as modified by her admission in the protocol of liability for wrongful acts of revolutionists. Under them the umpire is of opinion that the case of the company differs in no respect from that of any private individual in like predicament, and under the former decisions of the umpire Venezuela is liable.

Coming to the consideration of the claim upon its merits, it will be more convenient to take up the items separately and in the order in which they are presented.

Part 1 of item 1 of claim I is for 6,215 bolivars for damages caused by the derailment of the train taken by General Bello from Maracay to Cagua on the night of the 19th of December. It appears from the proofs that the engineer, Sanchez, refused to recognize the authority of General Bello, because the regulations of the company did not authorize an assistant engineer to send out special trains, and because the instructions of the Government limited the authority to ask for special trains to the civil and military chiefs of the districts of La Victoria and Valencia. Further, because the railroad was not equipped for night service and stations are not occupied, and the signal service and track service were entirely suspended during these hours. In addition, the Cagua station on the day in question had notified the Maracay station that the railroad would probably be destroyed by revolutionists. It appears, however, that President Alcántara subsequently approved the request of General Bello, and in such an emergency as this appears to have been it is doubtful if the ordinary regulations of the company applied. The proofs tend to show that the rails and ties were taken up by revolutionists.

In view of all the circumstances, the umpire is of opinion that the claimant is entitled to recover upon the ground that General Bello, having taken control of the train under the circumstances, having knowledge of all the facts above stated as to the condition of the road for night service, and the notice from Maracay of a probable raid on the road, made the trip at his peril, and did not exercise the necessary amount of care that he should. It is true that there is a dispute as to the time of the trip and the rate of speed, but under the circumstances under which the trip was made the speed of the train should not have been greater than would allow the stoppage of the train in the distance which the headlight of the engine would show an obstruction or break in the road.

As the Commissioner for Venezuela makes no objection as to the amount of the item, it is therefore allowed at the amount claimed.

Part 2 of item 1 of claim I is for the suspension of all traffic on the railroad from the 23d of December, 1901, to the 8th of January, 1902, inclusive, at

8,000 bolivars per day (136,000 bolivars), and for the suspension of train 6 on January 9 from Los Teques to Caracas, 400 bolivars.

This 8,000 bolivars per day is arrived at by taking the average of the operating expenses of the road per day in the years 1897 to 1901, 4,858 bolivars, less 9 tons of coal per day, at 60 bolivars per ton, 540 bolivars, making 4,318 bolivars. Adding thereto the interest at 3 per cent per annum on the capital of the company (which is 75,000,000 bolivars, less 36,000,000 bolivars of 5 per cent bonds of the Venezuelan loan of 1896 given in exchange for the 7 per cent guaranty of the Government of Venezuela, leaving capital of 39,000,000 bolivars), 3,250 bolivars per day, plus the proportional deduction of value for wear and tear on locomotives and cars, superstructure of the line, viaducts of iron, buildings, shops, water tanks, and other constructions, 1,179 bolivars, aggregating 9,347 bolivars per day.

The claimant submits a statement of traffic receipts for the month of January, 1901, which averages 7,848 bolivars, and takes for a basis of its claim the sum of 8,000 bolivars per day instead of the above sum of 9,347 bolivars per day. It also submits a statement of operating and other expenses from 1897 to 1901, both inclusive, from which the daily operating expenses of the company appear to be 4,858 bolivars. But it does not appear that the claimant gives any credit for these expenses as against its traffic receipts.

It is evident that the basis of computation in the *expediente* by which the per diem loss of 9,347 bolivars is reached is not sustainable. It is arrived at by taking the total operating expenses of the road, less the consumption of coal, and adding thereto interest at 5 per cent on the amount of capital of the company, less the 36,000,000 bolivars in Venezuelan bonds, and again adding depreciation in value of physical property. For some reason, which is unexplained, while the total receipts of the month of January, 1901, are given, the operating expenses for that month are not given, but the average daily operating expenses for the years 1897 to 1901, inclusive, are given. A representative of the company, at the suggestion of the Commissioner for Germany, appeared before the Commission to explain the *expediente*. As a result of his examination by the umpire the Commission requested a statement of the operating expenses of January, 1901. This has been furnished and it shows a daily net profit of receipts over operating expenses of 3,463.60 bolivars. But included in the operating expenses is an item for new structures and permanent betterments of the property in the amount of 6,020.55 bolivars. Ordinarily an expenditure of this character is not considered a proper charge to operating expenses. In view, however, of the circumstances in the case, and the belief of the umpire that on account of the unsettled state of the country in January, 1902, the receipts of the road would not have equalled those of the corresponding month of 1901, the umpire accepts the figures submitted by the company as to operating expenses. Upon this basis, the correctness of which can not be questioned, the company's loss during the 17 days' suspension was 58,881.20 bolivars, to which add for the suspension of train 6, on January 9, 1901, 400 bolivars, and we have for part 2 of claim I, 59,281.20 bolivars, upon which interest is to be computed at 3 per cent per annum up to and including December 31, 1903.

Item 2 of claim I is for interest on item 1, calculated at 12 per cent per annum, compounding with half-yearly rests, amounting to 47,635.86 bolivars. The legal rate of interest in Venezuela is 3 per cent per annum. This item is disallowed.

Part *a* of item 1 of claim II, 10,181.50 bolivars, for damages and injuries owing to transportation of troops and munitions of war, is made up of various items of detention of traffic and injuries to the road, from July 22, 1902, to

September 25, 1902, of which the Commissioner for Germany is of opinion that the items specified in his opinion for 8 bolivars, 658.50 bolivars, and 95 bolivars, aggregating 751.50 bolivars, should be disallowed. An additional item on pages 2 and 3 of the statement of claim II, 250 bolivars, is for damages by guerrillas, for which the umpire is of opinion the Government of Venezuela is not liable. With these deductions part *a* amounts to 9,170 bolivars.

Part *b* of item 1 of claim II, 27,000 bolivars, is for suspension of traffic and damages and injuries to the steam tramway from Guigue and for the steamer on Lake Valencia, in October, 1901, and July, 1902. The proofs establish the facts, and as no objection to the fairness of the amounts charged is made by the Commissioner for Venezuela the item will be allowed at the sum claimed. Item 1 is therefore allowed at 36,170 bolivars, with interest to be computed as above stated.

Item 2 of claim II is for interest on item 1 calculated at 1 per cent per month with a three months' rest, and is disallowed.

The sum of 141,184.15 bolivars, being a portion of part *a* of item 1 of claim III, is claimed for indemnification for the interruption and enforced suspension of traffic between the 1st of October, 1902, and the 7th of November, 1902.

The Commissioner for Venezuela is of opinion that the entire amount of this claim should be disallowed, as the suspension was a necessary part of the military operations when the army of the revolution occupied the villages of Maracay and Cagua and the forces of the Government with the President in the field were in Victoria engaged in a campaign which ended with the battle fought at Victoria. The suspension of traffic was by order of the President, in command of the armies in the field, and his minister of war.

The following, summarized from the opinion of the Commissioner for Venezuela, is believed to be a correct statement of the situation:

During this period the revolutionists of General Matos occupied, with an army of from 12,000 to 15,000 men, the villages of Maracay, Cagua, etc., and President Castro occupied La Victoria. The plan of the Matos leaders was to move upon La Victoria from Maracay on the west and Cagua on the west and south, and also on the east from the neighborhood of Los Teques. The topography of the country is such, by reason of hills and mountains running from the north and south to the valley of the river Aragua, that the line of least resistance and of most rapid communication would be in that valley. The Great Venezuelan Railroad runs through this valley generally parallel with the river. In the attempted execution of the plan above mentioned the forces of the revolutionists approaching from the east engaged the forces of President Castro at Los Teques, while the forces of the revolutionists approaching from Maracay and Cagua engaged the President's forces in final battle at La Victoria, in which the President was completely successful. The control of operation of the railroad, therefore, would be of the most vital importance to the success of President Castro.

The umpire agrees with the Commissioner for Venezuela that the suspension of traffic over the railroad during the period of these active operations in the field was a military necessity, and that the Government was justified in directing it.

That portion of part *a* of item 1 of claim III, 28,583.25 bolivars, for damages and injuries to the railroad owing to the transportation of troops and munitions of war and the enforced suspension and interruption of traffic at various dates in the months of September, October, November, and December, 1902, is allowed by the Commissioner for Germany with the exception of 53 bolivars.

No specific objection is made by the Commissioner for Venezuela to any detail of these items, although he claims that Venezuela is not liable and

generally that the amounts are greatly exaggerated. In the absence of any proof contradicting that put in on behalf of the claimant and the lack of any showing on the part of Venezuela against these amounts, the umpire is compelled to accept the claimant's proof. For these reasons he concurs in the allowance made by the Commissioner for Germany at the sum of 28,530.25 bolivars.

Part *b* of item 1 of claim III, 43,432.25 bolivars, is for damages and injuries similar to those in part *a*, in the months of April, 1900, and April, October, November, and December, 1902, and suspension of traffic of the steam tramway to Guigue and the steamboat on Lake Valencia. The Commissioner for Germany allows this part, except the charge for April, 1900, 7,800 bolivars. In this conclusion the umpire concurs, and part *b* of item 1 of claim III is allowed at the sum of 35,632.25 bolivars.

Item 2 of claim III for 12,791.88 bolivars, is for interest on item 1 at 12 per cent per annum from the 1st of January, 1903, to the 30th of June, 1903, and is disallowed.

Claim IV, 780,500.53 bolivars, as already stated, has been allowed by the Commissioners at the sum of 575,056 bolivars, in which the umpire concurs, and it will be so awarded.

The entire claim, therefore, is decided as follows:

Item 2 of claim I, item 2 of claim II, and item 2 of claim III, being for interest on items 1 of claims I, II, and III, respectively, are disallowed.

That part of part *a*, item 1 of claim III, on account of suspension of traffic from October 1 to December 1, 1902, amounting to 141,184.15 bolivars, is also disallowed.

Parts 1 and 2 of item 1 of claim I are allowed in the sum of 65,496.20 bolivars.

Item 1 of claim II is allowed in the sum of 36,170 bolivars.

That portion of part *a* of item 1 of claim III, on account of injuries to railroad, is allowed at 28,530.25 bolivars.

Part *b* of item 1 of claim III is allowed at the sum of 35,632.25 bolivars.

Making the aggregate amount of the allowances by the umpire 165,828.70 bolivars, to which is added for interest from June 15 to December 31, 1903, on the last-named sum, 2,694.71 bolivars, aggregating 168,523.41 bolivars. To this must be added the amount of claim IV, allowed by the Commissioners at the sum of 575,056 bolivars, which, however, includes interest to December 31, 1903, making the total allowance on the entire claim, including interest to December 31, 1903, of 743,579.41 bolivars.

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MIXED CLAIMS COMMISSION  
ITALY - VENEZUELA  
CONSTITUTED UNDER THE PROTOCOLS  
OF 13 FEBRUARY AND 7 MAY 1903

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**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. 643-871.**



## PROTOCOL OF FEBRUARY 13, 1903

Whereas certain differences have arisen between Italy and the United States of Venezuela in connection with the Italian claims against the Venezuelan Government, the undersigned, Mr. Herbert W. Bowen, duly authorized thereto by the Government of Venezuela, and His Excellency Nobile Edmondo Mayor des Planches, Commander of the Orders of S.S. Maurice and Lazarus and the Crown of Italy, Ambassador Extraordinary and Plenipotentiary of His Majesty, the King of Italy, to the United States of America, have agreed as follows:

### ARTICLE I

The Venezuelan Government declare that they recognize in principle the justice of the claims which have been preferred by His Majesty's Government on behalf of Italian subjects.

### ARTICLE II

The Venezuelan Government agree to pay to the Italian Government, as a satisfaction on of the point of honor, the sum of £5,500 (five thousand five hundred pounds sterling), in cash or its equivalent, which sum is to be paid within sixty days.

### ARTICLE III

The Venezuelan Government accept, recognize and will pay the amount of the Italian claims of the first rank derived from the revolutions of 1898-1900, in the sum of 2,810,255 (two million, eight hundred and ten thousand, two hundred and fifty-five) bolivars.

It is expressly agreed that the payment of the whole of the above Italian claims of the first rank will be made without being the same claims or the same sum submitted to the Mixed Commission and without any revision or objection.

### ARTICLE IV

The Italian and Venezuelan Governments agree that all the remaining Italian claims, without exception, other than those dealt with in Article VII hereof, shall, unless otherwise satisfied, be referred to a Mixed Commission, to be constituted as soon as possible in the manner defined in article VI of the Protocol and which shall examine the claims and decide upon the amount to be awarded in satisfaction of each claim.

The Venezuelan Government admit their liability in cases where the claim is for injury to persons and property and for wrongful seizure of the latter, and consequently the questions which the Mixed Commission will have to decide in such cases, will only be:

- (a) Whether the injury took place or whether the seizure was wrongful; and,
- (b) If so, what amount of compensation is due.

In other cases the claims will be referred to the Mixed Commission without reservation.

## ARTICLE V

The Venezuelan Government being willing to provide a sum sufficient for the payment, within a reasonable time, of the claims specified in articles III and IV and similar claims preferred by other Governments, undertake and obligate themselves to assign to the Italian Government, commencing the first day of March, 1903, for this purpose, and to alienate to no other purpose 30 per cent. of the customs revenues of La Guaira and Puerto Cabello. In the case of failure to carry out this undertaking, and obligation, 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 mentioned claims, shall have been discharged.

Any question as to the distribution of the customs revenues so to be assigned and as to the rights of Italy, Great Britain and Germany to a separate settlement of their claims shall be determined in default of arrangement, by the Tribunal at The Hague, to which any other power interested may appeal. Pending the decision of the Hague Tribunal the said 30 per cent of the receipt of the customs of the Ports of La Guaira and Puerto Cabello are to be paid over to the representatives of the Bank of England at Caracas.

## ARTICLE VI

The Mixed Commission shall consist of one Italian member and one Venezuelan member. In each case, where they come to an agreement their decision shall be final. In cases of disagreement, the claims shall be referred to the decision of an umpire nominated by the President of the United States of America.

## ARTICLE VII

The Venezuelan Government further undertake to enter into a fresh arrangement respecting the external debt of Venezuela with a view to the satisfaction of the claims of the bondholders. This arrangement shall include a definition of the sources from which the necessary payments are to be provided.

## ARTICLE VIII

The Treaty of Amity, Commerce and Navigation between Italy and Venezuela of June 19, 1861, is renewed and confirmed. It is however expressly agreed between the two Governments that the interpretation to be given to the articles 4 and 26 is the following:

According to the article 4, Italians in Venezuela and Venezuelans in Italy cannot in any case receive a treatment less favorable than the natives, and according to the article 26, Italians in Venezuela and Venezuelans in Italy are entitled to receive, in every matter and especially in the matter of claims, the treatment of the most favored Nation, as it is established in the same article 26.

If there is doubt or conflict between the two articles, the article 26 will be followed.

It is further specially agreed that the above treaty shall never be invoked in any case against the provisions of the present Protocol.

## ARTICLE IX

At once upon the signing of this Protocol, arrangements shall be made by His Majesty's Government, in concert with the Governments of Germany and Great Britain to raise the blockade of the Venezuelan ports.

His Majesty's Government will be prepared to restore the vessels of the

Venezuelan Navy which may have been seized and further to release any other vessel captured under the Venezuelan flag during the blockade.

The Government of Venezuela hereby obligate themselves and guarantee that the Italian Government shall be wholly exempted and relieved of any reclamations or claims of any kind which may be made by citizens or corporations of any other Nation, for detention or seizure or destruction of any vessel or of goods on board of them, which may have been or which may be detained, seized or destroyed, by reason of the blockade instituted and carried on by the three Allied Powers against the Republic of Venezuela.

ARTICLE X

The Treaty of Amity, Commerce and Navigation of June 19th, 1861, having been renewed and confirmed in accordance with the terms of article VIII of this Protocol His Majesty's Government declare that they will be happy to reestablish regular diplomatic relations with the Government of Venezuela.

H. W. BOWEN

E. MAYOR DES PLANCHES

WASHINGTON, D.C., *February 13, 1903.*

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PROTOCOL OF MAY 7, 1903

Mr. Herbert W. Bowen as Plenipotentiary of the Government of Venezuela, and the Royal Italian Ambassador Nobile Edmondo Mayor des Planches as representative of the Royal Italian Government, in order to carry out the provisions contained in articles IV, V and others of the Venezuelan-Italian Protocol of February 13th 1903, have signed the following agreement with reference to the Mixed Commission which shall have to decide upon the Italian claims against the Government of Venezuela:

ARTICLE I

The members of the Mixed Commission who are to be appointed by the Government of Venezuela and by the Royal Italian Government shall meet at Caracas on the first of June, 1903.

The umpire who is to be nominated by the President of the United States of America shall join the Commission as soon as possible.

The umpire is to be consulted in the proceedings and decisions whenever the Venezuelan and the Italian Commissioners fail to agree, or otherwise deem it appropriate to consult him.

Whenever the umpire will be present at the meeting he shall preside.

If after the convening of the Commission the umpire or either of the commissioners should be unable to fulfill his duties, his successor shall be appointed forthwith in the same manner as his predecessor.

The Venezuelan and the Italian Commissioners may each appoint, if necessary, a secretary versed in the Spanish and in the Italian languages to assist them in the transaction of the business of the Commission.

ARTICLE II

Before assuming the functions of their office the umpire and both the commissioners shall make solemn oath or declaration carefully to examine and impartially to decide according to the principles of justice and the provisions of the Protocol of the 13th of February, 1903, and of the present agreement,

all claims submitted to them; the oath or declaration so made shall be embodied in the record of their proceedings.

The decisions of the Commission shall be based upon absolute equity, without regard to objections of a technical nature or of the provisions of local legislation. They shall be given in writing both in Spanish and Italian. The awards shall be made payable in English gold or in silver at the current rate of exchange of the day at Caracas.

#### ARTICLE III

The claims shall be presented to the commissioners by the Royal Italian Legation at Caracas before the first day of July, 1903. A reasonable extension of this term may eventually be granted by the commissioners. The commissioners shall be bound to decide upon every claim within six months from the day of its presentation, and in case of the disagreement of the Venezuelan and of the Italian Commissioners, the umpire shall give his decision within six months after having been called upon.

The commissioners shall be bound before reaching a decision, to receive and carefully examine all evidence presented to them by the Government of Venezuela and the Royal Italian Legation at Caracas, as well as oral or written arguments submitted by the agent of the Government or of the Legation.

The secretaries mentioned in Article I Section 4 of this agreement shall keep an accurate record of the proceedings of the Commission; the Protocols have to be drawn up in duplicate copies which have to be signed by the secretaries and the members of the Commission that have taken part in the proceedings. After the work of the Commission will have come to an end, a certified copy of each of these Protocols is to be handed over to the Government of Venezuela and to the Royal Italian Legation.

#### ARTICLE IV

Except as herein stipulated, all questions of procedure shall be left to the determination of the commissioners, and, in case of their disagreement, the umpire shall decide them; in particular, they shall be authorized to receive the declaration of the claimants or their respective agents, and to collect the necessary evidence.

#### ARTICLE V

The umpire shall be entitled to a reasonable remuneration for his services and expenses, which is to be paid in equal moieties by the Government of Venezuela and by the Royal Italian Government, as well as any other expenses of the said Commission.

The remunerations to be granted to the two other members of the commission and to the secretaries are to be paid by the Government by whom they have been appointed. In the same way each Government will have to pay any other expenses which it may incur.

Washington, D.C., May 7, 1903.

H. W. BOWEN [SEAL.]

E. MAYOR DES PLANCHES [SEAL.]

#### PERSONNEL OF ITALIAN-VENEZUELAN COMMISSION

*Umpire.* — Jackson H. Ralston, of Washington, D.C.

*Italian Commissioner.* — Ruffillo Agnoli.

*Venezuelan Commissioner.* — Nicomedes Zuloaga.

*Italian Secretary.* — Adelchi Gazzurelli.

*Venezuelan Secretary.* — Segundo A. Mendoza.

*Umpire's Secretary.* — William Giusta, of Washington, D.C.

## RULES OF ITALIAN-VENEZUELAN COMMISSION

## I

*Meetings.* — The Commission shall meet on Thursdays and Saturdays at 9 a.m. and at such other times as in its judgment may seem necessary in order to expedite its business.

## II

*Minutes.* — The secretaries shall keep duplicate originals of the minutes of the proceedings, entered in books provided for the purpose and prepared, respectively, in Italian and Spanish, which minutes are to be presented at the opening of the subsequent meeting, and when found satisfactory shall be signed by the umpire, if present at the proceedings to which they relate, and by the remaining members of the Commission.

## III

*Docket.* — Each secretary shall keep a docket, entering thereon the respective claims by the name of the individual claimant, giving each a number, and stating the date of presentation to the Commission, and also the date and nature of every other paper filed or transaction of the Commission or umpire relating thereto.

## IV

*Reply of Venezuela.* — At any time before decision is rendered in a particular case the Government of Venezuela, through its agent, shall have the right to oppose the claim, presenting such proofs and allegations as it may deem proper or requesting the delay for so doing.

## V

*Custody of records.* — The secretaries shall be charged with the custody of all records submitted to the Commission. When the labors of the Commission shall be entirely terminated, original records shall be returned to the Government depositing them. The secretaries shall also file with their respective Governments the books kept by them. All papers shall be indorsed by the secretaries with the date of filing.

At any time the Government of Venezuela or the legation of Italy, or their agents, shall be entitled to receive from the secretaries a copy, duly certified by them, of whatever document may be found in the archives of the Commission. Certified copies of documents which are of such nature that they can not conveniently be removed from the archives of the Royal Italian legation or of the Government of Venezuela may be offered in evidence, the right at all times to examine the originals being accorded to the Commission or to the opposing party.

## VI

*Opinions.* — The opinions of the several commissioners (including the umpire) shall be transcribed in duplicate books kept severally therefor by the secretaries and carefully compared with the originals.

## VII

In every other rule of procedure the Commission shall refer to the provisions of the protocol of May 7, 1903, and in case of disagreement between the commissioners as to the proper interpretation or application of said provisions the umpire shall decide.

## VIII

*Amendments.* — The Commission reserves the right at all times to change these rules as occasion demands.

## OPINIONS ON QUESTIONS OF PROCEDURE

## TIME FOR SUBMITTING CLAIMS

Extension of time for submitting claims should only be granted upon cause shown. Such cause being shown an extension is granted under conditions to November 1, claims to be notified to the Commission by August 9.

RALSTON, *Umpire*:

I have carefully considered the application, under date of June 8, made by the royal Italian legation at Caracas for a reasonable delay, for the purpose of transmitting claims of Italian subjects as well as of obtaining proofs in connection therewith, such delay being requested under the protocol of May 7, by virtue of which, together with that of February 13, 1903, this tribunal is in existence, and the application in question being referred to me as umpire because of a difference of opinion arising between the Commissioners for Italy and Venezuela.

The language of the protocol is that —

The claims shall be presented to the Commissioners by the royal Italian legation at Caracas before the 1st day of July, 1903. A reasonable extension of the term may eventually be granted by the Commissioners.

According to my interpretation of the words "may eventually" the Commission is not obliged as a matter of course to grant the delay, but it should only be allowed upon a reasonable cause shown. I feel myself sustained in this opinion by the definition of the word "eventual" given in Webster's Dictionary, which is, "in an eventual manner; final; ultimate." The word "eventually" is also defined as "coming or happening as a consequence; final; ultimate; (law) dependent on events; contingent."

The reasonable cause justifying extension is stated by the royal Italian legation at Caracas to exist in the difficulty, which has continued up to the present time (though now with diminishing force), of reaching certain portions of the Republic by mail or otherwise, and further, in the fact that owing to recent disturbances many Italian merchants have gone to distant regions to avoid danger, and apparently as a consequence it has been impossible for them to yet present their claims, and will be impracticable to present them by July 1. That the application is reasonable and justifies some delay is evidenced by the fact that the Commissioner for Venezuela offers no objection to an extension of thirty-two days, and this premise being granted, it remains for me to consider what, under all the circumstances, would be a proper period.

From such information as I have been able to gather, a letter from Caracas to the most distant point in Venezuela reached at all by the post-office authorities may be sent in twenty days, and even as to such a place as Ciudad Bolívar, now in possession of the revolutionists, my information is, that by transshipment at Trinidad a letter will reach its destination in about a week.

I further consider it is to be remembered, in reaching a conclusion, that the first protocol looking to the formation of a mixed commission was signed February 13, and that the knowledge of it was sought to be disseminated by the Italian legation as thoroughly as possible some time in the month of April.

It has, therefore, seemed to me that an extension of forty days from July 1 (sufficient to enable a letter from Caracas to reach the most distant part of

Venezuela and a reply to be obtained), would, in addition to the period of four and one-half months now elapsing, from February 13 to July 1, meet all reasonable requirements.

Furthermore, however, the Commission might properly take into consideration at a later period any claim the existence of which should be made known to the Commission at any time before the termination of the additional time now proposed.

In view of the foregoing, the following order may be entered upon the minutes:

*Ordered, That the period for the presentation of claims before the Italian and Venezuelan Commission be extended to and including August 9, 1903: Provided, however, That the royal Italian legation shall be at liberty after that date, and before November 1, 1903, to present any claim, official knowledge of the existence of which shall be brought to the Commission on or before August 9, but with relation to which, for lack of data, the royal Italian legation shall not then have been able to submit a formal claim: And provided further, That for cause shown, on or before said date, this order may be enlarged as of this day.*

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#### TIME EXTENDED FOR SUBMITTING CLAIMS

Further allowing an extension of time for submitting certain claims to November 1, 1903.

RALSTON, *Umpire*:

The royal Italian legation has duly submitted an application for an enlargement of the time for presenting certain claims in accordance with the reservation contained in the order of the umpire of June 18, 1903, and in support shows that thirty claims are expected to arrive from Ciudad Bolívar, but that the names of the possible claimants have not yet come to hand; and further, that although registered letters have been sent to some 37 places named, neither the original letters nor the signed receipts have been returned, indicating want of proper postal communication.

The umpire believes that liberality should be shown in the application of the clause of the protocol referring to extensions, to the end that this Commission may fulfill as far as possible the object of its formation by determining all Italian claims. At the same time he recognizes that the labors of the Commission must be brought to a speedy finality.

He will therefore sign an order enlarging as of the date of June 18 the order then made, so that the 30 claims to be submitted from Ciudad Bolívar and any from the 37 places named may be entirely presented for action by November 1.

On behalf of the Venezuelan Government the umpire is asked to interpret the order of June 18, so that all claims, the names of whose owners are at this time to be submitted to the Commission, may at once be fully presented.

The umpire recognizes the difficulty of the situation in this respect, owing to the large number of papers recently received by the royal Italian legation, and at this time prefers accepting the assurance of the legation that all claims will be presented as rapidly as the papers can possibly be arranged. He does, however, in the enlarged order, change the former one by specifically requiring all claims to be presented formally and fully, with all supporting evidence, by November 1, his personal desire, however, being that they should be completely filed by October 1.

The royal Italian legation submits the question whether the claims not presented within the period limited shall on this account be excluded from

future indemnity. So far as this Commission is concerned the answer must be that they will be excluded. It would be beyond the jurisdiction of this Commission or its umpire to make any more comprehensive ruling as to effect of the protocol upon claims not presented to it.

In view of the foregoing, the following order may be entered upon the minutes:

*Ordered:* That the order of June 18, 1903, relating to the presentation of claims be enlarged as of that date so as to read as follows:

*Ordered.* That the period for the presentation of claims before the Italian and Venezuelan Commission be extended to and including August 10, 1903: *Provided, however,* That the royal Italian legation shall be at liberty after that date and before November 1, 1903, to present formally and fully, with all supporting evidence, any claim official knowledge of the existence of which shall be brought to the Commission on or before August 10, but with relation to which, for lack of data, the royal Italian legation shall not then have been able to submit a formal claim, but with further leave to said legation to bring to the official knowledge of the Commission the names of 30 claimants at Ciudad Bolívar and whatever claimants may exist at Altigracia (de Orituco), Nutrias, Tovar (2), Betijoque, Sebruico, S. Diego, Caripe, Amparo (2), Mitón, Yaritagua, Mendoza, S. Simón, Monte Carmela, Libertad, S. José (de Sucre), Upata, Soledad, Escuque, Turmero, Rubio, Quibor, Río Caribe, Caicara, Socorro, Carajal, Jabón, Aragua (2), Paraguaipoa, Cocorote, Guasipati, Cumarebo, and Tacarigua, San Fernando de Apure, Guama, Sta. Ipire, Colonia Bolívar, and Palmira, on or before September 21, presenting their claims formally and fully, with all supporting evidence, before November 1, 1903.

#### RECEPTION OF EVIDENCE AND CLAIMS

(By the Umpire:)

Additional evidence in support of reclamations may be received after the time for filing claims has expired.

Where within the time limited for the filing of claims nothing more has been presented than a statement (unsupported by proof) that a claim exists, no evidence in substantiation is thereafter receivable.

A "claim" must at least be sufficient to inform the respondent of the right claimed or the wrong inflicted.

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

Regarding the question of admitting claims, lacking documents, to-day presented to the Commission by the royal Italian legation, the Italian Commissioner remarks as follows:

It would seem that there can be no doubt except as regards claims not accompanied by a statement of damages, because claims having only said statement have been admitted and even favorably considered in other commissions. A simple written or even verbal demand may have sufficient evidence of veracity to enable the Commission, which is a tribunal of absolute equity, to take it into consideration and pass upon it. In any case the declarations of a claimant constitute a proof which should be studied and weighed by the Commission. Such declaration may even assume the character of an absolute proof, if supported by the sworn statement of the claimant. In practice this principle has been admitted by this Commission in two instances of claims received. The Commission would judge, therefore, said claims when both Commissioners within the limits of the protocol of May 7, 1903, find it proper to pronounce thereon.

It can not be admitted in justice and equity that the Venezuelan Commis-

sioner should have six months from the date of presentation of claims to adduce counterproofs without the legation having an equal right in favor of the claimants.

There now remain only the Ciudad Bolívar and a few other claims in which the legation has not so far been able to produce the formal demand of the claimants nor state precisely the sum claimed. Regarding the demand of the claimant, that seems to be adequately substituted by that of the legation or consular agent who legally represents the claimants. As to the statement of the sum claimed, this does not seem essential, inasmuch as the Commission has the right to determine the amount of the award on a simple statement of the facts in the case, showing that the claimant has actually suffered damages or violence, even though no definite sum be claimed.

The Commission has considered a number of claims in which, perhaps from a sense of delicacy in regard to injury to the person, or illegal incarceration, claimants abstained from fixing their own indemnity, leaving the same to be determined by the Commission.

These reasons would appear sufficient to cause the admission of the claims this day presented to the Commission by the royal legation, whatever be the condition of their documentation.

But other motions, based on special circumstances, support this view.

The legation, giving undoubted proof of respect for and confidence in the integrity of local tribunals, had advised all claimants to rely upon them for the compilation of the necessary evidence. The consequence of this has been that while in other commissions many claims were received based on proof prepared in the respective consulates, this Commission has not done so. Recourse to the consulates would have facilitated in all respects, but principally in the economy of fees, and hastened the presentation of claims; whereas local tribunals, lately closed for considerable periods or but recently reestablished in others, as in the case of Ciudad Bolívar, where the revolution lasted longer than elsewhere and operated with extreme slowness, have been the cause of delays and postponements which it would hardly be fair to saddle on the claimants.

The legation has, besides, proofs of frequent nontransmission or missing of both mail and telegraphic communications, all of which not chargeable to and by no fault of claimants would have the effect of prejudicing their interests in the exercise of their legitimate rights should the Commission rigidly and with severity interpret the clauses of the protocol and precedent decisions of the umpire in this regard.

It is proper to note that if the claims presented October 31 are not admitted, giving sufficient time for the presentation of necessary proof, the legation would be compelled to withdraw them, thus leaving open many questions which it is the common wish and interest to have settled and which the Commission, according to its high mandate of peace and justice, is morally bound to solve, leaving, as far as possible, only unencumbered ground behind it.

Now, as regards more especially the proofs and counter proofs, the reciprocal faculties of the Commissioners (of which, however, the legation and the Italian Commissioner intend to make only the most moderate use as regards the time limit) are determined by Article III of the protocol and can not well be the object of any restrictions or decisions whatsoever, as the honorable umpire is pleased to note in his elaborate decision of June 18 last.

No opinion by the Venezuelan Commissioner.

RALSTON, *Umpire*:

Upon disagreement between the honorable Commissioners for Italy and

Venezuela, two questions are presented to the umpire, which may be summarized as follows:

1. May additional evidence be received on behalf of Italian claimants in cases where formal claims have been filed?

2. May evidence be received in cases where nothing more has been filed than a statement that a certain person, located at a given place (as Ciudad Bolívar), has a claim, but has been delayed in the presentation of his proof because of inadequate mail facilities or judicial delay in taking proof?

The provisions in the protocol of May 7, 1903, bearing upon the matter read as follows:

ARTICLE III. The claims shall be presented to the Commissioners by the royal Italian legation at Caracas before the first day of July, 1903. A reasonable extension of the term may eventually be granted by the Commission. The commissioners shall be bound to decide upon every claim within six months from the day of its presentation, and, in case of disagreement of the Italian and Venezuelan Commissioners, the umpire shall give his decision within six months after having been called upon.

The commissioners shall be bound, before reaching a decision, to receive and carefully examine all evidence presented to them by the royal Italian legation at Caracas and the Government of Venezuela, as well as oral or written arguments submitted by the agent of the legation or of the Government.

The umpire has already passed two orders touching the general subject: The first of June 18, extending the time for the presentation of claims to and including August 9, but permitting the royal Italian legation, after that date and before November 1, to present any claim official knowledge of the existence of which should be brought to the Commission on or before August 9, but with relation to which, for lack of data, the legation had not then been able to submit a formal claim, and further permitting an enlargement for cause shown, as of date of June 18.

Cause being shown on August 10, the umpire enlarged the time within which knowledge of the existence of claimants located in certain places could be brought to the Commission to September 21, the claims to be presented "formally and fully" before November 1, such extension again applying only after September 21 to such of the cases indicated as for lack of data the legation should not have been able to submit a "formal claim."

With regard to the first proposition submitted, the umpire is, on full consideration, disposed to believe that additional evidence may be received by the Commissioners, if not by the umpire, at any time before the final decision. The power so to do is found in the paragraph of Article III, prescribing that —

the commissioners shall be bound before reaching a decision to receive and carefully examine all evidence presented to them by the royal Italian legation at Caracas and the Government of Venezuela, etc.

No restriction as to time of presentation of evidence (save that necessarily involved in the limitation of time for the consideration of claims by the Commission) is contained in the protocol, and the umpire does not feel that he can now make any, or can so construe his prior orders as to create such limitation. The first question will therefore be answered in the affirmative.

The second question is somewhat different. The protocol limits the time for the presentation of claims, with power in the Commission to extend the period. Within the time named by the orders of extension the legation, as above stated, has presented what is termed a "promemoria," but which in the cases under consideration contains absolutely no information relative to the claim save the name of the claimant and his locality. The fundamental question

is whether this constitutes the presentation of a claim, for if it does, then, as above indicated, statements and supporting evidence may yet be received.

Webster's Dictionary defines "claim" as follows:

Claim: 1. A demand of a right or supposed right; a calling for something due or supposed to be due; an assertion of a right or fact.

2. A right to claim or demand something; a title to any debt, privilege, or other thing in possession of another; also a title to anything which another should give or concede to or confer on the claimant. "A bar to all claims upon land." Hallam.

3. The thing claimed or demanded; that (as land) to which anyone intends to establish a right; as a settler's claim, a miner's claim.

It appears to the umpire that the "pro-memorias" referred to contain none of the elements of a claim within the natural application of the definition. They are not the demand of a right or supposed right, for they do not inform us of the amount or nature of the right claimed or the wrong inflicted. They assert nothing save that the legation is informed that a certain man claims something unknown against Venezuela; in other words, that he is a claimant. Before Venezuela can be expected to answer to a claim or demand she must be informed of its nature. This information is not furnished.

But it is said that there is sufficient basis to permit the furnishing of the information at a later time. Let us see. If this position be correct, carrying it to its ultimate, the lacking data may be furnished six months off, on the last day left for the consideration of claims, and Venezuela left without opportunity for defense. It is not for a moment to be supposed that such a course would be pursued; but an interpretation which would permit it must be erroneous.

To now admit that the "pro-memorias" in question are sufficient would be to nullify the effect of the orders of June 18 and August 10, above referred to. The "pro-memorias," when analyzed, simply contain the name and address of the claimants, with an excuse for the lack of other data. By the orders referred to this information (at least as to the important thing — the name) was to have been furnished on or before August 9 and September 21, respectively. When lack of data existed by those dates for the presentation of a "formal claim," such claim could be presented before November 1. But names and places were known before the dates mentioned and were then given, but no "formal claim" was presented for "lack of data." To say to-day that these words practically mean nothing, and that what are truly to be called claims may be presented within the next six months, would expand the time for the presentation of claims far beyond the clear intent of the orders given, and infinitely beyond the practice of other commissions working under similar protocols.

The umpire gives full attention to the suggestion that the present Commission should grant all possible opportunity to claimants to present themselves, to the end that all grievances may be adjusted. He himself has been so far influenced by this feeling that he has heretofore, in fixing November 1 as the final date, given the numerous Italian claimants one month more time than that enjoyed by claimants of other nationalities. But all things must come to an end, and if claimants in Ciudad Bolívar, for instance, having enjoyed one hundred days since the taking of that city by Government troops, have failed to furnish the royal Italian legation with more than their names when, even if it were not possible to supply all needed evidence, they could easily have given it the data required by the orders heretofore referred to, their loss must now be attributed solely to their own remissness. The umpire can not accept either irregularity of mails or vacation of tribunals as a justification for such neglect on the part of individuals. Meanwhile all power he possesses, either directly

or by indirection, to extend the time for the presentation of claims has been exhausted.

The second question must therefore be answered in the negative.

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BURELLI CASE

(By the Umpire:)

Claim not having been presented within the time limited by orders of the umpire, and this delay having been occasioned by default of telegraphic officials of respondent Government, claim must be dismissed, but without prejudice to diplomatic action or judicial remedies.

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

The royal Italian legation on December 23 last has presented to the Mixed Commission the unannounced claim of Giuseppe Antonio Burelli, residing at La Puerta, District of Valera, whereby, because of requisitions of merchandise and other supplies, an indemnity of 15,500 bolivars is demanded.

The writer, because of the reasons which he has the honor to mention in the course of this statement, was of opinion that the claim ought to be examined, but the honorable Venezuelan Commissioner at the session of the Commission on the 9th of the present month, declared that he could not accept it, because it was presented too late. In consequence of this difference of opinion the decision of the honorable umpire is asked.

From the documents contained in the record of the claim it is shown:

1. That Giuseppe Antonio Burelli, on August 3 last, caused to be delivered to the Venezuelan telegraphic agent of Escuque a telegram addressed to the royal Italian legation at Caracas, which ought to have received it at the latest on the following day, on account of which he would have announced the existence of his claim, the proofs of which were at that time being made before the competent judicial authority.

2. That said telegram did not reach the royal legation, through no fault of the claimant, either on August 4 or afterwards, wherefore the existence of the claim could not be announced to the Commission prior to the 9th of said month, the final date fixed for that purpose by the award of the honorable umpire of June 18.

3. That the complete documents supporting the claim for indemnity reached the royal legation on the 20th of October last past; that is to say, in due time, according to the above-mentioned award of the honorable umpire, for their transmission to the arbitral tribunal, to which in fact they were not presented prior to the 1st of November, because the announcement of the existence of the claim being wanting at the proper time the presentation of the documents in relation thereto for that reason alone was delayed.

The mere statement of these circumstances is sufficient, in the opinion of the Italian Commissioner, to justify the request of the royal legation that the Burelli claim be admitted.

There has been no negligence whatever on the part of the claimant, and it would be entirely contrary to equity that he should suffer the consequences of the irregularity of the telegraphic agent of Escuque; that is to say, of a governmental act of Venezuela, which is solely responsible for the nonarrival of the announcement and of the delayed presentation of the claim. It is true that this does not operate in every way as a bar, but the delay in its liquidation would prejudice the claimant; and our duty is to do him prompt justice, protecting him against the injurious consequences of the fault of another.

For these reasons, the writer asks the honorable umpire to decide that the claim for indemnity in question should be submitted to the examination and to the judgment of the Italian-Venezuelan Arbitral Commission now sitting at Caracas.

*ZULOAGA, Commissioner :*

The Venezuelan Commissioner refuses to admit to the examination of this Commission the claim of G. Antonio Burelli, and he takes this position for the following reasons:

1. The term, until the 9th of August, fixed for the legation to present its notice of these claims was a term which could not be extended, and in order to fix it all the possible eventualities were taken into account, such as the failure of the mail, of the telegraph, distance, etc.

2. The irregularities of the telegraph services ought to have been especially foreseen, since when the date was fixed there was not even a telegraph to distant places, such as Valera and Escuque, because the lines had been destroyed by the revolution.

3. Foreseeing all these irregularities, the claimant ought not to have allowed his notice to go until the last minute.

4. If the Commission should admit this claim of Burelli it would open anew the term for the presentation of claims of all of those who might allege motives more or less justified for not having presented them in time.

5. The Commission has no right to admit claims.

*RALSTON, Umpire :*

The above-entitled case comes before the umpire upon difference of opinion between the honorable Commissioners for Italy and Venezuela.

It appears that the claimant, who lives at Valera, sent to the telegraphic office at Escuque on August 3, 1903, a telegram signed by him, directed to his excellency, the Italian chargé d'affaires in Caracas, notifying him of the existence of a reclamation which he expected to prove before the tribunals of the State of Trujillo, the purpose evidently being to have his name certified by the royal Italian legation to the Commission on or before August 9, 1903.

The reception of this telegram is admitted by the chief of the telegraph office at Escuque.

It so happened that the telegram was not sent, or at least never reached the legation, whose first knowledge of the existence of the claim appears to have been gained October 20, 1903, by the reception of an expediente designed to sustain it.

This expediente was not presented before the Commission prior to November 1, 1903, the legation apparently not knowing the facts with relation to the attempted telegraphing on the part of the claimant, and considering that as the claim had not been called to the attention of the Commission within the time originally specified it was too late to present the claim.

By the order of the umpire, made June 18, 1903, official knowledge of the existence of the claim should have been brought to the Commission on or before August 9 and the claim itself presented before November 1. In this case neither step was taken, through no fault, however, either of the legation or of the claimant, who did all that it was incumbent upon him to do, and if his claim is not now regularly before the Commission it is because of the failure of the officials of the Venezuelan Government to fully perform their duty.

The suggestion is made that the umpire, in the extension given for the presentation of claims, took into account the condition of the country and the necessary

delays in transmission of letters and telegrams, and that he should not now be asked to virtually reopen the time limit already set.

To the umpire this argument seems in part correct and in part erroneous. He feels that the time having absolutely passed within which claims should have been presented he has no power of setting aside this limitation. On the other hand he would regard it as highly inequitable if the claimant were to absolutely lose his rights because of the failure of Venezuelan officials to perform their official duty, and in this connection he may remark that when the chief of the telegraphic station at Escuque accepted the dispatch tendered him he impliedly promised that it should be forwarded with all due promptness, and, accepting such dispatch without reservation, Venezuela (his principal) is not at liberty thereafter to say that communication was broken or the wires down, as is suggested by the honorable Commissioner for Venezuela may have been the case. Had the station agent informed the claimant promptly on August 3 that it was impossible to transmit the telegram the claimant could readily have procured transmission by other means of the desired knowledge within the time fixed by the order of the umpire.

In view of the foregoing considerations it seems to the umpire that, pending the objection raised by the honorable Commissioner for Venezuela, he can not consider the claim. Nevertheless, any order of dismissal which he might feel obliged to sign should leave the case open for such other remedies, either diplomatic or judicial, as the claimant may select. In other words, finding himself unable to grant the relief asked by the claimant in this Commission, while the jurisdictional question is raised by the honorable Commissioner for Venezuela, he is unwilling that the claimant should lose his rights because of clear negligence of other Venezuelan officials.

There are other views of the case which might be discussed, but as their consideration would bring us to substantially the same conclusions their development is omitted.

## OPINIONS OF A GENERAL NATURE

### CERVETTI CASE

(By the Umpire:)

Interest on claims can only be allowed from date of presentation to the Government or to the Commission in the absence of direct contractual relations with the Government.

Unless otherwise agreed by contract, interest will be allowed at 3 per cent per annum from such presentation to December 31, 1903.<sup>1</sup>

Under the protocols no interest can be allowed on awards.<sup>2</sup>

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

The above-mentioned claim having been submitted to the umpire in consequence of a divergence of views and appraisalment between the Commissioners in regard to the proofs of the acts which gave rise to the claim proper and the amount of the damages as well as to the question of the interest which may be awarded the claimant, the undersigned reserves the right to indicate the amount to be paid in principal to Cervetti as an equitable compensation for

<sup>1</sup> A like rule was adopted by the German-Venezuelan Commission (*supra*, p. 423), but in the British-Venezuelan Commission interest was only allowed to the date of the awards, nothing more being asked by the English agent.

<sup>2</sup> See to like effect Vol. IX of these Reports, p. 470.

actual damage done him, after the demonstration of the proof by the interrogatories deemed opportune on this occasion put to the claimant by the Commission.

Regarding the question of interest the undersigned contends:

1. That the adjudication of interest is in conformity with justice and equity, and impliedly comprised in the protocol.

2. That the interest in the case should run from the day on which Cervetti suffered damages to the day on which his case will be settled by the Commission, without in any wise forfeiting the interest which may eventually be conceded to claimants of any nationality, either by decision of the Mixed Commissions or by the grant of the Venezuelan Government, from the day of its award by arbitration to the day of payment.

3. That the rate of interest shall be at 5 per cent per annum.

Regarding the first point, it is held that the indemnity would not be complete and therefore not in accord with the requirements of strict equity, which alone should guide the decisions of the Commission, if interest were not allowed, excepting in cases of indirect damages and personal injuries.

The refunding to a merchant after a long time of the price only of the goods taken from him or the reimbursement to him of forced loans, also after a long time, does not constitute an equitable or integral compensation. Like to the tool in the hands of the workman, merchandise and money in the hands of the merchant constitute capital in a productive form, and may perhaps be his only resource, his only means of earning his livelihood.

The merchant must have paid interest to the hands furnishing the goods, and he from whom money has been forcibly taken or he to whom money has not been paid when due must have been compelled to procure capital on credit, and in either case the injured party must have been compelled to submit to the payment of interest, which, according to the local commercial conditions, must have exceeded 5 per cent.

What motive is there for denying in principle compensation for precise and certain damages? It is indisputable that the measure of redress should be fixed in a spirit of moderation.

In any event the protocols signed at Washington in no wise exclude the adjudication of interest, but rather determine that indemnity shall be accorded on the basis of absolute equity, and leave to the commissions a full and absolute liberty to deliberate on the sum to be by them accorded as an indemnity in each case.

The fact that the adjudication of interest must aggravate the financial situation of Venezuela is worthy to be taken into consideration, and it is with this in view that the undersigned has fixed the rate at 5 per cent, which, given the usages of the country, is very light indeed. It is further worthy of note that interest has been accorded in the majority of cases by arbiters and arbitral commissions, above all, in cases where decisions have been given in claims of long standing and those in which the payment could not be immediately made.

It should be sufficient to cite the very recent precedent of the "Commissions des Indemnités" in China. Various members of the diplomatic corps accredited to Peking, among which was the plenipotentiary of the United States, appointed to adopt rules for the government of claims in trust for their colleagues, established the principle adopted by all the interested powers, that the injured parties would be given interest at 5 per cent in civil and 7 per cent in commercial matters.<sup>1</sup>

The President of the Swiss Republic, sitting as arbiter in the large claim of

<sup>1</sup> Foreign Relations, Appendix, 1901, p. 107.

Fabiani against the Venezuelan Government, awarded 5 per cent. (Moore, p. 4915.)

The United States asked and obtained from Mexico (Com., 1838-1841, Moore, History and Digest, etc., p. 1254) interest at the rate of 5 per cent and from Peru at 6 per cent. (Moore, p. 1629.)

Interest at 5 and 6 per cent were likewise conceded by the Spanish Spoliation Commission and in the Panama riot and others. (Moore, p. 1004, 1381.)

The equity of the principle which the undersigned desires to see adopted seems from the foregoing precedents to be sufficiently established, though admitting that in some cases the request for interest had not been advanced at the time when the agreement as to the government of claims had not been formulated, or for other reasons.

The mere fact that the royal Italian legation in presenting claims did not request interest does not imply a renunciation of them. The legation believed it its duty to limit itself to the presentation of claims, leaving to the Commission the full liberty of deciding as to the amount and as to the form of the compensation.

If its silence in this regard is to be interpreted as a renunciation of interest, the legation will demand interest on all claims to be hereafter presented, as well as on those now in the hands of the Commission.

Even the silence of a claimant in this respect can not be considered as a renunciation, which latter should be explicitly stated, as otherwise it would be strongly contrary to the principles of equity and justice that interest should be accorded to a claimant asking it, while refusing it to another claimant who, through neglect or ignorance of the law, had failed to apply for it.

The question should be decided, after due examination, according to general and uniform criteria, as well in the case of Cervetti as in all the others.

If the silence of claimants with regard to interest is to be taken as a renunciation, similarly should it be considered a renunciation of indemnity when, by reason of illiteracy, or because not deemed by them necessary, a formal claim for indemnity does not accompany the testimony of witnesses as to the loss of receipts attesting forced loans or similar documents.

The Commission would most certainly depart from the principles of justice and equity, which should alone inspire it, if it were to reject all claims so presented, and the same principles and the same rules apply with equal force to the question of interest.

Regarding the second point, by the same reasons of equity, interest should run from the date on which the damage occurred to the date of the decision of the Commission or of the umpire, excepting the reserve in regard to the interest from the date of future decisions referred to above. This is the rule adopted recently in China by the "Commission des Indemnités."

The date of the presentation of the claim to the Venezuelan Government or to the Commission does not appear to the undersigned worthy of consideration, and not only because the forwarding of said claims to the legation was much delayed by the interruption in or temporary suspension of mail facilities of the Republic, but also because the legation did not deem it wise to call attention to these claims in times of political and financial crises, knowing well that there could not result practical utility or immediate solution.

It is known that for the claims of the period 1898-1900, none had as yet been obtained from the Venezuelan Government at the beginning of the current year and previous to the action of the allied powers.

What would it have profited the claimants and the legation to have hastened the presentation of the claims? It belongs to the Commission to provide therefor, and if the assembling of this latter could not be effected before the

1st of June, 1903, this fact should not influence the selection of a date from which interest should run in favor of the claimants.

This is not a case in which to invoke the rules governing ordinary courts and permanent tribunals, whose decisions, more or less solicited, depend solely on the diligence of the interested parties. We are in a question of claims and not in a jurisdiction absolutely exceptional, in which not only we may but we should depart from the usual forms of procedure.

Regarding the third point, assuming that local law may not according to the terms of the protocol of May 7 in all that concerns the settlement of Italian claims, it is clear that the Commission in order to determine the rate of interest to be awarded to Cervetti and other Italian claimants must base itself on equity and on precedents in similar cases, as well as on the usage of the country and of local commerce.

Though the Civil Code of Venezuela fixes the legal rate of interest at 3 per cent, it is notorious that is not the usual rate throughout the Republic. Instead the conventional rate is 12 per cent, and the same is true of the rate of interest on deferred payment in commercial affairs, and in this regard it is noteworthy that the Government exacts 12 per cent from importers that are backward in the payment of import duties.

The new law of the banks of Venezuela provides that on the falling due of hypothecated credits the banks may in case of delay exact 12 per cent per annum. According to articles 5 and 27 of the above-mentioned law, 7 per cent per annum is lawfully borne by hypothecated credits and 9 per cent for credits on 'change and mutuals.

The same local Government pays, as I am informed, to the Bank of Venezuela as per contract, 9 per cent on its operations in current accounts.

The legal rate in Italy is 5 per cent in civil matters and 6 per cent in commercial affairs.

It has been seen above how in cases of arbitration interest has run from 5 per cent to 7 per cent per annum.

In asking, therefore, that in the case of Cervetti and the other claimants interest be fixed at 5 per cent, the Italian Commissioner does not doubt having adopted an equitable and moderate average and one fairly convenient to the Venezuelan Government.

*ZULOAGA, Commissioner:*

Respecting the principle, I have admitted that it appears proven that a damage caused by Venezuelan forces exists, but I do not find elements of conviction by which it may be estimated, the proof submitted being altogether deficient. The case has been submitted to the umpire, who is to render his decision freely thereon, based on proofs and such other evidence as he may deem proper to obtain and consider.

Respecting the second point raised by the Italian Commissioner, whether or not interest shall be allowed Cervetti, it is my opinion that interest should not be allowed, either for the past or for the future. Respecting the latter, it would appear that the Commissioner for Italy and myself are in accord that none should be granted, though it seems that he wishes to make certain reservations as to the decisions, in case, as he says, the nations interested should desire to fix the rate of interest.

This reservation is foreign to our attributes as judges and to the faculties invested in us by the treaties in virtue of which we were appointed. Judges decide, grant or adjudicate that which they believe to be just, but they have not the power to make bargains.

Article V of the protocol of February 13, 1903, determines the manner in

which Venezuela is to make the payment of claims within a reasonable time, and, as Italy accepted this mode of payment, Venezuela is within her rights, since payment is to be made to the Italian Government within the delay and in the manner agreed upon without concerning herself as to whether any particular claim is to be paid immediately or not.

It is to be observed that many delicate and laborious negotiations were had before the establishment of the 30 per cent agreed upon, in which, without doubt, the economic and political conditions of Venezuela were duly considered and appreciated by the powers agreeing upon a fixed mode of payment.

In regard to the payment of interest for time past, I am also of the opinion that it should not be granted. These claims, as appears in the case of Cervetti, do not come to the notice of the Government before the moment in which they are presented to the Commission, and now is the time to fix the amount of the damages. It does not, therefore, appear just or equitable that interest should be awarded on amounts which Venezuela did not in reality know she owed.

Many nations, among them Italy and Venezuela, have decreed that legal interest (in Venezuela, 3 per cent) does not accrue on debts for liquidated sums without a request on the debtor for same. This request is necessary, and is based on equity, as without it the debtor can not be supposed to know that interest is demanded. When it is a question of unliquidated sums it is impossible to establish the fact that interest has accrued, since the amount actually owed was not known.

This case of Cervetti appears singularly appropriate for the bringing out of this class of argumentation — for the development of its applicability. He has come before this tribunal, and the Commission has been unable to agree on an award for damages, for the want of satisfactory and convincing evidence. The case has passed to the umpire, who is equally unable to determine it, and is seeking further proof. Can it be said to be equitable, under such circumstances, to award the payment of interest by Venezuela for time past? Is it not puerile to award interest on sums which can only be approximated?

As these claims were not before brought to the knowledge of the Government of Venezuela, it seems strange to assume that interest is due on them. It is objected, however, that the royal Italian legation was prevented from presenting these claims to the Venezuelan Government by reasons of its being inconvenient, and therefore these very reasons would undoubtedly seem to prohibit the allowance of interest upon these claims.

I do not agree with the Italian Commissioner that the matter should be decided in general terms, though in fact this may be the result.

We are judges, and our proceedings should declare a judgment in each case. Naturally the decisions of the umpire will be accepted as determining the course of settlement by the Commission of future cases, but I believe, nevertheless, that we, as well as the umpire, should give special and full consideration in each case. That each case may or not be consequent on previous criteria is a question of a different nature.

Without any doubt, only well-founded reasons would determine a different procedure in any one case from that followed in others.

RALSTON, *Umpire* :

A difference of opinion arising between the Commissioners for Italy and Venezuela, this case was duly referred to the umpire.

Upon examining the record, it was the opinion of the umpire that, although the claim was probably well founded, the proof would not justify any recovery, the claimant's witnesses merely stating that the facts alleged by them were

public and notorious, but stating nothing of their own knowledge. The foregoing view being submitted by the umpire to his associates, it was determined that the claimant himself should be summoned before the Commission and examined by its members under oath. This course was taken and the claimant appeared and was examined at length on June 25.

The claim is for the enforced loan of three horses (one being returned injured, and all, as appeared on examination, dying shortly after their return because of bad treatment), and for the taking on July 29, 1902, of some fowls, household effects, gold and silver articles, and 250 pesos in coin, the acts complained of being committed by Venezuelan troops at Macuto under the command of a colonel, and by virtue of his express direction, the damage claimed being said to amount to 3,200 bolivars.

The fact of the taking, under the circumstances as stated by the claimant, has been demonstrated, and the only questions are as to the amount of damages and the interest thereon.

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(After discussing the facts, the umpire continues:)

The taking having been without right, should interest be included in the award? If so, when should it begin and terminate, and what rate should be allowed? In the opinion of the umpire, some interest is justly due, the claimant having been deprived of the possession and use of his property and interest constituting some measure of return for such deprivation.

According to the general rule of the civil law, interest does not commence to run, except by virtue of an express contract, until by suitable action (notice) brought home to the defendant he has been "*mis en demeure*." Approximately the same practice exists in appropriate cases in some jurisdictions controlled by the laws of England and the United States. If such be the rule in the case of individuals, for stronger reasons a like rule should obtain with relation to the claims against governments. For, in the absence of conventional relations suitably evidenced, governments may not be presumed to know, until a proper demand be made upon them, of the existence of claims which may have been created without the authorization of the central power, and even against its express instruction. So far is this principle carried that in the United States no interest whatever is allowed upon any claim against the Government except pursuant to express contract.

In view, however, of the conduct of past mixed commissions, the umpire believes such an extreme view should not be adopted. It has seemed fairer to make a certain allowance for interest, beginning its running, usually, at any rate, from the time of the presentation of the claim by the royal Italian legation to the Venezuelan Government<sup>1</sup> or to this Commission, whichever may be first, not excluding, however, the idea that circumstances may exist in particular cases justifying the granting of interest from the time of presentation by the claimant to the Venezuelan Government. This method of procedure will, in the opinion of the umpire, offer in international affairs the degree of justice presented by the "*mis en demeure*" as to disputes between individuals.

In opposition to the foregoing it is suggested in the opinion of the honorable Commissioner for Italy that the above rule would be unjust for the reason that the forwarding of claims was much delayed by the interruption in or temporary suspension of mail facilities, and because the legation did not deem it wise to call attention to these claims in times of political and financial crises, knowing well that no practical benefit or immediate arrangement would result therefrom.

<sup>1</sup> This principle was adopted in the case of the *Macedonian* against Chile by the King of the Belgians. (See 2 Moore's Arbitrations, p. 1466.)

As to the first of these suggestions, it is to be said that the present claimant has been able at all times to reach Caracas personally or by letter without and delay, and the situation of so many other claimants has been the same that no general rule should be adopted based upon the condition of postal communications.

As to the further suggestion relating to the hesitancy of the royal Italian legation to submit claims, it can not be assumed that a nation which joins in creating a mixed commission to settle claims against it would have failed to recognize its just obligations when presented.

The umpire recognizes fully the fact that it may be a hardship to individual claimants not to receive interest from the date of taking; but, believing that this hardship could have been avoided in the manner before indicated, he does not now consider that it would be just to charge Venezuela with the payment of interest for perhaps long periods of time during which that Republic was not notified that a claim was made against it.

Next considering the question of the time when interest should terminate, the umpire is clearly of the opinion that no interest should be allowed upon the award finally to be made. In this conclusion he is influenced largely by the action of the Geneva tribunal, which granted no interest upon the award, and he is controlled by the fact that the protocols by virtue of which he acts do not provide for interest upon the awards. He believes, however, that under the powers contained in the protocols interest may in every case be calculated to a fixed period within the life of the Commission, this course placing all claimants upon a like footing. In the present claim, therefore, and in others like in general character where judgments are given for the claimants, interest may be calculated as a part of the award up to and including December 31, 1903, that being the date upon which the labors of the Commission might be presumed to terminate.

We now come to the final question as to the rate of interest to be allowed.

The umpire has been referred to the fact that commissions have allowed rates varying from 3 to 7 per cent and even more in some cases, while the commercial rate at Caracas often equals 12 per cent per annum, the latter rate being exacted by the Government on certain overdue taxes or imposts. Attention has further been called to the fact that the American Commissioners allowed against the recent Chinese indemnity 5 and 7 per cent.

The practice among prior mixed commissions has been so far from uniform and so often dependent upon the language of particular treaties as not to afford any very useful guide. Commercial rates are so uncertain that, while their consideration may be useful, the umpire would not be justified in being controlled by them. Of course, high percentages demanded by a Government from a defaulting taxpayer do not afford a safe precedent. Again, as to the Chinese indemnity, the rates were intended to operate simply between the United States and the claimant, and did not operate between nations.

The umpire believes it fair to take into special consideration the rate of interest paid in Venezuela by law in the absence of contract and also the rate accepted by foreign governments upon bonds given by Venezuela to pay obligations created by former arbitral tribunals.

It appears by article 1720 of the Civil Code of Venezuela that the legal rate is 3 per cent in the absence of contract, and the umpire is further informed, that although 5 per cent has been given in some cases, the rate upon bonds given by Venezuela in payment of awards in favor of French citizens and English and Spanish subjects is the same. He thinks, therefore, that this rate should be followed in the absence of contract of the parties fixing another.

Pursuant to the foregoing opinion, judgment will be entered for 1,724

bolivars, plus interest at the rate of 3 per cent per annum from the date of the presentation of the claim to the Commission up to and including December 31, 1903.

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POSTAL TREATY CASE

The Commission, under the protocols, has no power to allow interest after the probable termination of its labors.  
Claimants appearing before the Commission accept its limitations.

RALSTON, *Umpire*:

The Commissioners of Italy and Venezuela disagreeing on the question of the time for which interest should run on the above-mentioned claim, that question was duly referred to the umpire.

According to article 2, paragraph 33, of the Postal Treaty,<sup>1</sup> a government failing to pay charges, etc., for transportation due by it is, after six months' notice, chargeable with interest at the rate of 5 per cent per year. Interest at this rate is now asked till payment shall be made. The Venezuelan Commissioner admits interest should commence to run from July 1, 1900.

The rate and the time of commencement of interest are both fixed by the treaty, which is a contract determining absolutely the rights of the parties. However, as indicated in the Cervetti case, No. 9,<sup>2</sup> the Commission is without power to give interest to run beyond the time of the probable termination of its labors, and this principle extends, in the umpire's opinion, not alone to damage cases, but to cases arising under contracts.

It is to be borne in mind that claimants presenting themselves before this Commission appear before a body of limited powers, and are to be regarded as accepting its drawbacks in consideration of anticipated benefits. One possible drawback is the loss of interest after the termination of the Commission.

It is not the duty of the umpire to pass upon the justice of the claim for interest beyond the life of the Commission, and he does not do so, but solely upon the question of jurisdiction, and this decision, as well as the decision in the Cervetti case, is to be regarded as so limited.

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SAMBIAGGIO CASE<sup>3</sup>

(By the Umpire:)

Revolutionists are not the agents of government and a natural responsibility does not exist.

Their acts are committed to destroy government and no one should be held responsible for the acts of an enemy attempting his life.

The revolutionists (in this case) were beyond governmental control and the government can not be held responsible for injuries committed by those who have escaped its restraint.

The word "injury" occurring in the protocol imports legal injury; that is, wrong inflicted on the sufferer and wrongdoing by the party to be charged.

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<sup>1</sup> U.S. Statutes at Large, vol. 30, p. 1691.

<sup>2</sup> *Supra*, p. 492.

<sup>3</sup> The general subject involved in this opinion is discussed by Ch. Calvo, in *Revue de Droit International*, vol. 1 (1869), p. 417, and by Prof. L. de Bar in the same magazine, vol. 1 (second series, 1899), p. 464. See also *Annuaire de l'Institut de Droit International*, vol. 17 (1868), pp. 96-137, and Ch. Wiesse's *Le Droit Inter-*

- As rules of interpretation the umpire accepts that: (a) If two meanings are admissible, that is to be preferred which is least for the advantage of the party for whose benefit a clause is inserted; (b) the sense which the acceptor of conditions attaches to them ought rather to be followed than that of the offerer; (c) two meanings being admissible, preference is given to that which the party proposing the clause knew at the time was held by the party accepting it; (d) doubtful stipulations should be interpreted in the least onerous sense for the party obligated; (e) conditions not expressed can not be invoked by the party who should have clearly expressed them.
- Treaties are to be interpreted generally *mutatis mutandis* as statutes and, in the absence of express language, are not given a retroactive effect.
- The "most-favored-nation" clause contained in the Italian treaty does not oblige this Commission to follow, in favor of Italian subjects, the interpretation made by other Commissions of their protocols.
- Venezuela being recognized as a regular member of the family of nations, the universally accepted rules of international law must be applied to her and no intendment can be indulged in against her.
- Under a treaty which (as in this case) authorizes the decision of questions before the Commission according to "justice" and "absolute equity," it is its duty to apply equitably to the various cases submitted the well-established principles of international law.

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

That in favor of the Italian citizen, Salvatore Sambiaggio, resident of the parish of San Joaquin, who claims 5,135.50 bolivars on account of requisitions and forced loans exacted of him by revolutionary troops, an award be made of 4,591.50 bolivars (the claimant having adduced no proof whatever of a further loss of 544 bolivars, which he claims to have suffered), plus the interest thereon from the date of the loss to the date of the award, the following considerations are submitted in support of said request.

The Commission has before it the question as to whether the Venezuelan Government is materially responsible to the claimant, Sambiaggio, and other Italians established in Venezuela, on account of damages inflicted upon them by revolutionary authorities or troops. The Italian Commissioner holds that such responsibility exists when, as in the case under consideration, the said authorities exercise a *de facto* power or when the said troops have a recognized military organization for the purpose of overthrowing the legal government, though the damage alleged may have been inflicted by detached bodies of

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national Appliqué aux Guerres Civiles. The subject herein considered is also discussed herein by the American-Venezuelan Commission, p. 7, the English-Venezuelan Commission, p. 344, the German-Venezuelan Commission, p. 526, the Netherlands-Venezuelan Commission, p. 896, and p. 903' the Spanish-Venezuelan Commission, p. 923, and by this Commission in the Guastini case, p. 730.

Baron Blanc, of Italy, wrote August 17, 1894, to the minister of Italy in Brazil: "L'ingérence diplomatique ne doit pas être excessive. Le cas de dommages provenant d'actes qui, en violation du droit des gens, ont été commis par les autorités ou les agents dépendant du gouvernement contre lequel on réclame, est bien différent du cas des dommages qui ont d'autres origines, comme seraient ceux occasionnés par des opérations de guerre ordinaires, ou par des actes provenant de révolutionnaires, ou de malfaiteurs de droit commun.

"Quant aux premiers il n'y a pas doute que l'État ne doive en être tenu pour responsable; mais quant aux secondes, il manque toute base rationnelle d'une responsabilité gouvernementale, à moins que le gouvernement ou ses agents n'aient, d'une manière évidente, omis de remplir leurs propres devoirs en ce qui concerne la possibilité de prévenir le dommage dont on se plaint." So says Rev. Gen. de Droit International Public, 1897, p. 406.

troops (guerrillas), and that, on the contrary, such responsibility may be excluded when it is shown that such acts are committed by marauders who style themselves revolutionists solely that they may with impunity prosecute their nefarious calling.

This opinion is based upon the following heads:

1. The rights common to all Italians in Venezuela, and to claimants and Sambaggio in particular, under the terms of the treaty between Italy and Venezuela and of the Washington protocols.

2. The general principles of international law, special legislation, and precedent arbitral decisions in cases analogous to the one under discussion; and

3. Considerations of fact and principles of equity.

As to the first head: In the protocol of February 13, 1903 (Art. I), Venezuela recognizes in principle the justice of the claims presented by His Majesty's Government in the name of Italian subjects, and has besides admitted (Art. IV) that all claims, excepting only those of the first rank (Art. III), may be examined by a mixed commission which, with regard to damages to person or property or to unjustifiable taking, simply establish the truth of the facts and decide the amount of the award.

What is the meaning, the true reason, of these two dispositions, and more particularly of the first?

The meaning, the true reason, is that the Venezuelan Government recognized at Washington its responsibility for acts of revolutionists resulting in damages to Italian subjects; otherwise it would have formulated a special reservation.

Was it, indeed, at all necessary that the Venezuelan Government recognize damages inflicted by its authorities or agents?

Certainly not. The Government has never thought to deny such responsibility, and to specially insist thereon in the first clause of the Washington protocol, one which animates the whole, in order to reassert a principle which has never been questioned, would have been puerile. The justice of Italian claims for indemnity on account of acts of the revolutionists is what was sought to be established — a justice which Italy has always *in principle* upheld and which the Venezuelan Government has always *in principle* denied.

The consequences of this divergence in ideas are what were sought to be eliminated. There has never been any question as to the other point.

The first article of the protocol of February 13, and the above-quoted portion of the third not having, therefore, been created with a view to claims for damages inflicted by the Government or its agents, and it being unreasonable to suppose that they were called into being for no specific and well-defined purpose it follows that they must undoubtedly refer to claims styled "revolutionary".

The Commissioner for Venezuela urges, however, that had these claims been in view, explicit mention of them would have been made; to which the Commissioner for Italy observes, as before, that even though special reference to them has not been made, it is equally true that no reservation or exclusion was stipulated in regard thereto, and insists that his interpretation of the articles mentioned is the only logical one that may be given.

In this connection it is worthy of note that the German-Venezuelan protocol drawn up for similar causes, under identical conditions and having the same scope as ours, contemplates claims originating in the existing "civil war" in Venezuela, and the French-Venezuelan treaty of the 19th of February, 1902, relative to claims of French citizens against the Venezuelan Republic, considers "damages suffered from the fact of insurrectional events."

The "civil war" in Venezuela, in which the revolutionary troops have

never been recognized as belligerents, and "the insurrectional events" are nothing more nor less than the revolution, and the damages inflicted by it on German and French subjects will be passed upon by the respective Commissions; indeed, the French-Venezuelan Commission has already decided that such losses must be indemnified.

Under the international treaty of July 19, 1861, Italy is guaranteed the treatment accorded the most favored nation. A broad interpretation has been given by Article VIII of the protocol of February last to articles 4 and 26 of the said treaty, according to which Italians in Venezuela and Venezuelans in Italy shall in all matters, and particularly in the matter of claims, enjoy the rights accorded by the abovementioned clause. Now, as has been stated, the French-Venezuelan Mixed Commission has recognized the principle of the responsibility of the local government for damages caused French subjects by the revolutionists, according to the provisions of the treaty of Paris of 1902. The Italians have therefore right to similar consideration.

The Washington protocol contains (Art. VIII), however, another important clause, that which provides that the Italian-Venezuelan treaty may not in any case be invoked as against the provisions of the protocol. It may, however, be invoked in favor of the treaty, since it contains no provision contrary thereto, and the Commissioner for Italy accordingly so invokes in favor of the claimant Sambiaggio, as he will for other claimants whose cases are analogous to the one under consideration, the clause relative to the most favored nation.

But why was it agreed at Washington that the Italian-Venezuelan treaty could not be invoked against the provisions of the protocol?

A careful study of these two diplomatic documents will clearly show an intention that article 4 of the treaty should not be invoked as against the protocol, according to which treaty only damages inflicted by the constituted authorities of the country could have given rise to claims for indemnity. What other motive could there have been (and we must assume there was a motive) for the stipulation of Article VIII of the protocol?

It was evidently the intention that all, absolutely all, the claims arising from civil war in Venezuela should be examined and adjudicated *ex bono et æquo* by the Commission; and if such was the intention, it could not have been contemplated that those arising from revolutionary acts should be thrown out on the raising of a technical objection such as was advanced by the Commissioner for Venezuela in the present case of Sambiaggio, an exception which, even if founded in equity, should not, under the terms of the protocol, be admitted.

The protection and security of person and property which the Venezuelan Government explicitly guarantees by article 4 of the treaty of 1861 to Italians residing in Venezuela would be a mockery did it not include indemnity for injuries inflicted on Italian subjects by the frequent revolutions, against the abuses of which so far no adequate steps have been taken, either preventive or repressive. From the sole fact that Venezuela does not sufficiently and for long periods protect the persons and property of Italians resident in her territory, and has failed of fulfilling the obligations imposed on her by article 4 of the treaty of 1861, there arises the right to claim compensation for damages. (Bluntschli, art. 462.)

This is no new and exceptional theory. The very recent decision of the French-Venezuelan Commission has already been referred to, but there are many others. Mr. Robert Bunch, the English minister at Bogotá and umpire in the claims of the United States *v.* Colombia in the case of the steamer *Montijo*,<sup>1</sup> stated in his decision that:

<sup>1</sup> Moore, p. 1444.

It was, in the opinion of the undersigned, the clear duty of the President of Panama, acting as the constitutional agent of the Government of the union, to recover the *Montijo* from the revolutionists and return her to her owner. It is true that he had not the means of doing so, there being at hand no naval or military force of Colombia sufficient for such a purpose; but this absence of power does not remove the obligation. The first duty of every government is to make itself respected both at home and abroad.

Protection is promised to those whom the Government has consented to admit to its territory, and means must be found to render said protection effective. If the Government fails therein, even though it be through no fault of its own, it must make the only reparation in its power — i.e., it must indemnify the injured party.<sup>1</sup>

The United States demanded and obtained by arbitral decision of March 1895, an indemnity for the seizure of the North American vessels *Hero*, *San Fernando*, and *Nutrias*, for the unlawful arrest of United States citizens, and for other damages inflicted by the legal Government and by revolutionists. (Moore, Hist. and Dig. of International Arbitrations, etc., pp. 1723, 1724.) The same theory was sustained by the United States *v.* Peru, which on that occasion obtained an indemnity of \$19,000 in favor of an American citizen, Dr. Charles Easton, for material damages and maltreatment inflicted on him by a body of partisans of a rebel chieftain seeking to overthrow the constitutional Government of Peru. (Moore, pp. 1629, 1630.)

In the case of the "Panama riot and other claims" was recognized the "liability, arising out of its privilege and obligation, to preserve peace and good order along the transit route," of the Government of New Granada, now the State of Colombia, which, in that decision, was obliged to pay an indemnity for the damages inflicted by revolutionists. (Moore, pp. 1361 et seq.)

Fiore, a noted authority on international law and a writer of most liberal views (chap. 4, sec. 660), says:

A state may be declared responsible for acts committed on its territory, even by private individuals, if injury to a state or to strangers results therefrom.

and in section 666, same chapter, he says:

Let us assume that a government has failed to take proper steps to obviate certain disturbances. \* \* \* In these and similar cases justice and equity require that the state be held to an account and compelled to pay the damages.

In a treatise by the same author (chap. 4, sec. 672) is found this maxim, which deserves the special attention of the Commission, as it synthetizes all the present argumentation:

The question of the responsibility of a state is, therefore, a complex one, and requires for its solution not only the principles of law but an investigation of the facts and an appreciation of the circumstances.

If, therefore, in this matter international law does not establish fixed maxims, but follows different and at times contradictory decisions, it is because such questions, when submitted, were solved according to equity.

Now, the Commissioner for Italy believes he is justified in asserting in all confidence that in the case of the Venezuelan revolutions equity demands that the interests of the claimants injured by revolutions be not neglected.

Grave indeed would be the responsibility assumed by the Commission if it

<sup>1</sup> The exact language of the umpire in this case was as follows:

If it promises protection to those whom it consents to admit into its territory, it must find the means of making it effective. If it does not do so, even if by no fault of its own, it must make the only amends in its power, viz, compensate the sufferer.

decided to the contrary, especially from the point of view of the discouragement of immigration to Venezuela.

Was it not from considerations of equity that France, on the occasion of the massacre at Aigues-Mortes of a number of Italian operatives by French citizens, indemnified the families of the murdered, and that Italy, under similar conditions, indemnified resident French merchants who had suffered damages from an outburst of popular indignation aroused by the above-mentioned massacre?

And was it not perhaps the same decisions in equity that inspired existing laws in Germany and other European states, according to which municipalities are held to the indemnification of peaceful citizens in cases of mob violence and revolutions?

But, setting aside all reference to the foregoing precedents, it surely would not be just to establish an absolute parallel between the treatment that may be demanded in favor of foreigners in cases of mob violence and revolutions in countries where the administrative and military organization is complete and where acts of rebellion against constituted authority are an exception and may be considered as unfortunate accidents, and that which may be invoked in others where revolution is a frequent and persistent political phenomenon.

From a condition of fact essentially different arises a situation which has peculiar and distinctive characteristics, and upon this is based the question of responsibility, and thence the obligation to grant indemnity.

Requisitions and forced loans exacted from foreigners by the military or administrative authority *à main armée*, and often with threat, are not merely abuses, but constitute crimes which the Government of Venezuela is of its own motion and by the requirements of its internal laws bound to visit upon the offenders without awaiting report or denunciation from the injured parties. This it has not as yet done, except in rare instances, and then more from a policy of political order than from any desire to punish the perpetrators of illegal acts.

It is true there have been frequent confiscations of property from revolutionary leaders, but it is not shown that the product of such confiscation has ever been applied to the indemnification of the injured citizens or foreigners.

If this is always the attitude of the Government of Venezuela, it is because such requisitions and forced loans are by it considered as political acts incident to general condition of the country, and being morally responsible for the consequences, it should be held to a material responsibility therefor.

That such is the light in which such acts are viewed by the Government is shown by the amnesty granted to those revolutionists who lay down their arms and become reconciled, without any provisions whatever for the restitution of property unlawfully taken by them. It is true that restitution is not made to natives more than to foreigners, but this does not invalidate the principle of right, and it is logical that these latter should invoke diplomatic intervention which, as well as the protection of local laws, they have an undoubted right to claim. The one in no wise excludes the other, and in this they are on a parity with Venezuelans residing in Italy or other foreign country.

It is not sought to place in doubt the sincere desire of the Venezuelan Government to maintain political order; but judging from the results it must be admitted that the means employed by it for so doing are, to say the least, inefficient, and from this its responsibility is deduced as a logical sequence, and this is the better established in cases where revolutionists have taken property from and maltreated foreigners within the observation of Government authorities or troops who encouraged them thereto.

The Commissioner for Italy can not possibly distinguish in any manner

between damages caused by the acts of successful revolutionists and of those who failed in their attempt.

Success is an accident, and in no respect argues the worth of the cause fought for, the only moral element which could possibly justify a difference in the treatment of those who had been injured by a successful party and those who had been despoiled by an unsuccessful one.

It would be necessary to prove that the revolution broke out in defense of a high humanitarian principle or in vindication of a great political or social idea in order to prove the presence of this moral element.

The struggle between those in power and those seeking to overthrow it has no monopoly of this characteristic, and triumph depends generally upon the force of arms, the skill and foresight of commanders, as well as on other accidental circumstances.

It would, besides, furnish to foreigners a strong incentive for violating the laws of neutrality to make the distinction above mentioned, as in such a case it would be to their interest to side with one or the other faction, and to render more apparent the absurdity of the distinction they would be inclined to side with their despoilers, since with the success of these latter would lie their own chance for securing future compensation for their losses.

And even admitting the principle of such distinction, would we not thereby enter into a very labyrinth of difficulties in cases of sufficient frequency where this or that group of contestants passes from the side of the revolutionists to that of the Government, and vice versa? For example, in which category should be classed the damages caused by General Hernandez, who initiated the last successful revolution, then withdrew therefrom, and now is again reconciled with it?

The Government should be stimulated in the adoption of energetic means whereby to establish order in all the provinces of the Republic now in the hands of the revolutionists, and to maintain peace in the future by holding to the principle of its responsibility in case of claims for damages caused by this same revolution.

It should likewise be considered that on each success of the revolutionists there is established a government *de facto*, which collects taxes and imposes duties and in various other ways harasses both natives and foreigners.

During the last political crisis there have been several provincial governments which have exercised several, if not all, of the functions of a legal government, and as the sums collected by them can not be demanded from them it is to the Government we must look for redress, as it is the only body with which diplomatic relations may be held with regard thereto. It would be unjust that the property of foreigners should be converted without adequate compensation, to the profit of the country, and there would be danger in conceding that future revolutions might with impunity exist at the expense of foreigners.

These latter may not take part in local politics, and if the principle that they are entitled to compensation for damages inflicted by revolutionists be rejected they will be in a worse position than the natives, as they will have no means or right to armed defense, and at the same time no one will be held responsible for damages suffered by them from revolutionists.

It has already been remarked that several localities of the Republic are in the hands of the revolutionists. Let it once be known in those localities that it has been decided that the damages inflicted on foreigners there can not be made subject to indemnity and in what a critical position will not those foreigners be placed? What possible guaranty will there be for them against further aggressions?

The political situation in Venezuela has certain special characteristics

which the Commission should duly consider in judging of the consequences from the point of view of the claimants and of the compensation. The Commission is not specially called to decide questions of international law, except as it may do so incidentally. Its principal duty is the consideration of facts from the standpoint of moderation and absolute equity, and to compensate in a reasonable degree the Italians who have been injured from the abnormal political situation of the country, planting itself on the provisions of the Washington protocol, which do not distinguish between damages caused by revolutionists, whether triumphant or not, and those caused by the Government, and holding in view the fact that the Venezuelan plenipotentiary has recognized in principle and without reservation or discrimination the justice of claims which the Commission is called upon to decide.

Resting upon these considerations of law, and especially of fact, the Italian Commissioner insists that the claim of Salvatore Sambiaggio be admitted and the Venezuelan Government be held responsible in the sum of 4,591.50 bolivars, with the interest accruing thereon.

P.S. — The Italian Commissioner asks in addition that there be taken in consideration and decided the later claim for damages in the sum of 171.63 bolivars, this day presented by the royal Italian legation, to whom the claimant Sambiaggio transmitted it after having forwarded the claim already submitted to the Commission.

ZULOAGA, *Commissioner* :

It is a generally accepted principle of international law that strangers can not expect, in any country, better treatment than is accorded the nationals. Were this otherwise foreign immigration, instead of being a source of prosperity and grandeur, might become, to quote from Nesselrode's celebrated note, a true lash for the natives.

A foreigner who takes up his domicile in a country can not expect more than the justice of that country, more than the laws of that country, more security than it offers, or more than its civilization and well-being will afford him; in a word, more than the political organization of the place in which he lives will give him. This order of ideas is so founded on the condition of society and on absolute equity that to insist thereon seems superfluous.

The foreigner who comes to this part of America knows and implicitly accepts the fact that here at times society is politically perturbed, just as he knows that its soil is subject to upheavals which may engulf its inhabitants; just as he knows that fever lurks in every bush and pool of its exuberant nature. But if these are its drawbacks, there are also its compensations and advantages. Here life is easier than it is in the great European aggregations, and here fortune is more readily achieved. It would be absurd to pretend that all societies offer equal security and benefits, and hence to expect from each the same grade of civilization.

If this is true, it must be equally true that each government, as such, should be responsible for its acts, in that it constitutes a juridical entity, endowed with rights and duties.

The principle of the responsibility of governments is not otherwise founded, in the opinion of law writers, than on the rule of civil law that each individual is responsible for the acts of himself and his subordinates. (Authorities, articles 1116 of the Venezuelan and 1151 of the Italian code.) In private life the matter of responsibility is easily determined; but not so with the state. The motives which impel the action of the latter are many and various; and when, from whatsoever cause, political society is deeply stirred, it may be necessary for the state to adopt extraordinary, though entirely rational, measures for the

reestablishment of order and safety. Numerous are the reasons for a state's action in such case, and the canons of civil law can not apply to it save in a restricted sense.

These premises once established, it seems to me quite possible to appreciate the true meaning of Article III of the Washington protocol. Venezuela holds (art. 9 of the law of 1873, Seijas, Vol. I. p. 57), that the nation can not be considered responsible for damages, injuries, or expropriations not committed by the constituted authorities operating in a *public capacity*. The responsibility of the Government is therefore limited by and dependent on proof that the acts for which indemnity is claimed have been committed by the authorities while in the discharge of their public functions.

The protocol seems to have desired to avoid these discussions, and the Government admits, in principle, its responsibility; but only in so far as its agents are concerned; not for the acts of individuals — i.e., revolutionists — as that would be an extension of responsibility not contemplated by law, which is not supposable in a public treaty, or juridically deducible, as, according to the fundamental rule of interpretation, every exceptional clause is to be taken *restrictively*.

Governments, according to the authorities, are not responsible for the acts of individuals in rebellion, precisely because they are in rebellion. (Seijas, Vol. I, p. 50.) A government would be responsible, in the concrete, where it had been negligent in the protection of individuals; but in such case the responsibility would arise from the fact that the government, by its conduct, had laid itself open to the charge of complicity in the injury. The acts of revolutionists are outside of the government.

It is not sufficient for a state to prove that it has been injured by individuals residing in another state to entitle it to hold this latter responsible and exact indemnity from it. It is necessary to prove that the prejudicial act is morally chargeable to the state, which ought to or could have prevented it, and has voluntarily neglected to do so. (Fiore, Vol. I, p. 582. sec. 673, Rule g.)

These are the principles which I find applicable to revolutionists when their political character is clearly demonstrable, as in the case of regular forces who follow a definite political purpose. In regard to guerillas, the question appears to me even more simple. These are, generally speaking, men who take advantage of the disturbed state of the country to commit depredations. They are often individuals who seek to satisfy passion or to wreak a personal or local vengeance. Others, again, are simply robbers who operate as such under the guise of revolutionists. We have had in this Commission the case of a band of robbers operating on the road to La Guaira, and calling themselves revolutionists. To hold the state responsible for the acts of such individuals would be impossible, as they would naturally come under the jurisdiction of criminal courts, in common with bandits of any country.

Regarding violations of private property, there exists in the law of 1873 (see Seijas, Vol. I, p. 57) the following provisions:

ART. XI. All persons who unofficially order contributions or forced loans or any act of plunder whatsoever, shall equally with the perpetrators, be held personally and directly responsible to the injured parties.

For cases occurring in war coming before the Commission there has been no amnesty, so that the question is not presented. But in my opinion, even supposing a case in which amnesty has covered everything (which has not been the case), the Government would not be responsible if in its judgment such action had been dictated by motives of high public policy.

It is erroneous to assert that Venezuela covers with the shield of amnesty

the acts of violence committed by revolutionists against individuals. Only political amnesty has been granted, following the policy usual in such cases and it is generally so stated in the decrees issued.

The honorable Commissioner for Italy invokes in support of his argument Article I of the Washington treaty. I do not believe that this article has any such meaning, and even less before a tribunal of jurists called upon to decide questions of absolute equity. This article refers only to claims already presented by Italy, and this article of the treaty, given the condition under which it was signed by Venezuela, was simply a means of ending the blockade. Venezuela was compelled to subscribe to the payment of claims the justice of which she denied, and even to admit that they were just. *Quod scripsi, scripsi*. True, but even Italy, by the mouth of one of her greatest geniuses, has taught the world how much value may attach to a confession wrung by force, and his "*E pur si muove*" is to-day in the mouths of Venezuelans. Article I of the Washington treaty has, I repeat it, no meaning which may strengthen the claims last presented, as it can not be conceived that that which is unknown may be declared just.

The interpretation given by the honorable Commissioner for Italy to the third article of the Washington protocol would give a marked preference in favor of Italian subjects over the claims of the subjects of other countries who are equally entitled to a share in the 30 per cent set apart for the settlement of all claims. If such radical difference had in fact existed the other nations would not have failed to note it.

Article 462 of Bluntschli's Codification of International Law, invoked by the honorable Commissioner for Italy in support of his contention that as Venezuela had not fulfilled her obligation toward Italy the latter nation could claim indemnity for damages, is in my opinion, wrongfully appealed to. It is not true that Venezuela has violated its treaty obligations with the former country. Article 4 of said treaty does not and could not offer to Italians more protection than is afforded Venezuelans, and as in case of revolution or internecine war the Italians only have a right to be indemnified for injuries inflicted upon them by the constituted authorities on the same terms as those granted by existing law to Nationals, Italy can not say that Venezuela has treated Italians less favorably than her own citizens. Article 4 claims no more than this, and it can not be pretended that more protection is due Italians than is accorded Venezuelans. This article anticipates the case of Italians injured in internecine war, and provides that they shall be treated the same as Venezuelans. As the Washington treaty confers an advantage on Italians over Venezuelans in that it creates this Commission, before which they may appear without the necessity of previously having recourse to the tribunals of the country, and provides for the payment of their claims in gold out of the 30 per cent, the protocol takes care to state that the treaty of 1861 may not be invoked. This is the only object of the article referred to, and nowhere in it does it appear that there was any wish to consider the question of the responsibility for the acts of revolutionists. Neither does it appear, so far as I can see, that the "most-favored-nation" clause of the treaty of 1861 gives Italy the right to claim damages for such acts. It does not appear that any such agreement was made with any power, and if any reference is made therein to claims for damages arising in insurrectionary events, it is without doubt to such as are caused by the acts of the Government or governmental authorities.

To take as precedents the decisions of a mixed commission as though they were the clauses of a treaty is an error. A mixed commission gives its decision in each case and with especial reference to all its circumstances. If, therefore, such decisions were regarded as having the force and effect of a treaty, giving

to Italy the right to an advantage equal to the decision in any one identical case, it would be necessary to accord to the decisions in favor of Venezuela corresponding advantages. That is to say, decisions in favor of Venezuela in other commissions would be invoked by her in her favor and against Italy in this Commission. This would lead to the absurdity of submitting this tribunal to the decisions of all the mixed commissions.

The "most-favored-nation" clause referred to by the honorable Commissioner for Italy is absolutely inapplicable in this Commission and has no relevancy.

The decisions of this Commission are not governed by any rule other than that established by Article II of the Washington protocol; that is to say, they will be based on absolute equity, without regard to objections of a technical nature or the provisions of local legislation. This absolute equity is what is understood by the Commissioners to be such, and in the event of their disagreeing the decision of the umpire will be final.

Equity seems to me to be nothing more than the natural application of those rules of reason and justice which nations recognize as surest and which international law recommends in cases submitted for consideration. This is a tribunal of full and absolute jurisdiction and one which has no need to occupy itself with the decisions of other mixed commissions, which may or may not rest on equity, according to the principles governing and applicable only in each case. Furthermore, this tribunal may not be held subject to the precedent of an anterior decision, but is obliged to apply the principles of equity in each case, and if, for an unforeseen cause, a decision has been, in our judgment, incorrect, it is our duty not to perpetuate the error so committed. This is the rule of action of every tribunal.

The cases which the honorable Commissioner for Italy cites in support of his contention (the vessels *Montijo v. Colombia*, *Hero* and *San Fernando v. Venezuela*, and *Easton v. Peru*) do not seem to me to serve as precedents. In the two first, which refer to the seizure of vessels, there is a mingling of juridical questions which complicate and obscure the cases and render them quite distinct in principle from a simple case of injury to the property of a foreigner domiciled in this country. In the case of *Easton v. Peru* that country agreed with the United States to pay the sum awarded, but Moore assigns no ground for such agreement.

Fiore, the authority quoted by the honorable Commissioner for Italy, holds in his writings opinions which, when taken in sequence, support the position taken by me in this case. As quoted, the extracts cited do not correctly render the opinions of that learned writer, who maintains that a state may be held responsible if its system of laws is so grossly imperfect as to be evidently unfit for proper administration. The laws of Venezuela — penal, civil, and of procedure — have been inspired by those of Italy, and in so far as concerns the general order of their principles there is but little disparity between them. It would be difficult for Italy, according to equity and the principles laid down by Fiore, to cast imputations of inefficiency in Venezuela in this respect. The responsibility of a government is in proportion to its ability to avoid an evil. A government sufficiently powerful in all its attributes to prevent the occurrence of evil, but by negligence permitting it, is doubtless more accountable for the preservation of order than one not so endowed. It is on this basis that Fiore determines the responsibility of a government to be in direct ratio to its ability to foresee and avoid danger.

A few final considerations and I have done.

This Commission has not, in my opinion, the right to enter into a general discussion as to the merits of the policy of the Venezuelan Government. That

would be an act of intervention into its national life not warranted by the principles of international law. Venezuela is a sovereign state, recognized as such by all civilized nations, and is not accountable to any foreign power concerning the motives of its political action.

We here are simply acting as judges in the settlement of claims for damages, according to the merits and circumstances of each individual case — nothing more — and I repel the observations of the honorable Commissioner respecting the general policy and administration of the affairs of this country. Venezuela is a member of the family of nations according to the principles of international law, and admitted as such without question. I can not therefore see that there is any necessity for the discussion of this matter. Venezuela, though occupying a very modest position among the civilized powers, may say, in spite of her recent political misfortunes, that her people have a right to consideration as a cultured people for whom there is a brilliant and promising future. Her history is inferior to that of none of the South American states. To four of them her armies have given independence and furnished statesmen. From her soil have sprung Americans who may well be called eminent. Her institutions, though not as yet fully developed, as they surely will be in time, are most generous and liberal and progressive. She enjoys to the fullest degree liberty of conscience, of religion, of thought, and of education. On her shores the stranger enjoys the same measure of civil rights as does the native. Surely a country in which such conditions exist is entitled to consideration and esteem, and should not be judged by the standard of accidental occasions of political perturbations in which damage to property is suffered. Were so ignoble a criterion to be adopted in our estimate of nations, more than one now held in high regard in Europe would appear far otherwise.

Force of circumstances has drawn us into a general discussion of national responsibility for revolutionary acts, but the truth is that such principles are not needed except as the circumstances of each particular case may require.

This should be the procedure of judges, more especially of judges sitting in equity.

In accordance with the ideas expressed by me in the foregoing, I feel constrained to reject and deny the claim of Salvatore Sambiaggio.

ZULOAGA, *Commissioner* (supplementary opinion):

The government is not responsible to individuals for damages caused by factions, revolutions, or mobs in any manner against the constituted authority. It is true that the government should confer protection and security, but only in so far as is permitted by the means at its disposal and according as the circumstances may be verified. So many and so various are the causes which may render a government more or less culpable that it would be impossible to formulate a general idea on the subject. Moreover, so complicated are the circumstances that the solution of this problem in a perturbed state of society is a question of political tact which few statesmen are capable of settling.

There are times when the use of extreme energy and implacable repression may be a great error, serving only to feed the fires of the insurrection.

Revolutions are not here, more than elsewhere, always occasioned by the faults or errors of the government or by a simple spirit of uprising among the revolted. They obey multiple causes, and not infrequently there is in the political horizon of a people a condensation of revolutionary clouds that the patriotism of the best citizens of the government or of the opposition is unable to prevent, so deeply is the reason hidden in political or economical causes.

Europe itself, so proud of the internal peace which its states have succeeded in preserving during the latter half of the past century, sees with alarm, in

spite of the strength of the organization of its governments, the swelling of the socialistic forces and the affiliation therewith of the working masses.

Governments are constituted to *afford* protection, not to *guarantee* it, and it is out of the question that this tribunal should assume to investigate the causes of injury from the general standpoint of interior policy, without running the risk of undertaking to judge not merely the cases of claims for damages submitted to it, but also the very government and country itself, which would be an act of interference wholly unwarranted by the principles recognized by all countries.

It has, however, been maintained by various governments and authorities that in certain particular cases and under certain circumstances thereof a state might properly be charged with responsibility for damages to an individual, in the event of its being demonstrated that the state had been wholly negligent in furnishing the protection which could be reasonably expected from it. In accordance with this theory the government is not responsible for lack of protection not resulting from a culpable neglect so great as to equal an act of its own against private property.

Whosoever, therefore, makes claim against the state in such case must establish two things —

1. That he has actually suffered the damage alleged.
2. That the state is in a certain manner responsible, through its negligence, for the damage committed.

This is the doctrine laid down by Fiore: <sup>1</sup>

It is not sufficient for a state to prove that it has suffered a damage from the acts of individuals residing in another state to charge the latter with responsibility and exact a reparation. It must be proved that the prejudicial act is morally imputable to the said state, or that it could or should have prevented the injury and was voluntarily negligent of its duty in not having done so.

This is nothing more than the application of common law that the burden of proof rests on the plaintiff.

In the application of these principles of indirect responsibility it is necessary to take into account that the government of a country in a state of war meets with graver difficulties and problems than it does in a state of peace; that the means at its command and its especial attention are preferably directed to the reestablishment of order, and that its responsibility is in direct ratio to its ability for so doing.

Speaking of neutrality, Fiore says: <sup>2</sup>

The inability of a neutral state to prevent the violation of the laws of neutrality *always* excludes the liability of the government, and consequently the right of the belligerent to consider the neutral state responsible for said violation.

Now, if this rule is so clearly expressed in regard to neutrality, in which the obligations of neutral governments are in a certain way direct, what shall we say when it is a case coming within the internal life of a state?

This principle of the responsibility of a state by reason of its negligence is moderated, however, by that which holds that foreigners can not in any territory expect to receive more than is accorded the nationals, and according to the law of Venezuela the state is not responsible for the acts of revolutionists.

Setting aside all discussion as to principles of international law, to which we were brought by the necessity of understanding the meaning of certain statements in the Washington protocol, and keeping strictly within the principle of absolute equity, I would ask, Is it equitable that foreigners domiciled in

<sup>1</sup> See Vol. I, sec. 673, p. 582.

<sup>2</sup> See sec. 1569.

Venezuela should expect to escape the political condition of the country, and obtain, as an advantage over the natives, not only payment for damages inflicted on them by the Government, but for those caused by the rebels the Government was combatting, and against whom it was expending all its energies, blood, and treasure? Is it equitable that, as between a Venezuelan and a foreigner, the former should say, "My home is in mourning for cherished members of my family who have perished in defense of the state; I myself am ruined from the enforced neglect of my business: I have been the victim of the enemy," while the foreigner may say, "I have lost nothing by the war; I am as safe as in times of peace; not only does the government (which I do not defend) pay me for the losses which it has inflicted on me but for those occasioned by its enemies as well."

I believe that in equity such claims should be rejected.

RALSTON, *Umpire*:<sup>1</sup>

The Commissioners for Italy and Venezuela differing as to the right of recovery in the above-mentioned case, the same was duly referred to the umpire for decision under the protocol.

The claimant, Salvatore Sambiaggio, a resident of San Joaquín Parish, State of Carabobo, demands the sum of 5,133.52 bolivars for forced advances made to, property taken by, and damages suffered from revolutionary forces under command of Colonel Guevara on or about July 27, 1902, with the additional amount of 171.63 bolivars for costs and interests.

The immediate and most important question presented is as to the liability of the existing government for losses and damages suffered at the hands of revolutionists who failed of success.

Let us treat the matter first from the standpoint of abstract right, reserving examination of precedents, the treaties between the two countries, and the question whether there be anything to exempt Venezuela from the operation of such general rule as may be found to exist.

We may premise that the case now under consideration is not one where a state has fallen into anarchy, or the administration of law has been nerveless or inefficient, or the government has failed to grant to a foreigner the protection afforded citizens, or measures within the power of the government have not been taken to protect those under its jurisdiction from the acts of revolutionists; but simply where there exists open, flagrant, bloody, and determined war.

The ordinary rule is that a government, like an individual, is only to be held responsible for the acts of its agents or for acts the responsibility for which is expressly assumed by it. To apply another doctrine, save under certain exceptional circumstances incident to the peculiar position occupied by a government toward those subject to its power, would be unnatural and illogical.

But, speaking broadly, are revolutionists and government so related that as between them a general exception should exist to the foregoing apparently axiomatic principle?

The interest of a government, like that of an individual, lies in its preservation. The presumed interests of revolutionists lie in the destruction of the existing government and the substitution of another of different personnel or controlled by different principles.

To say that a government is (as it naturally must be) responsible for the acts it commits in an attempt (for instance) to maintain its own existence, and to require it at the same moment to pay for the powder and ball expended and

<sup>1</sup> For a French translation see Descamps-Renault, *Recueil international des traités du XX<sup>ème</sup> siècle*, 1903, p. 808.

the soldiers engaged, in an attempt to destroy its life, is a proposition difficult to maintain, and yet it is to this point we arrive in the last analysis if governments are to compensate wrongs done by their would-be slayers when engaged in attempts to destroy them.

A further consideration may be added. Governments are responsible, as a general principle, for the acts of those they control. But the very existence of a flagrant revolution presupposes that a certain set of men have gone temporarily or permanently beyond the power of the authorities; and unless it clearly appear that the government has failed to use promptly and with appropriate force its constituted authority, it can not reasonably be said that it should be responsible for a condition of affairs created without its volition. When we bear in mind that for six months previous to the taking complained of in the present case a bloody and determined revolution demanding the entire resources of the Government to quell it had been raging throughout the larger part of Venezuela, it can not be determined generally that there was such neglect on the part of the Government as to charge it with the offenses of the revolutionists whose acts are now in question.

We find ourselves therefore obliged to conclude, from the standpoint of general principle, that, save under the exceptional circumstances indicated, the Government should not be held responsible for the acts of revolutionists because —

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.

Let us now discuss the decisions of courts and commissions relative to the question at issue.

The case of *Prats v. The United States* was presented before the American and Mexican Mixed Commission of 1868, and was for the destruction of a brig by the Confederate forces during the American civil war.

Nonresponsibility on the part of the United States [said Mr. Wadsworth, speaking for the Commission], for injuries by the Confederate enemy within the territories of that Government to aliens did not result from the recognition of the belligerency of the rebel enemy by the stranger's sovereign. *It resulted from the fact of belligerency itself* and whether recognized or not by other governments. \* \* \* The naked question therefore remains: Is the United States responsible for injuries committed during the late civil war within the arena of the struggle by the armed forces of the so-called Confederate States to the property of aliens, transient or dwelling? We have no difficulty in answering that question in the negative.

\* \* \* \* \*  
 The principle of nonresponsibility for acts of rebel enemies in time of civil war rests upon the ground that the latter have withdrawn themselves by force of arms from the control and jurisdiction of the sovereign, putting it out of his power, so long as they make their resistance effectual, to extend his protection within the hostile territory to either strangers or his own subjects, between whom, in this respect, no inequality of rights can justly be asserted. (Moore's Digest, Vol. 3, pp. 2886-2892.)

As will appear by reference to Moore, Volume 3, page 2900, the same Commission followed this rule in various cases like in principle.

The United States was not held liable to foreigners for contracts entered into between them and the Confederate States during the civil war. (Moore, Vol. 3, pp. 2900-2901.)

A somewhat like principle was invoked when the American and Mexican Claims Commission of 1868 refused to hold Mexico responsible for the acts of the Maximilian government which was striving to accomplish its overthrow. (Moore, Vol. 3, p. 2902.)

The case of Daniel N. Pope was presented before the American and Mexican Claims Commission of 1859 for damages inflicted by a sudden insurrectionary movement which was soon quelled by the authorities. Mexico was not held responsible. (Moore, Vol. 3, p. 2972.)

So losses inflicted upon a foreigner by a government not recognized as *de facto* were not recompensed. (*Schultz v. Mexico*, American and Mexican Claims Commission of 1868, Moore, Vol. 3, p. 2973.)

In the Cummings case, before the same Commission, the umpire, Sir Edward Thornton, held that if the parties inflicting the damage were rebels, the Government was not responsible for the loss. (Moore, Vol. 3, p. 2977.)

In the case of Walsh, for imprisonment by rebels, the same umpire held that the Mexican Government could not be held liable. (Moore, Vol. 3, p. 2978.)

Like principles to these laid down in the foregoing cases were followed in the cases of Wyman and Silva. (Moore, Vol. 3, pp. 2978, 2979.)

The case of Divine (Moore, Vol. 3, p. 2980) is notable in that the American agent contended that Mexico should be held responsible as she had pardoned the revolutionist and had conferred high office upon him; but the umpire held that

other governments, including that of the United States, have pardoned rebels, but they have not on this account engaged to reimburse to private individuals the losses caused by those rebels,

and dismissed the claim.

Still other commissions have followed the same rule. In the case of McGrady et al. *v. Spain* (Spanish and American Commission of 1871), a claim merely setting up wrongs and injuries committed by insurgents was dismissed. (Moore, Vol. 3, p. 2981. See to like effect *Zaldivar v. Spain*, Moore, Vol. 3, p. 2982.)

Before the American and British Claims Commission of 1871 was heard the oft-cited case of Hanna, for destruction of cotton by the Confederate forces during the American civil war. After thorough discussion, the Commission unanimously held —

that the United States can not be held liable for injuries caused by the acts of rebels over whom they could exercise no control and which acts they had no power to prevent. (Moore, Vol. 3, p. 2982.)

The same principle was followed in the cases of Laurie and others (Moore, Vol. 3, p. 2987) and Stewart (p. 2989).

The last Commission to consider the point under discussion and decide thereon was the Spanish Treaty Claims Commission, formed by act of the American Congress dated March 2, 1901.<sup>1</sup>

The treaty of December 10, 1898, between the United States and Spain<sup>2</sup> provided that "The United States will adjudicate and settle the claims of its citizens against Spain and relinquished in this article," and to render effective this provision the Commission was constituted.

The article referred to released all claims that had arisen in favor of the nationals of either country against the other "since the beginning of the late insurrection in Cuba."

<sup>1</sup> Stats. at L., vol. 31, p. 1011.

<sup>2</sup> Art. 7, Stats. at L., vol. 30, p. 1754.

After the most thorough discussion of the question now before the umpire and the most ample consideration by the Commission it was decided by a majority — the minority apparently not dissenting from the statement of principle, but regarding it as abstract or qualified by certain treaty stipulations or other matters not in point here — that —<sup>1</sup>

2. Although the late insurrection in Cuba assumed great magnitude and lasted for more than three years, yet belligerent rights were never granted to the insurgents by Spain or the United States so as to create a state of war in the international sense, which exempted the parent government from liability to foreigners for the acts of the insurgents.

3. But where an armed insurrection has gone beyond the control of the parent government the general rule is that such government is not responsible for damages done to foreigners by the insurgents.

4. This Commission will take judicial notice that the insurrection in Cuba, which resulted in intervention by the United States, and in war between Spain and the United States, passed from the first beyond the control of Spain, and so continued until such intervention and war took place.

If, however, it be alleged and proved in any particular case before this Commission that the Spanish authorities, by the exercise of due diligence, might have prevented the damages done, Spain will be held liable in that case.

We may now consider the opinion of public men and international law writers.

Without discussing in detail the expressions of American Secretaries of State, in the opinion of the umpire they are correctly summarized in the head notes of section 223 of Wharton's Digest of International Law, as follows:

A sovereign is not ordinarily responsible to alien residents for injuries they receive on his territory from belligerent action, or from insurgents whom he could not control or whom the claimant government had recognized as belligerents.

Says Hall, in his work on International Law, page 231:

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 towards a foreign state.

In a note to the foregoing he remarks that during the American civil war the British Government refused to procure compensation for injuries inflicted by the United States forces on British subjects, remitting them to American courts for such remedies as were open to American citizens.

While the exact point at issue is not discussed by Bluntschli, he approaches it when he says (see sec. 380, bis):

Par contre, les États ne sont tenus d'accorder d'indemnités pour les pertes ou les dommages subis par les étrangers aussi bien que par les nationaux à la suite de troubles intérieurs ou de guerre civile.

<sup>1</sup> Opinion No. 8.

The British minister at Bogotá, on August 23, 1887, wrote, with relation to claims for destruction of property at Panama in 1887, as follows:

From the information obtained by Her Majesty's Government it is clear that the destruction of Colon was entirely due to the action of the insurgents who had declared themselves against the Government, and who, having succeeded in obtaining for a short period complete possession of and mastery over that town, proceeded to set fire to it in several places; nor does it appear to be open to question that at the time when these events occurred the Colombian Government was entirely powerless to prevent, although they eventually succeeded in quelling, the rebellion.

In these circumstances there is not, in the opinion of Her Majesty's Government, sufficient ground for contending that the destruction of Colon was so directly due to any default on the part of the Colombian Government as to justify a demand for compensation on behalf of those British subjects who, like yourself, have unfortunately incurred losses through the fire. (U.S. Senate Doc. 264, 57th Cong., 1st sess., p. 163.)

Whether the assumptions of fact contained in the foregoing are correct or not the statements of law may be accepted as a summary of the British position.

We may appropriately quote Escriche, who describes a fortuitous case for which no responsibility exists, as follows:

Caso fortuito es el suceso inopinado, ó la fuerza mayor, que no se puede preveer ni resistir. Tales son las inundaciones, torrentes, naufragios, incendios, rayos, violencias, *sediciones populares*, ruinas de edificios causadas por alguna desgracia imprevista, y otros acontecimientos semejantes.

According to Seijas, Volume III, page 538:

El gobierno inglés, como el ruso, el francés, el italiano y el español, han proclamado y sostenido la irresponsabilidad del estado por perjuicios ocasionados á extrangeros por tropas revolucionarias, y aún por las constitucionales, quando el daño no ha sido voluntario y deliberadamente causado.

While M. Despagnet does not more than touch the subject in his "Droit International Public," he says (p. 353):

Mais les étrangers peuvent souffrir un préjudice à la suite d'une guerre, d'une révolution, ou d'une émeute éclatant dans le pays où ils se trouvent; il est universellement admis aujourd'hui que la protection diplomatique ou consulaire ne peut être invoquée en pareil cas, parce qu'il s'agit d'un accident de force majeure, dont les étrangers courent le risque absolument comme les nationaux du pays. Ce serait, d'ailleurs, trop restreindre la liberté d'action des belligérants ou du gouvernement qui combat les insurgés que de les obliger à respecter les biens et les personnes des étrangers, alors surtout qu'il est souvent impossible de les distinguer dans une lutte violente.

Calvo remarks (sec. 86) that:

Les étrangers établis dans un pays en proie à la guerre civile et auxquels cet état de choses a occasionné des préjudices n'ont eux-mêmes aucun droit à des indemnités, à moins qu'il ne soit positivement établi que le gouvernement territorial avait le moyen de les protéger et qu'il a négligé d'en user pour les mettre à l'abri de tout dommage. Ces principes ont dans plus d'une circonstance été reconnus explicitement par les gouvernements d'Europe et d'Amérique.

To support the above statement he cites Grotius, book 2, chapter 25, section 8; Vattel, book 2, chapter 4, section 56; Wheaton, Part I, chapter 2, section 7; Kent, Volume 1, sections 23 et seq.; Twiss, section 21; Rutherford, Institutes, book 2, chapter 9; Puffendorf, book 8, chapter 6, section 14; Bynkerschoek, book 2, chapter 3; Wildman, Volume I, pages 51, 57, 58; Halleck, chapter 3, section 20; Martens, sections 79-82; Lawrence, Part I, chapter 2, section 7;

Pinheiro Ferreira, Volume II, pages 5 et seq.; Lawrence's Wheaton, note 16; Dana's Wheaton, note 15; Hall, pages 27-30.

In the work of J. Tchernoff, entitled "Protection des Nationaux Résidant à l'Étranger," page 337, the question is touched upon as follows:

On se trouve en présence d'insurgés qui ne sont pas reconnus. Ils commettent des actes qui d'une part sont accomplis en violation des lois de la guerre, et d'autre part sont de nature à causer des dommages aux sujets neutres. On ne peut parler de la responsabilité internationale des insurgés puisqu'ils n'existent pas pour le droit international public. Nous savons, nous venons de dire pourquoi, on ne peut rendre responsable de leurs actes le gouvernement légal.

Certain cases have been or might be cited contrary, or presumed to be contrary, to the enunciations of principle already indulged in by the umpire. They should be enumerated.

The first mentioned by the honorable Commissioner for Italy is the *Montijo* case, cited in 2 Moore, pages 1421 et seq. In this case the steamer *Montijo* was taken possession of by State revolutionists. After a short career they surrendered to the regularly constituted authorities of the State, which, according to the opinion of Umpire Sir Robert Bunce, granted them amnesty and stipulated as one of the conditions of peace that the State would pay for the use of the vessel. This contract, the umpire held, bound the Colombian Government. He went further, and in addition held that the Government had failed to perform its duty in that it had not recovered the *Montijo* and returned her to her owners, following with some general observations as to the duties of governments, which, however well meant, were not necessary to the decision of the case and not discussed by the parties. That the final result was correct is not doubted.

The next citation made by the honorable arbitrator for Italy is of the Venezuela Steam Transportation Company against Venezuela. Unfortunately, the grounds of the decision are not stated in the award. We learn from the agent's report (p. 11) that among the contentions of the United States were the following:

1. That the seizure, detention and employment of the three steamers of complainant and the imprisonment of its officers \* \* \* was —
  - (a) An invasion of the rights of the complainant in derogation of principles of international law; (b) was contrary to equity and justice; (c) and was in violation of the special privileges conferred by Venezuela upon the complainant under provisions of the act of Congress of May 14, 1869.
2. That by reason of the invasion of these rights and privileges Venezuela was internationally liable and is bound to indemnify complainant pecuniarily to the extent of the damage proven.

Considering the multiplicity of contentions advanced on behalf of the United States and the absence of reasoning in the decision, it is impossible to say on what principle the case was decided, although it is fair to remark that it might be inferred from the dissenting opinion of Commissioner Andrade that the case affords support for the theory of the honorable Commissioner for Italy.

Reference is next made to the case of Easton and others, supported by the United States, against Peru. As appears by the report in Moore, page 1629, the injuries complained of were inflicted by revolutionists, and a claim therefor presented before the United States and Peruvian Claims Commission. The question of Peru's liability for acts of revolutionists seems not to have been discussed, the Commissioners simply disagreeing as to the amount of the award, and the case going to the umpire, whose opinion is not given. Whether there were or not circumstances withdrawing the case from the usual rule does not appear.

The honorable arbitrator for Italy next cites the Panama riot claims (2 Moore pp. 1361 et seq.); but it seems clear that the citation is not in point, these claims having grown out of an assault in which the police themselves took part, and the Government being held liable for failure of its officers to do their duty, nothing approaching the present revolutionary question appearing.

The opinion of the honorable Commissioner for Italy invites attention to Bluntschli, article 462, and Fiore, sections 645, 651, and 657.

Bluntschli, in the article indicated, lays down conditions which would justify forcible interference by one state in the affairs of another; but the present situation does not seem to be such as to make his words applicable.

The positions taken by Fiore may be regarded as being in direct accord with the theory of the present decision. Furthermore, we may accept, as, in fact, has already been accepted, in principle, the words of Fiore (sec. 656), when he says:

Non é facile stabilire regole astratte per determinare quando la mancanza di diligenza per parte di un governo nel calcolare le conseguenze possibili e prevedibili del proprio sistema di leggi e di procedure, posse costituire una omissione volontaria, o tale da rendere lo Stato responsabile. Tutto dipende dal rapporto tra il dovere astratto dello Stato e le circostanze di fatto, e tra il pericolo del danno e la prevedibilitá.

La diligenza colla quale un governo deve provvedere a che siano rispettati i doveri internazionali dovrà certamente essere maggiore quando per la forza degli avvenimenti siano posti in giuoco molti interessi, quando la società internazionale sia agitata, quando il pericolo che accadano fatti a danno di un Stato amico, sia maggiore. Di maniera che la solerzia colla quale dev' essere tenuto un governo é in ragione diretta delle circostanze che rendono più o meno imminente ed il danno che si può provvedere ché i terzi possono soffrire; la sua responsabilitá effettiva poi in ragione diretta del dovere di essere solerte dei mezzi dei quali poteva disporre, e dei quali sei servito per allontanare il pericolo. (See Fiore, *Droit Int. Privé*, Antoine's ed., sec. 671.)

There is, however, the broad difference hereinafter pointed out between indulgence in a settled presumption, on the one hand, and an investigation of the facts and appreciation of the circumstances in each case.

It is suggested, in the opinion of the honorable Commissioner for Italy, among other things, first, that the Italian protocols impliedly recognize the obligation of Venezuela to pay for injuries committed by revolutionary troops; and, second, that under a proper reading of Article VIII of the protocol of February 13, bearing in mind that France and Venezuela, by the protocol of February 19, 1902, had expressly recognized damages arising from "insurrectionary events," and that the German protocol refers to claims resulting from the present Venezuelan civil war, Italy, under the "most favored nation" clause appearing in such article of her protocol, is entitled to be paid for injuries inflicted upon her subjects, and of the nature above indicated.

To fully understand these contentions a recital of the facts with relation to the diplomatic situation between Italy and Venezuela seems essential.

By article 4 of the treaty between the two nations, dated June 19, 1861, it was provided, among other things, as follows:

ART. 4. The citizens and subjects of one state shall enjoy in the territory of the other the fullest measure of protection and security of person and property, and shall have in this respect the same rights and privileges accorded to the nationals, and shall be subject to the conditions imposed on the latter. \* \* \*

In cases of revolution or internecine war the citizens and subjects of the contracting parties shall have the right, in the territory of the other, to be indemnified for loss or damage to person or property inflicted by the constituted authority in the same measure as would, under similar circumstances, be granted nationals according to the laws which are or may be in vigor.

Article 26 provides:

It is agreed between the high contracting parties that in addition to the foregoing stipulations the diplomatic and consular agents, all citizens, vessels, and merchandise of each state, respectively, shall enjoy the full right in the other to the franchises, privileges, or immunities accorded the most favored nations, gratuitously if the concession has been gratuitous, and on similar terms if the concession was a conditional one.

Discussions, the nature of which will be alluded to hereafter, arising between the two countries, by Article VIII of the protocol of February 12, 1903, it was provided as follows:

ART. VIII. The treaty of amity, commerce, and navigation between Italy and Venezuela of June 19, 1861, is renewed and confirmed. It is, however, expressly agreed between the two governments that the interpretation to be given to articles 4 and 26 is the following:

"According to article 4, Italians in Venezuela and Venezuelans in Italy can not in any case receive a treatment less favorable than the natives, and according to article 26, Italians in Venezuela and Venezuelans in Italy are entitled to receive in every matter, and especially in the matter of claims, the treatment of the most favored nation, as is established in the same article 26."

If there is any doubt or conflict between the two articles, the article 26 will be followed.

It is further specially agreed that the above treaty shall never be invoked in any case against the provisions of the present protocol.

Article IV of the present protocol reads as follows:

ART. IV. The Italian and Venezuelan Governments agree that all the remaining Italian claims, without exception, other than those dealt with in Article VII hereof, shall, unless otherwise satisfied, be referred to a Mixed Commission, to be constituted as soon as possible in the manner defined in Article VI of the protocol, and which shall examine the claims and decide upon the amount to be awarded in satisfaction of each claim.

The Venezuelan Government admit their liability in cases where the claim is for injury to persons and property, and for wrongful seizure of the latter, and consequently the questions which the Mixed Commission will have to decide in such cases will only be:

- (a) Whether the injury took place or whether the seizure was wrongful; and,
- (b) If so, what amount of compensation is due.

In other cases the claims will be referred to the Mixed Commission without reservation.

It is evident that the protocol last mentioned does not directly recognize any obligation on the part of Venezuela to pay for injuries inflicted by revolutionary troops, and the first question is whether it does so by implication. It seems clear that under the treaty of 1861 revolutionary claims could not have been entertained, for the obligation recognized by Italy and Venezuela reciprocally was to indemnify for the loss or damage inflicted by the constituted authority of the country, and then only in the same measure as nationals would be.

Consequent upon the revolutionary events of 1896 to 1900, injuries inflicted upon Italian citizens were the subject of the diplomatic discussion between the countries. A careful examination of the correspondence shows that it did not relate to the questions of liability or nonliability for the acts of revolutionists, but rather to the power of Venezuela under its decree of February 14, 1873, republished January 24, 1901, to remit Italians and other foreigners to the local authorities for relief. Bearing in mind the fact that the only treaty obligations then existing were to indemnify against injury by the constituted authorities of the country we can readily understand why it was that in the

diplomatic correspondence, as stated, no reference whatever exists to the question of liability for damages from acts of unsuccessful revolutionists, and none of the Italian claims submitted to the Venezuelan foreign office were for such injuries.

The article does not in itself refer to any specific classes of acts, and a natural and logical interpretation would be that it charged Venezuela with the fullest responsibility for the acts of her authorities of whatever nature, legal or otherwise, or other acts for which she might be responsible from the standpoint of international law, not for the acts of those over whom she had no control. This interpretation would not necessarily render the words meaningless or superfluous when we remember that at the time they were written there existed in full force the law of February 14, 1873, which provided only a limited responsibility, as follows:

ART. 9. En ningún caso podrá pretender que la Nación ni los Estados indemnicen daños, perjuicios, ó expropiaciones, que no se hubieron ejecutado per autoridades legítimas, obrando en su carácter público.

Article 14 of the constitution of Venezuela of April, 1901, contains the foregoing provision, but with the words applying it "tanto los nacionales como los extrangeros," while article 13 provides:

ART. 13. Los extrangeros gozan de todos los derechos civiles que gozan los nacionales. Por tanto, la Nación no tiene ni reconoce á favor de los extrangeros ningunas otras obligaciones ni responsabilidad que las que á favor de los nacionales se hayan establecido en igual caso en la constitución y en las leyes.

Venezuela, in addition, denied in principle the right of a foreigner to present any claims save before her own forums, and permitted that only for a limited time. About these points alone the discussion between the two Governments turned. It is therefore inconceivable that Venezuela by the protocol should have admitted liability for a large class of claims never contended for by Italy, her admission so naturally relating to a liability denied by both laws and constitution.

An interpretation which would extend the liability of Venezuela under her admission to acts of revolutionists would enlarge its limits to include any liability, no matter how generally denied by internationalists, and whether the damages were the result of private wrongs or unexpected brigandage, were committed by a power invading Venezuela or were the effect of an accident in the international sense as applied to war; in every case must Venezuela pay — a conclusion manifestly impossible. In the umpire's opinion, there must properly be the premise always understood that the claim is of a nature to create liability under international law — in other words, it must be for a legal injury. (See Webster's Dictionary, title Injury.)

Let us accept for a moment the interpretation insisted upon by Italy and see the result. Venezuela would be bound not alone for her own acts, but generally for all acts — bound for the acts of those seeking to destroy constituted government as well as to defend it; bound for every claim of damage the royal Italian legation might see fit to present. She would be held to have abandoned the usual position of a contracting party and to have consented to place herself within the judgment of those claiming against her, leaving only the amount of the claim to be determined. The Commission would no longer determine whether the (legal) injury took place, for all claimed offenses, no matter by whom committed, would constitute injuries in the eyes of the Commission. To indulge in such supposition is to imagine that the representative of Venezuela had abandoned reason when the protocol was signed, and an interpre-

tation according to common sense to both parties signing a contract should always be sought.

Let us for a moment analyze the language of the protocol in view of the facts. Venezuela had for a long time by her constitution and laws denied her liability for certain classes of acts, and denied that she was responsible anywhere save in her own courts.

By the protocol she admitted liability for injury to persons and property and wrongful seizure of the latter, and remitted to a mixed commission the questions (a) whether the injury took place, and (b), if so, what amount of compensation is due. In aid of the sense we may presume that the word "injury," when last used, includes injury to person and property and wrongful seizures.

It has already been pointed out that "injury" imports a damage inflicted against law. It involves a wrong inflicted on the sufferer and of necessity wrongdoing by the party to be charged, as otherwise it could not be called "wrongful" as against him. Applying this doctrine, which the umpire believes to be unassailable, by what process of ratiocination can he imply to Venezuela the wrongful intent lodged in the bosoms of those who were at enmity with her and seeking to destroy her established Government? And if he may not do so, how can he charge Venezuela with the commission of acts of which she is innocent? And how, under such circumstances, can he find that an injury has been committed with which, by the law of nations, she should be so charged?

If it be argued that she has admitted liability for the acts of another, and therefore she should pay, is it not to be remarked that a promise to pay for the acts of one's enemy engaged in an attempt upon one's own life is so far contrary to the usual practice of mankind that it is only to be believed upon the most direct and express evidence, and beyond all dispute this evidence is lacking.

But even if the case were not clear, as it seems to be, applying the usual rules of law, and bearing in mind the tendencies of human nature, what are we taught as the canons of interpretation in such cases?

Woolsey's International Law, section 113, gives as one of the most important rules of interpretation:

2. If two meanings are admissible, that is to be preferred which is least for the advantage of the party for whose benefit a clause is inserted. For in securing a benefit he ought to express himself clearly. The sense which the acceptor of conditions attaches to them ought rather to be followed than that of the offerer.

Wharton's Digest, section 133, expresses a like idea in these terms:

If two meanings are admissible, that is to be preferred which the party proposing the clause knew at the time to be that which was held by party accepting it.

In the same sense says Pradier-Fodéré (section 1188):

Les auteurs modernes reconnaissent que \* \* \* les stipulations douteuses doivent être interprétées dans le sens le moins onéreux pour la partie obligée.

Vattel expresses himself (sec. 264, Tome II) as follows:

Si celui qui pouvait et devait s'expliquer nettement et pleinement ne l'a pas fait, tant pis pour lui; il ne peut être reçu à apporter subséquemment des restrictions qu'il n'a pas exprimées.

Summing up the foregoing, the umpire thinks that if it had been the contract between Italy and Venezuela, understood and consented to by both, that the latter should be held for the acts of revolutionists — something in derogation of the general principles of international law — this agreement would naturally have found direct expression in the protocol itself and would not have been left to doubtful interpretation.

As above indicated, it is strongly urged, in connection with Article VIII of the protocol, that because of the presence of the "most-favored-nation" clause the umpire should give to Italy all the advantages which might be claimed by Germany and France by virtue of the protocols made with those powers.

At first glance the suggestion would appear to be well founded; but a careful study of the article will, in the umpire's opinion, prove the argument erroneous.

At the time the protocol was signed relations between Italy and Venezuela were so far broken that, as shown by the language of the article, it was necessary to "renew and confirm" the old treaty.<sup>1</sup>

Italy then asked and obtained a special interpretation of the treaty of 1861 with her. If this interpretation is to be given a retroactive effect, and if it is to be considered as applying in favor of Italy, all the provisions of other protocols recently signed, then a resort to such instruments is necessary in every case to learn the furthest bounds of the powers of this Commission. Unless both elements concur we need not refer to them.

Has, therefore, this new interpretation of articles 4 and 26 of the old treaty any retroactive effect? If it has not, the rights of Italian subjects and the duties of the Venezuelan Government are fixed by treaty or international laws as of the date of the occurrence complained of, but modified by such provisions of the protocol as do not form part of the treaty of 1861 as now interpreted.

Treaties are to be interpreted, generally, *mutatis mutandis*, as are statutes (Wharton's Digest, sec. 133), and on many occasions the Supreme Court of the United States has held that in the absence of express language statutes will not be held to be retroactive. In one of the most recent cases brought before that tribunal it was held that —

a statute should not be construed to act retroactively, or to affect contracts entered into prior to its passage, unless its language be so clear as to admit of no other construction. (*City R. Co. v. Citizens' Street R. Co.*, 166 U.S., 557.)

The case now before us, as above indicated, is substantially that of a treaty "renewed and confirmed," with a new interpretation as to claims, but not in terms relating back to past conditions or justifying the umpire in believing that new obligations as to past events had been called into existence by its signing.

This belief is borne out by the fact that the signers of the protocol did not think that this renewed treaty related back, for if they had done so they would not have concluded the article with the words:

It is further specially agreed that the above treaty shall never be invoked in any case against the provisions of the present protocol.

If the treaty, as newly interpreted, had, in the signers' opinion, related back, these words would have been unnecessary, for, giving full force to the interpretation as relating to an earlier date, there would have been nothing for Italy to fear. If the treaty uninterpreted could have been invoked, save for the presence of the words in the protocol, there was reason to believe that its Article IV, above cited, would have defeated many Italian claims.

Article VIII, though found within a temporary protocol, is in fact part of a renewed treaty and relates necessarily to the treatment to be accorded citizens

<sup>1</sup> It will be noted that the permanent court of arbitration at The Hague, sitting in the Venezuelan case, found that the blockade resulted in war between Great Britain, Germany, and Italy on the one hand and Venezuela on the other. (Vol. IX, of these Reports, p. 105.)

and subjects by general and permanent rules between nations, and not to momentary rules of decision controlling the disposition of claims arising out of past events. Rules for the settlement of prior disputes, which die with the Commission acting under them, accord nothing partaking of "favored-nation" treatment; for, to illustrate, suppose Venezuela had said in a protocol with Switzerland ten years ago that to settle by arbitration a dispute affecting a single individual she had admitted her liability for the acts of robbers, could that admission now be invoked by Italy as against Venezuela? Is the case stronger or the rule different because France, for instance, has now a hundred or more claimants? Must the umpire examine the records of every past commission to be sure that Italy is receiving "favored-nation" treatment before him?

If the idea presented by the honorable Commissioner for Italy were to prevail, would not inextricable confusion result? Must the umpire of the Italian-Venezuelan Commission withhold his decision on a particular case until another commission decide it, and follow the views then expressed? If he decide a certain proposition against Italy, and any other commission thereafter give a more favorable decision, must he, in subsequent cases, abandon his opinions despite his solemn declaration at the formation of this Commission, or must he insist upon them, notwithstanding that the Commission primarily charged with the interpretation of the other protocol be of a different opinion?

The umpire concludes that the interpretation of the old treaty in Article VIII of the protocol has no retroactive effect and no reference to the pending arbitrations.

The umpire has discussed the foregoing as if the French and German protocols might give superior rights to those granted to Italy, but expresses no opinion on this point.

It is strongly insisted on behalf of the claimant that whatever may be the general rule of international law with respect to the nonliability of governments for the acts of revolutionists, this rule does not find a proper field of operation in Venezuela, the country being subject to frequent revolutions.

It is true that an exception such as is indicated has on various occasions been maintained by the United States and several European nations in their dealings with certain Central and South American states. But the exception can not be said to have become a settled feature of international law, not having been accepted by the nations against which it was enforced, and being repudiated by some international writers (Calvo, sec. 1278) and perhaps squarely accepted by none.

Attorney-General Cushing, a lawyer of deserved eminence in international affairs, remarked nearly fifty years ago (2 Moore, p. 1631):

Great Britain, France, and the United States had each occasionally assumed in behalf of their subjects or citizens in those countries (South American) rights of interference which neither of them would tolerate at home — in some cases from necessity, in others with questionable discretion or justification. In some cases such interference had greatly aggravated the evils of misgovernment. Considerations of expediency concurred with all sound ideas of public law to indicate the propriety of a return to more reserve in this matter as between the Spanish-American republics and the United States, and of abstaining from applying to them any rule of public law which the United States would not admit in respect of itself.

To take the position, as is asked, that Venezuela is in the regard under discussion an exception to the general rule we must have the right to decide, and must actually decide, that Venezuela does not occupy the same position among nations as is occupied by nations contracting with her. Is this justifiable?

For about seventy years Venezuela has been a regular member of the family

of nations. Treaties have been signed with her on a basis of absolute equality. Her envoys have been received by all the nations of the earth with the respect due their rank.

The umpire entered upon the exercise of his functions with the equal consent of Italy and Venezuela and by virtue of protocols signed by them in the same sovereign capacity. To one as to the other he owes respect and consideration.

Can he therefore find as a judicial fact, even inferentially (the protocol not authorizing it in express terms), that one is civilized, orderly, and subject only to the rules of international law, while the other is revolutionary, nerveless, and of ill report among nations, and moving on a lower international plane?

It is his deliberate opinion that as between two nations through whose joint action he exercises his functions he can indulge in no presumption which could be regarded as lowering to either. He is bound to assume equality of position and equality of right.

The umpire is the more confirmed in this opinion because of the fact that at the time of the happening of many of the offenses committed by revolutionists upon which claims against Mexico before the several commissions were founded, Mexico was experiencing internal disorders and revolutions certainly not less marked than those from which Venezuela had suffered within the past five years. Nevertheless Mexico was not charged with responsibility.

While the umpire considers the rule of action above indicated as that which must control him, he does not ignore the fact that the existence of the protocol implies that Venezuela may have failed in her duties in the light of international law in certain instances, and that as to such cases his powers as an umpire may be called into play. But in his mind there is a broad difference between indulgence in a general presumption of inferior status and the acceptance of proof of wrongdoing in particular instances.

The umpire therefore accepts the rule that if in any case of reclamation submitted to him it is alleged and proved that Venezuelan authorities failed to exercise due diligence to prevent damages from being inflicted by revolutionists, that country should be held responsible. In the present instance no such want of diligence is alleged and proved.

It is suggested that a decision holding Venezuela not responsible for the acts of revolutionists would tend to encourage them to seize the property of foreigners. This appeal is of a political character and does not address itself to the umpire.

It is further urged that absolute equity should control the decisions of the Commission and that equitably sufferers from the acts of revolutionists should be recompensed. But this subject may be viewed from two standpoints. It is as inequitable to charge a government for wrongs it never committed as it would be to deny rights to a claimant for a technical reason.

In the view of the umpire, the true interpretation of the protocol requires the present tribunal, disregarding technicalities, to apply equitably to the various cases submitted the well-established principles of justice, not permitting sympathy for suffering to bring about a disregard for law.

The umpire will close the discussion by quoting upon this point from Mérygnac's *Traité d'Arbitrage*, section 305:

*Cet usage est assez fréquent entre particuliers (permitting to the arbitrator absolute liberty of decision). Grotius en parlait déjà et ne voyait aucune bonne raison de le prohiber au regard des parties ayant une confiance absolue en l'arbitre (conf. art. 1019 du code de procédure civile français). Dans ce cas aucune règle ne s'impose, en principe, à l'arbitre international, et il est libre de statuer "suivant sa conscience personnelle." Nous estimons, cependant, qu'on ne saurait trop lui recommander de se conformer, toutes les fois qu'il le pourra, aux solutions du droit*

international, mitigé, le cas échéant, par l'équité, comme nous l'avons dit. En agissant autrement il risquerait souvent de faire fausse route, car, si grandes que soient son autorité et son expérience personnelles, elles ne peuvent évidemment aboutir à des déductions aussi sûres que celles qui ont été approuvées par une longue pratique internationale et l'usage constant des peuples civilisés. Il faut ranger dans la classe des compromis, laissant toute liberté à l'arbitre, ceux qui lui permettent de juger suivant la justice et l'équité; cette formule vague aboutit en effet à lui laisser une liberté absolue.

Governed by what he regards as the clear teachings of international law, the umpire will sign a judgment dismissing the case.

In conclusion, the umpire desires to express his appreciation of the industry and learning displayed on behalf of Italy and Venezuela in the preparation of the case.

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#### MAZZEI CASE

Venezuela ultimately receiving property originally taken by revolutionists, equitably should pay therefor.

RALSTON, *Umpire*:

The honorable Commissioners for Italy and Venezuela disagreeing as to the above-entitled claim, it was referred to the umpire.

The facts of the claim are somewhat obscure in certain particulars, because the appropriate dates are not always given, but the following is believed to be a correct statement:

On November 16, 1899, Generals Leopoldo and Victor Bautista, of the Government forces, took from the claimant a horse and some other animals, which the claimant valued at 16,000 bolivars, but which are not valued in the testimony, or their number given, save that the claimant refers to "two superior jacks" and the witnesses to "burros" or "animals." The horse taken was returned.

On January 18, 1900, revolutionary forces took merchandise and animals. We may dismiss further mention of this taking, as it comes within the rule laid down in the *Sambiaggio* case.<sup>1</sup>

On October 12, 1901, factional forces under command of General Briceño and Col. Nicolás Geres took 30 mules valued at 624 bolivars each, or a total of 18,720 bolivars. These forces being shortly thereafter defeated, the mules were taken possession of by the Government and not returned to the claimant.

With regard to the taking of November 16, 1899, the number of animals taken does not clearly appear. The umpire is limited to the smallest number given, the "two superior jacks." The valuation of 250 bolivars, in the absence of specific evidence, may be placed upon them.

As to the taking of October 12, 1901, while the claimant was in the first place a sufferer at the hands of the revolutionists, nevertheless, the property taken finally fell into the hands of the Government and was retained by it. Having, therefore, received the benefit of the claimant's animals, the umpire believes it entirely equitable that the Government should pay therefor.

A judgment will therefore be entered for the sum of 18,970 bolivars plus interest from the date of the presentation of the claim to December 31, 1903.

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<sup>1</sup> *Supra*, p. 499.

## DE ZEO CASE

A claim founded upon supposed wrongful acts attributed to minor public officers should be clear and definite in its statements and proof and show unavailing appeal to superior authority to justify recovery against a State.<sup>1</sup>

RALSTON, *Umpire*:

The honorable Commissioners for Italy and Venezuela differing in opinion, the above cause was duly referred to the umpire for decision.

The claimant, in person or through his witnesses, states that in the middle of the year 1885 he was a merchant residing in Mucuchies, Province of the Andes, and had built up a flourishing business, with large investment of capital; that there were due him credits payable generally at the end of the then present year or the beginning of the following; that his prosperity excited the envy of the local authorities, and on the return of Gen. Rosendo Medina to resume the position of president of the State, he, the claimant, became the object of furious and persistent persecutions by the authorities of Mucuchies, being finally compelled to flee, abandoning everything; that he was never able to return home, but after an absence of a year and a half he returned as near as Medina; that thereafter he brought suit in the local courts to recover debts due him, but the "expedientes" were "extracted" and his debtors were warned, under threats, not to pay him; that he did not finally bring suit because of these facts (although a superior court in 1886 adjudged that his testimonial proof was sufficient), since suit had to be brought in the locality where the acts complained of had been committed, and the same authorities were still in power and inspired with animosity against him and he could not procure an attorney.

The testimony of a number of witnesses was taken and it sustained, in a general way, the above allegations, fixing his damages from every cause, including indirect damage resulting from loss of business down to 1896, at 140,000 bolivars.

If we may presume that the complaint of the claimant embodies a just ground of recovery, it is to be noted that neither he nor his witnesses state the nature of the persecutions to which he was subjected (except the "extraction" of "expedientes," by whom taken not being stated), by whom these persecutions were inflicted (save as they are said to have been by unnamed local authorities), the threats leveled against him, causing flight, the value of the stock he lost, the value of his yearly business, the amount of outstanding credits he was compelled to sacrifice, the value of his lands and improvements, the damage experienced from their forced sale, the place where he spent his absence of a year and a half from the neighborhood, the nature of the threats against his debtors, and the amount of his injury by reason of the threats against them. The witnesses who swear to the amount of his loss (four in number) show no personal knowledge as to any details and make no statement as to them, but simply give their belief that 140,000 bolivars would be "equitable" or "just." The claimant does not state, furthermore, that he ever made any complaint to the superior officers of the Government. In the utter absence of detail it becomes impossible for the umpire to say that he was subjected to any such persecutions, the legal conditions otherwise permitting recovery, as would justify a Mixed Commission in considering the claim, or, if it did so, would enable it to determine even approximately the damage inflicted.<sup>2</sup>

<sup>1</sup> See Poggioli case, with note, *infra*, p. 669; and Sanchez case, *infra*, p. 754.

<sup>2</sup> See to like effect Sanchez case, *infra*, p. 754.

Again, the belief of a witness that a certain estimate of loss would be "equitable" or "just" can rarely be of value to the Commission, which needs definite statements of facts to act upon, and will then judge as to the proper conclusion, which may or may not be that of the witness. Judgments must be founded upon facts furnished by the witnesses.

The claimant excuses himself, as appears above, for not having brought suit for the damages inflicted upon him by the alleged fact that the authorities committing the wrong were still in office and inspired with animosity against him, and, as may be inferred, it would have been impossible for him to obtain justice. Again, we are not informed as to what control they had over the judiciary. The umpire is therefore unable to judge of the validity of this excuse, which, according to authorities hereinafter cited, should have been proven in the clearest possible manner.

The umpire will close by referring briefly to some authorities bearing upon the question at issue, and the tendency of which would be, from a legal standpoint, to deny in part or altogether, the responsibility of Venezuela before this tribunal, even if otherwise the case had been made out.

In the case of *Johnson v. Mexico* (3 Moore, p. 3032), before the Mexican Claims Commission of 1857, referring to a charge that the Government of Mexico had tolerated and even set on foot disorders affecting the claimant's business, it is said:

So grave a charge against the government of any country should be maintained by the most unquestionable proof. It should be alleged as a distinct fact and ground of reclamation, and proved by evidence of the clearest character.

In case of *Bensley* before the same Commission (3 Moore, p. 3018), a boy having been seized by the governor of a State, it was said:

For the damages resulting from this unauthorized act he was individually responsible to the claimant, and it does not appear that ample redress might not have been obtained by a resort to the judicial tribunals of the country. Had the courts of Mexico been closed to the claimant and justice denied him, that might have constituted a ground for a claim of indemnity against the Government of Mexico. No such case, however, is presented. No appeal was made by the claimant to the courts, and no denial of justice had been proved. Under these circumstances the board can not regard the Government of Mexico as liable to a claim for indemnity on account of the wanton or malicious trespass of the person holding the office of governor of one of the States constituting the confederacy.<sup>1</sup>

The *Cahill* case (3 Moore, 3066), before the United States and Spanish Commission, may also be referred to. The claimant asked payment for damages suffered by him while conducting a drug store at Cardenas, Cuba, and the breaking up of his business. He attributed his misfortunes to the machinations of a rival druggist, who was also an official, a "subdelegate of pharmacy." Among other things he complained of various acts of the authorities touching matters such as the hanging out of a flag, threats, disrespectful remarks, etc. The arbitrators held that claimant had no title to recover and dismissed the claim.

<sup>1</sup> Calvo says (sec. 1263): "Dans l'intérieur des limites juridictionnelles les agents de l'autorité de toute classe sont personnellement seuls responsables dans la mesure établie par le droit public interne de chaque État. Lorsqu'ils manquent à leurs devoirs, excèdent leurs attributions, ou violent la loi, ils créent, selon les circonstances, à ceux dont ils ont lésé les droits, un recours légal par les voies administratives ou judiciaires; mais à l'égard des tiers, nationaux ou étrangers, la responsabilité du gouvernement qui les a institués, reste purement morale, et ne saurait devenir directe et effective qu'en cas de complicité ou de déni de justice manifeste."

From the foregoing it appears that the claim must be dismissed, but without prejudice to any right the claimant may have to present his claim in Venezuela courts or elsewhere against persons guilty of any legal wrong so far as he is concerned.

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#### BOFFOLO CASE

(By the Umpire:)

A state possesses the general right of expulsion; but —  
 Expulsion should only be resorted to in extreme instances and must be accomplished in the manner least injurious to the person affected.<sup>1</sup>  
 The state exercising the power must, when occasion demands, state the reason of such expulsion before an international tribunal, and, an insufficient reason or none being advanced, accepts the consequences.  
 The only reasons advanced in the present case being contrary to the Venezuelan constitution, and Venezuela being a country not of despotic power, but of fixed laws, the umpire can not accept them as sufficient.

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

The right to expel foreigners is fully held by every State and is deduced from its very sovereignty. All international law writers agree upon this, and the European nations use it amply. In the case of expulsion submitted by England and Belgium to the arbitration of the French juriconsult, Desjardins, he affirms the right fully. Even Italy has not refused to recognize it in regard to Venezuela, having practiced it extensively.

Venezuela, by the constitution of 1893, established as subject to expulsion foreigners having no domicile and notoriously prejudicial to the public order.

The question as to domicile of foreigners is determined in Venezuela by the provisions of the decree of February 14, 1873, and applying these provisions to the case of Boffolo it appears that he had no domicile in Venezuela. He had not been in the country two years; neither did he have a business properly so called. It appears that he had ostensibly, as a manner of living at the time of the expulsion, a connection with Roversi, according to contract of 1899, whose character demonstrated its precariousness, and in addition a small sheet published Sundays, which seemed little more than an advertisement for Roversi.

Boffolo had no domicile in the country, and the fact of his having been notoriously prejudicial to public order is a question that the Government is fully competent to determine, since to it is confided the power to expel without appeal or revision.

From the very statements made by the claimant the evil life and character of the subject may be easily recognized. In the first place, his affirmations to the minister of foreign affairs contain many things notoriously false; in the second place, the only copy of his little periodical we have had in it an attack on the authorities of the country; and in an article he recommends to the workmen to read and patronize *El Obrero*, a periodical of strong socialistic and dangerous tendencies, and which was circulating at about this time, and which really caused considerable prejudice to capital and machinery by its propaganda. No other number of the sheet is known to us.

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<sup>1</sup> See also Paquet case, Vol. IX of these Reports, p. 323, and Maal case, *infra*, p. 730.

The right to expel exercised against Boffolo seems to me to have been clearly within the constitution. But there arises another question: Was the constitution in vigor at the time? It was, but with certain restrictions rendered necessary by the reestablishment of public order. And the expulsion of a foreigner who was disturbing this work seems to me to be within these restrictions.

It is to be noted that if it be true that foreigners enjoy the same civil rights as the natives, this refers solely to those foreigners who are domiciled. (See art. 12 of the constitution of 1893.)

The proceedings employed in the expulsion appear to me fully justified, though the claimant has presented us with his version of the case. But supposing that what he says is true, it is in no wise different from that followed by European nations generally.

With regard to the amount claimed, this seems to me to be ridiculous; and as is seen in the record, and as has been fully established by the Commission, this man had nothing, and his mode of living was not of a good character.

AGNOLI, *Commissioner* :

The Commissioner for Italy deems it neither necessary nor useful to dwell upon the arguments used by his learned colleague of Venezuela to prove that the Republic has the right to expel from Venezuelan territory foreigners not domiciled in the country and who are prejudicial to public order. It is not desired to contest this right nor that of Venezuela to arrest and condemn an Italian, if only the arrest and condemnation be justified, and with the reservation of the right to claim and exact reparation in each case of an abuse of these rights. An equal right is accorded to Venezuela by Italy.

The question turns upon another point. Let us consider whether the act of expulsion (which is at times legal) was justified in the case of Boffolo. Doctor Zuloaga has quoted from the constitution of 1893 and the decree of February 14, 1873 (which he should not have done in view of the provisions of article II of the protocol of May 7, 1903, which imposes in a precise and peremptory manner upon the Commission the duty of deciding claims according to the principles of equity and without regard to the provisions of local legislation), and after having recalled that said constitution authorizes the expulsion of foreigners not domiciled, and informed us that a domicile is only to be acquired by a two years' residence and establishment in business, now asserts that neither of these conditions had been complied with in the case of the claimant — an assertion believed by the writer to be purely gratuitous.

As a matter of fact, the legation has produced the testimony of three well-known persons, from which it appears that Boffolo established himself in Caracas in 1898. On the other hand, it is of record that he was expelled in April, 1900. Now, unless Doctor Zuloaga prove that Boffolo arrived here subsequent to April, 1898, his statement that the claimant had not had two years' residence in the country at the time of his expulsion must be held to be unfounded, and in all cases of doubt the decision should be in favor of the claimant.

The assertion that the claimant was not actually in business appears likewise unfounded. It is shown by documents submitted to the Commission that he was the depositary of a stock of goods belonging to merchants established here, the Messrs. J. Roversi and V. Alberti, and that said goods were opened to the public under the name of Commercial Sample House, the claimant thus acting as middleman between producers or importers and consumers for the goods thus intrusted to him. If for the lack of means he was not able to do business on his own account (and it is known he was in very modest circumstances), he can not therefore be excluded from consideration as a merchant.

He was, in addition, proprietor and director of a periodical appropriately called "Il Commercio." He had taken a house under a three years' lease, and was occupying part of it as a dwelling and storeroom, besides subrenting the remainder. It is stated, and from a letter of the brother of the claimant included in the record of the case it appears, that some rooms had been occupied by improper characters, and from this unsupported circumstance the Venezuelan Commissioner has forged a weapon against the absent claimant and paints him to the Commission as a man of evil life and fame. These unfavorable aspects are not established by the evidence, but, assuming that they were, the mere fact of his having rented rooms to fast women can hardly be urged as reason for expulsion.

The claimant was not and never had been a go-between; and even if he had been, which the testimony clearly disproves, he would not have thereby become "prejudicial to public order," the condition required by the constitution to justify expulsion.

Further, the declaration of the brother of the claimant, by a principle of fundamental law, may not be taken in part, and, taken as a whole, it shows the animus of the expulsion, for by it we learn that the claimant had demanded payment of rent legitimately due him from a woman who was known to everyone as the favorite of —. Now, if the Commissioner for Venezuela desires to avail himself of the above statement, he must take it in its entirety.

The Commissioner for Italy can not, however, admit that the claimant was expelled because of his alleged immoral conduct. It is clear that the expulsion was decreed because of the denunciation of an official whose name has not and will not come to light, or, by a still more probable hypothesis, considering the dates of the 1st and 4th of April, 1900, was caused by the publication of an article in No. 49 of the periodical above mentioned, in which was a somewhat severe criticism of the action of a Caracas magistrate, with an entirely incidental allusion to the President of the Republic, and wholly free from a political or disturbing character. In either case the measure adopted was unjustifiable.

Free expression of thought, either in print or in speech, is guaranteed in Venezuela to both natives and foreigners; to Italians in particular, on account of the treaty in force. In case of calumny or abuse the guilty person may be proceeded against and condemned, but in no case imprisoned without sentence of the proper tribunal. much less expelled.

The article published by Boffolo does not certainly constitute an infringement of public or private right, and he was not placed on trial therefor. Even less could it be considered as subversive of or prejudicial to public order, justifying expulsion. The claimant had neither social prestige nor political following sufficient to give him a character dangerous to the peace of the Government. He was but an humble citizen, who concerned himself in no wise with local politics.

The writer has already called the attention of the Commissioner for Venezuela to the fact that, according to the opinion prevalent among writers of international law, governments are held to furnish to legations representing the nations to whom the expelled belong the reasons for such expulsion, which was not done by Venezuela in the case of Boffolo, though requested to do so. Had these been satisfactory and of a character to establish that the claimant had engaged in political controversy against constituted authority, the representative of the royal Government would have been satisfied, and there would to-day be one claim the less. The Government had therefore not only the legal obligation but also the duty imposed by international courtesy to declare the reasons for the sudden and violent expulsion of the claimant. If it did not do so, we are justified in believing that such reasons did not exist.

In view of all the foregoing, there seems to be ample reason for the umpire to award with entire conscientiousness to the claimant the modest indemnity of 5,000 bolivars, as requested by the Commissioner for Italy, but before concluding this statement he desires to call the attention of the umpire to another circumstance, which is that though the claim of Boffolo has been pending before the Commission two weeks, during which time the subject has been more than once called up, the Venezuelan Government has not so far produced anything justifying the damaging and arbitrary course it pursued in regard to the claimant.

The voluntary and prompt exhibition of such proofs as the Commission would consider indisputable would seem to be due from the Republic, on the hardly acceptable supposition that such existed. Should they hereafter be produced, the writer reserves the right to examine and estimate them, as, coming so late, he can hardly anticipate them.

In any case he must hold that neither the umpire nor the Commissioner for Venezuela could attach much importance to them in the event of their not resulting from documents bearing a date anterior to that of the expulsion, and that Doctor Zuloaga would regard proof collected within the last few days with the same measure of distrust with which he has received evidence submitted by Italians in support of their contentions, and with the intention of combating claims against Venezuela which the Venezuelan Government, through its plenipotentiary at Washington, Mr. Bowen, had, for some unknown reason, considered just.

RALSTON, *Umpire*:

The above case has been referred to the umpire on disagreement between the honorable Commissioners for Italy and Venezuela.

It appears that Gennaro Boffolo, an Italian subject, reached Venezuela in June, 1898, and in the spring of 1900 was a householder in Caracas and the publisher of an Italian weekly newspaper entitled "Il Commercio Italo-Venezuelano." In the issue of April 1, 1900, appeared an article somewhat critical of the local minor judiciary, and also referring, but in an unimportant manner, to the President. Another article recommended the reading of El Obrero, a socialistic paper. Three days later (April 4) the *Gaceta Oficial* contained a decree directing Boffolo's expulsion, in the following terms:

Considerando: Que de las averiguaciones practicadas por las autoridades respectivas del Distrito Federal, aparece formalmente que el súbdito italiano Gennaro Boffolo, es á todas luces, perjudicial á los intereses nacionales, decreta:

ART. 1º. El súbdito italiano de nombre Gennaro Boffolo será expulsado del territorio venezolano, embarcándose en el puerto de La Guaira en el término de la distancia.

ART. 2º. El ministro de relaciones interiores queda encargado de la ejecución del presente decreto.

Immediately thereafter, or perhaps simultaneously, Boffolo was, as it is said, "summarily" arrested, transported by third-class ticket to Curaçao, but, through the intervention of the royal Italian legation, allowed to return about a month later.

It is further said, but no proof is offered, that during his absence his house was invaded and plundered, and articles taken belonging to others, the value of which he was compelled to reimburse, and that the claimant was subjected to police persecution, threatened with another arrest, and finally left Venezuela.

That a general power to expel foreigners, at least for cause, exists in govern-

ments can not be doubted.<sup>1</sup> (See Hollander case in U.S. Foreign Relations for 1895, p. 775, and also see p. 801, same volume, citations to be found in sec. 206, vol. 2, Wharton's International Law Digest, and other citations hereinafter given.)

But it will be borne in mind that there may be a broad difference between the right to exercise a power and the rightful exercise of that power. Let us illustrate. In the Hollander case (cited above) the Government of Guatemala contended:

The Government was not under obligation to allow him more or less time to get out of the country, nor to accommodate him in any way. All the practices of jurisprudence, supposing them to be certain and indisputable, fall down before a law clear that comes immediately from the sovereignty of a nation.

To this Secretary Olney very forcibly replied:

The logical result of that proposition is, that whatever a state by legal formula wills to do, it may do; and that international obligations are annulled, not infringed, by legalized administrative action in contravention of those obligations.\* \* \* I construe the language used to mean that, as a rule of international law, the right of expulsion is absolute and inherent in the sovereignty of a State, and that no other State can question the exercise of this right nor the manner of exercising it. \* \* \* The modern theory and the practice of Christian nations is believed to be founded on the principle that the expulsion of a foreigner is justifiable 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.

We may cite Rolin-Jaequemyns, who reported on the subject to the Institute of International Law in 1888 (*Revue de Droit International*, Vol. XX, p. 498), and after admitting the right of expulsion said:

\* \* \* En sa qualité d'être humain il a le droit de ne pas être l'objet de rigueurs inutiles et de ne pas être injustement lésé dans ses intérêts. En sa qualité de citoyen d'un autre État il peut réclamer contre ces rigueurs ou ces spoliations la protection de son souverain. \* \* \*

\* \* \* Il est dès lors légitime que l'État auquel appartient l'expulsé soit recevable à demander communication du motif spécial de l'expulsion, et cette communication ne peut lui être refusée.

L'acte même de l'expulsion doit d'ailleurs être restreint à son objet direct, essentiel, qui est de débarrasser le sol national d'un hôte nuisible. Le droit de souveraineté nationale n'exige ni ne permet davantage. \* \* \* Mais cette contrainte ne devra pas prendre un caractère gratuitement vexatoire.

He continues:

5° Même en l'absence de traités, l'État auquel appartient l'expulsé a le droit de demander à connaître les motifs de l'expulsion, et la communication de ces motifs ne peut lui être refusée.

In one of the latest works discussing the subject, "Protection des Nationaux Résidant à l'Étranger" (p. 450), M. Tchernoff shows himself so little friendly to the right of expulsion that he remarks:

<sup>1</sup> *Nociones de Derecho Internacional*, by Miguel Cruchaga T. (of Santiago de Chile), says (sec. 177): "Puede el Estado expulsar a los extranjeros por consideraciones de orden público; pero entendemos que este derecho no debe ejercitarse sino con mucha parsimonia y en casos muy especialísimos. El derecho en sí mismo, sin embargo, no puede negarse, puesto que el Estado también lo tiene, según el Derecho Público, con respecto a sus propios súbditos por via de grave pena."

Peu de personnes de nos jours soutiennent que le droit d'expulser les étrangers soit une attribution normale de l'État exerçant sa fonction civilisatrice.

Calvo (Dictionnaire du Droit International), title, "Expulsion," says:

But when a government expels a foreigner without cause and in a harsh, inconsiderate manner (avec des formes blessantes), the State of which the foreigner is a citizen has a right to base a claim upon this violation of international law and to demand adequate satisfaction.

See also Bluntschli, *Droit International Codifié*:

ART. 383. Chaque État est autorisé à expulser pour motifs d'ordre public les étrangers qui résident temporairement sur son territoire. S'ils y ont établi un domicile fixe, ils ont le droit à la protection des lois au même titre que les nationaux.

1. Le droit d'expulser les étrangers n'est pas un droit absolu de l'État; l'admettre serait de nouveau porter atteinte au principe de la liberté des relations internationales. L'État n'est le maître absolu ni du territoire ni des habitants du pays. L'ancienne théorie se fondant sur le principe du moyen âge que l'État est propriétaire du territoire, en avait abusivement déduit l'idée de la souveraineté illimitée de l'État. On reconnaît cependant presque partout à l'État la faculté d'expulser les étrangers par simple mesure administrative et sans que les personnes atteintes par cette mesure puissent recourir aux tribunaux.

ART. 384. Lorsqu'un gouvernement interdit sans motif l'entrée du territoire à un étranger dûment légitimé, ou l'expulse sans cause et avec des formes blessantes, l'État dont cet étranger est citoyen a le droit de réclamer contre cette violation du droit international, et de demander au besoin satisfaction.

1. L'État peut aussi être atteint dans la personne des ressortissants qu'il a mission de protéger. L'expulsion arbitraire peut amener des représentations diplomatiques; la partie lésée a toujours le droit de demander aide et protection à son consul ou de provoquer l'intervention de l'envoyé de son pays.

In the recent Ben Tillet affair between England and Belgium, the arbitrator, M. Arthur Desjardins, of France, in his sentence examined thoroughly the reasons for the expulsion of Tillet (as we shall do hereafter in this case), and also as to the treatment accorded him in connection therewith, and maintained the right of Belgium to expel under the circumstances, and, as well, justified the manner in which Tillet was treated by Belgium. (*Journal du Droit International Privé*, Vol. 26 (1899), p. 203.)

Hall says (*International Law*, p. 224):

In such cases (expulsion of individual foreigners residing in a state) the propriety of the conduct of the expelling government must be judged with reference to the circumstances of the moment.

Says Professor von Bar (*Journ. Droit Intern. Privé*, Vol. XIII, p. 6):

La conscience juridique universelle proteste contre l'usage arbitraire du droit d'expulsion. \* \* \*

Il nous paraît que l'État qui ouvre libéralement aux étrangers l'accès de son territoire ne doit pas pouvoir leur retirer à son gré le droit de séjour. (1) En ce sens Heffter, *Voelkerrecht*, sec. 62; "Aucun État ne peut écarter de son sol les ressortissants d'un autre État, dont la nationalité est dûment constatée, ni les expulser après leur avoir fait accueil, sans avoir pour le faire de bonnes raisons, qu'il est tenu de communiquer au gouvernement dont ils relèvent." \* \* \*

Dans tous les cas il est d'une nécessité indispensable d'apporter aux mesures de rigueur qui peuvent être prises contre les étrangers un double tempérament. L'un est de pure forme: L'État qui recourt à l'expulsion doit invoquer des motifs de nature à la justifier. L'autre touche au fond: L'expulsion doit être conforme aux traditions et aux principes du droit des gens. \* \* \*

Une peine insignifiante prononcée contre l'étranger à raison d'une injure, d'une contravention de police, ne suffirait pas à justifier une mesure d'exclusion. Pour

que l'infraction qu'il a commise puisse entraîner son expulsion, il faut qu'elle soit telle que, dans l'hypothèse où elle aurait été consommée sur le territoire, elle eût exposé le coupable à une perte assez longue de sa liberté, et à la privation au moins temporaire de certains droits. \* \* \*

Encore faudrait-il, de toute façon, pour que ce fait puisse donner lieu à une expulsion, qu'il soit prouvé, ou tout au moins rendu vraisemblable au plus haut degré, qu'il contient les éléments d'une violation grave et réelle de la loi, ou bien d'une tentative pour la commettre, ou encore d'un acte condamnable, appliqué à sa préparation. \* \* \*

Bluntschli pose en principe, dans son § 384, que l'expulsion arbitraire et non-motivée d'un étranger peut être le point de départ de réclamations diplomatiques de la part de l'État dont il est le national. Ce point est au-dessus de toute controverse. \* \* \*

Woolsey says (International Law, sec. 63, p. 85):

6. No state in peace can exclude the properly documented subjects of another friendly state, or send them away after they have been once admitted, without definite reasons, which must be submitted to the foreign government concerned.

In the opinion of the umpire it may be fairly deduced from the foregoing that —

1. A state possesses the general right of expulsion; but

2. Expulsion should only be resorted to in extreme instances and must be accomplished in the manner least injurious to the person affected.

Must explanation of reasons and justification of conduct be made to an arbitral tribunal when the occasion arises? The question is answered in Moore's Digest.

Orazio de Attellis, a naturalized American citizen, entered Mexico in 1833, and on June 24, 1835, the President issued an order for his expulsion on the ground that he had —

occupied himself again (he had been expelled before becoming an American citizen) in the publication of a periodical in which some productions appear which tend to ridicule the nation and to plunge it into anarchy.

What the productions were and what was their offensive feature was not disclosed. The claimant was so expelled under circumstances of especial hardship. The American Commissioners contended that the expulsion was causeless, inspired by enmity, in violation of rights secured to inhabitants of the Republic by the constitution and contrary to treaty relations.

The umpire (p. 3334) gave judgment in favor of the claimant.

In the case of *Zerman v. Mexico*, before the American and Mexican Commission of 1868, Sir Edward Thornton (p. 3348) said:

The umpire is of opinion that, strictly speaking, the President of the Republic of Mexico had the right to expel a foreigner from its territory who might be considered dangerous, and that during war or disturbances it may be necessary to exercise this right even upon bare suspicion; but in the present instance there was no war, and reasons of safety could not be put forward as a ground for the expulsion of the claimant without charges preferred against him or trial; but if the Mexican Government had grounds for such expulsion it was at least *under the obligation of proving* charges before this Commission. Its mere assertion, however, or that of the United States consul, in a dispatch to his Government, that the claimant was employed by the imperialist authorities, does not appear to the umpire to be sufficient proof that he was so employed or sufficient ground for his expulsion.

The umpire awarded the claimant \$1,000.

It appears, therefore, that the Commission may inquire into the reasons and circumstances of the expulsion.

Let us apply the principles above laid down to the case before us.

Boffolo was expelled, as the claimant Government contends (and nothing else is before the Commission), because he published a certain article supposed to reflect upon the local judiciary and referring in some purely incidental way to the President, and, as stated, recommended a socialistic paper. It is not the province of the umpire to pass upon Boffolo's taste or justice in so doing. He is, however, obliged to examine somewhat, first, as to whether in so doing he offended the laws of Venezuela, and second, whether under the laws the expulsion was permissible.

Sometime previous to the expulsion, and on the 31st day of October, 1899, the present President assumed the executive power, issuing the following proclamation:

Considerando: Que por virtud de los acontecimientos que han determinado el triunfo de la Revolución Liberal Restauradora, la situación política que ha surgido en la República es extraordinaria y de un carácter provisional;

Que mientras se llega á la reconstitución normal del país es indispensable establecer un régimen que, aunque transitorio, asegure y proteja los derechos y intereses políticos y sociales de la ciudadanía, Decreto:

ARTÍCULO 1°. Se declaran vigentes en todo el territorio de la República todos derechos, garantías, y prerrogativas que la Constitución Nacional de 1893 reconoce y otorga á los venezolanos.

ART. 2°. Se declaran igualmente en vigencia á las demás disposiciones de la expresada Constitución en cuanto ne se opongan á los fines de la Revolución Liberal Restauradora y sean compatibles con la naturaleza del Gobierno que de ella ha surgido.

ART. 3° Regirán en los Estados de la Unión y en el Distrito Federal todos los códigos y demás leyes nacionales de carácter general ó especial, y todas las leyes orgánicas que venían observándose en los diversos y distintos ramos y esferas de la administración pública.

ART. 4°. Los Presidentes Provisionales de los Estados y todos las demás autoridades de la República cumplirán y harán cumplir este Decreto en la parte que les concierna y en el radio de sus atribuciones.

ART. 5°. El Ministro de Relaciones Interiores queda encargado de la ejecución del presente decreto.

Let us see, now, what were the rights, guarantees, and prerogatives recognized and guaranteed by the constitution of 1893.

#### TÍTULO IV. — *Derechos de los Venezolanos.*

ART. 14. La Nación garantiza á los venezolanos la efectividad de los siguientes derechos:

5°. La libertad personal, y por ella: \* \* \*

\* \* \* 4°. Todos con el derecho de hacer ó ejecutar lo que no perjudique á otro.

6°. La libre expresión del pensamiento de palabra ó por medio de la prensa. En los casos de calumnia ó injuria, quedan al agraviado expeditas sus acciones para deducirlas ante los tribunales de justicia competentes, conforme á las leyes comunes; pero el inculpado no podrá ser detenido ó preso, en ningún caso, sino después de dictada por el Tribunal competente la sentencia ejecutoria que lo condene.

7°. La libertad de transitar sin pasaporte en tiempo de paz, mudar de domicilio, observando para ello las formalidades legales, y ausentarse de la República, y volver á ella llevando y trayendo sus bienes.

14°. La seguridad individual, y por ella: \* \* \*

\* \* \* 4°. Ni ser preso ó arrestado sin que preceda información sumaria de haber cometido delito que merezca pena corporal, y orden escrita del funcionario que decreta la prisión, con expresión del motivo que la cause, á menos que sea cojido *infraganti*; no pudiendo fuera de este caso ordenarse la prisión sino por autoridad judicial, ni los arrestos por la policía pasar de tres días, después de los

cuales el arrestado debe ser puesto en libertad ó entregado al juez competente.

\* \* \*

\* \* \* 10°. Ni ser privado de su libertad, por causas políticas, sin previa información sumaria, de la cual resulte comprometido en perturbaciones del orden público y sirviendo de obstáculo á su restablecimiento.

Furthermore the constitution provided (Art. 13):

Los extranjeros gozan de todos los derechos civiles de que gozan los nacionales.

In addition to the extracts above given, the excellent and enlightened constitution of 1893 provided:

ART. 23. La definición de atribuciones y facultades señala los límites del Poder Público; todo lo que exralimite esta definición constituye una usurpación de atribuciones.

One is pleased to note from the foregoing that even in time of storm and stress Venezuela recognized that those subject to her jurisdiction were entitled to enjoy freedom of speech and of the press (subject only to trial for abuse thereof before competent tribunals, pursuant to the common laws, with personal freedom until after the sentence), freedom of transit and change of domicile, freedom from arrest (unless pursuant to written warrant, save when taken in flagranti, and except in such case not to be imprisoned unless by judicial authority), not to be deprived of liberty for political reasons, save for disturbing acts, etc.

As appears from a citation already made, the powers of the officers of Government were not autocratic, but Venezuela was a country of laws, governed even in April, 1900, by officials of limited powers; for if their powers were not limited the personal guarantees of the constitution would have been inefficacious — an impossible conclusion, as they were expressly recognized by the proclamation of General Castro.

Let us therefore see what law governed the matter of expulsion, for if none existed the power to expel was wanting. Another conclusion would make Venezuela's Government despotic — not republican or democratic.

The only provisions of law covering the right of expulsion either of natives or of foreigners were in articles 77 and 78 of the constitution of 1893, and read as follows:

ART. 77. Además de las atribuciones anteriores, que son privativas del Presidente de los Estados Unidos de Venezuela, éste, con el voto consultivo del Consejo del Gobierno, ejercerá también las siguientes:

9a. \* \* \*

3°. Arrestar ó expulsar á los individuos de la nación con la cual se está en guerra y que sean contrarios á la defensa del país.

ART. 78. \* \* \*

4a. Prohibir la entrada en territorio nacional, ó expulsar de él, á los extranjeros que no tengan su domicilio en el país y que sean notoriamente perjudiciales al orden público.

According, therefore, to the constitution of Venezuela, only as the nondomiciled foreigner might be shown to be prejudicial to public order would he be expelled. Let us pass over the fact that the Boffolo decree of expulsion declared that his presence was prejudicial to "national interests" and not to the "public order," as limited by the constitution, and see if such cause has been presented to this Commission as would justify the expulsion.

It is suggested that the expulsion may have taken place because of any one of three reasons:

1. That he spoke disrespectfully of the President.
2. That he criticized a subordinate member of the judiciary.

3. That he recommended the reading of "El Obrero," a socialistic paper.

The effective answer to all of these propositions is that freedom of speech and of the press are guaranteed by the constitution of Venezuela, and an expulsion for either one would have been an infringement of the constitution of Venezuela, and this is not to be presumed the President would have done. The umpire is more disposed to believe that for public reasons satisfactory to itself the Government has chosen not to offer the basis of its action, rather preferring to submit to such judgment as to this Commission might seem meet in the case.

The further suggestion is made that Boffolo, being a foreigner, did not possess the right to criticize the Government to the same extent as Venezuelans, while the Government possessed a larger power over him. To this may be replied that the constitution of Venezuela conferred upon foreigners the same rights as were assured to natives, and for the supposed offenses not the slightest punishment could have been inflicted upon Venezuelans.

Summing up the foregoing, we may (in part repeating) say:

1. A State possesses the general right of expulsion; but,
2. Expulsion should only be resorted to in extreme instances, and must be accomplished in the manner least injurious to the person affected.
3. The country exercising the power must, when occasion demands, state the reason of such expulsion before an international tribunal, and an inefficient reason or none being advanced, accepts the consequences.

4. In the present case the only reasons suggested to the Commission would be contrary to the Venezuelan constitution, and as this is a country not of despotic power, but of fixed laws, restraining, among other things, the acts of its officials, these reasons (whatever good ones may in point of fact have existed) can not be accepted by the umpire as sufficient.

In view of the foregoing it only remains to consider the amount of damages to be awarded. The honorable representative of Italy has indicated that he would be content to accept 5,000 bolivars, and considering the harshness of expulsion as a remedy, the fact that only great provocation will, in the eyes of international law, justify its exercise, and the further fact that expulsion of foreigners so readily leads the way to the gravest international difficulties, as it may be regarded as a national affront, the amount asked seems not intrinsically unreasonable. But bearing in mind the low character of the man in question (as developed before the Commission), and that his speedy return was permitted, the umpire believes his full duty will be discharged in allowing him 2,000 bolivars, and an award of this amount will be entered.

For convenience the umpire subjoins a careful translation of the articles in *Il Commercio* herein referred to.

FOR JUSTICE

[Translation — Article taken from *Il Commercio* of April 1, 1900.]

To his Excellency the ITALIAN MINISTER.

YOUR EXCELLENCY: I do not understand the Venezuelan code of procedure, much less its application; but the fact to which this article relates is so abnormal, so outside the severest penal code, that as a journalist speaking for the bulk of his readers, I am driven to the onerous necessity of praying your excellency to interpose your authority to the end that what is now obscure may be made plain.

I refer, your excellency, to the prolonged imprisonment of my countryman, Mr. Malenchini.

It is now nearly three months that the above-named has been immersed in a foul prison for having struck Mr. Pecchio with a walking stick. Mr. Pecchio was not in the least injured by the blow, no physician was called to his aid, and he suffered no interruption whatever in the transaction of his business.

It is said there was a quarrel between the two men on account of an alleged attempt at homicide, Malenchini having been armed with a revolver. According to the logic of the accusation, whoever carries a revolver for self-defense is held to be guilty of attempted homicide. If such were to be the rule, not a few, commencing with the President himself, would be in quod.

It may be said that Malenchini was ready to use the weapon and would have done so had he not been arrested. Such is not the case. He carried it solely as a means of defense and had he intended using it he would not have availed himself of his cane, least of all in a place so crowded as the Plaza Bolivar, where the slightest disturbance would surely be followed by an arrest.

That an assault with a cane deserves punishment is conceded without question, but it should be of a proper kind, and not that imposed by the humor of an overzealous advocate who had exaggerated the facts in the case.

Malenchini was interrogated by the judge, and three weeks ago he was tried, and a sentence should have been given in three days. A sentence was finally pronounced, but what a sentence! Based on a nullity! Malenchini was condemned for injury to the person, but that there really was such the sentence alone declares, for there is not the vestige of proof. And as if this were not sufficient, the ten days of his sentence expired on Saturday, the 24th, but he still lingers in jail.

As your excellency may see, there is something strange and mysterious in the case of Malenchini. Your excellency alone has the power and authority to have this mystery unveiled. You alone can see to it that justice be not a vain word for Malenchini, who is lying in a dungeon because he is powerless and without defense.

I and my countrymen trust that this unfortunate incident, as truly dangerous to our nationality as to humanity, will soon be cleared up.

Believe me, sir, with profound respect, your most devoted,

G. BOFFOLO

P.S. — On the afternoon of Thursday, after the above was already in type, Mr. Malenchini was provisionally released on the payment of a certain sum by his father, who had arrived in aid of his son. But why provisionally? Another mystery.

#### EL OBRERO

We have before us the first number of the periodical *El Obrero*. The title clearly indicates the purpose for which our new confrère has entered the lists. Every workman should read it, and support its publication, as it is the first sheet devoted to the workingman's cause. *Il Commercio* wishes a long and prosperous life to the new venture.

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#### CASE OF MASSARDO, CARBONE & Co.

(By the Umpire:)

The Italian protocol providing only for payment of a definite sum for "claims of the first rank derived from the revolutions 1898-1900," and the sums so paid being for certain named claims, jurisdiction will be taken over others of the same period.

Case retained for proof of Italian citizenship of those claiming interest in a succession.

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

The Commissioner for Venezuela contends that the above-mentioned claim should be denied, he interpreting Article III of the Washington protocol of February 13, 1903, in the sense that the Italian Government accepted the sum of 2,810,255 bolivars in complete satisfaction of all indemnities due for acts of the revolution and all other acts from 1898 to 1900, and in support of his opinion invokes, besides the provisions of the article above mentioned, the contents of a note directed by the Royal Italian legation at Caracas to the Venezuelan minister of foreign affairs of December 11, 1902, No. 532.

As regards the protocol, it is to be observed that various arguments may be drawn therefrom to refute the interpretation of the Venezuelan Commissioner. As a matter of fact, Article III speaks of claims of the first rank, arising from the revolution 1898-1900. Now, one rank of claims can not logically be qualified as of the first rank if it is not in correlation with another rank or with other ranks of claims. If it had not been intended to implicitly recognize the existence of other demands for indemnity relative to the period 1898-1900, as coming under the Mixed Commission, it would not be possible to read in Article III the words "of the first rank," which establish a clear distinction between claims already examined and settled in the Royal Italian legation in the sum of 2,810,255 bolivars, and another class of claims not submitted, not adjudicated, and not presented to the Venezuelan Government by the legation itself. If the interpretation of Doctor Zuloaga were correct, the article in question would speak in general terms of Italian claims arising from the revolutions of 1898-1900, and would not make any discrimination whatever.

The same distinction appears in Article III in the establishment of the principle that the claims already adjudicated by the legation shall not be reviewed by the Mixed Commission. This exception is, in fact, not formulated for *all* the claims of the period 1898-1900, but only for those of the first rank.

Article IV, in clear and explicit language, offers another argument in support of this said claimant. It states that "all other Italian claims *without exception*," outside of those considered by Article VIII of the protocol "shall be decided by the Commission."

Why, on the occasion in which the plenipotentiaries made an exception relative to the bearers of titles of the foreign debt of Venezuela, did they not also make an exception relative to the claims of the period of 1898-1900 not comprised in the sum of 2,810,255 bolivars, but stated instead that *all* the others outside of those already settled would be examined and settled? The reason is clear. It is because it was never thought to make the exception now presented by the Venezuelan Commissioner.

But is it admissible that the Italian Government should have wished to bar the way in support of a claim as just as the one in question against which, neither in equity nor from any technical point of view whatsoever, is it possible to raise an objection?

Besides, the Venezuelan Government has never yet pretended that there shall not be settled other claims of the period of 1898-1900 than those of the first rank.

In support of this my assertion I cite the case of Oliva Bisagno, to whom the Government itself has but lately offered the sum of 250,000 bolivars as an indemnity for damages suffered by her *in the period 1898-1900*.

It would seem to me that the Venezuelan Commissioner should insist on placing a more restrictive construction on the protocol than has been given by the Venezuelan Government.

But let us come to note 532 of the legation, the scope of which was a peremptory demand for the payment of 2,810,255 bolivars, amount of Italian claims of the period 1898-1900, *examined and found valid by the legation*. Nothing whatever is said of the claims of that period not yet examined by the legation and judged valid, for which diplomatic action remained open and undecided.

Further, the Italian minister says in said note that the Italian Government makes an express reservation of all claims which were or might be presented by Italian subjects subsequently to the period mentioned, as well for damages arising from the civil war commenced in 1901 as for any others against the Venezuelan Government, and requests that the Government of Venezuela be pleased to declare itself disposed to apply to the settlement of such claims such

provisions as shall eliminate ulterior discussions, accepting the decisions of a mixed commission.

Aside from the fact that every exception contained in said note should be held as having been incidental and not direct, and that the protocol of February 13, 1903, has established principles which, even if they were (as they are *not*) contrary to those enunciated in the note mentioned, should serve as the only and absolute rule of the Mixed Commission, it is well to observe that the Italian minister declared in the above-mentioned document that the Italian Government made express exception not alone of the claims arising from acts posterior to the period of 1898-1900, but of all claims presented subsequent to said period, making special mention of those occasioned by the war initiated in 1901, and of those based on whatsoever other title of credit or action against the Government of the Republic.

There is no indication of a restriction as to time relative to this second rank of claims, which includes all those not already settled, and this is the reason why the Italian minister did not deem it necessary to make a specific exception for the claims of 1898-1900 not already liquidated by the legation, and not therefore comprised in those of the first rank. Let it be thoroughly understood that between want of an express exception of any given category of claims and the abandonment of the right to support them there is an absolute and fundamental difference. A relinquishment can never be presumed, but must be tacitly enunciated.

Taking these principles in accordance with the clauses of the protocol, the Commissioner for Italy is of opinion that the claim presented by Mrs. Ernesta Raffo, widow Massardo, through the receiver of the firm of Massardo, Carbone & Co., should be accepted, and an award made to the claimants of the full sum of 18,212 bolivars, plus the interest.

ZULOAGA, *Commissioner* :

This claim is of March, 1898, and, by virtue of article III of the Washington protocol, claims arising during the period from 1898 to 1900 from acts of the revolution of said period were paid the Italian Government out of the sum of 2,810,255 bolivars. No claims for damages within said period can therefore, in my opinion, be presented. The Italian Government decided for itself as to the class of claims coming within this period and paid those accepted by it in the manner stated.

This interpretation of the protocol seems to be amply confirmed by the note of the Italian minister of December 11, 1902, published in the volume of *Asuntos Internacionales*, page 102,<sup>1</sup> in which it is stated that the

Royal Government has expressly excepted the claims which were or might be submitted by Italian subjects subsequent to said period, as well for damages arising from the civil war of 1901 as for whatever other title of credit or action against the Government of the Republic.

This latter class doubtless has no reference to damages.

Articles II and III of the German protocol likewise exclude claims for this period. Resting on the above reasons, I reject the claim of Massardo, Carbone & Co.

RALSTON, *Umpire* :

The foregoing case has been presented to the umpire, the honorable Commissioner for Italy in his opinion favoring an award for the full amount, and the

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<sup>1</sup> See the original Report, Appendix, p. 995.

honorable Commissioner for Venezuela opposing on the ground that the claim originated in the month of March, 1898, and grew out of the revolution commencing in that year, while all claims for the wars of 1898-1900 were settled by the acceptance, by Italy, of the sum of 2,810,255 bolivars. He further insists that the note of the minister for Italy of December 11, 1902 (*Asuntos Internacionales*, p. 102 <sup>1</sup>), made no express reserve covering a case for damages occurring during the period mentioned.

Returning to the protocol, we find that the amount above named was given for "Italian claims of the first rank derived from the revolutions 1898-1900." By reference to the above-mentioned book, page 96, it will be found that this sum was allowed for 123 individual claims which had been appraised by the Italian legation.

The question presented, therefore, is whether, assuming that no express reserve of other claims arising out of the wars of 1898-1900 was made by the Italian legation, such claims should now be recognized.

The protocol does not in terms exclude any class of Italian claims from consideration. The amount paid by Venezuela to Italy for claims was not to extinguish, generally, claims arising from the wars in question, but only to settle claims which had been previously enumerated.

The umpire can not imagine that when the protocol was signed there was any intention on the part of Italy to abandon without consideration and without apparent reason other claims of equal equity not theretofore presented. Had the sum paid been designed to extinguish all claims, the situation would have been different.

It is true that the reserves made by the Italian minister may have been vague; but the protocol subsequently passing on the whole matter, and no claims except those of the first rank being reserved from the consideration of this Commission, the umpire believes it to be the duty of the Commission to take jurisdiction over and grant judgment in all other cases originating at least before the date of the protocol where the evidence and the rules of international law justify such action. The umpire reserves consideration of the possible effect upon claims of an earlier date of any prior settlements and treaties not brought to his notice and therefore not now discussed.

The foregoing, however, does not completely dispose of the case. The claim is made in the name of Ernesta Raffo, widow of Massardo. The property taken appears to have belonged to the firm of Massardo, Carbone & Co., whose liquidator is Luigi Carbone, a member of the firm. It does not appear how many members of the firm there were, or what were the interests of each. Neither does it appear that the widow is the sole heir of Massardo, the former apparent member of the firm. If it is designed to claim the interest of the widow alone, her inheritance from the husband should appear and also the proportionate size of his interest in the firm. If it is designed to claim for the entire partnership, the names of all should be given, together with the appropriate proofs of citizenship, for only Italian subjects may have any interest in any claim passed on by this Commission.<sup>2</sup>

The umpire will not now, therefore, finally pass upon this claim, but will retain it until September 1, 1903, that the lacking elements of proof may be supplied or addition of parties may be made.

(The lacking proof being furnished, award for claimants was subsequently given.)

<sup>1</sup> *Idem*, Appendix, p. 995.

<sup>2</sup> See Corvaia case, *infra*, p. 609.

## BRIGNONE CASE

(By the Umpire:)

In the event of conflict of laws creating double citizenship, that of respondent nation must control.

In case of conflict of laws as to distribution of estate, the law of domicile of decedent, especially because of certain laws of Venezuela, must control the more, as otherwise laws of Italy would be given extraterritorial effect.<sup>1</sup>

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

In the case of claim No. 60, presented in the name of the estate of Sebastiano Brignone, and after hearing the exceptions in the case taken by his honorable colleague of Venezuela, the Commissioner for Italy sustains the three following points:

1. Primarily, that the claim should be accepted in its integrity, without regard to the nationality of the heirs of the deceased.

2. Secondarily, that the widow and children of Brignone being Italians, the amount of the claim should be awarded to them.

3. By a parity of reasoning, that the estate should certainly be liquidated according to the law of *de cuius*, and that therefore there should be awarded to the Italian relatives of the deceased residing in the Kingdom and claiming, with the widow, a share of the estate, two-thirds of the sum claimed, in conformity with the provisions of the Italian civil code in such case.

With regard to the first point, the claim is sustained by the royal Italian legation in its entirety, because the claim under consideration is essentially Italian.

To determine the nationality of a claim and the competency of the Commission there should be taken into account only the nationality of the claimant at the time of his suffering the damages, and not of the nationality of the persons in whose favor may redound the sum awarded.

By these principles were guided:

First. The French-American Mixed Commission under the convention of 1880. (See Moore, *Int. Arb.*, pp. 2398-2400.)

Second. The court of arbitration of Geneva in the case of the *Alabama*, and the Alabama Claims Commission, organized under the act of June 23, 1874, for the adjudication of the Geneva award. (See Moore, *Int. Arb.*, pp. 2360-2379.)

The judge who delivered the opinion based on the argument said, among other things:

It was a great principle for which our Government had contended from its origin — a principle identified with the freedom of the seas, viz, that the flag protected the ship and every person and thing thereon not contraband. \* \* \*

Therefore \* \* \* we decide that foreigners entitled to the protection of our flag in the premises, whether naturalized or not, have a right to share in the distribution of this fund. (Moore's *Arbitrations*, p. 2351.)

A fortiori, it should be admitted that claims originally owned at the time of the damage by Italians, ought to be entitled to indemnity. Moore, in the case of the *Texan Star*,<sup>2</sup> gives an even more conclusive example.

<sup>1</sup> The differences between the doctrines of France, Italy, and Belgium on the one hand and England, the United States, and Germany on the other relative to determination of status, family relations, and successions are extensively discussed by M. Henri Jacques, in 18 *Revue de Droit International* (1886), p. 563, entitled "La Loi du Domicile et la Loi de la Nationalité en Droit International Privé."

<sup>2</sup> Moore, p. 2360.

Third. We have, besides, among other more notable precedents, the arbitration of the Delagoa Bay Railway (Moore, 1865, et seq.), in which was sustained the right of an American citizen to be indemnified, even though his name did not directly appear in the company, which was English or Portuguese at the time of the presentation of the claim, and who was at the time merely a shareholder in a stock company. The acceptance of contrary principles would lead to most unjust consequences. In fact, let us suppose that Brignone had at his death left creditors in lieu of heirs, would it be equitable to reject the claim because some or all the creditors were not Italians? What, in fact, are heirs, if not creditors of the *universitas juris* formed of the sum of the property of the estate?

But if the equity of the principle advanced by my learned colleague be admitted, no Italian claim may be admitted without conclusive evidence that the Italian claimant is not indebted to Venezuelans, and has not ceded the sum which may be awarded him to creditors of a different nationality, and particularly Venezuelans. It has not yet occurred to anyone to demand such proof.

Let it be noted that such a cession may have been obtained forcibly by anyone, but more particularly by a merchant, as, for example, in the case of failure. But granting a voluntary cession, our principle — that of the original nationality of the claimant — should prevail, because we should not impede the freedom of anyone to dispose of his patrimony. How, then, can we sustain a contrary rule when cession occurs through the least voluntary of all acts — death?

The Mixed Commission is a tribunal *sui generis*, before which the Venezuelan Government is summoned. Before an ordinary tribunal might it perhaps be admitted that the local government, except against a foreign creditor, is not compelled to pay a portion of its proven indebtedness, because the sum claimed belongs, in part, to a Venezuelan? Surely not. Why, then, should such an exception be admitted by the Mixed Commission? Why endeavor, by a legal quibble, to evade the fulfillment of a moral and juridical obligation, and why resort to such an expedient before a tribunal of equity which not only can but must, according to the terms of the protocol by which it is governed, reject all technical objections?

It seems to me that the objection raised by my Venezuelan colleague does not agree with any concept of equity. As a matter of fact, he has taken no exception to the morality or foundation of the Brignone credit, and it is inconceivable that he should attempt to exonerate the Venezuelan Government from the payment of an amount which he impliedly recognizes as due by said Government. What is, therefore, the practical scope of Doctor Zuloaga's objection? Is it not true that the right to claim from the Venezuelan Government a part of the amount of the claim subsists in the widow Brignone, whatever her nationality?

She must run the same risks as the other heirs of the estate, for her interests therein are bound up with theirs and depend upon the same title. By the fact of her having presented to the Italian legation the documents in connection with her claim, and through said agency submitted it to the Mixed Commission she acknowledges the competency of this tribunal and at the same time expresses her choice for the Italian nationality, should any doubt exist on that point. It will be noted that I attach considerable weight to this option, given the circumstance of a conflict between the two laws; but of this we will speak later.

Now, I ask, let us suppose that the sum claimed as indemnity was originally owed to a Venezuelan, and that his heirs were Italian; as a matter of fact, the legation would not support such a claim; but admitting that it presented it to

the Commission, how would it be received by the Venezuelan Commissioner? He would most certainly reject it, objecting, with reason, that the claim was not originally Italian, and would, I am sure, advance still other sound reasons, as, for instance, that the cession by Venezuelans of their interests in a claim against the Republic to Italians, in order that these latter might make them the object of a claim before the Commission, could not be tolerated.

But why, on the other hand, given but not conceded that the widow Brignone is wholly Venezuelan, not apply *a contrariis*, the same rule? Why say, when the injured party is a Venezuelan and those to whom indemnity should be paid are foreigners, that indemnity can not be awarded because the claim is originally Venezuelan and therefore not to be considered, and when the injured party is Italian and the actual claimants Venezuelans the claim should likewise be rejected, because in this case the original nationality of the claim need not be taken into account? Where is the logic of such reasoning, and where the equity of such a principle? Two weights and two measures cannot be admitted.

I will admit that when the cession of an interest forming the basis of a claim takes place, either in bad faith or without just cause, and with the manifest or concealed design of procuring the readiest means for obtaining indemnity, the Commission should not sanction such proceedings; but in the case of the widow Brignone, even though she were a Venezuelan, bad faith is absolutely excluded, and the presentation of the claim as a whole before the Commission is a natural condition of things, not created expressly for secondary ends.

Let us examine the question briefly from a purely juridical point of view. I have observed above that the estate is a *universitas juris*; now, for the same reason the charges against the same, as well as the debts of the deceased, should on principle be charged against all the heirs of the estate; so, also, when it is a question of recovering from the credits of the deceased and of his estate action should be brought in the name and interest of all.

It can not be admitted that a contrary rule should be followed when it is a question of fulfilling an obligation or enforcing a right, when the heirs find themselves, as in the Brignone case, in community, since the object of the successory rights of each of them is the estate taken in its entirety.

The heir in his quality of successor has the personal representation of the *de cuius*, and by virtue of these principles the claim in question (whatever be the nationality of the heirs) should be examined and judged by the Commission as an Italian interest, and as such is covered by the provisions of the protocols without any restrictions whatsoever, either expressed or implied, having been stipulated in regard thereto.

With reference to the second point: There is no doubt that the widow Brignone was born a Venezuelan; neither is there doubt that by her marriage with an Italian she became Italian. (Art. 19 of the Venezuelan Civil Code, and art. 9 of the Italian Civil Code). The Italian Civil Code declares that the foreign woman who marries an Italian citizen acquires his nationality and retains it even in her widowhood, while according to the Venezuelan Code she is so only during the life of her husband; therefore, on the death of Brignone his widow found herself Italian by the Italian law, and Venezuelan by the Venezuelan law.

If in regard to this circumstance Italian tribunals should be called upon to decide there can be no doubt they would declare the widow Brignone to be an Italian, while the local tribunals would just as surely consider her a Venezuelan. Now, what should the decision of the Commission be on this point, given, but not conceded, that it has power to judge and determine the nationality of a claimant in whom the Royal Government, according to its laws and through its legation, has recognized as an Italian?

There is no doubt in my mind that the Commission should consider the widow Brignone as an Italian, and this for the following reasons:

1. The exception urged by the Commissioner for Venezuela rests on "provisions of local legislation," and should therefore a priori be rejected in obedience to Article II of the protocol of May 7, 1903.

2. The coexistence of two nationalities in the same individual not being theoretically admitted in international law, and (as I have more fully set forth in the claim of Giordana) the nationality of origin being in every way the one that should prevail, the widow Brignone should be considered an Italian. In fact, although the lady was born a Venezuelan, she by the terms of both laws became exclusively Italian on her marriage, and her nationality as a widow can not be other than the one she was peacefully enjoying on the date of her husband's decease, when without ceasing to be Italian she found herself invested with an additional nationality. The fact that this latter nationality is the same she had before her marriage does not affect the case, since the question arises at the moment of Brignone's death — that is to say, when to the Italian citizenship of the widow another was added.

3. Admitting that the juridically abnormal fact of the existence of two nationalities in the widow Brignone should be recognized, an international tribunal, such as this Commission, in whose decisions the circumstance of its sitting in Caracas can have no weight, since it might equally have been called to sit in Rome or Washington, or any other city, can not but take into account that the widow by the fact of having herself presented the claim to the royal legation in favor of the heirs of the deceased shows her preference for the Italian nationality, and unhesitatingly chooses it instead of the Venezuelan.

The Commission, therefore, evidently should not impose on her a nationality she does not desire, and should respect her liberty of choice.

4. But admitting that in her case the Italian citizenship does not exclude the Venezuelan, no one surely would dare to affirm that the latter may on the contrary exclude the former. The claimant would at least be as much one as the other. Now, she is entitled to the full exercise of her rights as an Italian, and among these is that of claiming before this Commission, and by this means obtaining, the share to which she is entitled of the Brignone estate as one of the heirs out of any indemnity which may be awarded them either present or absent.

Article IV of the protocol of February 13 is clear and precise. It speaks of Italian claims without exception. To now except claims of persons to whom, though admitted to the enjoyment of another nationality, that of Italy may not be desired, is an infraction of the protocol itself, and is a restriction of its stipulated terms, which should have been done in Washington by the Venezuelan plenipotentiary, but which can now not be done, according to the dictates of common sense and the maxim laid down by Vattel (sec. 264, Bk. 2):

Si celui qui pouvait et devait s'expliquer nettement et pleinement ne l'a pas fait, tant pis pour lui. Il ne peut être reçu à apporter subséquemment *des restrictions* qu'il n'a pas exprimées.

I ask for no amplification of the protocol, and I hold to its letter "all Italian claims without exception," but I reject all exceptions and restrictions sought to be made in Caracas and which were not made in Washington.

With regard to the third point: If under a most extreme hypothesis, none of the arguments hitherto employed by me have succeeded in convincing the honorable umpire of the justice of my contention, I maintain that the Brignone estate should be liquidated according to the provisions of the Italian law, which says that when, as in the present case, referring to estates ab intestato,

the surviving wife or husband joins with the ascending heirs of the deceased, to these latter belong two-thirds of the estate and the remaining third to the survivor aforesaid. (Art. 754 of the Italian Civil Code.) As the father of Sebastiano Brignone is living, as proved by documents submitted by the royal legation, he is entitled to two-thirds of the sum awarded as indemnity by the Commission.

It is a prevailing rule, and the Commission will surely not adopt another, that estates should be liquidated according to the personal law of the deceased, in the correctness of which rule my Venezuelan colleague appears to agree, and thus spares me the necessity for a long dissertation. It suffices for me to quote Article VIII of the preliminary title of the Italian Civil Code, which reads:

The legitimate and testamentary successions, however, whether as to the order of succession or as to the measure of the rights of succession and the intrinsic validity of the provisions, are regulated by the national laws of the person whose estate is in question, whatever be the nature of the property or in whatever country it may be situated.

In thus inscribing and proclaiming in the Italian Civil Code so lofty and liberal a principle of international law its compilers foresaw that it would redound greatly to their credit, and Italian legislation has warmly welcomed it in every case, whatever the nature of the testamentary property, and it seems to acquire additional force whenever this latter is personal, from the maxim, "*Mobilia sequuntur personam.*"

Fiore, in paragraphs 103 et seq., Volume I, *Diritto Internazionale Privato*, illustrates and justifies this principle, and in paragraph 109 sums up in these words his learned argument:

Among all the systems, the one which best responds to rational law is the one adopted by the Italian legislator and found in Article VIII (already cited in the present memorial) of the general provisions of the Civil Code.

Pasquale Stanislao Mancini in this connection says that the "ragione successoria" being naught else than the combination of the principle of property with that of the family should be governed by the law of the person, and I qualify the principle *tot hæreditates quot territoria* as scientifically erroneous, and conducive to complications, incoherencies, onerous charges, and injurious to the heirs.

My honorable Venezuelan colleague in one of the recent sessions of the Commission said, that if there were conceded to the heirs of Brignone residing in Italy two-thirds of the indemnity awarded, the widow might consider herself as injured in her interests, because the local law gives her a larger share of the property of her deceased husband than is granted by the Italian law.

It seems to me the widow, by the fact of her having submitted her claim through the Italian legation, which means that she accepts the Italian law, has impliedly renounced every right she might have under the Venezuelan law in the matter of the partition of the estate.

It would be far too convenient to invoke the Italian law in the prosecution of the claim, and then the Venezuelan in the award of the indemnity.

In any case, whatever may be the difficulty or responsibility of the Commission, it will be avoided by awarding indemnity "to the heirs" of Sebastiano Brignone, as was done in the case of Massardo, Carbone & Co.

It will be the business of the heirs to divide among themselves, by mutual agreement or according to law, the amount awarded them.

I come now to the conclusion, and ask, first, that the honorable umpire award to the heirs of Sebastiano Brignone an indemnity of 81,137 bolivars,

with interest from November 1, 1892, to December 31 of the current year; and second, that he allow the ascendant heirs of Brignone two-thirds of said amount, or 54,091.34 bolivars, with interest thereon calculated as above.

No opinion by the Venezuelan Commissioner.

RALSTON, *Umpire*:

This case comes to the umpire upon difference of opinion between the honorable Commissioners for Italy and Venezuela.

The claimants acquired their rights before this Commission through Sebastiano Brignone, an Italian citizen domiciled for many years in Venezuela as a merchant. The claim originated because of supplies furnished by Brignone, Delfino & Co. to the Venezuelan Government in 1892, and is for 81,137 bolivars, with interest from October 8, 1892.

The original beneficiary was married in Venezuela to a Venezuelan woman, September 5, 1891, and died in Caracas in September, 1898. His widow, who is one of the claimants, has always lived in Venezuela, and the question arises whether she may be treated as an Italian subject, and as such entitled to one-third of the estate. Of course, if she be Venezuelan she has no standing before the Commission. It is said that a conflict of laws as to her citizenship exists as between Italy and Venezuela.

The Civil Code of Italy provides as follows:

ART. 9. La donna straniera che si marita a un cittadino acquista la cittadinanza, e la conserva anche vedova.

ART. 14. La donna cittadina che si marita a un straniero diviene straniera, semprechè col fatto del matrimonio acquisti la cittadinanza del marito.

Rimanendo vedova, ricupera la cittadinanza se risieda nel regno o vi rientri, e dichiara in ambidue i casi davante l'ufficiale dello stato civile di volervi fissare il suo domicilio.

Upon the same points the Civil Code of Venezuela provides as follows:

ART. 18. La extranjera que se casare con un venezolano adquirirá los derechos civiles propios de los venezolanos, y los conservará mientras permanezca casada.

ART. 19. La venezolana que se casare con un extranjero se reputará como extranjera respecto de los derechos propios de los venezolanos, siempre que por hecho del matrimonio adquiera la nacionalidad del marido y mientras permanezca casada.

In the opinion of the umpire there is not a true conflict of laws, if we read the foregoing extracts with a due regard to their spirit.

Each country, speaking for its own nationals, declares that the native-born woman, marrying a foreigner and becoming a widow, having resided all the time at home, reassumes her original condition.

To permit so much of the Italian code as declares that the foreign woman marrying an Italian becomes Italian, to override the Venezuelan code, would therefore be against the spirit of the other section of the Italian code above referred to. It is therefore proper to say that in a true sense there is no conflict of laws.

But if it still be considered that a conflict exists, how should it be determined? Upon this point text writers and courts assist us.

Says Bluntschli (sec. 374):

Certaines personnes ou familles peuvent exceptionnellement être ressortissantes de deux États différents, ou même d'un plus grand nombre d'États.

En cas de conflit la préférence sera accordée à l'État dans lequel la personne ou la famille en question ont leur domicile; leurs droits dans les États où elles ne résident pas seront considérés comme suspendus.

In a note to the section he adds:

Contrairement à mes opinions antérieures, je pense aujourd'hui qu'en cas de collision on doit, en faveur de la liberté d'émigration, accorder la préférence à la nationalité de fait, c'est-à-dire, à celle qui s'unit au domicile.

Phillimore, volume 4, chapter 17, section 368, discussing the doctrine determining personal status, says:

An overwhelming majority of authorities pronounce that the law which governs the status is the law of the domicile,

referring to Rocco, Fœlix, and Savigny.

Let us now turn to the courts:

In the cases of *de Hammer* and others against Venezuela (3 Moore, p. 2456), there arose exactly the question before us. The claimants were Venezuelan born, but married to American citizens, and claimed American citizenship by virtue of the law of the United States of 1855, which declared a citizen —

every woman capable of naturalization married or who might marry thenceforward a citizen of the United States.

Commissioner Andrade decided against the claimant, and the American Commissioners, while not always following his reasoning, reached the same conclusion. Said Commissioner Findlay:

The question in the case is whether this law can have an extraterritorial operation and effect against the will and policy of another country in which the persons in whose behalf it is invoked are and have always been domiciled since their birth; and in my opinion there can be but one answer to that question. Whatever rights the United States had in its power to bestow will unquestionably pass under the law establishing the status of citizenship in favor of non-resident aliens, including the right to take property by descent and succession, and the right to prosecute any claim against the United States; but more than this can not be done without interfering with the rights of other States and involving them and itself in conflicting claims of the most absurd character.

In the case of *Jane L. Brand*, before the British and American Claims Commission (3 Moore, p. 2488), it was held that the doctrine that the national character of a married woman was in all cases determined by that of her husband had always prevailed in Great Britain, as elsewhere, where *the domicile* of the wife and widow had continued to be that of the husband's nationality.

It is true, however, that the majority of the Commission in the cases of *Calderwood* and others (3 Moore, p. 2486), against the strong dissent of Commissioner Fraser, held that a widow of American birth, always remaining in the United States, did not regain her American citizenship, but in view of all the foregoing decisions and authorities this view may be rejected.

The reason for the decision above given, reestablishing citizenship of a woman always resident, upon the death of her foreign husband, in so far as the question of conflict of laws is concerned, is excellently stated in the case of *Alexander* before the British and American Claims Commission (3 Moore, p. 2529), in which a decision was presented by the American Commissioner which met the approval of the umpire, Count Corti. According to English law the claimant was an English subject, and by American he was an American citizen. Said the opinion:

The practice of nations in such cases is believed to be for their sovereign to leave the person who has embarrassed himself by assuming a double allegiance to the protection which he may find provided for him by the municipal laws of that other sovereign to whom he thus also owes allegiance. To treat his grievances against that other sovereign as subjects of international concern would be to claim a jurisdiction paramount to that of the other nation of which he is also a subject. Complications would inevitably result, for no Government would recognize the

right of another to interfere thus in behalf of one whom it regarded as a subject of its own. It has certainly not been the practice of the British Government to interfere in such cases, and it is not easy to believe that either Government meant to provide for them by this treaty.

The conclusion to be reached from the foregoing is that the claimant, Madame Brignone, is a citizen of Venezuela, and is without standing before this Commission.

But a second question arises. There are relatives of the original claimant of this Commission line. What part of the succession may these relatives claim?

The civil code of Italy provides:

ART. 754. Se non vi sono figli legittimi, ma ascendenti o figli naturali, o fratelli o sorelle, o loro discendenti è devoluta in proprietà al coniuge superstite la terza parte dell'eredità.

The civil code of Venezuela provides:

ART. 719. \* \* \* Si existen cónyuge y ascendientes legítimos, y faltan hijos naturales, la herencia se divide en dos partes iguales, una que corresponde al cónyuge, y otra á los ascendientes legítimos.

If, therefore, the Italian code is to rule, the ascending heirs will receive from this Commission two-thirds, and if the law of Venezuela governs, they will receive one-half.

The Italian civil code provides:

ART. 7. I beni mobili sono soggetti alla legge della nazione del proprietario, salvo le contrarie disposizioni della legge del paese nel quale si trovano.

I beni immobili sono soggetti alla legge del luogo dove sono situati.

ART. 8. Le successioni legittime e testamentarie, però, sia quanto all'ordine di succedere, sia circa la misura dei diritti successorii, e la intrinseca validità delle disposizioni, sono regolate dalla legge nazionale della persona della cui eredità si tratta, di qualunque natura siano i beni, ed in qualunque paese si trovino.

The Venezuelan civil code contains nothing similar to section 7 of the Italian civil code, but provides as follows:

ART. 8. Los bienes muebles é inmuebles situados in Venezuela, aunque estén poseidos por extranjeros, se regirán por las leyes Venezolanas.

Shall this Commission be controlled by the law of nationality of the decedent, as Italy requires, or by the law of domicile, as indicated by the Venezuelan law? It will be borne in mind that Brignone died at his place of domicile, Caracas.

The differences of principle existing upon the question of succession to the estate of a deceased person are summed up in section 848 of Calvo's work as follows:

SEC. 848. Sur la question des lois généralement applicables aux successions testamentaires et aux successions *ab intestat*, la jurisprudence admet une triple division:

1. La jurisprudence qui soumet *l'universitas juris* (les biens mobiliers et les biens immobiliers) de la succession à la loi du dernier domicile du défunt. Cette jurisprudence est d'accord avec l'opinion de Savigny et les décisions des tribunaux supérieurs de l'Allemagne. Elle est aussi conforme à l'unité de constitution du patrimoine.

2. La jurisprudence, directement contraire, qui soumet les biens à la loi de l'endroit où ils se trouvent, laquelle admet en conséquence la possibilité de l'application de lois différentes aux différentes portions des biens, et ne pose aucun principe relativement aux dettes et aux créances dont il est loisible dans chaque cas de disposer pratiquement aux mieux des intérêts en cause. Cette jurisprudence est basée sur la loi féodale de la souveraineté territoriale.

3. La jurisprudence intermédiaire, qui soumet les personnes et les meubles à la loi du domicile du défunt et les biens à la loi de l'endroit où ils sont situés, *lex situs*. C'est la jurisprudence en vigueur en France (art. 3, du Code Civil), en Angleterre et aux États-Unis.

Si la succession ne comprend que des biens meubles, alors on applique le principe que les biens meubles suivent la personne et son domicile; c'est la loi du domicile qui gouverne la succession mobilière.

In the opinion of the umpire, the true rule, at least as to personal property, is indicated by Savigny, who says (Droit Romain, sec. 377, vol. 8):

La succession *ab intestat* se règle d'après la loi en vigueur au dernier domicile du testateur à l'époque où s'ouvre la succession. Cela s'applique notamment à l'ordre d'après lequel la loi appelle à succéder les héritiers *ab intestat*.

This principle is, it would seem, recognized by the Italian civil code, which declares:

ART. 923. La successione si apre al momento della morte, nel luogo del'ultimo domicilio del defunto.

The Venezuelan civil code similarly declares:

ART. 894. La sucesión se abre en el momento de la muerte y en el lugar del último domicilio del defunto.

The umpire feels, therefore, obliged to follow the principle recognized by both laws as to succession, despite the conflict above indicated, the Italian law in apparent conflict being regarded as applying under the present circumstances only to estates opened in Italy. Any other view would, in the umpire's opinion, give to the Italian law an extra-territorial effect overruling the law of the domicile where the goods were situate and the decedent was domiciled. The adoption of such contrary principle would in his opinion infringe the territorial supremacy of a state.

But it is urged that no attention should be paid to the local laws of Venezuela because of the provision of the protocol of May 7, 1903, as follows:

The decisions of the Commission shall be based upon absolute equity, without regard to objections of a technical nature or of the provisions of local legislation.

This unusual provision is to receive a rational and not a strained interpretation, and in the umpire's opinion amounts simply to saying that any local legislation which operates against equity shall be rejected. An extended interpretation rejecting any and all local legislation would at once defeat the very purposes of the Commission, as may well be illustrated by the present case. Mrs. Brignone was married in Venezuela under Venezuelan laws. Deny efficacy to these laws, and no marriage existed, for marriage is, in civilized nations, regulated by law. Her deceased husband acquired a complete interest in partnership assets from his associate (the partnership itself being created in accordance with the provisions of local law) by virtue of laws providing for such transfers. Proofs in this or in other cases have been taken before judges created by local laws and in the manner they provide. Reject local laws indiscriminately and the whole fabric of sworn testimony built up in more than 300 cases presented or to be presented to the Commission absolutely fails.

The only possible question, therefore, left to consider is, whether the provision of Venezuelan law giving the widow one-half of the estate of her deceased husband (there being no children) is contrary to equity. In view of the number of States in the United States as well as elsewhere in which precisely the same rule prevails, it is impossible for the umpire to say that the provision is opposed to equity or could be conceived as shocking to the moral sense of mankind.

A word should be added relative to the suggestion of the honorable Commissioner for Italy that the claim should be allowed without reference to the present citizenship of the claimant, and to enforce this position he cites Moore, pages 2398-2400, and 2360-2379, and 1865.

The first reference (Camy's case) simply sustains the validity of the assignment of an international claim, but the claim being against the United States, and the assignment having been made by a Frenchman to an American citizen, the demurrer of the United States was sustained and the claim rejected. The case is, therefore, if at all in point, opposed to the contention of the honorable Commissioner.

The second reference (*Texan Star* case) shows that a court acting equitably will in proper circumstances recognize the title and citizenship of the actual owner rather than those of the titular owner, whose title simply served temporary purposes.

The third citation (Delagoa Bay case) sustains the real interests of an American citizen who was required by Portuguese law to create a Portuguese corporation to exploit his concessions, and is not therefore in point.

In the view of the umpire, the "Italian claims," of which this Commission has jurisdiction must have been Italian when they arose as well as when presented.<sup>1</sup> Without discussing this point at length, he confines himself to referring to 2 Moore, page 1353, as well as to cases hereinbefore cited.

No dispute as to fact existing, a judgment will be signed in favor of the Italian heirs of Brignone, for one-half of the amount of the claim, with interest, but without prejudice as to the right of the widow to pursue her remedies elsewhere.

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GENTINI CASE

(By the Umpire:)

Local laws of prescription can not be invoked to defeat an international claim. Nevertheless, the principle of prescription will be recognized internationally, and equity will forbid the recognition of stale and secret claims.

A claim first presented thirty years after its supposed inception, the existence of which was never before revealed, may be rejected.<sup>2</sup>

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

At the session of the Italian-Venezuelan Mixed Commission of the 29th of August the honorable Commissioner for Venezuela, Doctor Zuloaga, intimated that he would not agree to a demand for indemnity from the Italian citizen Odoardo Gentini, because the facts upon which said claim is based occurred more than thirty years ago, from which it appears that my illustrious colleague of Venezuela intends to invoke the principle of prescription.

This conclusion must, it seems to me, be based on motives of equity, or upon rules of international law, or, finally, on the provisions of local legislation.

In each of these three cases the exception taken must be rejected.

With regard to the first point, I observe that a tribunal of equity can not invoke prescription in order to evade obligations established by authentic documents.

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<sup>1</sup> See Corvaia case, *infra*, p. 609.

<sup>2</sup> See Spader case, Vol. IX of these Reports, p. 223; and for limitations on rules laid down in the Gentini case see Giacomini case, *infra*, p. 594, and Tagliaferro case, *infra*, p. 592.

If to-morrow a creditor presents to me a receipt of mine, the genuineness of which I can not doubt, and representing a debt of more than thirty years' standing, even though I may legally refuse payment, my conscience would always counsel me to not recur to such exception unless in the case where, though a *summum jus*, it might be a *summum injuria*.

The law which declares a debt prescribed does not, on that account properly deprive a creditor of his rights, but interposes an exclusively legal obstacle to the double payment of the sum due.

The principle of prescription has indeed been admitted in the codes from motives of public order and with a political character (that of maintaining peace between individuals and preventing property from becoming a perennial source of contention), but it is not based on pure morals, so that when he who may does not invoke it the judge may not officially supplement an unexercised prescription (art. 2109 of the Italian Civil Code) even in case of minors or incapacitated persons. (Troplong on Prescription, No. 89.)

Dumond, commenting on art. 2223 of the French Civil Code, which has a similar provision, gave as the principal reason therefor "that he who does not oppose prescription may be induced thereto by remorse of conscience."

It is admitted in jurisprudence that a magistrate may not constitute himself an indiscreet patron of a party (V. Zacharie, Vol. III, p. 775; Troplong on Prescription, No. 91) or furnish officially a means of defense which, though permitted under the law, frequently offends the conscience of an honest debtor.

From the point of view of absolute equity, which should inspire the decisions of a mixed commission, I categorically reject the exception of my honorable colleague of Venezuela, and should this question come before the umpire, confidently expect his decision will found itself on my criteria.

On the second point I affirm that prescription is not admitted in the juridical reports based on the *jus gentium*.

I have consulted various authorities and found that while their opinions vary as regards the law to be applied when citizens of different nations raise the question of prescription in the act of regulating private interests, none of them has discussed or even raised this question in the settlement of claims, and therefore of actions of credit sustained by a government in the interest of its subjects as against another government and based on the treaties and protocols, as in our case.

I affirm that I have not found this question treated by the authorities consulted by me, though others may have done so; but on this matter we have the decision of the permanent court of arbitration of The Hague — that is to say, of the supreme tribunal in matters of international law, which decision must have a positive value, the more so that the decision to which I refer, that of the "Pious Fund of the Californias," is quite recent and absolutely analogous from the identical point of view in which we are concerned — the Gentini case.

The court of arbitration was convened to decide a case of credit of the Pious Fund of the Californias, represented by the Archbishop of San Francisco and the Bishop of Monterey *v.* Mexico, and the question was submitted to the court under the terms of a protocol stipulated at Washington, May 22, 1902, between the United States and Mexico.

It is worthy of note that, as in the case of present claims of Italy, so in the Pious Fund case, it was not a question of a credit of the United States against the Government of Mexico, but of a debt of this latter in favor of the prelates above named. The representatives of Mexico raised the question of prescription before the court because the case under consideration was one in which demand for payment had for many years been neglected.

The exception seemed to derive additional force that prescription, according

to the law of Mexico, requires five years, and by the existence of a decree of the same Government, promulgated June 22, 1885, calling on all its creditors to present their claims within a certain period (extended by another decree of 1894) under pain of prescription and extinguishment. In fact, the Catholic prelates of Upper California had not insisted upon their credit, either principal or interest, according to the provisions of the above decrees.

The distinguished agent of the United States before the court objected that it was not yet established, that an international tribunal had ever rejected a claim on the ground of an exception based on laws having no validity whatever before a tribunal of such character, and added (as I have already observed herein) that prescription does not extinguish the right of a creditor, but merely impedes his right of exercising it.

It did not require a lengthy argument from the honorable agent of the United States to obtain from the court a decree of payment from Mexico, including this maxim.<sup>1</sup>

*Les règles de la prescription étant exclusivement du domaine du droit civil, ne sauraient être appliquées au présent conflit entre les deux États en litige.*

This principle is besides absolutely logical and moral, since when it is a question of private credits and debits it may be presumed that he who has permitted the lapse of a long period without bringing his rights into court may have intended to renounce them; or it may be admitted that he should suffer the results of his negligence. But when the debtor is a government, and, moreover, when the demand of the individual may be the subject of a claim, the reasons which may induce a creditor to postpone his action may be many and of varied nature; as, for instance, the interruption of diplomatic relations between the Governments concerned, the lack of political influence of the creditor, the unfavorable financial conditions of the debtor government, the want of faith of the creditor in the impartiality of magistrates, who, unprotected by a feeling of permanency, might against their better judgment become pliant tools of a party, and many other similar motives.

Many reasons may therefore operate to render unavailable a credit against a government, and as it is a general rule that the term of a period of prescription does not commence to run until the day when the payment falls due and action for its recovery may be had, it would be necessary to prove (and the proof would always be difficult and uncertain) when these conditions occurred in the case of claims against governments.

As there is not in international law an exact and generally accepted provision which establishes when and within what limits a credit becomes null and void through prescription, there can not be a presumptive negligence on the part of the dilatory creditor, and the plea of prescription must be absolutely rejected.

In regard to the third point, to wit, the eventual invoking by my honorable colleague of the principle of prescription according to the provisions of local laws, it is only necessary to observe that I have already clearly expressed my opinion in the arguments used by me in my reference to the Pious Fund case, but I will add some further considerations. The law of prescription of Venezuela can not be considered here, inasmuch as it is contrary to the provisions of Article II of the Washington protocol of May 7.

If in the case of claims based on alleged denial of justice it may be opportune and even necessary to search the laws of the Republic to afford this Commission unlimited freedom and facility for the full performance of its duty, in any

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<sup>1</sup> Sen. Doc. 28, 57th Cong., 2d session, p. 858.

other case the introduction of them would constitute so patent and manifest an infraction of that clause of the protocol, which is for us the supreme law, that such a fact might well be considered a sufficient cause for invalidating our sentence.

The clause referred to, which we should not and can not ignore, was not included in the protocol without due reason, which was not merely to avoid placing the Commissioner for Italy in a position of manifest inferiority to that of his Venezuelan colleague, who is known to be profoundly versed in the laws of his own country, while I am at best but superficially acquainted with them.

But inasmuch as the protocol requires no such learning on my part it is but just that I should avail myself of its authority and refuse to join in any discussion touching Venezuelan codes and legislation.

Without concerning myself, therefore, with the rules from which, according to Venezuelan law, prescription is derived, I wholly reject the principle of prescription as being contrary to Article II of the protocol of May 7, 1903, and request the Commissioner for Venezuela, or the honorable umpire in case the Commissioners fail to agree as to the question of principle, to receive the claim of Odoardo Gentini and award him an indemnity in the following amounts: 293.50 bolivars due him as per receipts; 360 bolivars for eighteen days forcibly closing of his store, and 546.50 bolivars for his illegal arrest — in all, a total of 1,200 bolivars.

ZULOAGA, *Commissioner* :

Thirty years have passed since the transaction to which this claim refers without its appearing that during this long period it has been submitted to the consideration of the Government of Venezuela. The cause upon which this claim is based is barred. It is barred in accordance with the internal law of Venezuela. It is barred in accordance with the Italian law (arts. 1956 and 1936, Civil Code of Venezuela, and 2135 and 2114, Italian Civil Code). It is barred in accordance with the principles of international law, which establishes prescription as a legitimate cause for the extinction of obligations.

Prescription is founded upon a social necessity, and by all civilized peoples and at all times, it has been recognized as a substantial element of stability and peace.

Prescription, says Laurent, is more than a right consecrated by a law. It is a right of humanity. Nations have conceded also that a State is subject to prescription the same as an individual. (Art. 1936, Civil Code of Venezuela; 2114, Civil Code of Italy; 2227, Civil Code of France.) Limitation, therefore, runs against a State as a State ordains that it should run against individuals. Limitation will run against the Italian State as it ordains that prescription should run against an individual, and I do not see why these principles, which have been considered just in the internal civil law, should not be so considered in the life of nations, and why a claim of a civil nature only, and therefore essentially liable to prescription, must become unextinguishable thereby because it is converted into an international claim. It is not explained how a right already barred (if it is called to the attention of the claimant government after the expiration of the legal term) can give rise to a valid claim by the circumstance that the claim, as in the present case, appears as in the first instance as an international one. What would be the length of time necessary for prescription? It would be difficult to determine the shortest period, because an internal law can not govern; but, for my part, I do not doubt that a period of thirty years is more than sufficient, especially where there is a reference to a question between Venezuela and Italy, all the more since this period is greater than both States have fixed for prescription; having made it such an

essential to public order that both recite in their respective laws that there can not be pleaded in opposition to it want of title or good faith.

As a precedent in the Mixed Commissions we find the case of John H. Williams, No. 36, of the United States and Venezuela Commission of 1890 (Moore, p. 4181), which disallowed the claim because it was barred by a lapse of twenty-six years. The argument contained in the opinion gives us to understand that a less term is sufficient.

I believe, therefore, the claim of Gentini against the Government of Venezuela is barred.

AGNOLI, *Commissioner* (supplemental opinion):

The undersigned prays the honorable umpire to take into consideration the fact that the Italian Government has never heretofore had a protocol or a mixed commission for the settlement of its claims against the Government of Venezuela, while the majority of the other European powers — that is to say, France, Spain, England, Holland, and even the United States — have obtained the adjustment of claims by means of commissions opened to all claimants. Therefore, even if the principle of prescription had been admitted by a previous mixed commission, such precedent could have no application to Italian claims, because Venezuela has always refused us mixed commissions and the liquidation of claims accorded by it to other nations, basing her refusal on an erroneous interpretation of the treaty of 1861, against which refusal we have always protested.

It is worthy of note in this connection, besides, that, notwithstanding that, in the French-Venezuelan Commission five claims more than 30 years old (not *one*, as affirmed by the honorable Commissioner for Venezuela), have been liquidated.

In any case, we have the right to invoke in this question also the “most-favored nation” clause (Art. VIII of the protocol), it not being admissible that Italy should have intended to renounce her right to indemnity in a category of claims which other nations have had occasion to obtain.

The honorable umpire should, in addition, appreciate the fact that in the protocol which confers upon this Commission the right of competency in all classes of Italian claims no reserve is made of antiquated claims, but express mention is made of those relative to holders of bonds and those otherwise settled (Art. IV), the only ones not submitted to the action of the Commission.

RALSTON, *Umpire*:

In this case, referred to the umpire upon difference of opinion between the honorable Commissioners for Italy and Venezuela, it appears that the claimant, an Italian, was, in 1871, a resident of Trujillo, when, as it is said, his store was closed temporarily and business injured by the presence of a large number of soldiers, the claimant sent to prison on the order of the jefe, his establishment plundered, and later on forced loans were imposed upon him under threat of imprisonment. The proofs were taken the following year, and from that time till the past month nothing appears to have been done with the claim, it not having even been called to the attention of the royal Italian legation. The claim is for the sum of 3,900 bolivars.

It is submitted on behalf of Venezuela that this claim is barred by prescription, although it is admitted that no national statute can be invoked against it.

On the other hand, it is insisted for Italy that prescription can not be recognized in international tribunals, this contention being based upon the arbitral sentence given by the Hague permanent court of arbitration in the Pious Fund

case. If this contention be correct the argument must stop at this point. Let us examine it carefully.

In the Pious Fund case it was urged by Mexico that the claim, as presented, was barred by two short statutes of limitation, one of five years and a later one of about the same length of time, the claimants having failed, it was said, to present their claims before the proper authorities within the time limited. On the other hand, it was contended on behalf of the United States (American agent's report, p. 63<sup>1</sup>), that —

it has never yet been held in international tribunals that a claim brought before them could be defeated by reason of the existence of a statute of this sort, such statute having no authority whatsoever over international courts.

Passing upon these diverse contentions, the court held (American agent's report, p. 858) that

les règles de la prescription étant exclusivement du domaine du droit civil, ne sauraient être appliquées au présent conflit entre les deux États en litige,

adopting almost verbatim the position taken on behalf of the United States.

It will be noted that the declaration of the court had reference not to the principle of prescription, but to the rules with which civil law had surrounded it. A "règle," as we are told in Bourguignon & Bergerol's *Dictionnaire des Synonymes* —

est essentiellement pratique et, de plus, obligatoire \* \* \*; il est des règles de l'art comme des règles de gouvernement,

while principle (principe)

exprime une vérité générale, d'après laquelle on dirige ses actions, qui sert de base théorique aux divers actes de la vie, et dont l'application à la réalité amène telle ou telle conséquence.

The permanent court of arbitration has never denied the principle of prescription, a principle well recognized in international law, and it is fair to believe it will never do so. Such denial would tend to upset all government, since power over fixed areas depends upon possession sanctified by prescription, although the circumstances of its origin and the time it must run may vary with every case. The expressions of many international law writers upon this point, including Wheaton, Vattel, Phillimore, Hall, Polson, Calvo, Vico, Grotius, Taparelli, Sala, Coke, Sir Henry Maine, Brocher, Domat, Burke, Wharton, and Markby, are collated in the case of *Williams v. Venezuela*, Venezuelan-American Claims Commission of 1888, cited at length in 4 Moore, page 4181. To them we may add Bello, who, on page 42 of his *Derecho Internacional*, says:

La prescripción es aun más importante y necesaria entre las naciones que entre los individuos, como que las desavenencias de aquellas tienen resultados harto más graves, acarreado muchas veces la guerra.

Bluntschli (sec. 279) finds that a taking of territory, originally wrongful, becomes by time transformed into a legal condition.

But it remains true that the international law writers have referred almost invariably to that form of prescription involved in the taking and possession of property known at one time as usucaption, and we are left to examine whether the general principles of prescription should be applied to claims for money damages as between nations.

<sup>1</sup> Senate Document No. 28, 57th Cong., 2d session—United States *v.* Mexico. Report of Jackson H. Ralston, agent and of counsel.

In using the word "prescription" in the ensuing discussion, let us follow the definition given by Savigny (*Droit Romain*, vol. 5, sec. 237):

Quand un droit d'action p rit parce que le titulaire n glige de l'exercer dans un certain d lai, cette extinction de droit s'appelle prescription de l'action.

The same idea is embodied and somewhat enlarged in Article 2219 of the Code Napol on, which says:

La prescription est un moyen d'acqu rir ou de se lib rer par un certain laps de temps et sous les conditions d termin es par la loi.

On examining the general subject we find that by all nations and from the earliest period has it been considered that as between individuals an end to disputes should be brought about by the efflux of time. Early in the history of the Roman law this feeling received fixity by legislative sanction. In every country have periods been limited beyond which actions could not be brought. In the opinion of the writer these laws of universal application were not the arbitrary acts of power, but instituted because of the necessities of mankind, and were the outgrowth of a general feeling that equity demanded their enactment; for very early it was perceived that with the lapse of time the defendant, through death of witnesses and destruction of vouchers, became less able to meet demands against him, and the danger of consequent injustice increased, while no hardship was imposed upon the claimant in requiring him within a reasonable time to institute his suit. In addition, another view found its expression with relation to the matter in the maxim "*Interest republica ut sit finis litium.*"

The universal opinion of publicists and lawgivers has been that the statutes of prescription or "limitation," as they have come to be called, were equitable and the outgrowth of a general desire for the attainment of justice. Let us quote some not given in the opinion hereinbefore referred to.

Savigny says (Vol. 5, sec. 237):

Le motif le plus g n ral et le plus d cisif  galement applicable   la prescription des actions et   l'usucaption est le besoin de fixer les rapports de droits incertains susceptibles de doutes et de contestations, en renfermant l'incertitude dans un laps de temps d termin . Un second motif est l'extinction pr sum e du droit que prot ge l'action. Mais ce motif grave et v ritable peut ais ment  tre mal entendu. Le sens de cette pr somption est l'in vraisemblance que le titulaire du droit ait n glig  pendant un temps aussi long d'exercer son action si le droit lui-m me n'eut  t   teint d'une mani re quelconque, mais dont la preuve n'existe plus. \* \* \*

Le demandeur peut intenter son action quand il lui pla t; il peut, donc, en la diff rant, augmenter les difficult s de la d fense; car les moyens de preuve peuvent p rir sans la faute du d fendeur; par exemple, si des t moins viennent   mourir. Restreindre ce droit absolu du demandeur, dont la mauvaise foi peut abuser, est surtout ce qui m rite consid ration.

In section 245, Savigny says:

Mais la prescription, quoique de droit positif, n'en est pas moins une institution des plus bienfaisantes, et nous ne devons pas,   cause de son origine, affaiblir ou m me annuler son efficacit  par des restrictions sans fondement.

Says Troplong in "Droit Civil Expliqu ," title Prescription, 2d ed., Vol. I, p. 14:

Ces consid rations sont, je crois, suffisantes pour nous montrer tout ce qu'il y a d' quitable et de rationnel dans le principe de la prescription. Que le droit arbitraire soit intervenu ensuite pour d terminer la mesure du temps au bout duquel se trouve la d ch ance, c'est ce qui  tait n cessaire pour tenir en  veil la prudence des

citoyens et pour donner à tous une règle uniforme. Mais le droit civil n'a fait que travailler sur des notions préexistantes; le droit naturel avait parlé avant qu'il ne songeât à codifier.

Says Laurent, title Prescription, volume 32, page 23, section 12:

C'est plus qu'un droit consacré par une loi; c'est un droit de l'humanité; donc, en cette matière toute distinction entre nationaux et étrangers s'efface, comme n'ayant pas de raison d'être; tout homme peut invoquer la prescription.

In Bouvier's Law Dictionary (Rawle's edition), title Prescription, we read:

The doctrine of Immemorial Prescription is indispensable in public law. (1 Phill., Int. L., sec. 255.) The general consent of mankind has established the principle that long and uninterrupted possession by one nation excludes the claim of every other. All nations are bound by this consent since all are parties to it. None can safely disregard it without impugning its own title to its possessions. (1 Wheaton, Int. L., 207.) The period of time cannot be fixed in public law as it can in private law; it must depend upon varying and variable circumstances. (1 Phill., Int. L., sec. 260.)

As appears to the writer, all the arguments in favor of it as between individuals exist equally as well when the case of a national is taken up by his government against another, subject to considerations and exceptions noted at the end of this opinion. For may not a government equally with an individual lose its vouchers, particularly when, if any exist, they are in the hands of far distant subordinate agents? If there be collusion between claimant and official will not government witnesses die as readily as those of private individuals? If the claimant's own action be the cause of the misfortunes of which he complains, will not knowledge of the fact be lost with the flight of time? May the claimant against the government, with more justice than if he claimed against his neighbor, virtually conceal his supposed cause of action till its investigation becomes impossible? Does equity permit it?

And this brings us to a further point. We are told with truth that this is a Commission whose acts are to be controlled by absolute equity, and that equity will not permit the interposition of a purely legal defense, as prescription is said to be.

But is this position correct? As appears from the foregoing citations, the principle of prescription finds its foundation in the highest equity — the avoidance of possible injustice to the defendant, the claimant having had ample time to bring his action, and therefore if he has lost, having only his own negligence to accuse.

Additionally, however, we may refer to the position taken by courts of equity in England and the United States with reference to statutes of prescription.

Says Bouvier (Rawle's edition) title Limitation:

Courts of equity, though not within the terms of the statute, have nevertheless uniformly conformed to its spirit, and have, as a general rule, been governed by its provisions, unless especial circumstances of fraud or the like require in the interest of justice that they should be disregarded. (12 Pet., 56; 130 U.S., 43, etc.) Courts of equity will apply the statute by analogy, and in cases of concurrent jurisdiction they are bound by the statutes which govern actions at law. (149 U.S., 436; 169 U.S., 189). Some claims, not barred by the statute, a court of equity will not enforce because of public policy and the difficulty of doing full justice when the transaction is obscured by lapse of time and loss of evidence. This is termed the doctrine of laches.

It thus appears that courts of equity, even when not bound by the statute recognizing its essential justice, have followed it in spirit.

Let us turn to the cognate title of Laches, in the same work, and we find that —

Courts of equity withhold relief from those who have delayed the assertion of their claims for an unreasonable time, and the mere fact that suit was brought within a reasonable time does not prevent the application of the doctrine of laches when there is a want of diligence in the prosecution. (5 Col. App., 391; 155 U.S., 449; 160 id., 171.) The question of laches depends not upon the fact that a certain definite time has elapsed since the cause of action accrued, but upon whether under all the circumstances the plaintiff is chargeable with want of due diligence in not instituting the proceedings sooner (160 U.S., 171); it is not measured by the statute of limitations (155 U.S., 449); but depends upon the circumstances of the particular case (141 U.S., 260). Where injustice would be done in the particular case by granting the relief asked, equity may refuse it and leave the party to his remedy at law (158 U.S., 41), or where laches is excessive and unexplained (34 U.S. App., 50).

\* \* \* \* \*

Laches in seeking to enforce a right will, in many cases in equity, prejudice such right, for equity does not encourage stale claims nor give relief to those who sleep upon their rights (4 Wait, Act. & Def., 472; 9 Pet., 405; 91 U.S., 512; 124 id., 183; 130 id., 43; 142 id., 236; 150 id., 193; 1 App. D. C., 36; 157 Mass., 46); this doctrine is based upon the grounds of public policy, which requires for the peace of society the discouragement of stale claims (137 U.S., 556). \* \* \*

It has been held to be inexcusable for thirty-six years (16 U.S. App., 391); twenty-seven years unexplained (145 U.S., 317); twenty-three years (146 U.S., 102); twenty-two years, during which the defendant company spent much money and labor in improvements (161 U.S., 573); twenty-two years after knowledge of the facts (152 U.S., 412); nineteen years on a bill to establish a trust (7 U.S. App., 481); fourteen years in the assertion of title to lands which meantime had been sold to settlers (4 U.S. App., 160); ten years, in proceedings to enforce a trust in lands (158 U.S., 416); ten years, after the foreclosure and sale of a railroad in a bill by a stockholder to set aside the sale for collusion and fraud, which were patent on the face of the proceedings (146 U.S., 88); nine years in a suit to have a deed declared a mortgage on the ground that it was obtained by taking advantage of the grantor's destitute condition (7 U.S. App., 233); eight years' acquiescence in a trade-mark for metallic paint, during which the defendant had built up an extended market for his product (17 U.S. App., 145); eight years in proceedings where complainant in consideration of \$10,000 had released certain claims and sought to set the release aside on the ground that it was entitled to a much larger sum than it received (159 U.S., 243); three years where a person bought property of uncertain value, and after three years brought suit to rescind the contract on the ground of fraudulent representation (31 U.S. App., 102).

We may refer for a moment before concluding to such international precedents as exist upon the subject.

The first case to be cited is that of Mossman before the American and Mexican Mixed Claims Commission of 1868. The claimant alleged that he had been imprisoned unjustly by the Mexican authorities in 1854, and first presented his claim in 1867. Sir Edward Thornton, the umpire (4 Moore, p. 4180), in the course of his discussion said:

It seems unfair that the latter (the Mexican Government) should be first informed of the alleged misconduct of its inferior authorities more than *fifteen years after the date of the acts complained of*. The umpire can not, under this circumstance, consider that the Mexican Government can be called upon to give compensation for a very doubtful injury, and he therefore awards that the claim be disallowed.

The same subject was thoroughly discussed in the case of Williams v. Venezuella (4 Moore, p. 4181), heretofore alluded to, in which there had been a delay of twenty-six years in the presentation of an account. After a very learned and thorough discussion, the Commission held (p. 4199):

Upon these principles, too lengthily discussed, without awaiting further proof called for in defense from Venezuela, we disallow claim No. 36. It was withheld too long. The claimant's verification of the old urgent account of 1841, twenty-six years after its date, without cause for the delay, supposing it to be competent testimony, is not sufficient under the circumstances of the case to overcome the presumption of settlement.

We next have the case of *Barberie v. Venezuela*, No. 47, of the same Commission, and we quote from 4 Moore, pages 4202, 4203, expressions that cast a strong light upon the whole subject-matter under discussion.

It is true that this Commission is an international tribunal, and in some sense is not fettered by the narrow rules and strict procedures obtaining in municipal courts; but there are certain principles, having their origin in public policy, founded in the nature and necessity of things, which are equally obligatory upon every tribunal seeking to administer justice. Great lapse of time is known to produce certain inevitable results, among which are the destruction or the obscuration of evidence by which the equality of the parties is disturbed or destroyed, and as a consequence renders the accomplishment of exact or even approximate justice impossible. Time itself is an unwritten statute of repose. Courts of equity constantly act upon this principle, which belongs to no code or system of municipal judicature, but is as wide and universal in its operation as the range of human controversy. A stale claim does not become any the less so because it happens to be an international one, and this tribunal, in dealing with it, can not escape the obligation of a universally recognized principle, simply because there happens to be no code of positive rules by which its action is to be governed. The treaty under which it is sitting requires that its decisions shall be made in conformity with justice, without defining what is meant by that term. We are clearly of the opinion that in no sense in which the term is used would it be just for us to make an award which would require the levying of a tax on the whole present population of Venezuela to pay a claim which originated before nearly all of the oldest of them were born, and which is presented at a time when it is impossible to say whether it is well founded or not, the delay being without excuse or justification, and we accordingly reject the claim and dismiss the petition.

Before the same Commission was presented the case of *Driggs v. Venezuela*, No. 7, which was rejected on the same grounds as the *Williams* case. The Commission, among other things, say: <sup>1</sup>

Twenty-eight years had elapsed since the alleged wrong by the Colombian Government, and not a complaint had been made by *Driggs*. There is not a case on our list that better illustrates the wisdom of the prescriptive rule.

The same principle has just received the consideration of the American and Venezuelan Claims Commission now sitting. The claim of *William V. Spader* was, by the opinion of Commissioner *Bainbridge*, rejected. The honorable Commissioner, speaking of it, says: <sup>2</sup>

A right unasserted for over forty-three years can hardly, in justice, be called a "claim."

He further declares —

It is doubtless true that municipal statutes of limitation can not operate to bar an international claim. But the *reason* which lies at the foundation of such statutes, that "great principle of peace," is as obligatory in the administration of justice by an international tribunal as the statutes are binding upon municipal courts.

In opposition to the foregoing it is suggested that the umpire of the French-Venezuelan Commission, now in session in Caracas, has admitted claims

<sup>1</sup> See Decisions United States and Venezuelan Claims Commission, 1890, p. 404.

<sup>2</sup> See vol. IX of these Reports, p. 223.

dating from 1867, although there have been intermediate French commissions. As it is understood that the arbitral sentences referred to were not accompanied by a statement of reasons, we may imagine that they were based upon some exception to the rule above indicated, and we may now refer, at least partially, to exceptions to the application of the principle of prescription between nations.

In a case referred to in 4 Moore, page 4179, it seemed to have been considered that where there was an infraction of a treaty obligation by the legislative power of the Government itself, prescription would not lie. Whether the position be sound or otherwise need not be discussed.

Again, it was recognized in the Williams case (4 Moore, p. 4194) that the time which would bar an account might not affect a bond as to which a public register had been kept.

Further, the fact will not be lost sight of that the presentation of a claim to competent authority within proper time will interrupt the running of prescription.

The qualifications above referred to, and others which might be imagined, can not, however, have any application to the present case, in which for thirty-one years after proof had been prepared the case does not appear to have been presented in any manner, the royal Italian legation, even, until very recently, having been in ignorance of its existence. Of this conduct on the part of the claimant no explanation is offered.

The umpire, while disallowing the claim, expresses no opinion as to the number of years constituting sufficient prescription to defeat claims against governments in an international court. Each must be decided according to its especial conditions. He calls attention to the fact that under varying circumstances the civil-law period is ten, twenty, and thirty years; in England, for many years — for contracts, six years; in the United States, on contracts with the Government, six years, and in the several States, on personal actions, from three to ten years.

It is sufficient to say that in the present case the claimant has so long neglected his supposed rights as to justify a belief in their nonexistence.

A judgment of dismissal will be signed.

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GUASTINI CASE

(By the Umpire:)

Opinion in the Sambiaggio case as to non-responsibility of government for acts of unsuccessful revolutionists save in case of proven negligence (p. 666) affirmed and followed.

The legitimate government can not enforce a second payment of taxes once paid to revolutionary authorities when the latter were for the time being at the place in question the *de facto* government.<sup>1</sup>

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

The honorable umpire in the claim of Sambiaggio has expressed the opinion that the protocol of February 13, 1903, does not implicitly allow indemnity for damages caused by the revolution.

The Italian Commissioner not being able to accept this point of view, on account, no doubt, of a lack of similar data of fact and of law, has the honor to

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<sup>1</sup> See same principle affirmed by the British-Venezuelan Commission, Vol. IX of these Reports, p. 455.

present the following new considerations on this controversy, supporting them by documents not heretofore produced and by arguments not yet fully examined.

The honorable umpire justly remarks that the treaty of 1861 does not explicitly admit damages caused by revolution, but we must observe that neither does it reject them. In fact, it says that "Italians in Venezuela shall be entitled to indemnity in the same measure as the nationals," *not* that they "shall have right only." Now, if one right is conceded to foreigners this does not necessarily mean that they shall be excluded from additional rights, which is in point provided by article 26 of said treaty containing the most favored nation clause. And let us observe, by the way, that the treaty of 1861 may not be invoked against the protocol of February 13, and this is to say, that the protocol recognizes rights superior to those recognized by the treaty — that is, including the right to indemnity for revolutionary damages (Art. VIII of the protocol of February 13) above all when a similar advantage is granted others.

Now, we will undertake to show that the Royal Government has intended to reserve and make good the rights of Italian claimants on the basis of a responsibility which includes revolutionary damages. The whole question, according to and judging by the arguments employed in the Sambiaggio case, seems to hinge on the meaning of the word "injury" contained in the English version of the protocol.<sup>1</sup> "Injury," according to its English law meaning, is a "damage done contrary to law; illegal damage." The honorable umpire, therefore, holds that in order to render Venezuela responsible it would be necessary to show that she is so according to the "*jus gentium*." To reach this conclusion the honorable umpire has recourse to the correspondence between Italy and Venezuela prior to the protocol, and from it he thinks it may be shown that the royal Italian legation sought only to reject the pretension of the Venezuelan Government to limit its responsibility to that recognized by the decree of 1873; but it does not seem to us that his opinion is justified; in fact, the royal Italian legation not only denied this restriction of responsibility decreed by Guzmán Blanco, but has expressly declared (in the note of April 24, 1901, of the royal Italian legation) as follows:<sup>2</sup>

The Government has given me, in addition, the charge of adding, and I do so add, the most ample reservations in regard to the rights of Italian claimants.

This general reservation had for its object to protect the more important rights of injured Italians — rights which have been contemplated subsequently by the protocol of February 13 (Art. IV). Plainer still was the memorandum note presented by Minister Riva on December 11, 1902, which, by order of his Government, informed the Government of Venezuela that not only did it exact the payment of claims recognized by the legation, but made reservation with regard to other claims on the basis of a much broader Venezuelan responsibility than that partially discussed previously, and which Italy never expressly surrendered. This memorandum served as a starting point for fixing the conditions of the protocol of February 13, 1903. This has been impliedly admitted by the honorable umpire, who has evidently intended to take the text of the memorandum in order to explain the views of the Royal Government, and has formally alleged it, saying he had consulted the correspondence of the high contracting parties to acquaint himself with their intentions. Now the memorandum<sup>3</sup>—

<sup>1</sup> The Italian Protocol was signed in English.

<sup>2</sup> See the original Report, Appendix, p. 990.

<sup>3</sup> *Idem*, Appendix, p. 995.

expressly reserves all those claims which, posteriorly to the period 1898-1900, were or shall be presented by Italian subjects as well for damages arising from the civil war begun in 1901, as for whatsoever title of credit or action toward the Venezuelan Government.

Here, on the eve of a rupture of relations between the two countries, we have a new phase — one in which Italy has asked for a generic and complete, not partial settlement, of all accounts with Venezuela, in which she has considered her rights as a whole, making the most ample reservations, and invoking a broader and indisputable responsibility.

What is the significance of the words, "all those claims \* \* \* for damages arising from the civil war begun in 1901?" Is it not evidently intended to cover thereby all losses and destruction of property occurring in civil strife? Such losses must include those occasioned as well by government as by revolutionary forces.

In the memorandum note reservation is also made "for whatsoever other title of credit or action against the Government of the Republic," thus making double reference to future demands for indemnity on account of Venezuela's negligence in protecting Italian citizens, and to revolutionary damages.

The damages arising from civil war form a sum total embracing all losses, deteriorations, destructions, and damages suffered by property, since such is the meaning of the word "damage," which has nothing to do with the sense of the word "injury," as understood by various American and English jurists. The word damage employed in the memorandum has been repeated in Article IV of the protocol, and translated in the English text by the word "injury." In case of doubt, which of the two meanings should hold, the Italian or the English? Fiore, at paragraph 1036, says:

Where a word used in a treaty has a different juridical meaning in one State from that which it has in the other, it should be determined according as it is understood in the State to which the disposition of the treaty refers.

Evidently this State can be neither England nor the United States, but Italy, the English language having been employed simply for translation, or as an auxiliary tongue, because the third powers can have no part in a litigation which does not concern them. The language of a third nation can not have served except as a copy of the original substantiating the original in case of doubt, but is not to be construed against it. As a still further proof, it may be added that in the official documents published by the Venezuelan Government (Memorandum of December 11 and *Gaceta Oficial*, containing the official translation of the protocol), the words "danno" or injury were translated into "daño, daños," which are the equivalent of the English term.

The sense of the word "danno," as understood in the vernacular, as well as in Italian jurisprudence, is one and the same, whether referring to damages from natural causes, as storms, fire, etc., or the result of accident or intention, or to damages arising from war. While not wishing to enter into a juridical dissertation on this point, we will, nevertheless, remark that a damage caused by the fault of one occasioning it, directly or indirectly, becomes a civil crime or quasi crime. Only in practice has it happened that the meaning of quasi crime has sometimes been confused with that of damage, in order to avoid the reiteration of definitions and explanations already well understood.

In the Roman law the definition of *injuria* is taken from the Digest: "Injuriam accipimus damnum culpa datum," to become crime or quasi crime (in the English sense of "injury," which, however, at times simply means damage). To "damage" must therefore be added a new element — that of guilt. We say in Roman law that the "damnum est ademptio et quasi dimi-

nutio patrimonii;” that is to say, a subtraction and a quasi diminution of patrimony; in other words, an indirect loss equivalent to a diminution.

From the foregoing it follows that the protocol did not intend to distinguish between damages caused by unlawful acts and those brought about by civil war, and has not therefore eliminated those of the latter class which the *jus gentium*, according to some authorities, does not consider entitled to indemnity.

The Venezuelan Government having assumed so broad and extraordinary a responsibility as that of Article IV, should pay not only the damages caused by the revolution, but also those caused by the operations of war, such as bombardments, breaching of walls by shot during battle; in other words, all damages coming under “whatsoever title of credit or action against the Government of the Republic.” It is useless to repeat here that Articles III and IV set a limit to the powers of this Commission as regards claims of the second class of the period 1898-1900, and for all other claims without exception, saving as provided in the last line of Article IV.

The responsibility sanctioned by the protocol is, according to the principle that a nation admitted to the concourse of civilized nations, as Venezuela has been, should be held responsible for whatever abnormal occurrences happen within its territory in damage to the interests of pacific foreigners and neutrals. Such is the view of the “Institute of International Law,” and more than once expressed by that distinguished body, which counts as members the greatest expounders of the doctrine of the “*jus gentium*.” And further, the rule of the institute itself, formulated after mature consideration and learned discussion, and representing, as it were, the last word in the science of argument, establishes the general responsibility of a state for damages occurring during an uprising or a revolution.

*Text of the regulation on the responsibility of states for damages suffered by foreigners during riots, insurrections, or civil war, adopted by the Institute of International Law in the session of September 10, 1900.*<sup>1</sup>

1. Independently of cases where indemnity may be due foreigners in virtue of the general laws of the country, foreigners have right to indemnity when they are injured in their person or property in the course of a riot, an insurrection, or a civil war; (a) when the act through which they have suffered is directed against foreigners as such, in general, or against them as subject to the jurisdiction of any given state; or (b) when the act from which they have suffered consists in the closing of a port without previous notification at a seasonable time, or the retention of foreign vessels in a port; or (c) when the damage results from an act contrary to law committed by an agent of the authority; or (d) when the obligation to indemnify is founded in virtue of the general principles of the laws of war.

2. The obligation is likewise established when the damage has been committed (No. 1 (a) and (d)) on the territory of an insurrectionary government, either by said government or by one of its functionaries. Nevertheless, demands for indemnity may in certain cases be set aside when they are based on acts which have occurred after the state to which the injured party belongs has recognized the insurrectionary government as a belligerent power, and when the injured party has continued to maintain his domicile or habitation in the territory of the insurrectionary government. So long as this latter is considered by the government of the injured party as a belligerent power, claims contemplated in line 1 of article 2 may be addressed only to the insurrectionary government, not to the legitimate government.

3. The obligation of indemnity ceases when the injured parties are themselves the cause of the events which have occasioned the injury.

There is evidently no obligation to indemnify those who have entered the country in contravention of a decree of expulsion, or those who go into a country or seek to

<sup>1</sup> *Annuaire de l'Institut de Droit International*, volume xviii, pp. 254, *et seq.*

engage in trade or commerce, knowing, or who should have known that disturbances have broken forth therein, no more than those who establish themselves or sojourn in a land offering no security by reason of the presence of savage tribes therein, unless the government of said country has given the emigrants assurances of a special character.

4. The government of a federal state composed of several small states represented by it from an international point of view, can not invoke, in order to escape the responsibility incumbent on it, the fact that the constitution of the federal state confers upon it no control over the several states, or the right to exact of them the satisfaction of their own obligations.

5. The stipulations mutually exempting states from the duty of extending their diplomatic protection must not include cases of a denial of justice, or of evident violation of justice, or of the *jus gentium*.

#### CONCLUSIONS

1. The Institute of International Law expresses the hope that states will refrain from inserting in their treaties clauses of reciprocal irresponsibility. It believes that such clauses are wrong in that they dispense the states from the duty of protecting the foreigner in their territory.

It believes that states which, through a series of extraordinary circumstances, do not feel themselves to be in a position to insure in a sufficiently effective manner the protection of foreigners on their territory can not withdraw themselves from the consequences of such a state of things except by a temporary interdiction of their territory to foreigners.

2. Recourse to international commissions of inquest and international tribunals is, in general, recommended for all causes of damages suffered by foreigners in the course of a riot, an insurrection, or a civil war.

Is not the protocol of February 13 a sanction of these very principles which seem to be dictated by a desire to safeguard a pacific and well-ordered agreement among civilized nations? The council of contentious diplomacy in Rome referred directly to the foregoing expressions of the Institute of International Law in enunciating the views which served as a basic motive for the rupture of relations with Venezuela, and a demand for an equitable satisfaction.

In accord with this, Fiore, very far from sharing the opinions of the honorable umpire, as he seems persuaded, giving his views on the situation in Venezuela, thus defines her responsibility in the case of one Mammini, already known to this Commission.

The Venezuelan Government is especially responsible by reason of insufficient measures of security and a lack of vigilance in contravention of the principle laid down in the Italian-Venezuelan treaty of June 16, 1861, which provides that the citizens and subjects of one of the contracting states shall enjoy in the territory of the other the most constant protection and security in their persons, etc. (Extract of ministerial dispatch of March 29, 1899.)

It is clear, therefore, that Article IV refers to losses and deteriorations of property in civil wars, and to those inflicted by the government, by states, by the federation, and their employees, as well as by revolutionists, and undue appropriations chargeable to both parties. We lay stress on the term "undue appropriations." To unduly appropriate an article is to despoil the legitimate owner to one's own profit, and is equivalent to enriching one's self at the expense of one's neighbor. Whatsoever spoliator, says the protocol, if undue — that is, without right on the part of the spoliator — must give occasion to a claim for indemnity. Thus was had in view the numerous spoliations and forced requisitions unjustly suffered by Italians, especially during the struggles between contending factions at times when foreigners were frequently unable to tell which represented the legitimate power. Such are the limits which the protocol

assigns to the responsibility of a state, and this view is the only one which gives a logical and natural meaning to Article IV.

It is idle to insist that such a view is unreasonable and absurd in that, giving a too extended interpretation to Article IV, the Venezuelan Government would be obliged to recognize any claim for damages, even if inflicted by private individuals, and any claim which the royal legation might see fit to present. It is insinuated that in admitting such a responsibility the Venezuelan plenipotentiary would not have been in his right mind; but such a supposition is out of reason, because having accepted the situation we have clearly explained it was but natural he should have affirmed it. May he not have been in the same frame of mind which impelled the Commissioner for Venezuela in the French-Venezuelan Commission to accord, without objection, indemnity for revolutionary damages in 82 cases of the period 1900-1903?

If the French protocol of 1902, was, without objection by Venezuela, construed as allowing indemnity in a multitude of various cases, for the most part of revolutionary origin, running as far back as 1867, France having already had two settlements since that date, while Italy had had none, how can the latter nation be denied an equal treatment when it has a more stringent protocol and enjoys besides the provisions of the most favored nation clause?

Can the Venezuelan Commissioner above mentioned have intended to convey a lesson to the honorable Mr. Bowen, or did not, rather, the latter clearly recognize a condition of affairs so eminently logical and natural? Can the Commissioners and the umpires who on this point have so exactly agreed with the views here expressed be said to have lost their reason? If it be desired to ascertain the views of the high contracting parties, have we not here most precious data?

We have never maintained that indemnity should be exacted for damages inflicted by private parties for whatsoever motive. We have only sought to establish a responsibility for the state of disorder and insecurity arising from the revolutions which have almost continuously distracted the land, and obtain indemnity for damages in the past, with a moral guaranty for our people in the future.

This special responsibility the Institute of International Law establishes on a general principle such as to justify a demand for indemnity in all cases arising from riots and revolutions. In other words, there would be, according to the institute, a general responsibility from the very fact of the admission of Venezuela among the family of civilized nations. Having been received on a par with more progressive nations, it should guaranty order and security of persons and property. Failing in this, it should suffer the consequences of an habitual deviation from internal political order when such results in damage to its associates, and this in virtue of the principles of reciprocity of guaranties established on equal terms among civilized peoples. The International Institute lays down this concept as a fundamental maxim, and as the highest expression of progress in the "jus gentium."

Even should the Italian Commissioner not go as far as the Institute of International Laws in its conclusions on this point, he must insist that the protocol has established a concrete rule modeled after the most progressive doctrine, and this to him is sufficient.

But there is another point to be examined in this controversy. From our standpoint Venezuela has not been sufficiently diligent in the protection of foreigners — that degree of diligence the omission of which the honorable umpire himself holds to be sufficient to render the State responsible, and to receive claims for damages arising from the revolution. This lack of diligence consists not only in not preventing by appropriate means, but also in encour-

aging instead of repressing, the damages, violence, and spoliations charged.

To prove this it needs but to narrate in brief the different phases of the "Hernandez" revolution. This revolution, breaking out on May 2, 1898, interrupted on June 12 following, by the capture of its chief, burst forth afresh October 17, 1899. On May 27, 1900, Hernandez was again captured and shut up in the fortress of San Carlos to December 11, 1902. But his associates and partisans continued the war, coalescing subsequently with the forces of General Matos, who had in truth but a small following aside from the Hernandists.

The insurrection spread throughout almost all the Republic, embracing a majority of the nation, and involving an extraordinary organization. It established a de facto government, many even contending that the government so established in various States for considerable periods was more legitimate than that of the capital, alleging that the election of the President had been irregular and that the constitution was illegal, not having been duly published. But we will not enter into a discussion unsuited to a foreigner, who should be content to receive the protection and indemnity due him while respecting the laws of the country in which he lives.

Seeing itself unable to make headway against so many tireless enemies the Caracas Government compromised and offered guarantees and official positions to the principal leaders, civil and military, of the Hernandists, who controlled the most important nucleus of the revolution. In this guise attained to power, in part at least, the revolutionary party of "El Mocho" (Hernandez), which now has members in the cabinet, in Congress, among the high officials of the customs, and even among the presidents of the States. Some of these have governed uninterruptedly, first in the name of the revolution and now in the name of the Central Government. To others were given positions and emoluments, so that the revolution, to-day in subjection, might to-morrow become the controlling power of the Government.

For these reasons, in addition to the general responsibility sanctioned by the protocol, there is invoked here a special responsibility for the period of the Hernandez and Matos revolutions, the latter being a continuation of the former, whose adherents were its mainstay.

In the present case it is contended that the authorities failed in the use of due diligence. The officials who took part in the recent insurrections might, in fact should, be compelled to a restitution of the goods wrongfully taken. They should be proceeded against and condemned to punishment. But the Government has made no effort to punish or even prevent the wrong, nor is it our intention to advise it to do so, since we are not called upon to criticise its political movements. This policy, however, unquestionably weakens the guarantee of security to foreigners provided for by the treaties, by its constitution, and by international law. It would be absurd to require the claimant, in each case of damage from the Hernandez-Matos revolution, to prove that the Government could, but would not, prevent the damage, since the responsibility of that Government rises to the origin, even to the political and moral causes which precipitated the revolution, and depends upon the character and general consequences of civil war.

The case of Divine (Moore, Vol. 3, p. 2980) can not be appealed to in justification here. A pardon in certain special cases of riots is comprehensible, but certainly not in cases where revolution has progressed so far as to actually take on the functions of government.

In the present instance, either the Government is strong enough to crush the rebellion, and then it should punish at least the ringleaders, causing a restitution of the property unlawfully seized, or else, confessing its inability

to cope successfully with the opposing faction, seek to compromise by sharing its functions with the leaders, and then the honorable umpire is in duty bound to award indemnity in virtue of the very principles admitted by him (on which we make reservations with the object of establishing a general responsibility) in the case of successful revolutions. And besides, in the Divine case there was no protocol containing so categorical a clause as that of Article IV of the protocol of February 13, 1903. In that case it is stated that governments granting pardon are not obliged to pay indemnity for damage inflicted by rebels, while in our case, leaving out the discussibility of the principle in virtue of which Mexico was absolved from paying indemnity in the case of Divine, an agreement was made ad hoc which could not have sanctioned the civil and penal impunity enjoyed de facto by the successful revolutionists now sharing in the legal Government. Not thus, without cause, was abandoned the obligation of protecting foreigners, which led to the extreme resort of the blockade. What weight would an isolated and little known case in Mexico have in such a question by comparison with a general moral principle and the obligation of safeguarding the interests of foreigners?

Summing up our arguments, we maintain:

1. That no distinction should be drawn between revolutions wholly or partially successful.
2. Venezuela has been and is wanting in that degree of diligence which the umpire expressly recognizes as necessary to the exclusion of governmental responsibility.

Returning now to the construction to be given Article IV, let us determine to whom it belonged to make restrictions to the principle of general responsibility defined by the Institute of International Law and sanctioned by the protocol, and what modes of interpretation should be adopted for Article IV.

The making of restrictions, the elucidation of doubtful points, if such there can be, properly fell to the plenipotentiary for Venezuela. There having been submitted to him so rigid a draft of a protocol, one which insisted on a most categorical responsibility on the part of Venezuela (unprecedented in the annals of treaty making), would he not have refused to assent to the measure, if there had been any doubt in his mind, without further explanation? The opinion of Vattel (sec. 264, Vol. II), incorrectly invoked by the honorable umpire in favor of Venezuela, on the contrary, militates against that country. The Venezuelan Government, with power to explain itself clearly, failed to do so, and it can not now bring forward restrictions of which it gave no intimation in the protocol or during the negotiations at Washington. It accepted its responsibility in all cases of damages and wrongful takings and the admission of all claims without exception. On the other hand the Italian plenipotentiary based himself principally on the memorandum of December 11, above referred to, and on the well-understood meaning of the word "danno" (as was invoked by the honorable umpire himself, who has misinterpreted the intentions of the Royal Government and its plenipotentiary and their idea as to the character and extent of responsibility). The Italian ambassador had even considered the term "Matos revolution" (see the diplomatic documents), inserted in a first draft of the protocol, decisive though it was, not sufficiently rigid and comprehensive, and so preferred a more general formula, which would embrace all claims without exception. Who can complain if Venezuela did not see fit to protest against such general formula without precedent in diplomatic history? Certainly not Venezuela, as is evidenced by the fact that she allowed some 82 claims in the French-Venezuelan Commission for damages arising from the revolution without the least objection.

We will observe in passing that in the event of interpretation of clauses in-

volving the interests of persons who have actually been injured, despoiled, and robbed, any doubt in regard thereto should be resolved, according to general principles of jurisprudence, preferably in favor of the injured party.

The opinion of Wharton (Digest, sec. 133) inclines in favor of the claimants, since the Royal Government knew the extension given to the responsibility of Venezuela and was itself the proposing party.

As to the opinion of Woolsey (sec. 113), it seemed derisive to speak of benefits for claimants while intending to reject their claims, since no real advantage is reserved to them, but at most only a part of what they have lost, and in the case of revolutionary damages, even that will be lost to them.

It is their right, their just due, that it is proposed to secure to them not a favor or a benefit, a just indemnity; perhaps incomplete, but certainly not a gift. The benefit will, on the contrary, fall to Venezuela, whose payments will be far less than they would be were she to pay all she justly owes.

The vague opinion of Pradier-Fodéré (sec. 1188), quoted in the Sambiaggio case, is not sufficient to neutralize the effect of a public treaty so grave and important as is the protocol, under the pretext that there is something doubtful in its provisions and it can only have reference to matters of detail and not to the essence of an express stipulation. Were it so wished it would be possible to find in the clearest and most explicit of texts some elements of doubt and uncertainty by which its most equitable and just purposes might be assailed. What would be the use of protocols if they are to be opposed at every step by doubts, uncertain principles of international law, complex local legislation, and generic and hypothetical views of authors who, under the cloak of the rarely-applicable opinion of Pradier-Fodéré, would emasculate every provision drawn in the interest of unfortunate foreigners whose indemnities Venezuela has undertaken to pay.

How many opinions or maxims might not be adduced in favor of injured Italians! Calvo (par. 1650) says:

Les traités étant essentiellement des contrats de bonne foi (actus bonæ fidei) doivent avant tout s'interpréter dans le sens de l'équité et du droit strict. *Lorsqu'il n'y a aucune ambiguïté dans les mots, que la signification est évidente, et ne conduit pas à des résultats contraires à la saine raison, on n'a pas le droit d'en fausser le sens et la portée pratique par des arguties et des conjectures plus ou moins plausibles.*

Is it not an evident violation of the foregoing rule to seek to twist and distort out of their obvious meaning the words of a treaty, and to confuse the word "danno" with the word "delitto," or "quasi-delitto civile" (see art. 1151 *et seq.* of the Italian Civil Code), instead of applying to them their common meaning, spread throughout the entire Italian legislation?

Fiore (par. 1037) recommends:

The second general rule which it appears to us should be established is suggested to us by Grotius, and this is that, even though the intention of the parties and that to which they have consented is to be considered as expressed in the words written and subscribed to, nevertheless there should be found a meaning in harmony with that which the parties intended, and not have recourse to pitiful subtleties to destroy by the dead letter the true intent of the contracting parties.

Now, who will undertake to say that the plenipotentiaries at Washington intended to elaborate out of their own minds that complicated tissue of hypothesis and technicalities upon the word "danno" with a view to giving it a meaning out of the ordinary, and such as to exclude the payment of indemnity for revolutionary damages — that is to say, more than half of all the Italian claims — while the honorable umpire, speaking of damages of the revolution, by this alone seems to give the word the meaning invoked by us in the name of common sense.

But it is superfluous, nay, even injurious to the cause of justice, to indulge in so many quotations, precedents, decisions of tribunals more or less obscure or contradictory, contrary to the spirit of the protocol, which takes equity as its principal rule of action. The Italian Commissioner and the royal legation have no desire to and can not follow in this road the other members of the arbitral Commission, since, so intending, they might by similar means destroy the integrity of any protocol whatsoever. "Give me but two words of any man's utterance," said Napoleon, "and I will undertake to hang him."

It would thus be possible to take away every vestige of restriction to the powers of the Commission as established by Article IV, which stipulates that in the case of damage or unlawful seizure it must determine if the damage actually occurred, if the seizures were unlawful, and what amount shall be paid.

Now, is it logical and equitable to say the damage took place, the Venezuelan Government is responsible in principle? These things are indisputable. But nothing will be awarded because the plenipotentiaries, though admitting that awards should be made to claimants who were fortunate enough to see the troops who despoiled them enter Caracas, decided to reject the claims of those whose damages were caused by those who did not succeed, but might yet do so, almost as if it had been their intention to cast the fortunes of these claimants on the hazard of a die, or the chances of success of the opposing factions as one would wager on the result of a horse race (in fact, Matos was still in the field after February 13). Would it not have been much more simple and logical to clothe the Commission with unlimited powers by suppressing altogether Article IV and thus, without words, say to the Commission: "Judge with full and absolute liberty, whether the damage done be legal or illegal, according or contrary to international law?" Where do we find international law, the existence of which is opposed by many, and which is of no force and effect without the mutual consent of the parties, sanctioned by the protocol as a rule of action, giving it preponderance over an express and mandatory clause?

Finally the following point is insisted upon: To say that Article IV, which affirms and establishes in principle the responsibility of Venezuela for damages to property, was simply and only intended to eliminate the objections which had in the past been discussed between the two Governments, is contrary to the rule of international law in matters of interpretation of treaties which states that each special clause must have a special object. Now, in order to do away with the objections formulated by Venezuela on the basis of her laws and the decree of 1873 with regard to claims, it would have been quite sufficient to invoke: First, the constitution of the Mixed Commissions having jurisdiction over all claims without exception, thus avoiding decrees and local legislation; second, Article II of the supplemental protocol of May 7 which removed objections of a technical nature, or those founded on the provisions of local legislation. The reservations made by Article IV have therefore another purpose and may not be considered vain or superfluous by a long argument based on the very local laws so expressly disregarded by the Italian plenipotentiary at Washington, and appeals to which were expressly prohibited by Article II of the protocol of May 7.

It is curious to note how, on certain occasions, for reasons which escape our comprehension, Venezuela pays for damages committed by the revolution, as for instance in the case of Gen. Manuel Corrao, who received 7482.29 bolivars for loss of stamps stolen from him by revolutionists. (See *Gaceta Oficial* of August 14, 1903.) It may be urged that this is simply a case of voluntary relief to which the Government was in nowise compelled.

But why afford relief when all should suffer equally; why derogate indirectly

and in favor of certain privileged ones to a principle which is proclaimed as absolute?

Let us now examine the question solely from the standpoint of equity.

It is repugnant to the umpire to hold the Venezuelan Government responsible for damages caused by revolutionists, for the reason that they are the enemies against which Venezuela is fighting. At first this seems plausible, but in fact is not so. It is not a case of foreign enemies penetrating from outside into the national territory and robbing the inhabitants. It is rather a case of damages committed by insubordinate subjects, whose very insubordination must be held as due to a lack of care and provision on the part of the Government.

The Venezuelan revolutionists are not belligerents, and they have not been regarded as such by either Venezuela or the powers. Their repression is wholly a question of internal policy, and Venezuela can not, in order to escape her responsibility, invoke the rules of international law, applicable only and in a certain measure to damages caused by belligerents.

For the chronic condition of internal political agitation in Venezuela some one must be found morally responsible, and this some one can be none other than the Government, upon whom falls, as a logical consequence, likewise a material responsibility for all damages occasioned by the revolutions.

In addition to refusing indemnities for damages caused by revolutionists, the honorable umpire places foreigners in a condition of manifest inferiority to the natives in so far as regards the protection of their persons and property. The latter may defend themselves by force of arms, the former can not. The natives run the chances of perils or advantages consequent upon the discomfiture or the success of the party to which they belong; but there is nothing for the foreigner but perils and damages. Justice demands, then, that provision be made for a relative indemnity, and thus in favor of the latter the powers have intervened and the protocols of Washington have been framed.

It is futile to say that the carrying out of these protocols will place the foreigners in better position than that occupied by Venezuelans. Venezuela is under no obligation not to indemnify her citizens, and she can readily place them on a par with the foreigners in this respect, as she has done in certain cases of revolutionary damages. Italy has nothing to do with this phase of the question. She only asks that justice be done her sons, and is in no wise concerned with those whom she is not bound to protect. So that if any difference of treatment exists, the fault thereof will not lie at her door, nor will her demands on that account be less equitable.

The refusal to grant indemnity for revolutionary damages will be a grave offense against equity under another point of view. It is a fact that the troops of the Government have everywhere defeated those of the revolution, and that all the arms, ammunition, stores, animals, money, etc., in possession of these latter, have passed into the possession of the former, for their use and disposal. Almost all of this property was violently, or at least unduly, taken from the inhabitants, and it is no exaggeration to say that the larger share belonged to foreigners. Were the honorable umpire to deny indemnity to the foreigners in question he would be sanctioning an enrichment of the Venezuelan Government at their expense — a thing which to us appears contrary to justice.

When, therefore, damages have been inflicted upon foreigners simultaneously by government and by revolutionary troops, or successively by either, it has frequently been impossible for claimants, perhaps for a lack of eyewitnesses easily understood at times of agitation and terror, perhaps because the courts were not in operation for months after the occurrences complained of, to deter-

mine what portion of the damages suffered by them were chargeable to one and what to the other party — i.e., government or revolution.

Now, it may happen that in these cases the honorable umpire will fail to find elements by which to discriminate between damages entitled to indemnity and those to which he has so far refused it. He must, therefore, either integrally accept the claims or reject them utterly. In the first hypothesis — the only just and acceptable one — he will run counter to the principles heretofore laid down by him; in the second he will deny the sacredness of a right admitted without restrictions of any kind by Venezuela herself.

Let us now cast a look to the future. However optimistic we may choose to be, it would be difficult to believe that revolutions in Venezuela are at an end. Hence, future revolutionists (never, according to our experience, promptly suppressed), strong in the decision of the honorable umpire, may with absolute impunity make themselves masters of the persons or property of Italians with entire freedom from any obligation to indemnify in the event of their party not being successful. This feeling of security will be a powerful incentive to abuses of every sort, while the assurance that the country would in every instance be held to a strict accountability for damages inflicted upon foreigners could not but act as a salutary check.

The decision in the Sambaggio claim on the other hand will strongly tend to make Italians heedless of their neutrality, for even the honorable umpire himself would hardly expect these people to rise to the sublime heroism of allowing themselves, with meekness and equanimity, to be stripped of their possessions by revolutions, with the certainty that their claims would never be indemnified. They will have to either resort to arms for self defense, or, making common cause with the revolutionists, assist these latter to attain to power as the only means of securing reimbursement. All of which would injure the peace of the Republic and tend to inaugurate a profoundly immoral and subversive state of affairs.

Great as may be, therefore, the responsibility which the honorable umpire seems thus far disposed to assume for past events, a much greater will rest upon him in the future, either on account of attempts upon the life and property of Italian citizens, or the political tranquillity of the Republic, which, in view of its best interests, can hardly be grateful to him should he in this present claim decide not to adopt principles different from those governing his previous decision.

Let us now consider the treatment to which Italian subjects are entitled under the provisions of the "most-favored-nation" clause contained in the Italian-Venezuelan treaty of 1861, and confirmed with especial reference to claims in the Washington protocol of February 13, 1903.

Assuming that the Guastini claim (which, had it been French, would have been awarded indemnity for revolutionary damages, but, being Italian, is in danger of rejection) seems expressly calculated to render more glaring the injustice of the treatment which it is proposed to inflict upon our fellow-citizens, let us call attention to the fact that the treaty of 1861 has never been repealed, and has never for a moment ceased to be in force. There has been no declaration of war between Italy and Venezuela, and the blockade has been no more than an interruption of diplomatic relations, which could not have annulled existing treaties according to the opinion of the best authorities on international law.<sup>1</sup>

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<sup>1</sup> See, however, decision of the Hague Permanent Court of Arbitration in the Venezuelan case, considering that a state of war existed. Vol. IX of these Reports, p. 107.

It is true that Article VIII of the protocol of February 13 speaks of the treaty as being "renewed." But if we consider well we will see that the word was used *ad abundantiam*, to obviate all future doubt and discussion. In the said article there is no explicit declaration that the treaty had ceased to exist, and the sole purpose in view was precisely to explicitly confirm the "most-favored-nation" clause now in force, and to give it so full and ample an application as to render its elusion by subterfuge impossible.

It was not possible to more clearly express this intention than was done by the phrase —

The Italians in Venezuela and Venezuelans in Italy shall in all respects, and particularly in the matter of claims, enjoy the provisions of the most favored nation clause, as stipulated in article 26 (of the treaty).

In order that the scope of this fact might not suffer diminution from any restrictive interpretation of Article IV of the treaty, which, without excluding better conditions, provides that Italians in Venezuela shall not in any case receive a less favorable treatment than that accorded the nationals, the last line of Article VIII of the protocol provides that the treaty shall never be invoked against the provisions of the protocol.

In the decision in the Sambiaggio case not only was there no account made of this provision of the last line of Article VIII of the protocol of February 13 and the treaty invoked against it, but there was likewise invoked the noted Article IV, to prevent the application of which it is well known that the last clause of Article VIII, above mentioned, was especially framed, if it be desired to discuss the question logically and with unprejudiced mind. But let us admit, for the sake of argument, that the treaty of 1861 was no longer in force on February 13 of this year. None the less would the "most favored nation" clause apply in favor of Italian claimants since the treaty was renewed and confirmed by the protocol of that date.

In fact, it can not logically be held that so important a clause of a protocol framed expressly to settle a preceding question with regard to claims should not be applied to the claims themselves; to claims of a civil war not yet then terminated, and which continued for five months after the signing of that instrument.

It is in any event an unquestioned rule of law that an explanatory clause is retroactive in its effect, because, except in cases of *resjudicata*, it tends to clear up the intention of the legislator, and, in the present case, that of the original negotiators.

Fiore, after a long discussion of this subject, thus sums up his arguments in the following maxim (par. 1012):

The effects of international conventions extend, on general principles, to juridical relations established and formed prior to the stipulations of the treaty. A contrary provision might, however, be provided by express agreement.

This "express agreement" does not appear either in the treaty or in the protocol, and hence the umpire's concept of the nonretroactivity of Article VIII of the protocol does not seem to conform to the principles of international law.

To us, however, it seems clearly established that the "most favored nation" clause should apply in every supposable case in the interests of Italian claimants. It remains to be seen whether this application may be invoked by us in view of the decisions rendered in the French-Venezuelan and German-Venezuelan Commissions, in which indemnities were granted to French and German claimants for revolutionary damages.

With regard to this, it has been objected that if this principle were admitted, should those commissions subsequently render decisions of an opposite nature,

it would become necessary for this Commission to follow them in this devious and uncertain path. Hence it has been concluded that this Commission is not to accept as binding on it decisions rendered in the others.

We will merely observe, in relation to the foregoing supposition, and more especially with reference to the French-Venezuelan Commission, that the latter has about terminated its labors, that more than eighty indemnities for revolutionary damages have been granted without discussion on the part of the Venezuelan delegate in said Commission, and that when he, with tardy objections attempted to raise difficulties, the umpire cut short those objections by declaring that there must be complete similarity between damages created by the Government and those of the revolution. So far as the German-Venezuelan Commission is concerned, we have time to consider this point, and should it transpire that its decisions have changed we will not refuse to do so, but there is no reason to anticipate such change, in view of the evident equity of the course so far adopted by it.

It suffices us that a single one of the Commissions assembled in Caracas for the settlement of foreign claims should have granted indemnity for revolutionary damages to give us the right to demand and obtain that an equal treatment be accorded Italian claimants.

In fact, the decisions in this sense of a single Commission even would constitute the authentic and sovereign interpretation of the treaty and of the protocol stipulated by the Venezuelan Government for the pacific settlement of claims brought forward by subjects of the respective nations. Hence it is that, according to the protocols and treaties, of which the decisions of the Commissions are the unchallengeable interpretations, we demand for our fellow-citizens the application of the "most-favored-nation" clause. But granting that Article IV of our protocol lends itself to a double interpretation, which we positively deny, the honorable umpire should, even reluctantly, give a decision granting indemnity for revolutionary damages, in order to avoid giving one which, in view of the action of the French and German Commissions in this respect, would be in open contradiction with the provisions of Article VIII of the protocol of February 13, above named.

If the treatment accorded the most favored nation be not accorded us by the granting of indemnity for revolutionary damages, in what other case may we hope to obtain this advantage? What effect, if not this, has the clause referred to? Shall we remain satisfied with a differential treatment which leaves us in a position of manifest inferiority, when the treaty of 1861 and the Washington protocol guarantee to us the contrary in the widest and most explicit manner?

If the honorable umpire rejects claims for revolutionary damages, the effect will be as though Article VIII of the Washington protocol had not been written, or as if the provisions of the same were to have no application — a conclusion repugnant at once to intellect and to conscience. In short, such a course would be tantamount to an emasculation of the entire protocol, since what has so far been granted by the honorable umpire is nothing if not that which in principle was not refused by Venezuela, even before the framing of that instrument — that is, that indemnity should be granted for damages caused by the Government or its agents. Now, when it is considered that, as has already been remarked, the Venezuelan Commissioner in the French Commission conceded, without discussion, over 80 claims for revolutionary damages, it should logically and in good faith be recognized that the interpretation given in that tribunal to the French protocol, much less explicit than ours, is the one admitted by the Venezuelan Government itself.

If, indeed, the Commissioners are free to judge according to rules of equity

and justice, and with full and absolute independence, the facts and circumstances on which the claims are based, and the efficacy of the respective proofs, they are none the less, in questions of principle, as in the question of revolutionary damages, bound by the instructions of their governments, and governed by them in the judgments they render.

None of us has accepted the honorable charge which has been intrusted to him without first thoroughly investigating between what limits and according to what general rules lay the duties of his office. Our appointment as Commissioners, who are not exactly or exclusively judges, clearly shows this.

The diplomatic course pursued by Italy in Venezuela in favor of her claimants, if always inspired by extreme moderation, has nevertheless constantly aimed to secure to injured Italians a treatment analogous to that granted to other foreigners. The honorable umpire will find an absolute proof of this in the documents we send herewith, which are all of an earlier date than that of the protocol of February 13, to wit, in the note of the royal Italian legation at Caracas to the Venezuelan minister of foreign affairs of April 24, 1901, in that of the Italian minister of foreign affairs at Rome to the United States ambassador at Rome, in a telegram of the aforesaid minister to the ambassadors at Berlin, London, and Washington and in the telegraphic reply to the latter.

Convinced that the honorable umpire will recognize that Italy is not here asking more than it has always been her intention to ask, even prior to the negotiations at Washington, we await with confidence a decision from him in favor of the claimant, Luigi Guastini in the sum of 582 bolivars for damages inflicted upon him by civil authorities and for judicial expenses, and in the sum of 6,247 bolivars on account of requisitions, forced loans, and other damages from troops and authorities of the revolution, or a total of 6,829 bolivars.

*ZULOAGA, Commissioner:*

In this case the honorable Commissioner for Italy has deemed it proper to reopen the discussion touching the responsibility of Venezuela for damages caused by acts of revolutionists, especially with reference to the Washington protocol.

To me it seems that the decision of the honorable umpire, given in the Sambiaggio case, has settled the question. The Commissioners fully stated their opinion in that case before the honorable umpire, verbally and in writing, and he then gave a learned and extended decision in which were carefully considered and solved all the points which the honorable Commissioner for Italy now desires to reconsider, and I believe the subject to be exhausted, as appears proven by the fact that the new opinion of the honorable Commissioner simply endeavors to refute the decision of the umpire. I will not undertake for my part to make a new exposition, since it would only result in uselessly prolonging the labors of the Commission.

Venezuela never accepted responsibility for claims arising from acts of revolutionists, as is evidenced by her laws. In the case referred to by the honorable Commissioner for Italy, which appears to be inferred from an Executive resolution published in the *Gaceta Oficial* of August 14, only by a strained interpretation may it be construed that the Government had accepted such responsibility. There was no disbursement in payment thereof, nor was it paid in any other way.

The honorable Commissioner for Italy insists that the French-Venezuelan Commission accepted revolutionary claims, and referring thereto I will quote here the opinion of the Venezuelan Commissioner in that Commission:

Notwithstanding the respect which the Commissioner for Venezuela owes to the decision which has been rendered by the honorable umpire in the claim of Antoine

Bonifacio and in other cases where indemnity has been claimed for damages to property by revolutionary forces which have committed depredations in various sections of the Republic, and principally in the town of Carúpano, I consider it my duty to maintain the opinion heretofore expressed by me, that claims based on negotiations, loans contracted between revolutionary chiefs and private individuals, as well as those for forced requisitions and damages sustained at the hands of revolutionary troops by neutrals, do not affect the responsibility of the Government of Venezuela.<sup>1</sup>

The historical-political narration made by the honorable Commissioner for Italy for the purpose of deducing the responsibility of the Venezuelan Government for its lack of diligence in suppressing the revolution is weakened by serious inaccuracy in both its general scope and minor details. The Venezuelan Government did energetically and resolutely attack the revolution, and the fact of its having continued to the present year was due to the action of the three allied powers in destroying the war vessels of the Government, with which Venezuela was pursuing the dismembered revolutionists, permitting the latter to reorganize, and thus cause new and bloody combats.

"The most-favored-nation" clause invoked by the honorable Commissioner for Italy finds no place in the labors of this Commission, but refers solely to the drawing up of treaties, not to the application of their provisions, which must necessarily depend on the point of view of those who construe them. It would be well to note, however, that it is extremely difficult to determine which is the nation having the most favored claimants in these mixed commissions.

In some, as in this one, by the decision of the umpire a long delay has been granted for the presentation of the claims: in others, not. In some, the consideration of proof has been left absolutely free; in others, not. In some, the responsibility of the Government for acts of revolutionists has not been admitted, while admitting its responsibility for the acts of its agents; in others, the Government has been held accountable for the acts of revolutionists, but not for the acts of its agents. Again, interest has been allowed in some commissions, and not in others. England has presented no revolutionary claims, yet it has a protocol similar to the Italian. By what criterion is it possible to determine which is the most favored nation in carrying out the provisions of the various protocols?

There remains but a brief consideration of the serious charge made by the honorable Commissioner for Italy that the doctrine of the non-responsibility of the Government for acts of revolutionists will prejudice the peace of the Republic and tend to inaugurate a profoundly immoral and subversive state of things, and, he adds, the umpire will incur a grave responsibility for future attempts against the lives and property of Italians in Venezuela, and even for the peace of the Republic, in deciding, as he has, that the Government can not be held for the acts of the revolution.

Immoral and unjust it is to assume to withdraw Venezuela from the operation of laws which govern all cultured peoples, and insist that the honorable umpire shall decide accordingly. Immoral and unjust to ask that foreigners in Venezuela shall be governed by laws other than those under which Venezuelans themselves live, and that the Government shall be as an insurance company against real or imaginary losses from *force majeure*, and profoundly immoral it would be, as well, to advocate the doctrine that the state is responsible for acts of revolutionists.

Foreigners should be interested in the preservation of peace and public order, and they have numerous ways of contributing thereto without inter-

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<sup>1</sup> Acquatella case, *supra*, p. 5.

vening in the politics of the country. But the day when the state is made responsible for the damages mentioned will see foreigners grow indifferent to the continuance of public peace, aye, and even become eager to foment revolution, as a means of acquiring by trumped-up claims what they might not be able to obtain by means of honest labor.

The honorable Commissioner for Italy seems unduly preoccupied as to the future. In the future the foreigner in Venezuela will live as he has in the past — under the constitution of the country, which establishes that the nation has no more or greater obligations toward them than it has toward its own citizens, according to the laws of the land — as the Venezuelans themselves live, who know very well that under the law they have no right to claims for damages committed by revolutionists.

I am confident that the honorable umpire, abiding by his decision, will reject the claim of Guastini as one based on acts of revolutionists.

RALSTON, *Umpire*:

The above case has been referred to the umpire upon difference of opinion between his honorable associates relative to an allowance for damages committed by insurgents during the recent revolution.

The questions presented in this respect are the same as those presented by the recent case of Salvatore Sambiaggio, No. 13,<sup>1</sup> in which the umpire reviewed in extenso the subject of responsibility of the Government for revolutionary damages in the case of unsuccessful revolution. In the present case, as before, the honorable Commissioner for Italy has presented a learned and able exposition of his views, which exposition has received the careful and respectful consideration of the umpire. He is, however, unable to change the views then expressed, but feels obligated to discuss briefly some of the fundamental positions taken on behalf of Italy.

The honorable Commissioner for Italy rests his opinions largely upon the assumed inequity of a refusal to require the Government to pay such revolutionary damages. The subject was fully investigated by the umpire in the former opinion, in addition to which discussion he desires now to call attention to article 21 of the treaty of 1892 between Italy and Colombia, which reads as follows:

It is also stipulated between the two contracting parties that the Italian Government will not hold the Colombian Government responsible, save in the case of *proven* fault or negligence on the part of the Colombian authorities or of their agents, for injuries occasioned in time of insurrection or civil war to Italian citizens in Colombian territory, through acts of rebels or caused by savage tribes beyond the control of the Government.<sup>2</sup>

The foregoing sufficiently indicated the opinion of the Italian foreign office, and, in exact accord as it is with the opinion he expressed in the Sambiaggio case (as well as with a fair interpretation of the Italian-Venezuelan treaty of 1861, as pointed out in the case mentioned), confirms the ideas of the umpire; for had Italy believed such a clause inequitable and unjust to her subjects that

<sup>1</sup> See *supra*, p. 499.

<sup>2</sup> It appears that by an exchange of notes, dated October 27, 1902, between the minister of Italy in Bogotá and the Colombian minister of foreign affairs, it was understood that if other countries were granted *by Colombia* damages for acts of revolutionists or savage tribes *Colombia* would afford the same relief in favor of Italians. ("Trattati e Convenzioni fra Il Regno d'Italia e gli altri Stati") This does not affect the recognition by Italy of a just principle, and, furthermore, in the case of Venezuela, she has accorded no more (or even as much) to other nations as to Italy. (Note by umpire.)

enlightened and cultivated nation would never have solemnly ratified a treaty with Colombia, situated as it was and is like Venezuela, containing such a provision.

It is worthy of note that, according to the opinions of nearly if not quite all the umpires now in Caracas in the various Commissions, there exists no legal responsibility on the part of Government for the acts of unsuccessful revolutionists. Such is the view of the umpire of the English and Netherlands Commission,<sup>1</sup> of the German Commission,<sup>2</sup> and, as it appears, of the Spanish Commission.<sup>3</sup> Furthermore, it is the opinion of the umpires above referred to (save that of the Spanish Commission, possibly) that such claims are inequitable. It is true that the umpire of the German Commission, influenced by a construction of his protocol which this umpire can not conscientiously follow, has allowed (but within strict limits) certain claims of the character in question. It is also true that the umpire of the Spanish Commission, notwithstanding his apparent belief as to their illegality, has granted claims of this nature, considering the objections raised thereto by Venezuela as "technical," and therefore opposed to the protocol. This view the present umpire is unable to accept, believing as he does that an objection going to the foundation of the right to recover can not be regarded as technical. In addition to the Commissions above named, the American Commission has already indicated<sup>4</sup> that it would deny the right to recover for claims of this nature. Nothing is said above about the decision of the umpire of the French Commission, as, according to information furnished, the reasons for his decision were not given and the particular facts are unknown.

To the suggestion that Italy is entitled to the benefit of the "most-favored-nation" clause contained in the protocol, and that she has been deprived of it — a point argued at length and ably — it only remains to add that Italy obtained from Venezuela a protocol, certainly so far as this discussion is concerned, more favorable than those given other nations, for while (to illustrate) under the German protocol Venezuela admitted its liability —

in cases where the claim is for injury to or wrongful seizure of property, and consequently the Commission will not have to decide the question of liability, but only whether the injury or the seizure of property were wrongful acts, and what amount of compensation is due,

in the Italian protocol Venezuela admitted its —

liability in cases where the claim is for injury to *persons and* property, and for wrongful seizure of the latter, and consequently the questions which the Mixed Commission will have to decide in such cases will only be: (*a*) Whether the injury took place or whether the seizure was wrongful; and (*b*) if so, what amount of compensation is due.

The French protocols contain no similar admission.

It is true that there have existed differences of opinion among umpires as to the responsibility of Venezuela for acts of unsuccessful revolutionists; but such differences of opinion, relating as they do to questions of international law or of the construction of protocols, can not be said to have any relation to a "most-favored-nation" clause obligatory upon Venezuela, which nation has apparently given Italy all she promised. These opinions may be studied to

<sup>1</sup> Vol. IX of these Reports, p. 408; and *infra*, p. 713.

<sup>2</sup> *Supra*, p. 390.

<sup>3</sup> *Infra*, pp. 741 and 748.

<sup>4</sup> Vol. IX of these Reports, p. 145.

advantage, but they are not protocols, nor are they "treatment," within the meaning of the Italian-Venezuelan agreement.

It is greatly urged that the decision in the Sambiaggio case rested largely upon the meaning of the word "injury," and that the word "danni," used in the Italian version of the protocol, has a vastly different meaning. To this observation several answers are to be made. The text of the protocol is in English and Italian. It was the result of long negotiations between the representatives of England, Germany, and Italy on the one hand, and Mr. Bowen, Venezuela's representative, on the other. These negotiations were carried on almost altogether in English, and the drafts (afterwards becoming protocols) were in English. It is therefore evident that the basic language is English, and in case of difference of translation resort should be had to it.

But if this were not so, no difficulty would arise. We must conceive that the language employed, used as it was in a document in a sense legal, is to be interpreted with some regard to law. Examinations of articles 1151-1152 of the Italian Civil Code, with reference to "danni," "quasi delitti," shows that:

1151. Any act of man which results in damage to others obliges the one through whose fault the damage occurred to indemnify therefor.

1152. Every one is responsible for the damage which he has occasioned, not only by his individual act, but also by his own negligence or imprudence.

Careful examination of these words descriptive of "danni" will fail to show any difference between its significance where used in a legal way, and that of the word "injury" similarly employed, for there always exists the idea of responsibility only for acts with which one has some association, physically or by intendment of law.

Furthermore, if difference exist, it should be settled in favor of the party obligated, as pointed out under other conditions in the Sambiaggio case.

Although the umpire has the highest respect for the opinions of the Institute of International Law, which are referred to by the honorable Commissioner,<sup>1</sup> he does not discuss them specifically, as the principles covered by the citation made by him have received the attention of the umpire at great length, so far as they may be esteemed pertinent to the present case.

The claimant demands 150 bolivars for having paid double license to the revolutionary authorities in 1902 and 1903. The facts in connection with this item appear to be as follows:

The claimant paid --

To the revolutionists:		<i>Bolivars</i>
Apr. 1, 1902	For second quarter of 1902 . . . . .	50
July 16, 1902.	For third quarter of 1902 . . . . .	50
Mar. 10, 1903.	For first quarter of 1903 . . . . .	50
To the Government:		
Jan. 1, 1902.	For first quarter of 1902 . . . . .	50
Mar. 24, 1903.	For the entire year of 1902 and first quarter of 1903 . . . . .	250

It appears from the receipts evidencing the foregoing that during the period named the claimant was a merchant of the fifth class at El Pilar, and subject to annual license of 200 bolivars, payable quarterly.

It is impossible to grant the claim in the manner presented. If the taxes were wrongfully exacted by the revolutionary authorities the Government can not be required to refund them.

But the claimant apparently has a ground of recovery founded upon another

<sup>1</sup> *Annuaire de l'Institut de Droit International*, Vol. XVIII, p. 254 (1900).

principle. We are justified in believing from the evidence in the case that during nine months of 1902, and at least to March 10, 1903, the revolutionary authorities were in possession of El Pilar. The claimant was therefore authorized, and we may presume compelled, to pay them the license fees which would have been payable to the legitimate authorities had they controlled the town. In fact, without such payment or some other, he could not have gained his livelihood as a merchant. A payment to them discharged (at least so far as the "expediente" informs us) his obligations toward his municipality. For him in his local relations the revolutionary authorities were the Government. They constituted his municipal government *de facto*.

We learn from Bouvier's Law Dictionary (Rawle's edition, title *de facto*) that:

Where there is an office to be filled, and one acting under color of authority fills the office and discharges its duties, his actions are those of an officer *de facto*, and are binding on the public. 159 U.S., 596. An officer in the actual exercise of executive power would be an officer *de facto*, and as such distinguished from one who, being legally entitled to such power, is deprived of it — such a one being an officer *de jure* only. \* \* \* An officer *de facto* is *prima facie* one *de jure*. \* \* \* An officer *de facto* is frequently considered an officer *de jure*, and legal validity allowed his official acts.

Money paid, therefore to the *de facto* authorities in the shape of public dues must be considered as lawfully paid, and receipts given by them regarded as sufficient to discharge the obligations to which they relate. Any other view would compel the taxpayer to determine at his own peril the validity of the acts of those exercising public functions in a regular manner.

We must apply to the facts before us the principle which would be invoked if the acting *jefe civil* had been illegally appointed or elected by legal authorities acting improperly. In such case no dispute could possibly exist as to the right of the taxpayer to be protected by payment to such illegal but acting officer.

Says Morawitz on Corporations, sec. 640:

In order to secure the peaceful and orderly government of the community, the rule has been established that the right of a *de facto* public officer to exercise the powers of his office can not be investigated in a collateral proceeding. It must be determined once for all times in a direct proceeding to oust the officer.

In *Norton v. Shelby Co.*, 118 U.S., 425, the Supreme Court of the United States held that where an office exists under law, it matter not how the appointment of the incumbent is made, so far as the validity of his acts are concerned. It is enough that he is clothed with the insignia of the office and exercises the power and functions.

Let us add another consideration. During the period for which taxes were collected by the revolutionary government, the legitimate government (as we may believe from the "expediente") performed no acts of government in El Pilar. It did not insure personal protection, carry on schools, attend to the needs of the poor, conduct courts, maintain streets and roads, look after the public health, etc. The revolutionary officials, whether they efficiently performed these duties or not during the time in question, displaced the legitimate authorities and undertook their performance. The legitimate government therefore was not entitled at a later period to collect anew taxes once paid to insure the benefits of local government which it was unable to confer.

We need not question the obligation of taxpayers to pay to the rightful authorities taxes accrued but not paid during illegitimate government. That does not enter into this discussion.

If the opinion above expressed need support from precedent and the views

of others, it is at hand. A situation analogous to that now presented arose out of the holding of the town of Castine, near the eastern extremity of the State of Maine, by the British during the war of 1812 between the United States and Great Britain. That eminent jurist, Justice Story, in passing upon the questions presented to the United States Supreme Court, said (*U.S., v. Rice*, 4 Wheaton, 246):

The single question arising on the pleadings in this case is, whether goods imported into Castine, during its occupation by the enemy, are liable to the duties imposed by the revenue laws upon goods imported into the United States. It appears by the pleadings that on the 1st day of September, 1814, Castine was captured by the enemy and remained in his exclusive possession, under the command and control of his military and naval forces, until after the ratification of the treaty of peace, in February, 1815. During this period the British Government exercised all civil and military authority over the place, and established a custom-house and admitted goods to be imported according to regulations prescribed by itself, and, among others, admitted the goods upon which duties are now demanded. These goods remained at Castine until after it was evacuated by the enemy, and, upon the reestablishment of the American Government, the collector of the customs, claiming a right to American duties on the goods, took the bond in question from the defendant for the security of them.

Under these circumstances we are all of opinion that the claim for duties can not be sustained. By the conquest and military occupation of Castine the enemy acquired that firm possession which enabled him to exercise the fullest rights of sovereignty over that place. The sovereignty of the United States over the territory was, of course, suspended, and the laws of the United States could no longer be rightfully enforced there or be obligatory upon the inhabitants who remained and submitted to the conquerors. By the surrender the inhabitants passed under a temporary allegiance to the British Government, and were bound by such laws, and such only, as it chose to recognize and impose. From the nature of the case no other laws could be obligatory upon them, for where there is no protection, or allegiance, or sovereignty, there can be no claim to obedience. Castine was, therefore, during this period, so far as respected our revenue laws, to be deemed a foreign port, and goods imported into it by the inhabitants were subject to such duties only as the British Government chose to require. Such goods were, in no correct sense, imported into the United States. The subsequent evacuation by the enemy and resumption of authority by the United States did not and could not change the character of the previous transactions. The doctrines respecting the *jus postliminii* are wholly inapplicable to the case. The goods were liable to American duties when imported, or not at all. That they were not so liable at the time of importation is clear, from what has been already stated, and when, upon the return of peace, the jurisdiction of the United States was reassumed, they were in the same predicament as they would have been if Castine had been a foreign territory, ceded by treaty to the United States, and the goods had been previously imported there. In the latter case there would be no pretense to say that American duties could be demanded, and, upon principles of public or municipal law, the cases are not distinguishable. The authorities cited at the bar would, if there were any doubt, be decisive of the question. But we think it too clear to require any aid from authority.

American statesmen have since followed the precedent. For instance, in 1873, Secretary Fish wrote to Mr. Nelson (*Wharton's Digest of Int. Law*, vol. 1, sec. 7, p. 29):

The obligation of obedience to a government at a particular place in a country may be regarded as suspended, at least, when its authority is usurped, and is due to the usurpers if they choose to exercise it. To require a repayment of duties in such cases is tantamount to the exaction of a penalty on the misfortune, if it may be so called, of remaining and carrying on business in a port where the authority of the government had been annulled. \* \* \* Since the close of the civil war in this country suits have been brought against importers for duties on mer-

chandise paid to insurgent authorities. Those suits, however, have been discontinued, that proceeding probably having been influenced by the judgment of the Supreme Court adverted to. (*U.S. v. Rice*, 4 Wheaton, 246.)

Without multiplying at length possible citations, reference is also made to a letter to like effect from Mr. Cass, Secretary of State, to Mr. Osma, dated May 22, 1858. (*Wharton's Int. Law Digest*, vol. 1, sec. 7, p. 28.)

Perhaps the latest similar instance in American international affairs is to be found discussed in *Foreign Relations for 1899*, and refers to an attempted second collection by the Government of duties at Bluefields, Nicaragua, a first payment having been made to a revolutionary government. After an extended correspondence, and pursuant to instructions from Mr. Hay, Secretary of State, the American envoy extraordinary and minister plenipotentiary, W. L. Merry, signed an agreement for settlement, providing, among other things, that —

The deposit (conditional deposit for second payment made by merchants) shall be paid by Her Britannic Majesty's consul to the authorities of the custom-house if it is decided that that Government has had the right to demand the payment claimed, or to its owners, the American merchants, if it is decided that the payment made to the revolutionists of Bluefields was legal for the reason that they pretend that the revolutionary organization of General Reyes, between February 3 and 25, 1899, was the government *de facto*. (*For. Rel.*, 1899, p. 576.)

It will be seen that the only question for consideration was the character of the government. In the pending case its *de facto* character is sufficiently established, and therefore the second payment, made, as satisfactorily appears, under circumstances of compulsion, must be returned to the claimant.

In this case an award will be signed for 1,517 bolivars, including amounts taken by the Government, for which receipts were or were not given, and the second payment of taxes above referred to, with interest, and refused for acts of revolutionists, no want of diligence on the part of the Government having been shown.

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#### CASES OF REVESNO, BIGNOSO, STIZ, MARCHIERO, AND FANTI

Government is not to be held liable for acts of revolutionists unless negligence be clearly apparent or proven by claimant, the more so when claimants have never appealed to it for protection.

#### RALSTON, *Umpire*:

The above cases, all from Colonia Bolívar, came to the umpire on difference of opinion between the honorable Commissioners for Italy and Venezuela.

It is urged on behalf of Italy that the above cases come from a distance not greater than 30 miles from Caracas, that the takings were all by Matos revolutionists under command of General Rolando, and occurred during the months of May and October, 1902, and January, February, March, April, May, June, and July of 1903, happening at Custire, El Bautiamo, Chispita, and Colonia Bolívar; that by reason of their nearness to Caracas they could have been prevented by the exercise of proper diligence, and that therefore these cases are exceptions to the general rule laid down in the *Sambiaggio* case, No. 15,<sup>1</sup> and affirmed in the *Guastini* case, No. 225.<sup>2</sup>

A study of these cases will show that the burden of proving want of diligence

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<sup>1</sup> See *supra*, p. 499.

<sup>2</sup> See *supra*, p. 561.

rests upon the claimants. In the "expedientes" now under consideration not a word of affirmative proof is furnished to show negligence on the part of the Government. The umpire is aware of the fact that for several months the revolutionists remained within a short distance of Caracas without being dislodged by the Government, or perhaps without a serious attempt being made to dislodge them. But he is also aware that during that time war was being actively prosecuted over large areas of the country, while the external relations of Venezuela were in a state of danger. He is unable, and if furnished with data would doubt his right, to judge as to the military or political considerations which made military activity or concentration more necessary in one portion of the country than another.

Furthermore, he knows nothing of the relative strength of the forces of General Rolando and of the Government in this neighborhood or their advantages of location. He only knows that when the tension was apparently released elsewhere the forces of Rolando were attacked and ultimately defeated.

The claimants, so far as the evidence shows, never made any appeal to the Government for protection, as it was their right to do if they desired to obtain it, and although such appeal, if made, might have had an important effect upon the question of liability.

In view of the foregoing an order dismissing said cases will be signed.

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GUERRIERI CASE

Government will not be held responsible for results of legitimate acts of warfare.

RALSTON, *Umpire*:

The above case has been presented to the umpire upon difference of opinion existing between the honorable Commissioners for Italy and Venezuela.

The larger part of the claim is for damages committed by unsuccessful revolutionists, and, resting upon the principles discussed in the Sambiaggio and Guastini cases,<sup>1</sup> can not be given further consideration.

A further claim of 225 bolivars is made because of the fact that the Government steamers bombarded the town of Puerto Cabello, where claimant's property was situated, a shell in part destroying the walls of claimant's house. It is urged that the bombardment was without reason or purpose, and therefore the Government should be held responsible for wanton destruction of property. This principle was adopted by the Commission in the case of Eugenio Barletta, consul at Ciudad Bolívar,<sup>2</sup> and, in the opinion of the umpire, correctly adopted, it then appearing that the Government vessel had thrown 1,400 or 1,500 shells into the town without directing its attack upon the quarters of the revolutionary troops, without any supporting force to make the bombardment effective, and when the city had not broken out in insurrection, but a body of troops had defaulted in their allegiance.

Nothing like this is proven in the present case. We are simply informed that shells were thrown, one of them injuring claimant's property. Upon this statement of a single fact, a state of war existing, the umpire is not justified in assuming that the act was needless or unjustifiable. The legal presumption would be in favor of the regularity and necessity of governmental acts.

A decree of dismissal will therefore be signed.

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<sup>1</sup> See *supra*, pp. 499 and 561.

<sup>2</sup> No written opinion. See de Lemos case, vol. IX of these Reports, p. 377.

## MILANI CASE

(By the Umpire:)

In cases of double citizenship neither country can claim the person having the same as against the other nation, although it may as against all other countries.

However such matters may be treated by the diplomatic branch of a government, an international commission can only accord damages to a citizen or subject of a claimant country — not to the country itself, and taking no account of offenses to a nation as such.<sup>1</sup>

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

Article 4 of the Italian Civil Code declares that “ the father being a citizen, the son is likewise a citizen.”

The constitution and the civil code of Venezuela declare, instead, that all who are or may be born on Venezuelan soil are Venezuelans. From which it follows that sons of Italians born in Venezuela are Italian citizens according to the law of Italy and Venezuelans according to the law of Venezuela. In the event of conflict between the two provisions, would Italy have the right to protect individuals finding themselves in the juridical condition above mentioned, and would the Mixed Commission be competent to consider the claims of such according to the protocol of February 13, the principles of equity, and the principles of international law?

To both questions I answer in the affirmative. The right of Italy to accord diplomatic protection to the sons of her citizens, wherever born, was expressly reserved by the Royal Government, so far as concerns Venezuela, in a note of the royal chargé d'affaires at Caracas, dated March 13, 1873, by which protest was made against the provisions of the Venezuelan act of February 14 of that year.

The sons of citizens are citizens by the national law, and subsequent legislation by another State can not deprive them of this quality or minimize the rights accruing to them under the former act.

The imposition of a nationality on a preexisting one is a fact juridically abnormal, and certainly can not in any manner vitiate the original one.

We must distinguish between these two facts: The acquisition of the new nationality and the loss of the old one. The first depends exclusively upon the foreign law; the second exclusively upon the home law, and it is clear that the denationalization of an Italian is not to be sanctioned by any but Italian law.

Our law grants the citizen full and absolute liberty to become a foreigner, but insists that the change shall be of his own spontaneous choice. We can not, therefore, consider a foreigner him upon whom a foreign law imposes a new nationality, when it does not appear that he has lost or relinquished his Italian nationality, and we can not abandon him.

Were we to accept such a rule we would arrive at excessive consequences, since we would thereby subject ourselves without discussion to the provision of any foreign law whatever operating upon our citizens in this respect, however illiberal and contrary to general custom it might be in principle.

The consequence being thus illogical and absurd, the principle from which it flows must be erroneous and unacceptable.

Granting that the local law may impose another nationality on the sons of Italian subjects born in Venezuelan territory, it can not thereby deprive them of the quality of Italian citizenship. In regard to this very question the court of Lyons laid down this maxim:

<sup>1</sup> Same doctrine discussed in British-Venezuelan Commission, Vol. IX of these Reports, p. 385.

Si l'acquisition d'une nationalité est régie par la loi du pays où elle est obtenue, la perte de la nationalité l'est par celle du pays auquel appartenait l'individu naturalisé.

If, therefore, loss of nationality does not take place under the conditions above stated, neither can Italy lose the right to protect the sons of citizens born on foreign soil. If such were not the case, by the operation of special Venezuelan laws all foreigners here residing might be declared citizens of Venezuela, in which event claims would cease to exist, and there would no longer be need of diplomatic representation.

Now there can be no doubt that the limits of diplomatic action are fixed by international law, and can not be restricted by internal legislation.

This right being established, there logically flows therefrom the admissibility of claims of persons coming under this head before the Mixed Commission.

This Commission, be it understood, is governed by the terms of the protocol, which, from our point of view, has referred to it all classes of Italian claims, without distinction or exception.

Why should the Commission deem itself incompetent to pass upon them? Is it not a tribunal which was constituted and accepted by the mutual agreement of both Venezuela and Italy? What motive is there for rejecting the consideration of claims of persons having two nationalities, and therefore entitled to the protection of both countries? None, from the point of view of equity, so the claim be just and well founded. There would only remain the elimination of technical exceptions, but this is already accomplished by the protocol.

The tribunal of arbitration is therefore competent, even in the case where the incubus of a dual nationality bears upon the claimant, because under no circumstances may the local citizenship outweigh the other.

But we may go further. It seems to me that, as between the two nationalities enjoyed by Venezuelan-born sons of Italians, that of Italy ought, for various reasons, to prevail. There is no doubt that the more liberal laws do not regard the mere accident of birth in any country as being of itself sufficient to convey citizenship, but hold, on the contrary, that it should be determined with due regard to family. The contrary principle, sanctioned by various legislations, especially the American (with the exception of the United States, the Supreme Court of which favors the view (based on the act of April 9, 1866, Rev. Stats., U.S., sec. 1992) that children born in the union of foreign parents who have not been naturalized are themselves foreigners), constitutes an abandonment of the rules which inspired the wisdom of the Roman legislator and are a return to the now-condemned system of the middle ages, adopted for political reasons and expediency, but carrying within itself something contrary to the order and peace of the family, in that a father might have ten sons, each of a different nationality. While the ties of family rest on sacred and indissoluble foundations, which are the basis of our social order, there is not always a moral bond, a tie of affection, or a mutual interest between the land and the person born therein.

Cogordan (p. 25) observes:

Il était logique, en effet, sous l'ancien régime, d'attribuer la qualité de français à quiconque était né sur le sol de France; puisque la nationalité n'était que la soumission au Roi; mais quand parut le sentiment de la race, l'idée de la patrie française existant en elle-même, abstraction faite du Roi, et résidant dans l'ensemble des français, il était juste de revenir à la filiation, puisque c'est par la famille qu'on acquiert les qualités physiques et morales qui rattachent l'homme à une race et à une patrie.

The fact of birth in any given country may be a mere accident.

Fiore (par. 330 et seq. of Vol. I of "Diritto Internazionale Privato"), examining the question of a double nationality coming before a tribunal of a neutral State — that is, a tribunal which, like the present Mixed Commission — is not to apply any particular law on the question of citizenship, but determine that of a given person, holding to the principles of international law as well as to the general principles of common law, concludes that such tribunal should admit that "a legitimate son acquires by birth the nationality of his father (Vol. I, p. 334), and adds (p. 335, par. 333):

The principle which bestows upon the son the nationality of the father is derived from Roman law, and rests on the natural tendency of the individual, which warrants the assumption that each desires the citizenship of his father. The oneness and homogeneity of life, of the affections, of the sentiments of family, all render such assumption reasonable, founded as it is on the ties of blood, and surely more rational than that which would attribute to the son the nationality of the soil on which he was born, "*jure territorii*."

The court of cassation of Belgium, founding itself on the adage, "*Nasciturus pro nato habetur quando de ejus commodo agitur*," decided that the son of a person who changed nationality after the conception, but before the birth, of said son, may invoke the nationality which his father had at the time of his (the son's) conception, and thereby admitted that citizenship should be considered as a personal right of the individual from the moment of his conception.

According to this ruling the Venezuelan-born sons of Italians first possessed Italian citizenship, and at birth acquired the Venezuelan; but the original and prevailing one, the one to be considered by the Commission, which is not to apply either Italian or Venezuelan laws, but, on the contrary, reject exceptions based on local laws, is surely the Italian.

The Mixed Commission, resting upon sound principles of international law, should hold inefficient the law which would impose citizenship when not only is there no act tending to show a voluntary renunciation of the original nationality, but everything showing a preference for it, as in the case of claimants, who, having a dual citizenship, in fact, choose the Italian, as clearly evidenced by their appearance before this tribunal demanding indemnity due them from Venezuela through the intermediary of the royal Italian legation.

Bearing in mind that the courts of the Republic dispense justice with no less impartiality than does the Commission, and considering as well that while the sentences of the former are susceptible of immediate execution, those of the latter are subject to some years' delay and to the fluctuations of Venezuelan custom-house receipts, it is evident that a claimant having two nationalities who turns to this tribunal rather than to the local courts for justice in spite of all delay, impliedly testifies his choice for Italian nationality. Various reasons, both in law and in equity, exist why this Commission should accept well-founded claims of Venezuelan-born sons of Italians. But the strongest, to my mind, is that, the Italian nationality of the claimants having been established, the nationality of their claims can not be denied, and that therefore they should be treated according to the provisions of article IV of the Washington protocol of February 13 of this year.

Claims of this character have been received and adjudicated in the French-Venezuelan Commission, before which the question of nationality of sons of French citizens born in Venezuela was not even raised. Our own are, therefore, under Article VIII of the above-mentioned protocol, entitled to equal treatment.

AGNOLI, *Commissioner* (additional opinion):

With one or two exceptions, in which damages for which claims were presented to this Commission were suffered in person by Venezuelan-born sons

of Italians, all claims of persons finding themselves in regard to citizenship in the condition above mentioned were by them presented as representatives of deceased fathers, who had themselves suffered the losses on which the claims were based and about whose citizenship there was and could be no question.

The undersigned maintains that Venezuelan-born sons of Italians are competent to present claims before this Commission, not only because of the reasons assigned in the first part of this memorial, but also because said claims are of Italian origin, since in nearly all cases indemnity is asked for damages suffered by persons unquestioningly recognized as Italian by their heirs.

The gist of the question at issue, therefore, lies in deciding whether the original nationality of the claim shall be taken as the fundamental and decisive reason for its admission to the Commission.

The Commissioner for Italy feels no hesitancy in taking the affirmative on this point, being impelled thereto by every consideration of law, of logic, and of equity. The lack of time and the amount of work before him compel him to sum up briefly as follows:

The protocol makes no restriction as to the presentation of claims. To restrict the range of that instrument would be equivalent to an infringement of its spirit.

All requisitions, acts of personal violence, forced loans, illegal imprisonment — in short, all damages inflicted upon an Italian by the Venezuelan Government, or by its agents, or committed against an Italian on Venezuelan soil, when not characterized as acts of private malice, constitute an offense against the Italian Government, because by their nature and repeated occurrence they take on a political character and establish the right of intervention, and that of exercising a protective action — that is to say, a diplomatic action.

If to-morrow an Italian is killed in Venezuela, or his private interests are damaged, under circumstances which establish lack of diligence or prevention on the part of the Venezuelan Government, the Kingdom of Italy intervenes and claims. Would it be admitted in the course of diplomatic negotiations that Venezuela might object that the murdered man had no heirs, or that his heirs were born in Venezuela, and by this quibble escape the granting of adequate satisfaction? Certainly not, because in the person of the citizen the nation has been offended. Did the United States stop to inquire whether there were any heirs of the American citizen assassinated by brigands in Asia Minor when they demanded and obtained an indemnity of \$100,000 from the Turkish Government?

Did France undertake to determine the nationality of the widows or children of the Italian operatives murdered at Aigues-Mortes, when an indemnity was awarded them on the demand of the Italian Government?

Now, should an exception, which would not be admitted, and I believe would not even be offered in the course of a simple convention between governments, be accepted before a mixed commission? No, because the mixed commission was constituted for the purpose of giving effect in its results to the diplomatic action which preceded it.

The Washington protocols were not drawn with a view to restricting the rights of claimant governments, but to affirm them in the solemnity of an international agreement.

Let us suppose that a principle contrary to the foregoing is admitted; what will be the consequences? The first would be that every debtor government would seek to retard to the utmost the fulfillment of its obligations, and each passing year would see diminished the amount of indemnity to be paid. Each death of a claimant leaving no heirs, or leaving heirs born on foreign soil having laws like those of Venezuela, would mean the virtual annulment of the claim.

We would therefore see negligence compensated, or, what is worse, encouraged.

But let us consider another result, and as a practical case, that of the claim of Poggioli recently submitted to this Commission.

The firm of Poggioli Brothers (and I do not enter here into any consideration of the value of the evidence) suffered heavy damages through the operations of governmental agents. The firm was composed exclusively of Silvio and Americo Poggioli, brothers, both Italians, born on Italian soil. Among the damages for which claim is made was the wounding of Silvio, who remains a cripple, and the murder of Americo, whose heirs, associated in the claim and forming now part of the existing firm of the same name, are the widow, daughter of an Italian but born in Venezuela, and several minor children, likewise born in this Republic.

The claim of Silvio Poggioli, for himself and his heirs, may not be denied for reasons of nationality, *because, though badly wounded, he was not killed*. The share of the claim demanded for Americo and his family may be rejected, and why? Because Americo was not merely wounded, he was killed, and to his widow and children, born in Venezuela, this Commission should award nothing. It would have perhaps been better to suppress Silvio as well; then there would be no occasion to discuss the Poggioli claim.

If the Commissioner for Italy could believe that a principle contrary to the one he is advocating is to prevail in this Commission, he would consider it his duty to advise the heirs of Americo Poggioli and all other claimants analogously situated to withdraw their claims, so as to leave a way open to future diplomatic action on the part of his Government.

The case is quite different when the claimants have voluntarily assumed Venezuelan nationality, either by naturalization or marriage, acts in which may clearly be seen a deliberate renunciation, excepting, however, the case of Berti-Nieves, in which the marriage of the Italian claimant to a Venezuelan was not solemnized until after the stipulation of the protocol at Washington.

It is an elementary rule in logic that any principle which leads to unjust or absurd consequences must itself be deemed unjust and absurd.

I invite the attention of my Venezuelan colleague and of the honorable umpire to decision No. 34 of the American-Venezuelan Mixed Commission of Revision in the case of Albino Abbiatti,<sup>1</sup> who suffered damages while he was an Italian citizen, and, being subsequently naturalized as an American citizen, presented his claim before that Commission, which in its just sentence enunciated these two principles: "The infliction of a wrong upon a State's own citizen is an injury to it," and that "in claims they must have been citizens at least when the claims arose."

No opinion was filed by Doctor Zuloaga.

RALSTON, *Umpire*:

The above-entitled claim is referred to the umpire upon difference of opinion between the honorable Commissioners for Italy and Venezuela.

The claim is based upon "vales" or receipts given by certain chiefs in 1871 and 1872, and as well upon seizures said to have been made by revolutionary and governmental chiefs in 1899 and 1900. The claim for the events of 1871 and 1872 during his lifetime belonged to Michele Miliani, an Italian subject, who was married to Matilde Miliani May 29, 1872, she then being a Venezuelan citizen. He died in Valera, Venezuela, in 1890. Their children were apparently born in Venezuela, which, by legal presumption, may be considered

<sup>1</sup> Moore, p. 2347.

still their residence, though no proof is offered on the subject. The widow has always lived in this country.

It is urged against the claim, first, that the earlier part is barred by prescription, thirty-one years having elapsed since its origin, and it never having been presented to the Venezuelan Government; and in addition, second, that the widow and children, claiming as of their own right for the later damages and by inheritance as to the earlier ones, are to be regarded as Venezuelan citizens. The latter objection will be discussed.

So far as the rights of the widow are concerned, the questions affecting them were disposed of in the case of the estate of Sebastiano Brignone,<sup>1</sup> wherein it was held that in the event of conflict of laws the status of a woman born in Venezuela, married here to an Italian, and becoming a widow and always residing here, was to be determined by the laws of Venezuela, the land of her domicile, which declared her to be Venezuelan. The condition of the widow in this case being identical, her claim must be rejected for want of jurisdiction, but without prejudice to her other remedies.

The case of the children deserves careful consideration. The Italian civil code provides:

ART. 4. È cittadino il figlio di padre cittadino.

The Venezuelan constitution provides:

ART. 8. Los venezolanos lo son por nacimiento ó por naturalización.

(a) Son venezolanos por nacimiento;

1. Todas las personas que hayan nacido ó nacieren en el territorio de Venezuela, cualquiera que sea la nacionalidad de sus padres.

It thus appears that a conflict of laws again exists, Italy claiming her nationality for the children of her subjects, without limitation as to the location of their birth, and Venezuela claiming as her citizens those born within her territory, irrespective of the nationality of their parents. Which should control?

England, the United States, Portugal, and nearly all the Central and South American States accept the rule followed by Venezuela, while Germany, Austria, Hungary, France, Sweden, and Switzerland follow broadly the rule adopted by Italy. Either theory has, therefore, very respectable support.

It is urged on behalf of the Italian rule that Venezuela should not be deemed to have power perforce to confer nationality irrespective of the desires of the person concerned; that a child is Italian not merely from the time of birth but from the time of conception, and that the Venezuelan law, operating from birth, can not change a nationality already established.

The doctrine that citizenship is fixed by conditions existing from the moment of conception, while occasionally referred to by courts and writers, is not so far established by reason or authority in international disputes as to induce the umpire to largely regard it. To base citizenship upon the conditions of such an uncertain moment would be to introduce into the international law an element of doubt.

In the umpire's opinion, therefore, the natural moment for determining the commencement of citizenship is that of birth, both laws from that moment receiving such effect as they may deserve. Assuming this position, it can not be contended that Venezuela, more than Italy, has given an enforced citizenship.<sup>2</sup>

<sup>1</sup> See *supra*, p. 542.

<sup>2</sup> On pourrait élever un doute sur la question de savoir si le bienfait attribué au fils né, dans notre royaume, d'un étranger non domicilié depuis dix ans, pourrait

In discussing the rule that place of birth determines citizenship Cogordan (*La Nationalité*, p. 39) says that "the eminently practical spirit of the English Government has inspired a wise solution," in that Lord Malmesbury, in writing to Lord Cowley, ambassador at Paris, on March 13, 1858, said that if England recognized as English, children born in England of foreign parents she did not pretend to protect them as such against the authorities of the parents' country, which claimed them, above all when they voluntarily returned to that country; in other words, the Frenchman born in England would be protected by England in Germany, Italy, everywhere, in fact, except in France, where he could be legally called to military service.

Restating the same rule as existing in certain States, Tchernoff (*Protection des Nationaux Résidant à l'Étranger*, p. 470) says:

Un individu à double nationalité n'en aura qu'une dans le territoire de chacun des États qui le considèrent comme leur sujet. C'est la pratique de l'Angleterre et de la Suisse.

It follows from the foregoing that while the children of Miliani may with absolute legal propriety be recognized as Italians in Italy, or by Italy in any country other than Venezuela, in this country, and, as a consequence (following the decisions cited in the Brignone case, and accepting the domicile as furnishing the rule in case of conflict), before this tribunal, they must be considered, for the purposes of this litigation, as Venezuelans.<sup>1</sup>

The umpire is the more disposed to the rule above indicated because certain equities in the case favor it. Miliani came to Venezuela some time prior to

s'étendre aussi au fils conçu dans le royaume et né à l'étranger, en vertu du principe infans conceptus pro nato habetur, quoties de commodo ejus agitur. Nous sommes d'avis que le législateur ayant employé le mot nato, on ne peut étendre la disposition à l'enfant concepto, et que la fiction par laquelle on répute comme déjà né l'enfant seulement déjà conçu ne peut valoir dans tous les cas. Pourtant, si le père eût continué à tenir domicile dans le royaume après la naissance de l'enfant, et si la naissance à l'étranger pouvait être considérée comme un fait accidentel et de passage, la disposition de l'article 8 pourrait être appliquée. Le fait seul de la conception, quelquefois difficile à constater et susceptible de nombreuses contestations, ne peut par lui-même être suffisant pour fixer une qualité aussi importante que celle de la nationalité. Mais si, indépendamment du fait d'avoir été conçu, l'enfant avait été élevé et avait reçu l'éducation dans le royaume, les facilités de l'article 8, fondées sur les attractions instinctives pour les lieux où l'enfant se développe et passe son enfance, ne devraient pas être refusées, par le seul motif qu'il était accidentellement né à l'étranger pendant un voyage (1).

(1) Confr. Richelot, t. I, p. 115; Caen, 5 février 1813; affaire Montalembert. V. Émigré. (Note de M. Fiore.)

La même solution est donnée par la jurisprudence française. Il est admis, en effet, et enseigné que l'enfant né à l'étranger, de parents étrangers, ne pourrait se prévaloir des dispositions de l'article 9 du Code civil, bien qu'il eût été conçu en France: la maxime infans conceptus pro nato habetur, quoties de commodis ipsius agitur, n'étant point applicable dans ce cas, parce qu'il résulte, et du texte de l'article 9 et de la discussion au Conseil d'Etat, que c'est exclusivement à la naissance sur le sol français qu'est attaché le bénéfice dont il s'agit. Voir Zachariæ, édition d'Aubry et Rau. 1<sup>e</sup> partie, Chapitre IV, § 70, t. I<sup>er</sup>, note 1, p. 209, et les auteurs cités par les annotateurs. P. Pradier-Fodéré.

(Fiore, *Droit International Privé*, livre I, pp. 113, 114).

<sup>1</sup> The rule here laid down is that accepted by Bluntschli, who says (*Droit Public Codifié*, sec. 374):

"Certaines personnes ou familles peuvent exceptionnellement être ressortissantes de deux états différents ou même d'un plus grand nombre d'états.

"En cas de conflit la préférence sera accordée à l'état dans lequel la personne ou la famille en question ont leur domicile; leurs droits dans les états où elles ne résident pas seront considérés comme suspendus."

1871, and died in 1890 at the age of 56 years. He had married in 1872. His children were all born here, and, so far as appears, have never claimed Italian citizenship till now, or lived in Italy. It is scarcely to be supposed that they have any intention of living upon Italian soil. To declare them to be Venezuelans is not to deny them anything that they have ever felt in any essential way they possessed, and an option to choose Italian citizenship is scarcely to be inferred from the fact that their mother has seen fit in their names to file a claim before this Commission.

Another consideration may be added. Michele Miliani, the father, deliberately established his domicile and married in Venezuela, choosing that his children should there and under her laws first see the light of day. While he had not power to select the land of his own birth, he could control that of his children. In so far as a father may be considered as selecting the citizenship of his children he did so, and under all the circumstances of the case it seems proper they should abide the consequences of his actions.

The foregoing considerations make it unnecessary to discuss the question of prescription.

The umpire has not discussed the suggestion that the claim, largely at least, was Italian in origin and should be considered, even if not now Italian, because involving an infraction of international duty on the part of Venezuela toward Italy which would survive even change of citizenship on the part of the individual claimant. It is sufficient to observe that all the considerations for or against a claim which appeal to the diplomatic branch of a government have not necessarily a place before an international commission. For instance, unless specially charged, an international commission would scarcely measure in money an insult to the flag, while diplomatists might well do so. On the other hand, commissions have and exercise jurisdiction over contract claims, while the diplomatic branch of government, although usually reserving the right, rarely presses matters of this nature. While it remains true that an offense to a citizen is an offense to the nation, nevertheless the claimant before an international tribunal is ordinarily the nation on behalf of its citizen. Rarely ever the nation can be said to have a right which survives when its citizen no longer belongs to it. Italy, save when her own pecuniary rights are affected, recovers nothing for her own benefit before a tribunal such as this, however much her own dignity may have been affected by the treatment of her subjects.

A decree may therefore be entered dismissing the claim, but without prejudice to such rights as the claimants may have elsewhere.

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#### PETROCELLI CASE

The Government is liable for loss from having so taken possession of property as to especially expose it to destruction, but not for damages incident to ordinary warlike operations.

#### RALSTON, *Umpire*:

This case is submitted to the umpire upon difference of opinion between the honorable Commissioners for Italy and Venezuela.

While the claim is for 45,000 bolivars, embracing a large number of items, very few circumstances are so established by proof as to be worthy of consideration, and these only will be discussed.

It appears that the Government troops in the month of May, 1902, entrenched themselves in front of the claimant's dwelling house at a street corner in Ciudad Bolívar, and that as a result a battle raged around that house for five days.

it being made the object of attack and being greatly damaged. It further appears that the same troops broke open the doors, smashed wardrobes, and helped themselves to property, but no satisfactory evidence is furnished as to the value of property so taken or injured. It seems fair to believe that the house was used in connection with the entrenchments. In addition, it is said that during the battle of last July five bombs were thrown, apparently by the Government troops or vessels, which entered this house and another, causing considerable damage. An expert valuation of the amount necessary to restore the dwelling house fixes it at 1,850 bolivars, and to repair a storehouse, belonging to the claimant and located elsewhere, at 100 bolivars.

The damages to the storehouse are rejected, as incident to the operations of war. The damages to the dwelling rest upon another principle. When the Government troops entrenched themselves in front of claimant's habitation and took possession they made it the object of the enemy's attack. They condemned it specially to public use. Claims for damages to it were taken out of the field of the incidental results of war, the Government having invited its destruction. The claimant's property was exposed to a special danger, in which the property of the rest of the community did not share. The Government's responsibility for its safe return was complete. The principle upon which such responsibility rests is above indicated, and is more at large set forth in 4 Moore, page 3718, *Putegnat's Heirs*, decided by the American-Mexican Commission formed under the treaty of 1868, which decision was recently followed in the case of the American Electric and Manufacturing Company *v.* Venezuela,<sup>1</sup> the opinion being presented by Doctor Paúl, in the American-Venezuelan Commission now sitting in Caracas.

Part of the damages caused to the dwelling house were from shells thrown by the Government during the battle of July, and, as incident to the usual operations of war, no recovery from them can be had.

An expert examination shows that the dwelling house can be repaired for 1,850 bolivars. Only so much of this amount can be paid as may be considered the result of the special use made of it by the Government. The evidence does not distinguish, and perhaps could not be expected to distinguish, clearly the damages caused by the two classes of acts — those involving and those refusing responsibility. The umpire, however, believes himself justified in holding responsibility to the extent of one-half of the amount claimed for damages to the dwelling house, or 925 bolivars.

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#### TAGLIAFERRO CASE

Responsible officers of the Government having had full knowledge of the claim from the beginning, the reclamation, although 31 years old, is receivable. Where the reason for the application of the principle of prescription ceases, as in this case, prescription can not be invoked to defeat the claim.<sup>2</sup> Illegal refusal of amparo by superior judge and procurador-general will sustain claim for denial of justice.

RALSTON, *Umpire*.

The above-entitled cause is referred to the umpire upon difference of opinion between the honorable Commissioners for Italy and Venezuela.

The claimant, an Italian subject, was, in 1872, a merchant of Tariba, doing

<sup>1</sup> See Vol. IX of these Reports, p. 145.

<sup>2</sup> See Gentini case, *supra*, p. 551, and Giacomini case, *infra*, p. 594.

a considerable business. On January 28 of that year, the general in chief of operations in the States of Mérida and Táchira issued an order of the collection of enforced exactions against a number of citizens of Táchira, requiring, among things, the collection from the claimant, by name, of 12 "morocotas," a morocota being the equivalent of an American 20-dollar gold piece, the order stating that those who should not make the payment "will be conducted to the prison, subject to the disposition of Gen. Manuel Pelayo."

Pursuant to the foregoing, the claimant was, on February 1, required to pay the money, but refused, electing to accept imprisonment. Immediately upon being imprisoned his petition for "amparo" or protection was presented to the superior judge, who, contending that the military power was superior to the civil, refused to grant amparo.

Immediately thereafter, and on February 5, the claimant addressed a petition to the procurador-general of the nation for the State of Táchira, setting up the foregoing facts, and praying that he might be set at liberty, and that the order depriving him of the same might be revoked. The procurador returned claimant's petition to him on February 6, authorizing him to apply again if he saw fit, producing documents showing that he was an Italian subject, without which requisite, he said, nothing could be done.

The duration of claimant's stay in prison is not fixed in the expediente, but, as on March 11 he prepared his proofs, we may presume that it did not exceed forty days at the outside. It does not appear that he paid the exaction.

The first question presented is one of prescription, more than thirty-one years having elapsed between the infliction of the injury and the presentation of the claim. In the Gentini case, No. 280,<sup>1</sup> the umpire sufficiently indicated the reasons why prescription could properly be invoked in international claims. It may be said that none of the reasons then adduced can be given effect in the pending case. Here the acts complained of were committed pursuant to the orders of the highest military authority of the State. The injured party at once appealed to the judicial authority, which denied relief, and then to the immediate representative of the nation, who, upon a subterfuge, refused his assistance. The responsible constituted authorities knew at all times of the wrongdoing, and if the complaint were baseless — an impossible conclusion under the evidence — judicial, military, and prison records must exist to demonstrate the fact. When the reason for the rule of prescription ceases, the rule ceases, and such is the case now.

It is true that the claimant has not presented his claim to the Government at Caracas, but his unavailing efforts to get relief at home may well have discouraged him. As having some incidental bearing we are told that complaints made by Italians of acts of the character here indicated came to the General Government about the time of the occurrence of the injuries, and strict orders for the cessation of the causes for them were very promptly and properly given, a representative of the Government being sent to the neighborhood to secure correction of abuses.

The offenses complained of now are double in nature, consisting of unjust imprisonment and denial of justice. The only cause for imprisonment was the nonpayment of an illegal exaction. Clearly this affords ground for recovery. That there was a denial of justice is likewise evident. Military authority could not justly override civil authority, as the superior judge seemed to admit, and it was immaterial whether the claimant were Venezuelan or Italian, although the procurador refused relief because of a supposed lack of proof of Italian citizenship.

<sup>1</sup> See *supra*, p. 551.

The forced loan violated many provisions of the constitution, among them, that property should only be subjected to contributions decreed by the legislative authority, in conformity with the constitution; that no Venezuelan could be taken or arrested for debts not proceeding from fraud or wrongdoing; that all shall be judged by the same laws and subject to like duties, service, and contributions. Strangers enjoy, under the constitution, all the rights of Venezuelans.

In refusing the relief prayed for, the officers of the judicial department were guilty of a gross denial of justice, failing, as they did, to follow the excellent laws prescribed by Venezuela. In so doing they unfortunately subjected the Government to liability.

The claimant fixes no amount for his demand, but the royal Italian legation asks 5,000 bolivars. In view of the gravity of the case this amount seems reasonable, and will be accorded without interest.

#### GIACOPINI CASE

Venezuelan authorities having been notified of the taking of proof thirty-two years ago and having assisted therein, the principle of prescription held not to apply, although no express demand was made. Allowance made for imprisonment of claimant.<sup>1</sup>

<sup>1</sup> Measure of damages for unlawful imprisonment is largely discussed in the Topaze case (supra, p. 329), and many of the authorities to be found in Moore are abstracted in that case on page 330. In addition in Moore and elsewhere may be enumerated the following:

Moore, pages 1646-1653, case of Charles Weile, before the Peruvian Claims Commission, for imprisonment for an uncertain time, payment was allowed of \$32,407.

Moore, page 1655, case of George Hill, before the same Commission, for being fired upon and made a prisoner for three days, without food or medical attendance, claimant was awarded 6,000 Peruvian soles, or \$5,555.

Moore, page 3240, case of Baldwin, before the Mexican Commission of 1839, for 84 days of imprisonment, claimant was awarded \$20,000.

Moore, page 3247, case of Barnes, before the Mexican Commission of 1868, for sixty days' detention, claimant was awarded \$5,100.

Moore, page 3248, case of Rice, before the same Commission, for three days' imprisonment, claimant was awarded \$4,000.

Moore, page 3251, case of Jonan, before the same Commission, for imprisonment during long periods in 1853 and 1854, claimant was awarded \$35,000 Mexican gold.

Moore, page 3252, case of Moliere, before the Spanish Commission, for sixteen days' imprisonment, claimant was awarded \$3,000.

Moore, page 3253, case of Jones, before the same Commission, for thirty-one days' imprisonment, claimant was awarded \$5,000.

Moore, page 3277, case of Casanova, before the same Commission, for twenty days' imprisonment, other elements entering into the affair, claimant was awarded \$6,000.

Moore, page 3282, case of Rahming, before the British Commission, claimant was imprisoned about eight months, and was awarded the sum of \$38,500.

Moore, page 3283, case of Stovin, before the same Commission, for five weeks' imprisonment, claimant was awarded \$8,300.

Moore, page 3285, case of Shaver, before the same Commission, for two months and twenty-one days' imprisonment, claimant was awarded \$30,204.

Moore, page 3288, case of Ashton, before the same Commission, for three months and four days' imprisonment, claimant was allowed \$6,000.

Moore, page 1807, case of Van Bokkelen *v.* Haiti (Foreign Relations U.S., 1888, p. 1007), plaintiff was allowed \$60,000 for an imprisonment of fourteen months and twenty-two days.

RALSTON, *Umpire*:

This case comes to the umpire upon a difference of opinion between the honorable Commissioners for Italy and Venezuela.

In 1871 Domenico and Giuseppe Giacopini, Italian subjects, were merchants, doing an extensive business at Valera. In November of that year their partnership store was entered by Venezuelan troops, by order of General Pulgar, commanding the right wing, and there was forcibly taken from it property of the value indicated: Coffee, 14,400 fuertes; potatoes, 250 fuertes; cacao, 40 fuertes; fennel, 112 fuertes; general merchandise, 2,000 fuertes; personal and household effects, 500 fuertes; figs, 640 fuertes. In addition, mules were taken to the value of 2,400 fuertes and oxen worth 100 fuertes. About the same time Domenico Giacopini was arrested on an unfounded charge of complicity in political disturbances, and transported by the army, in chains, under dangerous conditions, to Maracaibo, where, contrary to the Venezuelan constitution, he was thrown into prison in association with criminals, and again, contrary to the same instrument, loaded with fetters. After some weeks he was released from prison upon payment of a forced exaction to General Pulgar of 400 fuertes and the execution of a bond requiring his presence in Maracaibo to meet any charge brought against him. None such was ever brought, and after seventy-five days of absence from his business, part in actual and part in virtual captivity, he was restored to his home in Valera. Giuseppe Giacopini also spent some time in prison, but its term is not fixed, and this element of damage is not considered for reasons hereinafter given.

Against the claim it is first urged that prescription should lie, about thirty-two years having elapsed since its origin. In the Gentini case, No. 280,<sup>1</sup> in this Commission, the umpire referred to the fact that under certain circumstances prescription would not be recognized as a defense, mentioning specifically that of bonds "as to which a public register had been kept," and furthermore stated that the presentation of a claim to competent authority within proper time would interrupt the running of the time of prescription, adding that there were other qualifications "which might be imagined" without entering into an attempt to enumerate them.

Examination of the expediente in the present case shows that the tribunal before which the proofs were made (in November, 1872), directed notice to the fiscal of the nation before their taking; that he was present and vigorously cross-examined the witnesses; that he asked and was accorded by the judge a copy of the evidence. The Government knowing in this manner of the existence of the claim had ample opportunity to prepare its defense.

As was stated in the Gentini case:<sup>2</sup>

The principle of prescription finds its foundation in the highest equity — the avoidance of possible injustice to the defendant.

In the present case, full notice having been given to the defendant, no danger of injustice exists, and the rule of prescription fails.<sup>3</sup>

In addition, as bearing upon the question of its good faith (though not to be considered as of conclusive legal value), the claim was made known to the royal Italian legation in 1872. At a later period one of the claimants (with a letter from a high Venezuelan authority recognizing the justice of his demand) came to Caracas to press for relief, but died here before anything could be accomplished.

<sup>1</sup> See *supra*, p. 551.

<sup>2</sup> *Supra*, p. 551.

<sup>3</sup> See also the Tagliaferro case, *supra*, p. 592.

In the Gentini case the claimant never made his supposed grievances known to anyone in authority in any manner for thirty-two years.

We are brought next to the consideration of an objection to a part of the claim. As before stated, one of the original complainants, Giuseppe Giacomini, is dead. His widow has remarried with a Venezuelan citizen. Giuseppe Giacomini's children were born in Venezuela. By the laws of this country the foreign woman who marries a Venezuelan becomes Venezuelan. Under the decision in the Miliani case, No. 223,<sup>1</sup> the children of a foreigner who are born in Venezuela are Venezuelans. In so far, therefore, as the claim belongs to Venezuelans, it is not considered and must be dismissed without prejudice.

The value of mules, coffee, potatoes, cocoa, fennel, merchandise, household articles, figs, and oxen taken from the firm was 20,442 fuertes, or 102,210 bolivars. Four hundred fuertes, or 2,000 bolivars, were paid (apparently in the end by the firm) to General Pulgar, to secure the release of Domenico Giacomini. One-half of this amount may be awarded to Domenico Giacomini. For the time he was in constraint, either in prison or in Maracaibo, the average sum of 50 fuertes per day, or a total of 3,750 fuertes, will be awarded without interest.

The total award to Domenico Giacomini will therefore be 52,105 bolivars, upon which interest may be calculated since December 1, 1872, approximately the date of the taking of proof, and 3,750 fuertes without interest. No award is made of the sufferings of Giuseppe Giacomini nor for money expended by him personally, as only his heirs could possibly be entitled to an interest therein, and they are excluded from this judgment for the reasons hereinbefore set forth.

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#### BOTTARO CASE

Letter received to explain statement of facts.<sup>2</sup>

RALSTON, *Umpire*:

The umpire has carefully considered the expediente in this case, as well as the opinions of the honorable Commissioners for Italy and Venezuela; this case reaching him because of their differences of opinion.

It is contended on behalf of Venezuela that the case is badly proven; two of the witnesses testifying, not from their knowledge of the facts, but from their public notoriety, and the third witness giving no reason to support the testimony furnished by him. Furthermore, it does not appear in evidence whether the troops taking the property, for the seizure of which recovery is sought, belonged to the Government or revolutionary forces.

On the other hand, it is contended that the proof is sufficient, and it is pointed out that a letter from the claimant has been filed, showing that of the eleven chiefs whose action was complained of, four were chiefs of the Government.

In some respects the proof in this case affects the umpire favorably. For instance, the property taken has been enumerated specifically and the values of each class given; the values so furnished being in every case apparently reasonable. It is true that two witnesses attest the facts from public notoriety, but the third witness speaks with sufficient definiteness, and apparently of his own knowledge.

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<sup>1</sup> See *supra*, p. 584.

<sup>2</sup> As showing extent to which informal proof may be received, see Lasry case, Vol. IX of these Reports, p. 147, Faber case, *supra*, p. 438 and note and *infra*, p. 747.

The proof is not as complete as it should be, in that it fails to show the number of cattle, burros, or horses taken by each particular leader, either of the Government or of the revolution. We are only favored with the aggregate number. The letter of the claimant designating which chiefs were of the Government or of the revolution, undertakes to attribute to the governmental chiefs the taking of more than four-fifths of the property lost by him. As but four of the eleven chiefs were of this side, the umpire is disposed to think that while his statement may be true, it is not probable, and no details are furnished which would tend to establish its probability. In view of this fact, and bearing in mind the proportion existing between the two contending forces, he is disposed to think that approximate justice will be rendered by charging the Government with the taking of property to the extent of 6,000 bolivars, upon which amount interest may be calculated to the 31st day of December, A.D. 1903.

The umpire accepts as evidence, though, naturally, of the lightest character, the letter written by the claimant; it being his duty under the protocols to receive and carefully examine everything presented to him.

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#### DI CARO CASE

In estimating damages for unlawful killing, age and station in life, deprivation of comforts and companionship, and shock to surviving members of the family may be taken into consideration among other elements.

An award will not be made in favor of Italian subjects who have served in revolutionary forces.

Claim for money said to have been taken rejected because of deficient proof.

#### RALSTON, *Umpire* :

The claim of Beatrice Di Caro, widow of Giovanni Cammarano, has been submitted to the umpire upon difference of opinion between the honorable Commissioners for Italy and Venezuela, upon the question of the amount of damages.

The admitted facts seem to be that on May 4, 1902, two government soldiers went to the store or "pulperia" of Giovanni Cammarano in Duaca, when he was absent, and, after demanding various articles with which they were supplied, attempted to assault the claimant, Beatrice Di Caro and her daughter-in-law. The two sons of Giovanni Cammarano struggled with the soldiers and one son, getting possession of the gun of a soldier, shot and killed him. The remaining soldier escaped. The sons thereupon fled.

A detachment of soldiers in charge of an officer shortly after went to the house and, finding Giovanni Cammarano, who had meanwhile returned, demanded the whereabouts of his sons. This he was unable or unwilling to give. They seized him and, conducting him about a square and a half, cut him with a machete and shot and killed him in the street. Thereafter the soldiers sacked the store and again, on January 27, 1903, the store having been somewhat replenished, it was plundered by the government forces.

The claimant fixes the value of property taken at 16,468 bolivars and of cash money at 13,554, or at another place at 14,072 bolivars.

The sons of the claimant, shortly after the occurrences first mentioned (and possibly before), joined the revolutionary army, but there is no sufficient reason to believe that claimant's deceased husband took any part in the domestic difficulties of Venezuela.

The first question presenting itself is as to the damages to be awarded claimant for the unwarranted killing of her husband. The honorable Italian

Commissioner would fix this award at a considerable amount. The honorable Commissioner for Venezuela, arguing that the deceased, had he been a young man, could not have earned more than 3 bolivars a day and that, being 64 years of age, his expectancy of life could not exceed six more years, would award damages for his death at not to exceed 6,510 bolivars.

The argument in favor of the sum last named is based exclusively, as appears, upon the theory that the deceased was but a laborer, and that his death only deprived his family of his value as such laborer. But the evidence tends to show that he was a shopkeeper and bought and sold coffee and other productions in considerable quantities, besides apparently cultivating a small piece of land, the extent of which is not given. We may fairly consider, therefore, that his earning power would be much more than 3 bolivars a day.

But while in establishing the extent of the loss to a wife resultant upon the death of a husband it is fair and proper to estimate his earning power, his expectation of life, and, as suggested, also to bear in mind his station in life with a view of determining the extent of comforts and amenities of which the wife has been the loser, we would, in the umpire's opinion, seriously err if we ignored the deprivation of personal companionship and cherished associations consequent upon the loss of a husband or wife unexpectedly taken away. Nor can we overlook the strain and shock incident to such violent severing of old relations. For all this no human standard of measurement exists, since affection, devotion, and companionship may not be translated into any certain or ascertainable number of bolivars or pounds sterling. Bearing in mind, however, the elements admitted by the honorable Commissioners as entering into the calculation and the additional elements adverted to, considering the distressing experiences immediately preceding this tragedy, and not ignoring the precedents of other tribunals and of international settlements for violent deaths, it seems to the umpire that an award of 50,000 bolivars would be just.

The next question of difference is as to the award for property taken. The umpire is not disposed to accept the claim for cash money said to have been taken. This, it is alleged, was sent to the decedent by a bank a short time previous to his death, and the sons, for whose benefit the umpire does not feel he can make an allowance because of their revolutionary career, were apparently interested in it. Besides, its existence is not clearly shown; and if it had been received from a bank, this fact was susceptible of definite and disinterested proof, which is lacking. In addition, the amount, considering the claimed value of the deceased's other property, is so unreasonably large that excessive exaggeration may be presumed. The umpire is further satisfied, taking the evidence as a whole, that the value of the contents of the "pulperia" has been grossly overestimated, and that if he allows 1,000 bolivars as the value of the widow's interest in all of the personal property, he will be doing full justice.

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#### BIAJO CESARINO CASE

Governments are liable for the wanton acts of their officials<sup>1</sup>

RALSTON, *Umpire*:

The foregoing cause was duly referred to the umpire, on difference of opinion between the honorable Commissioners for Italy and Venezuela.

The claim arises because of the killing of Gaetano Cesarino, father of the

<sup>1</sup> Cf. Poggioli case, *infra*, p. 669 and notes.

claimant, in the town of Tocuyo on the 9th day of April, A.D. 1903, by a shot fired by a police official named Manuel Aguilar. The claimant asks 50,000 bolivars.

From the undisputed facts in the case, it appears that Manuel Aguilar was at the time a police official, and fired upon the deceased, a pedlar by occupation, as he was crossing a street of Tocuyo. The first proofs submitted tended to show that Aguilar was about 50 meters from the deceased at the time he shot, but subsequent more exact information places the distance at 200 meters.

At first it was proven simply that the deceased was killed by the official named, no particulars being furnished, leaving it open to be supposed that the killing might have been accidental, or brought about upon sufficient cause. The later evidence, however, demonstrated that the deceased was a peaceful, inoffensive man, who had taken no part whatever in any political questions, and was engaged in no disturbance and furnished no cause for the act against him. The assailant professes entire ignorance of the event, but a man who stood next to him, Giminez, saw him raise his gun and fire at the deceased, and suggests no provocation or excuse.

There is considerable evidence tending to show that there were street fights in Tocuyo on the morning in question between Government troops originally in possession and revolutionary troops which were entering, and the testimony of some of the witnesses would seem to indicate that the killing of Cesarino occurred about the time of an exchange of shots. Other papers submitted apparently demonstrate that there was no contest between the contending parties until about an hour after Cesarino was killed. Whatever may be the exact fact as to this point, it does appear that the deceased took no part in the contention, but was shot down in the street unarmed. Nowhere is it suggested that he suffered because believed to be taking part with the revolutionists, and one is unable to determine whether he was killed by Aguilar in a spirit of reckless bravado or in unreasoning panic. Certain it is that the killing was utterly causeless, while deliberate.

The umpire can not, under all the evidence in the case, accept the theory that the death of Cesarino was one of the incidents of war for which no responsibility exists. True it is that governments are not to be held to too close accountability for the misdirected shots of their soldiers or for every display of lack of judgment, but this is not to say that the existence of war frees them from every responsibility. Cases before the present Commissions in Caracas afford many illustrations of decisions holding the Government of Venezuela liable for the wanton or negligent acts of its agents in war and in peace, and, in the judgment of the umpire, the present claim should be added to the list of such cases.

The claimant apparently claims for himself and his mother and a minor child. In the estimation of damages, he, being a man of full age and married in Venezuela, will not be recognized. There is no proof of the marriage of his mother or the existence of a minor child, except as he has stated, and, in the opinion of the umpire, the royal Italian legation requesting it, an opportunity to furnish other and more exact proof should be afforded. No award will therefore be made pending the furnishing of fuller proof.<sup>1</sup>

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<sup>1</sup> Later the lacking proof was furnished and award given for 40,000 bolivars.

## 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,<sup>1</sup> 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

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<sup>1</sup> *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 case<sup>1</sup> 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

<sup>1</sup> *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.

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#### 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 case<sup>1</sup> 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

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<sup>1</sup> *Supra*, p. 499.

fact of his having accepted charges and missions from Venezuela (in the absence of evidence of his having previously obtained the consent of his own Government) lose his Italian citizenship, and, true to the principle he has always maintained that the original nationality of a claim should be considered as the absolute rule and guide in determining its admission before this tribunal, invokes from the umpire a decision which will recognize all the heirs of Corvaia as entitled to share in the liquidation of the estate in just and due proportion, and without distinction based on their actual citizenship.

But should the umpire consider the Baron Corvaia as having lost his primitive nationality, the Commissioner for Italy begs to insist that the deceased had not thereby acquired citizenship in Venezuela, and could not have contracted any bond of allegiance to this Republic.

It is therefore his opinion that this claim should, even under the least favorable hypothesis, be considered foreign with respect to Venezuela, and that consequently the umpire should, without prejudice to the rights of such of the heirs whom he intends considering as invested with Venezuelan or other nationality, in consonance with the principles he has himself proclaimed, award a due share of the indemnity claimed to such of the heirs of Corvaia as are to-day enjoying Italian citizenship.

As regards the nationality of Baron Fortunato Corvaia, the Italian Commissioner again calls the attention of the umpire to the arguments addressed to him in the Giordana claim, No. 116, which was allowed as a claim for salary due for services rendered as engineer for the Venezuelan Government. It is indeed true that the services performed by Baron Corvaia in the United States and at Paris were vastly more important than those of Giordana, but when it is considered that they were rendered in a time of absolute peace between this Republic and other nations, particularly the Kingdom of the Two Sicilies, it must be admitted that the deceased was never in a position to defend foreign rights and interests in conflict with those of his country, and that he did not resort to extremes which, according to rule, are considered necessary, when services rendered a foreign government, without the consent of the home government, involve a loss of nationality.

For the rest, it appears from documents submitted to the Commission that the Corvaia family, out of favor with the Bourbon Government on account of its liberal sentiments, had been driven from the Kingdom of Naples. Could Baron Fortunato Corvaia, who had followed his father Joseph in exile, turn to the clemency of his sovereign with a request for a permission which would most certainly have been denied him? We have among the papers of the claim a copy of the petition with which the deceased, finding himself, in January, 1854, passing with his family through Naples, and receiving from the police a new order of expulsion, had had recourse to his King for a revocation of that odious measure, which was denied him. To assume, therefore, that Baron Corvaia, son of a political refugee, and himself driven from the Kingdom of the Two Sicilies and considered as an outlaw, should, shortly after his expulsion and during the most rigorous period of Bourbon tyranny solicit from his Government the above-mentioned authority, or make him fall under the incubus of failing to obtain it, seems contrary to all rules of justice and equity.

Corvaia never solicited any permission, for it would have inevitably exposed him to a refusal which would have placed him in the attitude of disobedience to his King, whose faithful subject he still considered himself, as is abundantly proved by his above-mentioned petition of January, 1854, in which he styled himself a "good citizen." The umpire should particularly note this expression "good citizen" occurring in the petition written by Corvaia himself and addressed to his King.

The Italian Commissioner holds that any tribunal called upon to decide whether the deceased baron had, under the circumstances, lost his nationality through this omission, the consequences of which it is sought to exaggerate in order to cause a rejection of the entire claim, would give a negative answer. In this sense particularly would tribunals of Italy decide it, who are truly competent in this respect, if we consider that that provision of law, *which had never been applied*, according to the solemn declaration in the Italian Senate of the minister of pardons and justice himself, Emanuel Gianturco, was subsequently abolished by the act of January 31, 1901, it having been recognized that the acceptance of foreign service lacks in general those conditions which warrant the assumption of an intention on the part of a citizen to renounce his original citizenship.

In every case the law which abolishes a provision having a penal character is retroactive, and Corvaia, against whom the loss of citizenship had never been pronounced by the magistrate, should be given the benefit thereof, and through him to his heirs and descendants. The Commissioner for Italy observes besides that the services of Corvaia in behalf of Venezuela had not the true and proper character of an employment, but were missions. The Venezuelan minister of foreign affairs, Giacinto Gutierrez, in a letter to the minister of hacienda, of March 18, 1856, declared having appointed him to a mission to France as envoy extraordinary and minister plenipotentiary. Corvaia, in Washington as in Paris, acted as confidential agent; that is to say, in a capacity in which we must recognize the essence of a mission or extraordinary charge, and not an employment.

If afterwards other titles were conferred upon him, as those of envoy extraordinary and minister plenipotentiary in France, when he was in Paris endeavoring to foster emigration, which was in fact the principal object for which the Republic had sent him, it was only because under such title he could more readily place himself *en rapport* with the Imperial Government and be officially recognized by the French minister of foreign affairs.

Whenever the Italian code speaks of employments, it is in the sense as understood in the Kingdom, those into which one enters as a career at modest compensation with a view to future advancement into more important undertakings. The mission assumed by Corvaia carried with it no assurance for the future, not even so much as a retired pension, and did not constitute an "employment" according to our law.

It never occurred to Baron Corvaia that his operations in Europe and North America in behalf of Venezuela could involve a forfeiture of his original nationality or set up a legal bond of a permanent character between himself and the country for whom he was acting. He lent his services in deference to the President of the Republic, Joseph Thadeus Monagas, whose intimate friend he was, and as a personal favor, as well as to render himself useful to the land to which he had come in his youth, where he had raised a family, and increased his private fortune.

No sooner had his functions of minister from Venezuela to Paris ceased, they having been terminated by the retirement of Monagas from the Presidency, than Baron Corvaia accepted the post of minister from Ecuador to the same capital. As he had no intention of changing nationality by the acceptance of missions under Venezuela, so also he could have had no thought of endangering it by undertaking similar functions for the Government of Ecuador.

These operations imposed upon him living expenses far in excess of the moderate salary granted him by the Venezuelan Government, and which, as proved by documents in the claim, was never fully paid.

The court of cassation of Belgium, by its decree of June 25, 1857, about the

time Corvaia was acting as Venezuelan minister in Paris, laid down the following maxim:

\* \* \* la naturalisation est acquise. Tant qu'elle ne l'est pas il n'y a point de changement de nationalité.

Besides that of Cogordan, the umpire will doubtless remember the opinion of the eminent Italian jurist, Fiore, cited by the writer in his memorial in the Giordana case; that opinion is the synthesis of the rulings in Italy whenever there was application of article 20 of the Sicilian code, afterwards replaced by the eleventh article of the Italian code now in force, and that prevail in principle. Says Fiore:

Even if it were established that according to the internal law one should find himself bereft of one nationality without having acquired another, as we must, in accordance with international law, always eliminate the condition of a lack of determined nationality, so we should hold, as more in consonance with just principles, that such person is in the meantime a citizen of the country in which he was born (until he becomes a citizen of another) during the period intervening between the loss of one citizenship and the acquisition of another. (Fiore, *Droit International Privé* (Antoine), sec. 345.)

The same author observes:

The loss of original citizenship should not be held as an accomplished juridical fact until it is proven that a new one has been acquired. (Ibid., sec. 344.)

We will see in proceeding that Baron Fortunato Corvaia never acquired Venezuelan nationality.

In the work recently published entitled "La República Argentina y el Caso de Venezuela, por el Doctor Luis M. Drago, ex-Minister de Relaciones Exteriores," there is quoted in Spanish an article which appeared in "The Nineteenth Century and After," of April, 1903, from the pen of Mr. John Macdonnel, member of the supreme court of Great Britain, of the Institute of International Law, etc. At page 168 of said article in the aforementioned publication we read that the Ecuadorian Congress passed a law which contained (art. 5) the following provision:

Foreigners who may have filled positions or commissions which subjected them to the laws and authorities of Ecuador can make no claim for payment or indemnity through a diplomatic channel.

And Mr. Macdonnel observes:

It is almost needless to say that the diplomatic corps at Quito protested against this legislation. The United States Secretary of State denounced it as *subversive of all the principles of international law*.

In this affirmation of the Secretary of State aforesaid is found the proof that in the councils of the North American Government there prevails the principle advanced here by the Italian Commissioner, to wit, that the acceptance of missions and charges abroad, and particularly in South American countries, where there has been and is frequent recourse to foreign collaboration, does not involve a loss of nationality, since it is considered that there persists in the individual accepting such posts a right to claim, *per via diplomatica*, against the government which availed itself of his services, and that therefore his nationality persists as before.

The contrary theory is justly styled "subversive."

The honorable Commissioner for Venezuela has manifested his intention of sustaining also the following points: (1) That Fortunato Corvaia forfeited

his Italian citizenship because he left his country with no intention of returning, and (2) because he violated his neutrality.

To these exceptions the writer objects that Corvaia left his country by reason of the proscription of his family from the Kingdom of the Two Sicilies, and therefore by no spontaneous act creating any juridical situation whatsoever; that he established himself in Venezuela at the age of 18, and when, by reason of his minority, he could not, either by implication or directly, decide his nationality; that the intention of returning to the mother country must be assumed as persisting in the bosom of an exiled family; that when in 1854 Corvaia not only manifested the intention of repatriating, but desired to settle with his wife and family in Naples, he was expelled by the Bourbon police, against which measure he unavailingly protested; that, finally, it is freely admitted that he who emigrates for the purposes of trade and commerce, as had been the case with the deceased, can not without further evidence be viewed as having the intention of definitely abandoning his original domicile, particularly as in the present case Corvaia had not on arriving in Venezuela any settled purpose of establishing himself therein. He came to these shores seeking health. Only the force of circumstances decided his residence here, though with frequent and long absences.

The intention not to return should exist at the time of expatriation. The non-return may be brought about by a multiplicity of causes quite independent of the will of the emigrant, and has of itself no legal value.

The Italian Commissioner observes further that it does not appear that Corvaia ever participated in the political affairs of the Republic in such a way as to constitute an infraction of neutrality, since his operations were always in behalf of the constituted government, from which alone he accepted offices. If the following of such a course toward the legal government of the country which then sheltered him were held to imply a violation of the duties of neutrality, then must the foreigner be compelled to refuse any assistance to the authorities of his abiding place and manifest both insensibility and ingratitude in not preoccupying himself with interests not identical with his own.

Fortunato Corvaia favored Venezuela to the extent of his abilities, and now, when many of his credits toward the Government remain unpaid, there is hurled against him the charge of having violated his neutrality -- a charge which from every legal and moral point of view should be rejected as unsustainable. Never did Corvaia participate in the political struggles of the country or associate with the revolutionists. He always remained a foreigner, and though he loved this country well enough he never consented to become Venezuelan, and Doctor Zuloaga can not produce a single act of his during his long sojourn here from which may be deduced his intention to become a citizen, and much less that he had done so.

Fortunato Corvaia was the last scion of a family that had suffered for its country. His father lived exiled from his native land; his ancestors had filled public offices in the Kingdom of Naples. For centuries the Corvaias had figured among the aristocracy of Sicily. Such a man will not readily abandon his nationality, to which he must of necessity be profoundly attached, and in him such an act can not be presumed in the face of a complete want of precise and explicit renunciation or the formal act of naturalization. Besides, the Corvaias have always considered themselves Italians, and were recognized as such, not only by the representatives in Caracas and elsewhere of the Royal Government, but by the authorities of the Republic. In proof of this there is submitted an authentic extract from the register of the notarial acts of the Royal Italian legation in this capital, from which it appears that in 1877 Enrico Corvaia caused to be legalized the diploma of the Equestrian Order of

Venezuela of Bolívar, conferred upon him for services rendered to the Republic, and in the legalization referred to the royal chargé d'affaires of that period, the Chevalier Massone, styled Corvaia a royal subject.

There is likewise submitted an authentic extract of the general power of attorney conferred on the Baron Fortunato Corvaia the 30th of October, 1877, by his son of the same name, for the transaction of divers affairs in Italy. In this document, the original of which is to be found in the same register of notarial acts, the royal Italian chargé d'affaires thus declares: "Appeared before the legation the *royal subject* Corvaia Fortunato, of Fortunato, *native of Caracas*," etc.

Fortunato Corvaia, *native of Caracas*, was styled an *Italian* citizen by the royal legation in 1877, and since he was a native of Venezuela, the quality of Italian citizen could not have been attributed to him, save and except as he *was the son of the Italian Baron Fortunato Corvaia*.

The royal legation recognized Baron Corvaia, ex-minister of Venezuela to Paris, as an Italian citizen, and the proof of this is evident and undeniable.

It is well known that Venezuelans can not, under their laws, assume titles of nobility. Now, the deceased had not relinquished his, nor did any of his male descendants. (See certificate of birth of Giuseppe Isacco Enrico Corvaia, the certificate of decease of Lucio Corvaia, the power of attorney of Teresa Campbell, of Fortunato, and Ricardo Corvaia to the Signora Luisa, widow De Lara, and the copy of the dispatch of the Italian minister of foreign affairs, all contained in fascicle No. 2.) We might conclude from all this that never did the deceased or his descendants contemplate being local subjects. But there is more. In the same fascicle the honorable umpire will find a document emanating from the prefect of the department of Bravo, in the state of Guarico, Venezuela, under date of June 2, 1880, in which Enrico Corvaia is styled an Italian citizen.

The Signora Luisa Corvaia, widow of the Venezuelan general, Eladio Lara, was not pensioned by the Venezuelan Government, as she should have been, because she was a foreigner. It would therefore seem that the Corvaias have been considered Italians, even by the authorities of the Republic, evidently because it was notorious that their father was originally Italian, and so remained to the day of his death.

The writer believes he has convinced the honorable umpire of the equity and substantial foundation of his argument. But in the event that the umpire should decide that Baron Corvaia had ceased to be Italian, he would not for that have become Venezuelan. It is not deemed necessary to enter into a long discussion in support of this proposition. The conditions by which Venezuelan nationality is acquired are tacitly indicated in the fundamental laws and codes of the Republic. The members of the Corvaia family never complied with the formalities necessary to that end. We may add that it does even appear, and until proof to the contrary is submitted by the Commissioner for Venezuela, it may be absolutely denied, that he ever took the oath of allegiance or any other toward this Government, and from this we may deduce his firm intention of remaining true to the nationality of his origin. A bond of allegiance between him and this Republic could not arise, because neither in the Venezuelan nor in the Italian legislature is such a juridical condition foreseen and contemplated. By the law of either country, one is a citizen or one is not. The very word "allegiance" can not be exactly translated into either Spanish or Italian.

Besides, allegiance seems to be due solely to the sovereign, and the loyalty of the subject is to his king, his natural protector — a thing almost inconceivable in a country governed according to republican principles; but even were it

admitted that there were such a bond between an individual born in a monarchy and a country under republican rule, there would still be required the formal and essential oath of allegiance, which we know, and as will more clearly appear further on, he never took.

Ernest Lehr (*Elements of English Civil Law*, par. 38), referring to this, says:

To within quite a recent period England was a country of perpetual allegiance. Whoever was born on British soil was a British subject, and could not cease to be such without the consent of the prince.

Calvo (*Dictionary of Public and Private International Law*, p. 35), speaking of the word "allegiance," says:

It is the name which is given in England to the obedience which every subject owes to his prince and his country. Any individual born a subject of the British Crown can never, by a mere act of his will, dissolve this obligation and break the bond of allegiance which unites him to the sovereign of Great Britain.

This doctrine of allegiance is thus summed up by Blackstone and Stephen:

Natural allegiance is such as is due from all men born within the king's dominions immediately upon their birth. \* \* \* An Englishman who removes to France, or to China, owes the same allegiance to the king of England there as at home, and twenty years hence as well as now. For it is a principal of universal law, that the natural-born subject of one prince can not by any act of his own, no, not by swearing allegiance to another, put off or discharge his natural allegiance to the former, for this natural allegiance was intrinsic and primitive, and antecedent to the others, and can not be divested without the concurrent act of that prince to whom it was first due.

These definitions and opinions confirm the principle that the bond of allegiance can not be conceived except as due a sovereign, and obviously that of the country of birth, not to be contracted toward another prince, and in every case with a solemn oath of fidelity.

Instead of this, we see Corvaia, in 1854, when he had already filled the post of confidential agent of Venezuela in the United States, and on the eve of accepting a mission to France, making an open act of submission and devotion to his legitimate king. Let it be noted, besides, that the first law, in the order of time, according to which employees of Venezuela were obliged to take an oath — not carried into effect, as we know from the *Giordana* case<sup>1</sup> — was promulgated May 29, 1865, that is, at a time considerably after Corvaia had accepted the mission referred to, which completely excludes the idea of his having taken any oath whatever.

The Italian Commissioner must therefore insist upon his position that the Corvaia claim can not in any case be held to be an originally Venezuelan claim. He believes it to be Italian, since the deceased baron must have had a nationality, if we assume with Folleville (*Studies of Private International Law*, p. 285) that the legal status of a person without a nationality is "a more singular and unjustifiable anomaly than would be a duality of fatherlands;" but in any conceivable hypothesis, he maintains that this claim must constitute for Venezuela an essentially foreign claim.

The honorable Doctor Zuloaga has declared to the writer that other exceptions will be submitted, and will sustain the forfeiture of the right of the Corvaia heirs to claim before this international tribunal, either because the damages upon which their claim is based were suffered by the deceased in a period long since passed, or because he does not appear among the Italians indemnified under

<sup>1</sup> Not reported.

the provisions of the protocol of La Ville-Jiménez, of October 7, 1868, or because the heirs did not have recourse to the royal Italian legation in 1894, when, under Count Roberto Magliano de Villar S. Marco as minister to Caracas, it drew up an agreement in regard to claims with the Government of the Republic. In rebuttal, the Italian Commissioner recalls, in the first place, his arguments in the Gentini case, with reference in general to the subject of prescription in international relations, and observes, in addition, that all the credits of the Corvaia heirs are of such character that the Venezuelan Government can not have ignored their existence, and that therefore, in conformity with the principles admitted by the honorable umpire in the claims of Giacopini<sup>1</sup> and Tagliaferro,<sup>2</sup> prescription could not in anywise operate against them. It appears, besides, from various documents found in the papers of the Corvaia claim, that neither the deceased baron nor his heirs ever had the least intention of abandoning the rights which to-day, under more propitious conditions as to time and tribunal, they propose to defend, which intention has, on the contrary, been repeatedly manifested by them.

The protocol of La Ville-Jiménez was subscribed for the purpose of effecting an amicable settlement of all Italian claims up to that time presented to the royal Italian legation. It contains no declaration on the part of the chargé d'affaires indicating the abandonment or exclusion of any claim not comprised among those contemplated in this international act. The words "with the addition of this sum the total amount of all the claims is 1,154,686 pesos," and "the Italian claims," on the meaning and scope of which the honorable Commissioner for Venezuela bases his argumentation, would be superfluous unless accepted as referring to the claims presented, known, or liquidated at the time the above-mentioned protocol was stipulated.

To give an unlimited interpretation to those words would be equivalent to prejudicing legitimate interests, and certainly the chargé d'affaires would never have assumed the responsibility of shutting out claims of which for obvious reasons he could have had no knowledge, without special authority from his Government, which he surely never had. If the Venezuelan Government had intended that every anterior claim should be liquidated by the above protocol, it would undoubtedly have insisted upon an explicit clause or declaration therein to that effect — something it did not do then or during the preliminary discussions.

As a matter of fact, in the report of this protocol furnished by the legation to the minister of foreign affairs at Rome, an authentic extract of which is herewith inclosed, mention is made of "the claims of royal subjects which had been recognized and admitted by the Venezuelan Government." There is no mention of all claims, and it is permitted to be implicitly but clearly understood that there existed other claims for which diplomatic action remained reserved.

In the partial settlement of claims obtained by Count Magliano in 1894 only those were examined which arose from damages and requisitions of the revolution resulting in the elevation of General Crespo to the presidency. This is established by the tabular statement of claims for indemnity of that period submitted in the original to the examination of the honorable umpire, written by Minister Magliano himself, special attention being invited to page 4 of the statement marked "B" in red, in the column of remarks, in which may be read, opposite the entry of claim of Stefano Giajer del fù Giovanni, these words:

This not being a case of damages occasioned by the civil war, but by an alleged

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<sup>1</sup> *Supra*, p. 594.

<sup>2</sup> *Supra*, p. 592.

abuse, the royal legation has decided that it can not be accepted, and the claimant should appeal for redress to competent authority, in conformity with existing law.

Therefore if the Corvaia heirs did not present their claim to the legation at that time, it was undoubtedly because it would not have been received thereby. For the rest, has not the Mixed Commission liquidated claims arising out of the war of 1892, notwithstanding the rule laid down by Count Magliano?

Claim No. 199, of Giuseppe A. Menda, accepted by the Venezuelan Commissioner himself, was for requisitions made in 1892, and others of the same nature have likewise been accepted.

Did not the Commission, notwithstanding the opposition of the Venezuelan Commissioner, settle claims of the period of 1898-1900, though not included in the ultimatum of 1902, and in the sum of 2,810,255 bolivars obtained by the protocol of Washington of February 13?

It were well to recall the claim of Massardo, Carbone & Co., which entailed a long discussion and a decision of the honorable umpire sustaining the contentions of the Italian Commissioner.

Have we not awarded indemnity in claims for damages arising in the period 1871-72, in spite of the rulings of Magliano and Riva?

The above-mentioned protocol of Washington makes no such restrictions, and admits all Italian claims without distinction to the examination of the Commission, excepting only those already liquidated and those of holders of bonds of the foreign debt.

To demonstrate how unjust and contrary to law and equity is the theory opposed to that advanced by the Italian Commissioner one example will suffice.

Recently the Italian citizen, Biagio Lamberti, presented himself before the royal legation and exhibited absolute and undeniable proof that in 1899 he supplied military musical instruments to the Venezuelan Government to the value of 1,430.55 bolivars. Lamberti, who holds an order from the war office in his favor for the sum named, signed by Gen. Diego Bautista Ferrer, on the minister of hacienda, has not, in spite of repeated efforts, been able to obtain payment. The said Lamberti, who resides in Caracas, did not want to have recourse to this Commission, and only now comes to seek the aid of the royal representative to obtain his due, delayed until now with no apparent motive. Can it be said that because Lamberti very patiently refrained from formulating a claim before the Commission, he has forfeited the right to invoke the assistance of the legation, and that it must refuse to protect him?

The Washington protocols do not peremptorily declare that claimants shall either submit their claims or forfeit them. They have simply provided for the installation of tribunals in equity, before which claims may be judged, and opened a way by which claimants may obtain speedy justice; but if any among them have not desired to avail themselves of these means, or thought it inopportune to do so, they have surely not on that account renounced any of the means of redress to which they are entitled by common law.

The conclusion to which the Italian Commissioner arrives is that while the protocols furnish a mode of liquidating claims for indemnity, in the absence of a clear and explicit declaration to the contrary, they were never intended to exclude future diplomatic action, or preclude the possibility of claimants whose cases have not been considered of having recourse to the authority of their country. Now, this clear and explicit declaration the protocol of 1868 does not contain.

The reasons why Baron Corvaia did not press his claim in that year are unknown to us, but to argue from that one fact that he no longer considered

himself an Italian, while all else proves the contrary, or that he, and therefore his heirs, should have lost the right to claim, is unjust.

This abstention may be explained, rather by the affectionate regard he had for this country, or the important personal relations which always induced him to hope, even to the day of his death, that he would be able to bring about an amicable settlement of his numerous credits against the Government, or by his frequent and prolonged absences in Europe. At that time his credits did not really constitute a claim, because the measures he and those interested with him had instituted for a direct reimbursement were still pending, and besides, while other royal subjects were presenting claims, he had still so much faith in the strength of his relations with the Government that in that same year (1868) and subsequently, he continued to advance it money.

Let it be noted further that prior to 1868 Italy had never had a settlement of claims with Venezuela; that the kingdom of the Two Sicilies had never had a diplomatic representative in Venezuela, and that that of the King had only existed since 1864, with frequent interruptions; to say nothing of the fact that while other nations had secured settlements through mixed commissions, Italy had never had a commission until after the blockade, so that, generally speaking, there had been no opportunity for Italian citizens to have recourse to the justice of international tribunals.

If Baron Corvaia had formally pressed his claim through diplomatic channels he would have been charged with ingratitude. Having shown himself moderate, courteous, and forbearing he is rewarded in having heirs told that because their ancestor had made no claim (which is not strictly true) they had forfeited their right to do so.

This is a style of argumentation and judgment that does not appear to be inspired by those principles of absolute equity which should constitute a guide for the Mixed Commission.

This being premised, it is pertinent to examine, from the point of view of citizenship, the status of each of the Corvaia heirs, as much in the warranted supposition that the honorable umpire will admit that the deceased never abandoned his nationality of origin as in the scarcely probable hypothesis that this quality will be denied him, while admitting him to be no Venezuelan, it being out of the question to consider him a citizen of this Republic.

Maria Teresa Corvaia, first-born child of the deceased baron, married an Italian, Signor Pasquale Miccio, living, and is therefore certainly Italian.

Margherita, fourth daughter of the deceased baron, married to Baron Carlo Bottini, an Italian citizen, and therefore she, too, is an Italian.

Giuseppe Isacco Enrico, sixth son, was born in Naples. If his father is held to be Italian there can be no doubt as to the nationality of the son. If his father is held to have lost his original citizenship, Enrico should nevertheless be considered as Italian, as he was born in Italy after his father had lost his citizenship, and all the more so in that his father had not acquired another nationality. A careful study of article 5 et seq. of the Italian civil code will result in an absolute conviction that Enrico Corvaia is not and can not be other than an Italian.

He has, in any case, a true and undoubted legal status as an Italian citizen, recognized, as has heretofore been said, as well by Venezuelan authority as by the royal Italian legation. His name is inscribed in the proper register of the legation itself, to which he exhibited, not many months since, a certificate of the census of Paris, where he customarily resides, in which he declares himself Italian, and a passport of August, 1903, from the royal embassy in that city, in which he is likewise styled an Italian. What nationality would the honorable Commissioner for Venezuela ascribe to Enrico Corvaia?

Irene, deceased, born in Caracas, married Gen. François Ernest Le Plus, became French by said marriage, and left heirs who are all of French nationality.

Fortunato, third son, and Ricardo, fifth son, are Italians, according to the law of Italy, because they are the sons of a citizen. The first, it has been seen, was so considered by the royal legation up to 1877. For the honorable umpire will no doubt take into account the certificate of identity drawn up at the royal Italian embassy at Paris, from which it appears that both are recognized as royal subjects, contained in book No. 2 of the claim, as well as the circumstance that they have not since many years lived in Venezuela and had never established a domicile therein.

Lucio, eighth son of the deceased baron, was an Italian, because he was born in Paris of an Italian father. He died, leaving two children, Fortunato and María Louisa, both born at Barquisimeto, Venezuela, and a widow, also born in the Republic, now married to a Venezuelan. The two children are Italians by the laws of Italy — article 4 of the civil code. It is not denied that they were born and reside in Venezuelan territory and the former decisions of the umpire are not lost sight of, but we reserve our opinion on that point.

The Signora Luisa Carmela Corvaia, who presents the claim, widow of the Venezuelan general Eladio Lara, was born in Paris. There can be no doubt as to her Italian nationality, if the same nationality be accorded her father.

Besides, according to article 14 of the Italian civil code, the native woman who marries a foreigner becomes a foreigner, since always by the fact of matrimony she acquires the nationality of her husband.

Article 18 of the Venezuelan civil code provides that the foreign woman who marries a Venezuelan acquires all the civil rights of a Venezuelan and retains them during her husband's lifetime.

Article 17 of the same code provides that foreigners shall enjoy the same civil rights as Venezuelans.

The Signora Luisa Corvaia De Lara has not, therefore, by the fact of her marriage with a Venezuelan, acquired in fact Venezuelan citizenship, but only the *civil rights* proper to Venezuelans — those rights which are generally enjoyed by foreigners in Venezuela. She has not on that account lost her Italian nationality.

Even if by an interpretation too sweeping, and to our mind unwarranted, it were desired to make these rights — the civil rights referred to in article 18 of the Venezuelan civil code — equivalent to nationality, which seems absolutely contrary to Article VIII of the Venezuelan constitution, which does not number among Venezuelans the foreign women married to local subjects, this quality would have been lost to her by the fact of her widowhood, and would therefore *ipse jure* have resumed her former nationality, either on the principle that one can not be without citizenship, or by a logical and pacific application of article 14 of the Italian civil code, and this notwithstanding that she, having lived in Italy after the death of her husband, as shown by documents in No. 2 of the claim, had not made the requisite declaration before the proper official (not considered necessary for the reasons above set forth) of her intention of living there.

If it is not admitted that Baron Corvaia preserved his Italian citizenship, it will be somewhat difficult to establish the nationality of his daughter. It might be contended that being born in Paris she must be French.

Teresa Campbell, widow Corvaia, was born of English parents in Caracas, and married Baron Fortunato Corvaia in 1846, being now a widow, as shown by certificate above mentioned as having been recorded at the royal embassy in Paris, and having resided in Europe since the death of her husband. If the latter be considered as Italian she must likewise be so considered, since according

to principles admitted by the umpire, and given her prolonged residence abroad, article 19 of the local civil code could hardly be applied to her case, whereas she might very properly invoke article 9 of the Italian civil code which provides:

The foreign woman who marries a citizen acquires citizenship and retains it even as a widow.

If, then, the deceased husband is regarded as having lost his Italian nationality, it will be for the umpire to decide whether or not his widow, under the circumstances, may appear as a claimant before this Commission.

Summing up, then, under the most favorable hypothesis, if the Italian origin of the claim of the deceased baron be admitted, all his heirs should be admitted to share in the indemnity here claimed. If this view is not to prevail, but it be recognized, as we confidently believe, that Baron Corvaia never lost his Italian citizenship, according to precedent decisions of the umpire, then only the heirs of Lucio, the only ones born and living in Venezuela, and the heirs of General Le Plus, who are French, would be excluded from participating in the award.

Under the most unfavorable hypothesis (we will not even suppose that the baron will be considered as being Venezuelan) in which the deceased will be judged to have lost his Italian citizenship, there would always remain, as undeniably Italian, Giuseppe Isacco Enrico Corvaia, María Teresa Corvaia Miccio, and Margherita Corvaia Bottini. These three descendants could not in any case be shut out from participating as Italian subjects in the liquidation of a claim which was foreign from its very origin.

The Italian Commissioner expects from the umpire a decision founded on the highest rules of justice and equity; and in calling attention, with regret, to the steps taken by the interested parties, with no practical results, for a direct settlement with the Government, he urges that in rejecting the claims of such of the heirs as may not be deemed recognizable before this Commission, it be without prejudice to their interests before any other tribunal, as, for instance, before the local courts, and in the case of the heirs of General Le Plus, and possibly of the Signora Luisa Carmela, widow Lara, through the intermediary of the French legation in Caracas.

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*Extract from the register of the notarial acts of the royal Italian legation at Caracas for the year 1877.*

Legalization of the signature of Dr. Andueza Palacio on the diploma of the Order of Bolivar, with which was invested the royal subject Enrico Corvaia for services rendered to this Republic.

Caracas. \* \* \*  
[L. s.]

CAV. P. MASSONE

N. B. — The royal chargé d'affaires omitted the date in the foregoing certificate, but this, in the register of notarial acts, uninterruptedly kept from December 12, 1864, to January 21, 1889, is found between an act made June 2, 1877, and another made the 26th of the same month. It therefore is certain that the legalization referred to was made in the period elapsing between the first and second dates above named.

The royal chargé d'affaires.

C. ALIOTTI

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*Extract from the register of the notarial acts of the royal Italian legation at Caracas for the year 1877.*

This day, 30th October, 1877, at Caracas, in the office of the royal Italian legation, before us, Cavaliere Pasquale Massone, chargé d'affaires of His Majesty the King of Italy, in this residence, etc., appeared the royal subject Corvaia, Fortunato, of Fortunato, a native of Caracas, freeholder, who declares as follows, etc.:

(Here follows the full power of attorney to his father, Fortunato Corvaia.)

A true copy:

The royal chargé d'affaires.

C. ALIOTTI

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*Extract from the register of correspondence of the royal Italian legation at Caracas with the Italian minister of foreign affairs.*

CARACAS, January 30, 1869

MR. MINISTER: As a supplement to the report No. 47 of this series, dated October 20, by which there was sent to your excellency a copy of the protocol of the claims of royal subjects which have been acknowledged and admitted by the Venezuelan Government, I have the honor to inclose herewith an analysis of the claims themselves, to the end that your excellency may know the nature of them, and what were the rules determining the awards made to these claimants, etc.

G. GALLI,  
*In Charge of the Legation*

A true copy:

The royal chargé d'affaires.

C. ALIOTTI

ZULOAGA, *Commissioner*:

The heirs of Mr. Fortunato Corvaia claim the sum of 16,438,661.23 bolivars, which they say the Government of Venezuela owes them for various negotiations which their predecessor in interest Corvaia had with the Government, and for interest accruing upon the sums owed. The claims are until now generally unsubstantiated, or they have informal proofs; but the preliminary question of the nationality of Corvaia arises, and even the question of the nationality of the claimants themselves, and these are the questions which are now submitted to the honorable umpire.

Mr. Fortunato Corvaia, as appears from the biography presented by the claimants, came to Venezuela in the year 1838, immigrating with the intention of establishing himself in the gold mining regions of Guayana. He did not come to Guayana, but remained in Puerto Cabello, where he was for three or four years, and afterwards removed to Caracas, where he established himself as a printer and engaged in other business. In the year 1846 he married, in Caracas, Miss Teresa Campbell, a Venezuelan, and on the 24th of January, 1848 (which is a celebrated day in the political history of Venezuela, because of the *coup d'état*, which upon that day the chief of the Government performed), the biography to which we refer says that Corvaia was in Congress, performing the duties of political and literary reporter; that there he discovered the plot against the life of General Monagas, and that, exposing his own life, he went out to give notice of it to the wife of the President of the Republic. (This really has never been known in Venezuela, or was there any such plot.) In the same year, 1848, Gen. Hosea Antonio Páez, representative of the so-called conservative party, and who already had been twice President of the Republic, took up arms against Monagas by virtue of the events of the 24th of January, and Corvaia left for the United States of America to seek armament and ships of war for General Monagas, leader of the liberal party.

In the following year, 1849, the Government named Corvaia in order that he might confidentially negotiate with the minister of the United States of America, with the object of strengthening relations with the American nation. In June, 1850, it appointed him confidential agent to said Republic. In January, 1851, the minister of foreign relations of Venezuela addressed himself to the Secretary of State of the United States to tell him —

that the President of the Republic, after receiving notice that Páez and his partisans were attempting to form an exploitation in the United States, in order to renew their attempts against the institutions and the legitimate government of this country, has seen fit to send there a diplomatic agent, who, observing the conduct of the Venezuelans expatriated because of their political crimes, might give opportune notice of this monstrosity of their plans, and prevent their being put into effect; that with these objects and that of promoting the friendly relations which exist between both countries, has accredited Mr. Corvaia in the character of chargé d'affaires to the United States.

A little later Mr. Corvaia goes to Europe with various missions, and among others a mission to the Holy See. In March, 1855, the Government appointed Corvaia confidential agent to various courts of Europe, with the object of promoting immigration, and in March, 1856, he was appointed envoy extraordinary and minister plenipotentiary of Venezuela to several courts of Europe, the consuls in said countries, in conformity with the law of 1824, being, therefore, under his supervision, and he was minister until June 1, 1858, when he ceased to hold this office because of the revolution which had triumphed in March of that year.

In the year 1860 Corvaia goes to Venezuela and is put in jail. At that time Gen. Hosea Antonio Páez was dictator; he ruled the conservative party, and the imprisonment of Corvaia was only the political imprisonment of the constant servant of Monagas against the conservative party. In 1863 the liberal party again triumphed, and Corvaia again goes to Venezuela and enters anew into favor, and negotiates with the Government. If he had not returned since 1858, it was as he himself says, in a note of December, 1866, which is found in Record I, "by reason of said revolution," because of the fear of persecution by his political opponents. In this same record (I) a statement of Corvaia of his services as minister appears. He enumerates them thus:

I believe that I can assert without fear of contradiction that my assiduous efforts and labor have brought advantageous results. Among these the recognition of the nation by the Russian and Ottoman empires, by the \* \* \* of the Two Sicilies and Portugal, especially in the capitals and important cities of Europe; \* \* \* I negotiated treaties of friendship, commerce, and navigation with Prussia and the other states of the "Zollverein;" I concluded another with Sardinia, \* \* \* the present Government of your excellency (1863), ratified the second of these treaties, and have signed with *Italy*, which is the same one as has just been published as a law of the Republic, in which there were established two principles of the greatest importance for this country: 1. That which designated the only sort of damages and injuries for which both parties would be liable in case of revolution; that is to say, those caused by the legitimate authorities, excluding, therefore, those arising from any other sources. 2. That which makes arbitration obligatory as to the disputes which arise between the two countries. On the other hand, I succeeded in obtaining a very advantageous adjustment of the claims of the French Government on account of the efforts of the law of suspension, and almost paid what was owed by this Government. I did the same thing with the English Government in the matter of the claim of Fitzgerald, and in all these negotiations I have only borne in mind the good name of the nation. \* \* \* Finally, upon giving up my diplomatic functions on account of the events of 1858, I was honored by Ecuador. \* \* \*

Corvaia from the time of his return to Venezuela remained in the country,

and died in 1886 in the village of Maiquetia, situated on the coast very near La Guaira.

This is the life of Corvaia, as appears from the proofs presented by the claimants. From it, it appears in a clear manner that Corvaia constantly intervened in the political affairs of Venezuela; that he was a high official of state from 1848 to 1858; that in 1848 he sought arms for Monagas, and later was a secret agent of the liberal party to watch the acts of Páez, leader of the conservative party; that in all the liberal administrations he enjoyed very special favors, and carried on lucrative negotiations with the Government; that during the administration of the conservative party he was persecuted as a political enemy, and that in order to avoid this he remained abroad during this period. That these facts established it follows: 1. That the heirs of Corvaia can not claim before this Commission, because it is a national recognition, and under the principles of national law diplomatic protection is not accorded to individuals who mix in the political affairs of another nation. 2. That Corvaia, born in the Two Sicilies in 1820, has lost his nationality, since in the Two Sicilies the Napoleonic law, with very few modifications, was in force, and among the articles referring to the loss of nationality there were articles 17 and 18 of the Napoleon code, which provides his loss of nationality by the fact of absenting himself in another country without the intention of returning, and also by accepting public employment from a foreign government. As is seen, these two circumstances apply to Corvaia, the first because it is evident that a man who as he did came to Venezuela in his youth and without resources, married there, made his fortune there (almost entirely by political negotiations), who there raised his family, who was there honored by distinctions, and there died, had considered Venezuela his true country, without the intention of returning to his native land, to which nothing called him.

Because of the code of Napoleon, which in the premises is in accord with the Italian code, and provides for the loss of nationality by one accepting public employment from a foreign government, there is no stronger case in which to apply it than in that of Corvaia, who was for the space of ten years the confidential agent, chargé d'affaires, and minister plenipotentiary of Venezuela; who had been received in this capacity in the country which it is now attempted to claim as his fatherland, and had obtained from the Governments of the Two Sicilies and of Sardinia political advantages of paramount importance.

The question as to the loss of nationality was discussed in this Commission in the case of Giordana <sup>1</sup> but he was an assistant engineer in the service of the minister of public works, and the honorable umpire of this Commission was of opinion, bearing in mind the humble character of the employment, that it might be considered that he had not lost his nationality; but he said that he reserved his opinion with respect to a case in which the employment was of more importance. After the office of the President of the Republic, I do not see what authority can be higher or more important than that which Corvaia for many years exercised, as representative of the Republic in the United States and the courts of Europe, entering into agreements, and having the consuls subordinate to him.

The theory of the loss of nationality by the acceptance of employment does not admit of any exception, according to the commentators on the code of Napoleon, and it is applied rigidly. The excuses which may have been made can not influence a matter now of fifty years ago. In this question of the loss of sovereignty I do not see how discussion is possible. The law of the Two

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<sup>1</sup> Not reported.

Sicilies is definite in declaring that Corvaia was not a Sicilian, and it is not to be supposed that a state claims from another state for the benefit of anyone whom its own laws declare is not a citizen. This is a matter of strict right and as to which the Commission ought to strictly apply the law of the case. The citation of authorities which the honorable Italian Commissioner makes are therefore out of place, since they refer to personal opinions and assumptions, more or less founded for the solution of the conflict of nationalities. Besides, some of the citations of my honorable colleague might be considered as opposed to his opinion, and I might cite paragraphs of Fiore which are. Based, therefore, on the three reasons mentioned, that Corvaia had taken part in the affairs of the country, had lost his nationality by establishing himself in Venezuela without the purpose of returning to the Two Sicilies, and because he accepted public positions in Venezuela, he claims the Corvaia claim is inadmissible. With respect to Corvaia, moreover, there is a very serious circumstance, and it is that he, when the Two Sicilies were annexed to Italy, was not a Sicilian, nor was he domiciled in the Two Sicilies, an indispensable requisite in order that the annexation might affect his nationality. The Hon. Mr. Agnoli, Commissioner for Italy, has insinuated that although Corvaia had lost his nationality (had never been a subject of the King of Italy), this does not hinder his heirs from claiming internationally. This would be an absurdity in law. No one can transmit to another more than what he has, and if Corvaia could not have claimed the protection of a foreign nation against the Government of Venezuela, it is not possible that his heirs should have that right. I am not aware that the Hon. Mr. Ralston would give a contrary opinion, as my honorable colleague asserts. It is to be observed that Corvaia never thought of asking protection from the Government of Italy for any claim. The fragment of a *copy* of a letter which is presented in order to show that Corvaia believed he had the right to a claim has reference to a French claim.

Since Corvaia was not an Italian, this is sufficient to exclude the claim, and it is useless to enter into a study as to the nationality of the actual claimants. Nevertheless, these are not Italians.

Teresa Campbell, widow of Corvaia, is a Venezuelan, born in Caracas in 1831, and if by the fact of her marriage she may have changed her nationality, as a widow, she recovered her original citizenship. The case would already have been decided in that of the widow Brignone,<sup>1</sup> but in the present case it is my opinion that the wife of Corvaia never has been an Italian.

Irene Corvaia, deceased, married Gen. Francis Le Plus, and was born in Caracas; she was, therefore, never an Italian, and her heirs are French.

Fortunato Corvaia was born in Caracas in 1849. He lived in Venezuela for many years, and to-day resides in Paris. He is, therefore, an Italian.

Ricardo Corvaia was born in Caracas in 1851, lived in Venezuela for many years, and to-day resides in Paris. He is therefore a Venezuelan. It is to be noted that the fact of residence in France does not even give the character of residence to those who live there.

Henrique Corvaia was born in Naples in 1853. He has always lived in Venezuela, and he has a wife and children here, and at the time of his birth, it appears that Corvaia was acting in the capacity of confidential agent of Venezuela. At the time of the birth of Henrique Corvaia his father had lost his nationality, and he could not, therefore, be claimed by Italy as a national. (See art. 11, Italian code.) It is to be borne in mind that these claimants who call themselves Italians have never shown by any direct or legal proof that they

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<sup>1</sup> *Supra*, p. 542.

desire to be Italians, and it does not appear that they have rendered military services in Italy.

Luisa Corvaia, widow of Lara, was born in Paris in the year 1857, her father being minister plenipotentiary of Venezuela. She was born in the legation; she is the widow of a Venezuelan general, and has always lived in Venezuela. She is therefore a Venezuelan. Italy can not claim her as an Italian. Margarita was born in Caracas, married in 1879 Carlos Bottini, a Frenchman. Her husband was naturalized an Italian in 1888, and if this naturalization had any influence, in no case could it give her the right to appear as an Italian claimant, because of an act long preceding the naturalization. Moreover, Margarita Corvaia, French, because of the nationality of her husband, did not acquire Italian nationality by his naturalization, since, according to the French rule, naturalization is personal. (Fiore, *Droit International Privé*, p. 379.)

Teresa Corvaia was born in Caracas in 1847; married Pasquale Miccio, an Italian; legally separated from her husband in 1873, and resides in London. If she preserved the Italian nationality by virtue of the citizenship of her husband, in reality very weak ties bind her to her country.

An order of expulsion from the Two Sicilies has been made use of as proof that Corvaia retained his nationality. I do not see why. This order might also have been made against a stranger or a man like Corvaia who could not rely upon the nationality of the Two Sicilies. Nothing in these documents leads us to suppose that Corvaia had thought that he preserved his nationality. Besides, we do not know the antecedents of this matter. The fact that Corvaia or his family were not friends of Bourbons and therefore had to ask permission to hold a public office in Venezuela, since it would have been denied it, is an argument adduced which is turned against the claimants, since it leads us to believe that Corvaia was appointed against the desire of the Government of the Two Sicilies.

For the reasons set forth, I am of opinion that, without entering into the merits of the case, the claim of the heirs of Corvaia should be rejected.

On this occasion only the nationality as a previous question has been considered. Every other question, including that of prescription, I shall consider upon their merits.

In order to answer the last paragraph of his honorable colleague the undersigned has to say that, from information which he has obtained in various public offices, it appears that at no time have the heirs of Corvaia taken any sort of action, or made any sort of claim, and that the first notice which has reached the Government of Venezuela of the existence of the claim came to it when it was made known that it would be presented to this Commission.

AGNOLI, *Commissioner* (additional opinion):

The Italian Commissioner takes cognizance of the abandonment on the part of the Commissioner for Venezuela of the prejudicial exceptions previously formulated by him relative to the forfeiture of the right of the Corvaia heirs to defend their interests before this Mixed Commission, these exceptions being based on the circumstance that neither the deceased Baron Fortunato, in 1868, at the time of the stipulation of the protocol of De la Ville-Jiménez, nor the heirs themselves subsequently, prosecuted their claim against the Government of the Republic through the intermediation of the royal Italian legation.

Therefore the undersigned holds it as useless now to submit to the umpire a list of the claims for indemnity which had occupied the attention of the Italian

minister, Count Magliano, and mentioned in my memorial of the 12th instant, on page 19.<sup>1</sup>

The objections raised by the Commissioner for Venezuela in this Commission can therefore affect but one point — that of nationality. The Italian Commissioner presents, as complementary to the arguments used by him in sustentation of his opinion concerning the acceptability of the present claim, and in reply, to the objections of the Venezuelan Commissioner, the following observations:

1. It is not established that Baron Corvaia ever went to Naples as minister for Venezuela, that he presented his credentials, or that, finally, his appointment as a diplomatic representative of this Republic to the Bourbon court exceeded the limits of a simple designation not followed by an effective accomplishment of plenipotentiary duties.

There is, on the contrary, a strong presumption that Corvaia never did actually perform them officially, given his status as a Neapolitan subject, descendant of political exiles, and himself expelled from the Kingdom of the Two Sicilies.

There is in fact a proposed treaty with the Two Sicilies, but this document is simply a project — it bears neither date nor signature, does not give the names of the negotiators, and is not in the writing of the deceased baron. It need not even have been submitted to the Commission, and from it one proof alone can be drawn — that of the utter sincerity of the claimants.

2. The letter addressed under date of June 26, 1885, by Baron Fortunato Corvaia to the minister of the King of Naples at Paris, Marquis Antonini, concerns a simple exchange of publications. At that time the baron was not minister, and was not considered as a member of the diplomatic corps; as a matter of fact, the reply of Marquis Antonini is addressed to Signor F. Corvaia, without official qualification whatsoever.

3. Concerning the acknowledgment of the Republic of Venezuela on the part of the Neapolitan Government, the credit for which was claimed by Corvaia in a document, the importance and authenticity of which will be hereafter referred to in this paper, it is to be understood as resulting from his private negotiations, and nowhere does it appear that it was brought about officially. We do not even know at what time this transaction took place.

4. The document contained in book I, a letter of the deceased to the President of the Republic, dated January 14, 1863, in which he requested payment of some of his credits, is not in the handwriting of the deceased, but is a copy, and it is not known whether the original was ever sent. In it the deceased relates his services to the Venezuelan Government, and with all due respect to his memory be it said, appears to indulge in momentary exaggeration. As a matter of fact there has never been, so far as can be learned from a research of the old Italian treaties, a treaty between the Kingdom of Sardinia and the Republic of Venezuela, and Corvaia had never been a subject of the King of Sardinia, and his relations with that Government, whatever they may have been, could have had no influence on the nationality of the deceased.

As regards the treaty between Italy and Venezuela of June, 1861, it may be admitted that the deceased baron had privately collaborated in its preparation. I say, "it may be admitted," because there is nothing definite with regard thereto. It can not be denied, though, that this international agreement was stipulated nearly three years after he ceased his functions as minister plenipotentiary for Venezuela; that it was signed in Madrid, where it does not appear that he was present officially or otherwise; that the representatives of the two countries were Mr. Fermín Toro for Venezuela, and Baron Romualdo Tesco

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<sup>1</sup> *Supra*, p. 616.

for Italy, both being ministers plenipotentiary at the court of the Queen of Spain. The name Corvaia does not appear therein.

5. The right, so far as regards the Italian heirs, of a person who had, for instance, lost this nationality without acquiring that of Venezuela, to claim before this Commission is certainly not absurd, since the claim would, in such case, be of foreign origin. The umpire has already so decided.

The undersigned holds that the foreign holders of claims against Venezuela, coming to them by inheritance and not purchased with a view to prosecuting them, have a right in law and in equity to have recourse to diplomatic aid in the prosecution of their claim even though it had originally been the property of a local subject, and that therefore this Commission would be competent to pass upon such cases.

This principle has been recognized as just in prior Mixed Commissions as well as by the council of the contentious diplomat in session at Rome.

6. The letter written by Corvaia to his daughter Luisa, dated February 18, 1885, expresses the hope that the diplomatic convention then concluded between France and Venezuela would facilitate the settlement of his claim. I can not see that it would be possible to deduce from the copy of this document that has been shown us anything but the intention on the part of the deceased to avail himself of diplomatic means in securing a recognition of his rights. It is out of the question to argue that it was his intention at the opportune moment to appeal to any legation other than the Italian, since he was not born French, neither had he acquired that nationality.

7. The honorable Commissioner for Venezuela affirms that Corvaia was not a Neapolitan subject at the time of the annexation of the southern provinces to the rest of Italy, and calling attention to the fact that he was not then living in the Kingdom of the Two Sicilies, concludes that the deceased could not have acquired Italian citizenship.

In regard to this it is worthy of note that the question as to whether or not Baron Corvaia was a Neapolitan citizen in 1860 is precisely the point at issue, and that therefore the assertion of the honorable Commissioner would seem to imply a begging of the issue; now with regard to the effect, so far as the citizenship of Neapolitan emigrants is concerned, of the annexation of the Kingdom of Naples to the other Italian provinces, taken from the Monarchy of Savoy, it is well to remember that there was no cession of a part of the territory of said State, but an incorporation of the whole Kingdom of the Two Sicilies with that of Italy; the Bourbon dynasty was deposed, and the Neapolitan State, as a political autonomy, ceased to exist.

It is not possible to admit that all the Neapolitans who, in 1860, were residing abroad should either have been at once deprived of all citizenship or preserved their original one, to form a nationality without government or territory. It must therefore be evident that they became without distinction Italian citizens.

8. The honorable Venezuelan Commissioner thinks the Baroness Margherita Bottini should be considered as without right to claim before this Commission, in that having become French by her marriage she must have remained so, notwithstanding the fact that her husband has for the last sixteen years been a naturalized Italian citizen. The Commissioner for Venezuela has here raised a very nice question, one that might have considerable value and importance were we called to decide French-Venezuelan claims instead of Italian-Venezuelan. Such a question can not come before this arbitral tribunal.

The French code in nowise provides for such a case; but the undersigned recognizes that French jurisprudence has adopted the maxim that a change of nationality on the part of the husband does not affect the status of the wife.

The Italian Civil Code, however, provides (last paragraph of art. 10) that —

the wife and minor children of the foreigner who acquires citizenship become citizens, provided they, too, have fixed their residence in the Kingdom, and by the same article the option of citizenship is granted to the children, but not to the wife.

Now, the Bottinis have for many years resided in Italy, and it is notorious that the Baron Carlo Bottini exercises important functions in Italian railway administration.

There is no real issue between the French and the Italian law on the point under discussion, because so far as regards the former it is in the last analysis a question of interpretation, and the latter has a provision clearly and distinctly conferring citizenship on the wife of the naturalized foreigner. But even if there were a conflict, given the fact of the continued residence of the Bottinis in Italy, the honorable umpire, in conformity with principles by him laid down in other cases and with the general principles of law, should recognize the wife as having Italian citizenship to the exclusion of any other. The fact that this lady has acquired (or reassumed, because the writer holds she was born Italian) Italian citizenship, at a time subsequent to the events upon which this claim is based, does not appear to be a motive for debarring her from the right to prosecute her interests before this Commission against the Republic of Venezuela. It suffices that the claim be Italian at the time it is presented to the Commission, and it would be out of reason to insist upon its never having had another nationality. The Bottinis did not assume Italian citizenship in view of the present Corvaia claim.

Concluding, the Italian Commissioner deems it opportune to remark to the honorable umpire that, in expressing the opinion that the fundamental exceptions with regard to the nationality of the deceased Corvaia and of several of his heirs at present exclusively submitted to his judgment should be set aside, he reserves his opinion concerning the admissibility of the specific proofs so far adopted by the claimants as to the eight points on which is based their demand for indemnity in the sum of 16,438,661 bolivars. These proofs will be taken up one at a time at the proper moment and discussed with moderation and according to equity, as well in regard to their intrinsic merit as in the calculation of the interest on the amount claimed, which must be reduced in accordance with prior decisions of the umpire and with precedents established by this Commission in analogous cases.

RALSTON, *Umpire*:

The above-styled reclamation is referred to the umpire upon differences of opinion between the honorable Commissioners for Italy and Venezuela as to certain preliminary questions, among others, that of the citizenship of Fortunato Corvaia; the honorable Italian Commissioner contending that he was a citizen of Italy within the meaning of the protocol between the two countries, and as such entitled to present the reclamation had an opportunity offered during his lifetime, and the honorable Commissioner for Venezuela denying such citizenship. It will not be necessary to discuss at the present time the remaining questions.

The references contained in the protocols, in so far as this Commission is concerned, to the character of the claims submitted to it are as follows:

Referring to the protocol of February 13, 1903, the preamble speaks of "Italian claims." Article I refers to "claims \* \* \* preferred \* \* \* on behalf of Italian subjects." Article III mentions twice "Italian claims." Article IV speaks of "Italian claims."

The preamble of the protocol of May 7, 1903, refers to "Italian claims against the Government of Venezuela," but gives no other specific characterization.

The only question which will now be considered by the umpire is as to whether the claim submitted was Italian as far as its original owner was concerned, waiving consideration for the moment of the further question, whether a claim before the Commission must be both Italian in origin and Italian at the time of presentation.

Many documents are presented to the umpire bearing upon the life history of Fortunato Corvaia, and from their examination one learns that he was born at Calascivetta, Sicily, in 1820, being the son of Giuseppe José Corvaia. At the age of 18 years, being in infirm health, he voyaged to Venezuela, leaving his mother in Paris; his father, who had been expelled from Sicily as a revolutionist, living from time to time in Malta, London, Paris, Brussels, and elsewhere. Corvaia arrived at Puerto Cabello, intending to go to the gold mines of Guayana, but, being urged to commence business at the point of debarkation, he did so. Some time afterwards he started a printing office on a considerable scale, thereafter translating into Spanish and publishing many of the works of the more noted French authors. In 1846, he married a girl of 14 years, by the name of Teresa Campbell, a child of English parents, who had come to Venezuela at the time of the war of independence. He interested himself in the public and social affairs of Caracas, forming a musical society, which finally constructed the Caracas theater. In January, 1848, he was occupied in the National Congress as a reporter for his politico-literary publications, and it is said had the good fortune to discover a plot against the life of General Monagas. The same year he went to the United States and brought back a complete supply of munitions of war and one or two vessels, fully armed and equipped, arriving at a fortunate time for the Government, which thereafter successfully opposed the then revolution.

Corvaia's fortune went on increasing, his business relations with the Government in 1850 demonstrating this fact. In 1850 and 1851 he represented the Government as its confidential agent in the United States, and in the latter year again brought to Venezuelan waters two completely armed vessels of war. A little later, pursuant to his initiative, there was established the cemetery of foreigners in Caracas. In 1854, he, with some friends, established a packet boat communication between La Guaira and Puerto Cabello; and between 1855 and 1858 instituted the banking establishment known as the "Compañía de Accionistas." With friends, he secured the concession for and installed the electric telegraph throughout the Republic.

After seventeen years of absence from Italy he embarked with his family for Naples, where his mother then lived, with the desire, as it is said, of residing at her side. He was, however, in Naples, we are told, subjected to an insufferable system of espionage, the royal police finally stopping a ball given in his family house to celebrate his return, alleging that such reunions became gatherings of conspirators. He then spent some time visiting various cities of Sicily, presenting his wife to his relatives, who desired him to again inhabit his father's house. The petitioner in this case tells us, however, that notwithstanding the insistence of his Italian relatives, it was not possible for him, with his activity of character, to remain tranquilly in the old peninsula, above all, when he knew that his father was prohibited from entering the kingdom of the Two Sicilies, and he therefore installed himself in Paris.

We have already learned that in 1850 and 1851, Corvaia represented the Government of Venezuela in the United States. It further appears that in 1853, 1854, 1855, and 1856 he was charged by the Government of Venezuela with arranging, in the best manner possible, questions pending between the Governments of England and Venezuela relating to its public debts, loans made since the year 1840, etc.

In the spring of 1856 he was appointed diplomatic agent to Europe, charged particularly with the duty of fostering immigration to Venezuela, and at his suggestion, in the early part of 1857, he was named envoy extraordinary and minister plenipotentiary of Venezuela to various of the courts of Europe, and he continued in this employment certainly as late as the year 1859. In the year last named he presented his letters of recall, but about the same time was charged with the duty of representing Ecuador "*ad honorem*" in Paris as well as other European capitals, some months later receiving a more formal appointment. He appears to have remained in Paris at least the most of the time until about the 1st of July, 1862, when he returned to Venezuela. It is said that in 1864 and 1865 he aided the Government in connection with the making of a loan. Meeting, however, with losses, he opened a house for the sale of letters of exchange. Later he subscribed to a local loan, and on repeated occasions, as we are again informed, he aided the Government by advancements of money. In 1876 and 1877 he went back to Italy to be present at the death of his mother in Naples; his father having died in the year 1860. At that time Corvaia's mother left to the city of Castrogiovanni an income of 6,000 bolivars annually to aid its poor students. He died in August, 1886, at Maiquetia, Venezuela.

In view of the foregoing history, was Corvaia so far an Italian citizen that he personally, during his lifetime, could have successfully maintained before an international commission, controlled, as this must be by the protocols mentioned, a claim for advancements made to or damages suffered from the Government of Venezuela?

Corvaia was a Sicilian by birth, the land of his nativity — the Kingdom of the Two Sicilies — not having been merged into the Italian union until at least October 21, 1860, when the Two Sicilies joined Sardinia, the first Parliament of united Italy assembling in February, 1861. The determination of his nationality must largely, if not altogether, depend upon the code of the Two Sicilies, and invoking one printed in 1842 and at the disposal of the umpire, he finds that in treating of the deprivation of civil rights by the loss of the conditions of citizenship, it (sec. 1, art. 20), provides:

The condition as a national is lost —

1. By naturalization acquired in a foreign country.
2. By the acceptance, not authorized by the Government, of a public employment conferred by a foreign government.
3. Finally, by establishing himself in a foreign country with the intention of never returning.

Entering into commercial business can never be considered as done without the intention of returning.<sup>1</sup>

As a matter of historical interest, although perhaps not of great importance in the determination of this question, there is added in a footnote the Italian code on the same subject, as it existed down to about three years ago.<sup>2</sup>

<sup>1</sup> La qualità di nazionale si perde:

1. Per la naturalizzazione acquistata in paese straniero.
2. Per l'accettazione non autorizzata dal Governo di pubblici impieghi conferiti da un Governo straniero.
3. Finalmente qualunque stabilimento eretto in paese straniero con animo di non più ritornare.

Gli stabilimenti di commercio non potranno giammai considerarsi come formati senza animo di ritornare.

<sup>2</sup> ART. XI. The right of citizenship shall be lost —

1. By him who renounces it by means of a declaration made before the custodian of a civil register, followed by the change of his residence to a foreign country.
2. By him who may have taken up the citizenship of a foreign country.

It appears from the statement of fact above given that Corvaia was in Venezuela diplomatic service as early as 1850, when he was sent to the United States; that in 1853, 1854, and 1855 he occupied confidential and intimate relations with the Government in the adjustment of its financial obligations to foreign powers; that while he doubtless went to Italy in 1855, it was with no settled intention of remaining there, as is manifest from the statement that his activities could find no proper outlet in the old peninsula; that in 1856 he re-entered the Venezuelan public service as the direct and immediate representative and mouthpiece of the Government, under credentials which in terms accredited him to the French Emperor, who, as we further learn, was to give "entire credit to the words of the envoy, whether spoken or written, as the organ of the Government of Venezuela," and so far did he consider himself and his fortune bound up with Venezuela that we find among his papers the draft of a proposed treaty of commerce between Venezuela and the Two Sicilies, which draft, it seems fair to presume, was prepared by himself as the representative of a nation other than that of his nativity. We note in June, 1862, an exchange of letters between Corvaia and the Italian ambassador in Paris concerning a loan which he desired Italy to guarantee for Venezuela on the security of Venezuelan custom-houses. It is true that the letters to and from Corvaia with relation to the latter affair do not recite any representative capacity, but the inference is very strong that at the period named he did represent the Venezuelan Government.

It seems therefore absolutely clear that he lost his Sicilian citizenship long before the union of the Two Sicilies with Sardinia, provided the conduct recited came within the denunciation of the law as constituting acceptance of "public employments" (*publici impieghi*) conferred by a foreign country.

Upon this point we may refer briefly to the opinions of text writers.

Alauzet in "De la Qualité de Français et de la Naturalization," section 35, indicates that by French law acceptance of any public function, administrative or judicial, involves loss of citizenship. (It is to be borne in mind that the corresponding language of the French code is "*Fonctions publiques.*")

Folleville, in his work entitled "La Naturalization," sections 449 and 450, takes the position that a Frenchman can not accept diplomatic functions without losing citizenship, but would permit him to accept a position as consul, as such a position is not a "*fonction diplomatique*" for "*ils ne représentent point le pouvoir exécutif du pays étranger; \* \* \* ils sont en un mot de simple mandataires dans l'intérêt du commerce.*"

Folleville, in section 453, says that in the case of a French physician put by a foreign government at the head of a hospital, the controversy is sharp as to whether he is furnished with a public character, receiving government pay.

One of the final criteria, as given by Folleville, section 454, to be used to arrive at a proper conclusion, is stated as follows:

Le juge doit rechercher de quelle nature, politique ou non, est le lien de subordination qui rattache un Français à un gouvernement étranger.

Contuzzi in "Il Codice Civile nel Rapporti Diritto Internazionale," on page 61, note, says:

3. By him who, without authorization of the Government, may have accepted employment or entered into the military service of a foreign power. The wife and minor children of those who have lost their citizenship shall become foreigners, except in the case of having continued to reside in the Kingdom.

They shall be able, nevertheless, to recover their citizenship in the case and by means of the forms indicated in Article XIV with respect to the wife, and Article VI with respect to the children.

An Italian who, without the permission of the Government, accepts employment of a foreign government or enters into the military service of a foreign power, loses his Italian citizenship (Civil Code, Art. XI, No. 3), but if contemporaneously he does not acquire the citizenship of a foreign state from the government of which he has accepted the employment, or under which he may have entered into the military service, he finds himself without a country.<sup>1</sup>

It seems, therefore, perfectly clear by the French code, by the Italian code as it existed up to three years ago (a change having been made recently), and by the code of Sicily as it existed up to the time of the unification of Italy, that the man who accepted public employment of a diplomatic character lost his ancient citizenship, unless by some affirmative act he thereafter regained it.

As has further appeared from the Sicilian code, the national who has departed without intent to return (save in a certain case in no respect resembling the present) loses his citizenship.

Meanwhile, it is worthy of note that very eminent authorities have reached substantially the conclusions embodied in the Sicilian Civil Code, above referred to, and this without the aid of statutes. In 1873 the President referred certain questions on the subject of citizenship to the Hon. George H. Williams, Attorney-General, whose reply is found in 14 Opinions Attorneys-General, page 295. To the question, "Can an election of expatriation be shown or presumed by an acquisition of domicile in another country with an avowed purpose not to return?" the Attorney-General responded:

Residence in a foreign country and an intent not to return are essential elements of expatriation, but to show complete expatriation as the law now stands it is necessary to show something more than these. Attorney-General Black says (9 Opin., 359) that expatriation includes not only emigration out of one's native country, but naturalization in the country adopted as a future residence.

My opinion, however, is that, in addition to domicile and intent to remain, such expressions or acts as amount to a renunciation of United States citizenship and a willingness to submit to or adopt the obligations of the country in which the person resides, such as accepting public employment, engaging in military services, etc., may be treated by this Government as expatriation without actual naturalization. Naturalization is without doubt the highest but not the only evidence of expatriation.

In the answer to another question touching the intent to return, the Attorney-General said:

When a person avows his purpose to change his residence and acts accordingly, his declarations upon the subject are generally received as satisfactory evidence of his intent, but in the absence of such evidence, the sale of his property and the settling up of his business before emigration or removal of his family, if he has one, arrangements for a continuing place of abode, acquisition of property after removal, the formation of durable business relations, and the lapse of a long period under such circumstances are among the leading considerations from which the intent to make a permanent change of domicile is inferred.

<sup>1</sup> Un italiano, che, senza permesso del Governo, accetta un impiego di un Governo estero od entra al servizio militare di potenza estera, perde la cittadinanza italiana (Cod. Civ., capov. n. 3); ma, si contemporaneamente egli non acquista la cittadinanza dello Stato estero dal cui Governo abbia accettato un impiego, o presso il quale sia entrato a prestare servizio militare, egli trovasi senza patria. La moglie e i figlie minori di un italiano che ha perduto la cittadinanza, perdono anch'essi la cittadinanza italiana alla condizione che non continuino a mantenere la loro residenza nel Regno (Cod. Civ., art. 11, capov., n. 3° alinea); ma, se per questa circostanza non acquistano di pieno diritto la cittadinanza novella del rispettivo marito e padre, essi si trovano già senza patria.

Referring further to the question of abandonment of citizenship by permanent residence abroad, we learn from Moore's Arbitrations (p. 2565) that by the decision of the Spanish-American Commission of 1871 a citizen of the United States who, being of lawful age, leaves the United States and establishes himself in a foreign country without any definite intention to return to the United States is to be considered as having expatriated himself. (For other references similar in character see Van Dyne on Citizenship, pp. 275-278.) The references to American authorities are the stronger since no laws of the United States provide expressly for expatriation.

It will be noted that nearly all of the criteria held to evidence abandonment of original citizenship existed in the Corvaia case. Save when absent in the United States or Europe on official business for Venezuela, or for a period of two or three years for Ecuador, Corvaia appears to have passed forty-eight years of his life in Venezuela, and his last twenty-four years seem to have been uninterruptedly spent in Venezuela, except for a very brief stay in Italy occasioned by his mother's death.<sup>1</sup> The umpire, under the testimony before him, is unable to refer this long residence in Venezuela to any sufficient considerations of ill health or poverty, and he can not ignore the fact that, despite the protests of his family, Corvaia declined the less active life of the Italian peninsula for Venezuela and her service thirty-one years before he died, then passing perhaps only a month or two under the Italian sun.

A further point should not be omitted. We may believe Venezuela knew, as she might well have known, that when Corvaia entered her diplomatic service he abandoned all right to call himself a Sicilian. The Government might properly have hesitated or refused to receive into one of its most important employments a man who would be recognized by his original government as still attached to its interests.

Italy is, therefore, now estopped to claim Corvaia as her citizen, standing in this respect as did the Two Sicilies, and may not say that her laws are made to be broken and have no binding force when assumed interests dictate their disregard.

Another consideration: The umpire is disposed to believe that the man who accepts, without the express permission of his own government and against the positive inhibitions of her laws, public and confidential employment from another nation is himself estopped from reverting to his prior condition to the prejudice of the country whose interests he has adopted.

The umpire does not ignore the conclusion reached in the Giordana case, which recognized as still an Italian a poor man who had spent but a few years in Venezuela, and who had for a year or so occupied an extremely minor position, not connected with the administration of the laws of Venezuela or being in any way representative. The umpire in that case was disposed to go as far as was permitted to him, and perhaps too far, considering the fuller examination of authorities now possible, to sustain the equitable claim of this man, who in a political sense was not more important to the government than a day laborer, virtually following the suggestion of Folleville, section 454, above cited, that —

*Le juge doit rechercher de quelle nature, politique ou non, est le lien de subordination qui rattache un Français à un gouvernement étranger,*

and he found no political bond of subordination.

<sup>1</sup> The expediente is not very complete as to the relative portions of his later years he spent in Venezuela and abroad. (Note by umpire.)

Did Corvaia ever regain the Sicilian citizenship lost by him by virtue of his public employment in Venezuela? The Sicilian law provided that:

The national who has lost his status as a citizen can always regain it by entering into the Kingdom, with the approval of the Government, and declaring that he has returned to establish himself there, and by renouncing whatever position may be contrary to the law of the Kingdom.<sup>1</sup>

The Italian code is quite similar in character and provides as follows:

ART. XIII. The citizen who may have lost his right by any one of the causes set forth in Article XI may recover them:

1. By his return to Italy, with the special permission of the Government.
2. By renouncing the citizenship or civil or military employment which he may have accepted in a foreign country.
3. By the declaration made before the custodian of the civil register to fix his domicile within the Kingdom, provided always that he carry out this intention within the term of one year.<sup>2</sup>

Contuzzi treats these three provisions of the Italian code as cumulative, as they plainly are under the Sicilian code, and there is nothing before this Commission to show either:

(a) That Corvaia returned to Italy with the special permission of the Government.

(b) That he renounced the foreign citizenship. (He held foreign office, both before and after his visit to Italy in 1858, and his renunciation does not appear to have been of the voluntary character apparently contemplated by the section.)

(c) That he declared before the custodian of the civil register that he was about to take up his residence or that he did in reality establish his domicile in the Kingdom within one year.

We have therefore the case of a man who had definitely lost and who never regained his citizenship.

The umpire can not believe, therefore, that Fortunato Corvaia during his lifetime could have presented this reclamation as an Italian subject.

A second exception presented by the honorable Commissioner for Venezuela relates to the citizenship of some of the heirs of Corvaia, who are said to be Italians, and it is contended that as the claim is not Italian in origin the Commission does not possess jurisdiction over it, even admitting that some of the heirs are now Italian.

On the other hand, it is earnestly insisted that the language of the protocols, referring as it does to "Italian" claims and claims of "Italian subjects," is sufficiently broad to confer the needed jurisdiction upon the Commission.

If the proposition now presented were one of first impression the umpire would approach its study with a strong disposition to recognize the jurisdiction of the Commission over claims which had by regular course of inheritance now become vested in Italian citizens, for he would recognize that to refuse,

<sup>1</sup> Il nazionale che abbia perduto la qualità di nazionale potrà sempre ricuperarla rientrando nel regno coll'approvazione del Governo, e dichiarando di volervisi stabilire e di rinunziare a qualunque distinzione contraria alla legge del regno.

<sup>2</sup> ART. XIII. Il cittadino che ha perduto la cittadinanza per alcuno dei motivi espressi nell' articolo II, la ricupera purchè:

1. Rientri nel regno con permissione speciale del governo;
2. Rinunzi alla cittadinanza straniera all' impiego od al servizio militare accettati in paese estero;

3. Dichiarati davanti l'uffiziale dello stato civile di fissare e fissi realmente entro l'anno il suo domicilio nel regno.

to illustrate, jurisdiction in a French commission because a claim, although French in origin, was now owned by Italian citizens, and to refuse jurisdiction over the same claim in the Italian Commission because, although now Italian in ownership, it was French in origin, would be to perpetrate an injustice. The umpire does not, however, find himself free. A long course of arbitral decisions has emphasized the fact that the claim must be both Italian in origin and Italian in ownership before it can be recognized by an Italian Commission.<sup>1</sup> (See Moore's Arbitrations, pp. 1353, 2254, 2753, 2757.)

Knowledge of this condition induced the signers of the American protocol to arrange its language to the end that certain claims, British in origin but now American in ownership, might be presented before the American Commission.<sup>2</sup>

In the discussion of this case it was urged upon the umpire that the presence of the "most-favored-nation" clause contained in article VIII of the protocol should be so construed as to give to Italy all the advantages which might be claimed by American citizens under the American protocol. The umpire discussed so fully in the Sambiaggio case<sup>3</sup> the effect of the favored-nation clause as contained in the protocol, pointing out that it was plainly designed to refer to claims thereafter to originate, that he is unable to accept the suggestion now under consideration.

The exception, therefore, of jurisdiction of this Commission over the claims of those who are now Italian citizens must be sustained, but without prejudice to the rights of any of the claimants to claim against Venezuela before any court or commission which may have suitable jurisdiction, or to take such other action as they may be advised.

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DE CARO CASE

(By the Umpire:)

A paper blockade or blockade by proclamation is illegal, and a country declaring it accepts the legal consequences.

Damages refused for acts of unsuccessful revolutionists (following Sambiaggio case).<sup>4</sup> Under Venezuelan law duties can not be collected on exportations of Venezuelan products.

Commission can not correct abuse of process in judicial proceedings which have been closed and in which the claimant might have directly applied to the court for relief, but did not.

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

Daniele De Caro, an Italian citizen and wealthy merchant of Barcelona, claims:

1. For interruption of his import trade by the ineffective blockade of the port of Guanta decreed by the Venezuelan Government, 47,719.30 bolivars.

2. For interruption of his export trade under identical circumstances, 13,807.03 bolivars.

3. For duties on exportations illegally collected by the authorities of the State of Barcelona, 10,595.47 bolivars.

4. For forced loans exacted of the claimant by Gen. Paolo Guzmán, of the

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<sup>1</sup> See extensive discussion of this subject in the opinion of Umpire Plumley in the Stevenson case, vol. IX of these Reports, p. 494.

<sup>2</sup> See opinion of Umpire Barge in the Orinoco Steamship Co. case, vol. IX of these Reports, p. 191.

<sup>3</sup> See *supra*, p. 499.

<sup>4</sup> *Supra*, p. 499.

” Libertadora ” revolution, and Giuseppe Antonio Velutini, of the Government, 19,766.40 bolivars, plus interest on same 2,371.96 bolivars.

5. For damages arising from the seizure of 5,000 hides ready for shipment, 12,972 bolivars, including the expenses for obtaining the release of said hides.

6. For interest paid and interest lost on the amounts of 40,000 and 140,000, at 6 per cent for one year, 10,800 bolivars.

The claimant therefore considers himself entitled in all to an indemnity of 118,032.16 bolivars.

Let us examine in detail if and to what extent this claim may be received under its various heads as presented.

As a rule, damages which appear to be the direct consequences of an unlawful measure should be indemnified.

Such was, in the opinion of the writer because contrary to the principles of international law, the blockade of the port of Guanta and of other ports of the Republic decreed by the Venezuelan Government but not effective — a fact well known and which is established by a document annexed to the claim. (See the certificate of February 10, 1903, of the chief officer of that port and locality.)

The illegality and nullity of a blockade decreed but not enforced, even in the case of civil war, is a question that has often been discussed and that has been decided in previous cases in the sense here affirmed. (See Wharton's Digest of Intern. Law, par. 361; Lawrence in a note on Wheaton, Part IV, chap. 3; Moore on Arbitration, pp. 3404-3406; idem., 3790-3793.)

In the particular case of this claimant it might at first seem that there is a contradiction of fact, because while, on the one hand, he declares and proves that the blockade of the port of Guanta was not effective, he, on the other, seeks to recover because he was prevented from receiving or shipping goods during the same period. But it will be seen that the contradiction is only apparent when it is considered that the hindrance was caused by the execution of an order given to the consuls of the Republic at New York and Amsterdam not to permit the certification of bills of lading of goods for said port of Guanta, which, of course, rendered their shipment impossible and interfered with the regular stoppages of steamers formerly calling there, thus bringing business to a standstill.

There remains, however, to be determined whether the amount claimed by De Caro, because of his not having been able to import merchandise during the period from August 10, 1902, to April 12, 1903, 47,719.30 bolivars, may properly be allowed.

The claimant establishes his account on the following basis: In the first seven months of 1902 he imported goods from abroad on which he paid 87,590.71 bolivars of custom-house, maritime, and territorial duties. This assertion is proved by the list which appears on page 22 of the claim, authenticated by the declaration of the chief customs officer of the port of Guanta, dated April 30, 1903. In order to exclude any doubt that might arise as to the connection between these two documents, the honorable umpire will deign to note that the sum of 19,835.44 bolivars, indicated by the above-mentioned customs officer, is produced by the addition of 15,868.35 bolivars paid by the claimant on August 2, 1902, on goods imported per steamer *Prins Willem I*, and 25 per cent thereof collected as “ territorial duty.”

The claimant affirms, besides, that the customs duties represent approximately one-half the value of the goods, and that the presumptive gain of the merchant is 12 per cent gross on the amount of value of goods imported.

As to the second of these assertions, it may be considered correct, inasmuch as a gain of 12 per cent gross on imported goods is not excessive. With regard

to the first assertion, its accuracy may be determined by comparing the sum of duties collected by the custom-house at Guanta on the goods received by the claimant per steamers *Prins Frederik Hendrik*, *Prins Willem V*, and *Prins Willem III*, on February 18, March 1, and April 16, respectively, from New York and Hamburg, i.e., 16,876.86 bolivars, with the amount of the value of the goods themselves (see doc. "M," pp. 7-8, and doc. "N," both legalized), which is 32,257.04 bolivars.

On this basis the claimant, who paid in the first seven months of 1902 for goods from abroad 87,590.71 bolivars, found himself in possession of foreign products to the amount of triple the value of the sum named, or 262,762.13 bolivars.

The profits would have been, according to the calculation of claimant, 31,532.12 bolivars, or 4,504.66 bolivars per month. He affirms that the ineffective blockade lasted about eleven months, and the loss in consequence is estimated by him at 49,551.28 bolivars, from which sum must be subtracted 1,831.98 bolivars profit on a small quantity of merchandise which it was possible to land in the second half of December at Guanta from the steamers *Prins Willem IV* and *Prins Willem V*, which had been compelled, from August of the same year, to deposit them (the goods) at Curaçao and Trinidad, afterwards availing themselves of the ineffectual condition of the blockade to reship them to their actual destination.

It is to be observed that these goods had been passed upon by the Venezuelan consulate in Amsterdam before the declaration of the blockade. The calculations made by the claimant seem to the writer to be susceptible of modification as to fact, but acceptable as to principle.

If, on the one hand, an indemnity is due the claimant, on the other we can not take into account the period of duration of the blockade of the allied powers, nor of other brief periods, as he has done, during which commercial traffic was impossible, either because of the notice of the raising of the blockade not having been published abroad, or because of lack of sufficient time for the sailing of steamers from Europe or North America, and the port remaining inactive.

Assuming that the duration of the ineffective Venezuelan blockade was five months, which seems correct, and deducting 1,831.98 bolivars of profit on goods received in December, 1902, it results that the indemnity under this head may be reduced to 20,691.33 bolivars.

Let us now take up the question of damages on account of stoppage of exportation.

In so far as the principle is concerned, the case is identical with the preceding, and it would be useless to indulge in a repetition of the arguments.

In order to justify his demand for an indemnity of 13,707.03 bolivars the claimant bases himself on these facts, to wit: That during the first four months of 1902 (see certificate of United States consular agent in Barcelona, of April 3, 1903) he exported goods to the value of 46,023.70 bolivars, and affirms that he realized a profit of 10 per cent, or 4,602.37 bolivars — a monthly profit of 1,150.59 bolivars. Assuming that this estimate is moderate and fair, the Italian Commissioner must observe that the claimant had full liberty to export his goods, and especially hides, in which he dealt largely, up to the day of the declaration of the blockade, that is to say, to about August 10, 1902, and that therefore his profit of 4,602.37 bolivars should be divided into about eight months instead of four, which would reduce the monthly profit to 575.74 bolivars. On this basis the sum to which he would justly be entitled under this head would not exceed 2,878.70 bolivars for the given period of five months of Venezuelan blockade.

Concerning export duties illegally collected by the governmental authorities

who were Messrs. Briceño Martin (p. 42), Pedro José Adrian (pp. 46 and 48), J. Bello Rodriguez (pp. 110 and 111), H. Calcaño (p. 112), and F. Lopez Baguero (p. 113), for the State of Barcelona, these are amply documented and their illegality is unexceptionally demonstrated by the circular of Gen. José Antonio Velutini (p. 50), Venezuelan ex-minister for the interior. The order therein contained was not made effective by the Government of the Republic, which was fully aware of the abuses complained of by the claimant, but took no steps to abate them, and therefore and thereby assumed full responsibility for their existence. Under this head is claimed the sum of 10,001.05 bolivars, which admits of no reduction, and interest thereon 594.42 bolivars. This interest is calculated at 1 per cent per month, but should be stated at one-fourth or 148.60 bolivars, according to the rule governing interest in this Commission.

The forced loans were imposed by Gen. Paolo Guzmán, of the " Libertadora " revolution, in the sum of 18,779.40 bolivars, and by Generals Velutini and Bravo, of the Government, in the sum of 2,000 bolivars; but the receipt of these latter to the amount of 1,013 bolivars was accepted in payment of export duties, the reimbursement of which forms another part of this claim. Therefore setting aside, and with reservation (accepted by the Italian Commissioner), of the right to recover the amount represented by General Guzmán's receipt, and hence of forced loans imposed by the revolutionists, the claimant asks under this head an indemnity of 987 bolivars.

Let us pass now to the seizure of the 5,000 hides.

The claimant was indebted to the custom-house at Guanta for imports received August 2, 1902, in the sum of 19,835.34 bolivars (see certificate of chief customs officer, pp. 21 and 22 bis). According to the custom rules then in force he had seven days in which to pay this amount. Just at that time, however, both Guanta and Barcelona fell into the hands of the revolutionists, who imposed upon claimant the forced loan of the amount above mentioned.

After November 25, 1902, and the recapture of Guanta and Barcelona by the federal troops, the Governmental authorities insisted that claimant pay again the sum indicated for duty on imports, which he refused to do. Thereupon the judge of hacienda ordered as a guarantee of payment the seizure of the 5,000 hides in question and which were in his storehouses in Barcelona. Claimant states their value to have been in Guanta or New York 120,000 bolivars. He subsequently obtained the release of the hides by a " resolution " of the minister of hacienda (p. 105) of December 22, 1902, giving satisfactory guarantee for the payment of the sum claimed, but afterwards compromising with the Government on payment of 9,917.72 bolivars — i.e., half the sum originally claimed.

This transaction took place before the honorable umpire ordered, by his decision in the Guastini case, the refundment of duty collected by the Government after the same had already been collected by the authorities of the revolution. But the claimant does not ask the repayment to him of said duties in view of the intervening transaction (see doc. " O " and particularly the marginal note in red ink), which, however prejudicial to his interests, he will respect. The Italian Commissioner has here given this detailed statement solely to clear up the antecedents of the claim for the seizure of the hides. According to Venezuelan commercial laws actually in force, a judge may not, for the purpose of securing the payment of any given sum, confiscate goods in excess of said sum, plus the requisite judicial costs.

It is customary that the goods seized shall not exceed double the amount sought, the excess to this extent being considered sufficient to cover the costs mentioned.

In this case the judge of hacienda, to insure a payment of 19,835.44 bolivars, ordered the seizure of 5,000 hides, worth, according to estimate of the claimant, more than six times the sum claimed, and therefore three times more than he was allowed by law and custom to seize. The measure was consequently illegal in a double sense, in that the claimant was required to pay the same duties a second time, and in that the judge had largely exceeded the proper amount of the seizure.

It is true that on December 22, 1902, the hides were released, but on account of the closing of the port of Guanta they could not be exported until after the raising of the blockade, or next April, whereas had the judge kept within the legal limits in his seizure, the claimant might have been able to ship a part of his goods on the steamers *Prins Willem IV* and *Prins Willem V*, which touched at Guanta from the 17th to the 30th of December, 1902.

It will be observed that the notice of the release of the hides on the condition of furnishing a guarantee could not reach Barcelona until a considerable time after the close of the year, on account of the interruption of all telegraphic and postal communications, which explains why the guarantee was not furnished until April 20. (See doc. O.)

Now, it being well known that hides which are not shipped at the proper time lose in weight, and that they are sold by weight, it follows that they lose in value. This loss is by the claimant put at 6,992 bolivars. It is to be noted, also, that on the hides remaining unshipped an increase of duty was laid under the guise of a "war tax," which may be considered a further result of the illegal act of the judge above referred to, as was also the expense incurred in sending one of his employees, one Antonio Vestri, as ascertained by the writer, to Caracas for the purpose of obtaining an order for the release of the hides mentioned. This it required a month to accomplish; but in consequence of the then disturbed condition of the country, three months elapsed before Vestri could safely return to Barcelona. Summing up, the claimant, from these various losses in connection with the seizure of his hides, considers himself entitled to an indemnity of 12,972 bolivars; but the Italian Commissioner, while admitting the equity of the principle involved in the demand for such indemnity, holds that it should be reduced, as shown in the following considerations:

The value of the hides as stated by the claimant seems exaggerated; according to impartial and exact information this should not exceed 100,000 bolivars. The action of the judge of hacienda can not be called into question except in so far as it exceeded law and custom in going beyond the limits of two-fifths of the goods seized. The indemnity claimed under this head should be reduced to three-fifths, or 7,783.50 bolivars.

The last motive for demand of indemnity by the claimant is based on the fact that, not having been able to sell his 5,000 hides at an opportune moment, he was, in the first place, not able to meet certain obligations toward his correspondents (in proof of which see his account current, pp. 96-100), and thereby was charged for sums of accrued interest; and in the second place was prevented from profiting by the sale of the hides valued by him at 120,000 bolivars, and by another sum of 20,000 bolivars for a certain lot of hides which he affirms he was prevented from exporting on account of the blockade.

The Italian Commissioner holds the first of these demands justified, but considers the second deficient in proof. He therefore believes that under this head there should be awarded an indemnity of 2,400 bolivars.

Recapitulating, while having in view the decisions of the honorable umpire, and reserving the right of the claimant to indemnity for injuries inflicted by the revolutionists, the Italian Commissioner is of opinion that the present

claim should be allowed in the aggregate amount of 42,490.18 bolivars, with interest thereon from the date of the introduction of the claim to the Commission to the 31st of December of the year last past.

ZULOAGA, *Commissioner* :

This individual claims certain amounts for injuries which he says he suffered, because in accordance with the decree of the Government blockading the port of Guanta, which according to his statement was not effective, he could not carry on exporting and importing. The time referred to is from August 3 to November 25, during which the revolutionists occupied Guanta, and later, from February 16, 1903, to April 12, 1903, when they were also occupying it. The claimant also makes demand for the time of the blockade of the allied powers, but the Italian legation does not support this part of the claim. The time fixed, therefore, is about five months.

The damages asked are the unrealized profits in mercantile operations which he imagined or satisfied himself he could have made, in accordance with calculations based on the former course of his business. From these calculations it will at once be seen that they attempt to compare a period of tranquillity and peace with another completely disturbed, during which a revolutionary government was in force, which in accordance with the statement of the claimant himself was one of violence and arbitrariness of every kind; that from the 5th to the 10th of August, 1902, in the city of Barcelona, a disastrous and fatal struggle took place, by virtue of which almost all the inhabitants were ruined; that under these conditions it is not credible that Caro could have thought of making extensive importations, nor could he have had anything to export; that if Caro suffered because of the suspension of his business during this period of disturbances, on the other hand, the legitimate authorities having been reestablished, the subsequent importations and exportations must have been greater because of this suspension and the one thing compensated the other.

This with respect to the amount of the claim, since with respect to its juridic validity, it is my opinion that the Government of Venezuela had a right to prohibit commerce with these revolutionary ports, especially when the vessels that carried on the commerce also touched at other Venezuelan ports; that the observation to the effect that the Government, not holding actual sovereignty over these places in revolution, it could not oppose commerce with them, is not conclusive as to this claim, since, if it could treat them like the enemy's country, I do not see why the inhabitants of that territory could not have taken direct action against it because of this treatment.

I reject this portion of the claim, not only in fact but also in law.

De Caro claims 8,876 bolivars (p. 38) for duties on exportation paid for hides and pelts, according to a receipt which he presents (pp. 42, 46, 48), which could not be collected, because they were unconstitutional, and he demands, moreover, interest on these sums. It is true that the collections of these duties is unconstitutional, but the law gives a right to the citizens to go before the court and denounce as unconstitutional the decree which levies them, in order that it may not continue in force. Besides, in reality, in the course of the transaction the merchant computes the duty in his calculations and it does not fall on him, either because the article (the hides in this case) are bought cheaper from the producer, or because they are sold at a higher price. There is, therefore, no direct damage. I reject this claim.

De Caro, moreover, claims 19,766.40 bolivars for loans to the revolution and the Government. They are not recoverable, except those made to the officers of the Government amounting to 987 bolivars, besides interest from the 24th of October, the date of the presentation of the claim.

He claims 12,972 bolivars more for the expenses of an injunction proceeding which the judge of the hacienda brought against him, in a suit which he prosecuted through the government attorney, for failure to pay certain export duties, the claimant maintaining that the attachment was illegal. The affair terminated, as appears, by an agreement between the government attorney and De Caro. It is, therefore, a completed transaction, and it is not for this Commission to review the provisional decisions which the judge may have rendered in the suit. The statement of De Caro that it was not possible to lay an attachment on his hides, the value of which was much more than twice the amount claimed (which does not appear), is not true either. The judge could have issued the attachment, and he, proving the value of the goods attached, could demand that it be limited to double the value of the amount claimed. I reject the claim.

M. De Caro wishes that there be paid him interest on the sums which he owed his creditors. I reject the claim.

RALSTON, *Umpire*:

The above entitled claim was duly referred to the umpire upon difference of opinion between the honorable Commissioners for Italy and Venezuela.

It appears from the expediente in this case that for many years past the claimant, De Caro, a subject of Italy, has resided in Barcelona, Venezuela.

His first demand is for the sum of 47,719.30 bolivars, for injury to his business consequent upon the paper blockade of Guanta (the port of Barcelona), proclaimed in August, 1902, Guanta then being in the possession of revolutionists. The amount of this claim is, by the honorable Commissioner for Italy, for various reasons not necessary to the discussion, reduced to 20,691.33 bolivars. The claim evidentially is only supported by proof of the fact that in October, 1902, the claimant ordered from Neuss, Heslein & Co., of New York, a cargo of kerosene, rice, flour, etc., the value of which is not stated, but which the firm in question refused to forward, assigning as the reason that the consul-general of Venezuela at New York would not authenticate invoices for Guanta; the firm, however, promising that as soon as affairs should take a favorable turn and the port be opened, it would forward cargoes. In exchange for the goods above referred to, the claimant proposed to ship 6,000 hides and 150 packages of skins.

Some proof is offered for the purpose of showing the amount paid in the shape of duties upon importations made by De Caro during the seven preceding months, as well as the value of such importations, and the probable profit thereon is calculated at the rate of 12 per cent; the Commission being asked to accept the theory that but for the blockade, De Caro's importations would have been, during the months it lasted, of the same average amount, with the profits calculated as indicated.

A further branch of the claim, which is for the interruption of the claimant's export trade because of the paper blockade, and for which he asks 13,807.03 bolivars (this amount being reached by a similar course of reasoning), may be considered in this connection.

That a noneffective or paper blockade is illegal, and can not constitute the foundation of rights on the part of the government declaring it, but may create liabilities against such government, is well established; many of the authorities demonstrating this position being collected in the opinion of Plumley, umpire of the British-Venezuelan Mixed Claims Commission in the case of *Compagnie Générale des Asphaltes de France*.<sup>1</sup>

<sup>1</sup> See vol. IX of these Reports, p. 390, and *infra*, p. 665 and note.

Illustrations of this doctrine in principle, suggestive of the one now under consideration, will be found in the cases of the *Boyne* and the *Monmouth*, cited in Moore's Arbitrations, page 3923, and it remains only for the umpire to apply it.

The umpire can not accept the idea that the claimant is entitled to average business profits for the months of the blockade, reckoned upon possible importations and exportations and based upon the imports and exports for any preceding period, as he would be compelled to ignore the fact that during a large part of the time of the noneffective blockade there was continuous fighting in and about Guanta and Barcelona. Historically, he notes that on the night of August 9, 1902, Barcelona was taken from the Government by troops of the revolution and new civil authorities named by them; that on November 26, 1902, Barcelona was reoccupied by the Government; that on February 17, 1903, the governmental forces retired, and on February 19, 1903, the revolutionists took possession of the town, retaining such possession until after a bloody conflict, lasting from April 5 to 10, they were ejected. The above account takes no note of frequent skirmishes. To assume business profits for such a period at all analogous to those obtained during the time of business quiet would be to grossly violate the probabilities of the situation. It is not to be supposed that during a period of destitution, plundering, and destruction of all sorts De Caro would have successfully carried on any business whatsoever.

The umpire, therefore, finds it impossible to accord to the claimant any profits, even upon the goods he ordered from Neuss, Heslein & Co., and these are the only goods that the proof shows were ordered at all by De Caro from abroad during the time in question. He would find difficulty in awarding, even under favorable circumstances, speculative profits upon goods which had never been forwarded to or received by the claimant.

The situation as to the 6,000 hides and 150 packages of pelts proposed by De Caro to be exchanged for the goods in question, is somewhat different. He was entitled to sell or exchange these goods without interference and he had the opportunity of doing so. This opportunity was lost and he was not able to sell or exchange them until many months after. He is entitled to the difference, as nearly as it can be estimated, between the value of the goods in October, 1902, and their value at the time of the final sale, plus charges for taking care of them in the meanwhile. The amount of this difference and of these charges is not clearly proved in the testimony submitted, but by reference to the testimony connected with a later item of De Caro's claim it may be approximately ascertained. By calculation we find that the probable loss in value of the hides were 8,390.40 bolivars, and there was paid out by him on account of interest, which we may regard as a carrying charge, 2,400 bolivars, making a total of 10,790.40 bolivars.

Another head of plaintiff's claim relates to certain forced loans executed by the revolutionary and governmental generals. For reasons sufficiently discussed in the *Sambiaggio*<sup>1</sup> and other cases, the Government can not be held responsible for loans exacted by revolutionists, but is responsible for loans required by General Velutini, and this exaction, deducting for "vales" duly received and accepted by the Government, amounted to the net sum of 987 bolivars, for which an award must be made.

A further head of the claim is for taxes on exportations. This tax was exacted in direct violation of the provisions of the constitution of Venezuela, which in the second title "Bases de la Unión," article 6, reads as follows:

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<sup>1</sup> See *supra*, p. 499.

ART. 6°. Los Estados que forman la Unión Venezolana son autónomos é iguales en entidad política, y se obligan: \* \* \*

ART. 11°. A no imponer contribuciones sobre los productos nacionales destinados á la exportación.

A full allowance must therefore be made for taxes so collected, and these amount to 8,876.17 bolivars.

An additional claim arises from the seizure of 5,000 hides (apparently the larger part of the hides whose exportation was prevented as above described), and the circumstances with relation thereto may be detailed as follows:

Claimant was indebted on August 2, 1902, to the custom-house at Guanta in the sum of 19,835.34 bolivars, and had seven days within which to pay this amount. By the 10th of the month Guanta and Barcelona both fell into the hands of the revolutionists, and the claimant was required to pay this sum to them. After the capture of Guanta and Barcelona by the Government, its authorities insisted that the claimant should again pay the sum indicated for duty on imports, which he refused to do. The judge of hacienda thereupon directed the seizure of 5,000 hides as a guarantee of its payment. These hides were said to have been of the value of 120,000 bolivars. Subsequently, upon his giving satisfactory security, the hides were released and at a later time the Government compromised with the claimant, he paying 9,917.72 bolivars, being one-half the sum originally claimed. It is now contended on behalf of the claimant that even if the action of the Government had been entirely legal, the judge should not have directed the seizure of property in excess of twice the amount of the Government's claim, and that, having directed the seizure of property, worth five or six times the amount of the claim, the Government should be held responsible for any loss attendant upon the embargo of the excess amount, and it is also contended by the claimant that he was compelled, because of the seizure of the property, to borrow money at a high rate of interest, which borrowing would not have been necessary had the judge of hacienda acted within the usual limits of his authority. Furthermore, it is said that the hides, because of the delay, became less valuable, and the Government should be charged with the difference in value consequent upon the delay.

The umpire has already sufficiently indicated in the Guastini case<sup>1</sup> his strong conviction that when taxes had been once collected by a de facto government, the government de jure could not enforce a second payment, and but for the compromise between the Government and De Caro, which compromise antedated his decision in the case referred to, he would have no difficulty in awarding to the claimant any sum he might have paid on this behalf, but, as is admitted by the honorable Commissioner for Italy, it is now impossible for him to reopen this matter. He feels compelled to regard the compromise as a complete and final settlement of any issue growing out of the acts to which the compromise related, whether such issue had reference to the original dispute or the proceedings taken to enforce the original claim. He can not recognize that De Caro accepted the benefit of the compromise of the original claim and at the same time reserved a right of action for steps taken to enforce it.

While the terms of the compromise entered into between De Caro and the Government do not appear at length in the record, we may believe that both parties considered that the dispute, with all the attendant consequences, was at an end when 50 per cent of the original claim was paid by De Caro.

The claim for moneys necessarily borrowed has apparently been allowed under another head, and as the hides were only detained from December 1 to December 22, 1902, it would under this heading call for little attention. Besides,

<sup>1</sup> Page 561.

if De Caro believed that the judge of hacienda had directed the seizure of an excessive amount of property, he had the right under the code of civil procedure of Venezuela to appeal to the court for the release of the excess, in this respect enjoying the remedy to which he would be entitled under similar circumstances in a common-law country. It does not appear that he availed himself of his rights, and it is not within the power of this umpire to grant damages to a claimant who, by a seasonable reliance upon his rights in a case in court, might have suitably protected himself. Certainly before he can appeal to an international tribunal, the suit in court having long since terminated, he should be prepared to show some actual denial of justice with relation to the subject-matter of his appeal.

A sentence will therefore be ordered in favor of De Caro in the sum of 21,788.62 bolivars, with two months' interest to December 31, 1903, at the rate of 3 per cent per annum.

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#### MARTINI CASE

(By the Umpire):

The right of the sovereign power to submit all claims of its citizens to a mixed commission is superior to any attempt on the part of a subject or citizen to contract away such right in advance.

This Commission is, as between Venezuela and Italy, substituted for all national forums which, with or without contract, might have had jurisdiction over the subject-matter.<sup>1</sup>

Venezuela is responsible for attempts to enlist in her armies, in violation of her contract, Venezuelans employed by the claimant, and also for interference with foreign workmen employed by the claimant.

Venezuela is responsible for profits which claimant might have obtained had she not broken her contract where such profits are not uncertain or remote, or where it may reasonably be presumed they were within the intent and understanding of the parties when it was entered into.

Where the damage is continuous in its nature, an award may be made covering the loss up to the date of such award, although, under other circumstances, it seems damages after August 9, 1903, the last date for the presentation of claims, would not be recoverable.

A contract is to be interpreted in the light of the surrounding circumstances, and the port of Guanta being open to foreign commerce at the time the contract was signed, and such condition being a material element in the value of the contract, the government is responsible for damage incident to its subsequent closure by executive order.

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

In the memorial presented by the firm, at page 68, are enumerated the various items that the claim is composed of, and it is here proper to explain and sum them up.

(a) Thefts. Detailed at pages 72 and 73, and they amount to 9,104 bolivars. The proofs are to be found at fascicle B.

The firm call attention to the fact that it has not been possible to furnish proofs for some of these, because at the time of the taking the station master at Guanta, Marsilio Catelli had gone to Italy (December, 1902), but the more important amount of 8,334 bolivars is supported by the testimony of witnesses. It is to be noted at the outset that the firm relinquish their right to the sum of 750 bolivars because of the possibility that this sum may have formed a portion

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<sup>1</sup> See note attached to this opinion on p. 664.

of the indemnity awarded to A. Bonnon by the French Commission, which granted his claim in the sum of 6,000 bolivars for damages caused for the most part by revolutionists.

(b) Requisitions. At page 72 of the memorial is indicated the total amount requisitioned in different ways by General Marcano, of the Government, to the sum of 60,600, and the corresponding documents are in fascicle C. The firm, however, renounce all right to the repayment of this money, as they have explicitly declared to the writer, since the same is included in the account between the Venezuelan Government and the firm in compensation of the annual payment due the former by the latter. On this point it will be well to forestall a possible objection. From original documents shown by the honorable Commissioner for Venezuela, copies of some of which had already been presented by the firm (see fascicle N), it appears that Engineer Lanzoni, in the name of the firm, declared, under date of September 6, 1900, that in view of certain concessions obtained from the President of the Republic the firm renounced whatsoever claim they might have at that time against the Government. But on examining the previous correspondence, and especially the firm's letter of May 23, 1900, the original of which might be produced by the Government, it appears that among said claims therein enumerated in detail Lanzoni had not included the recovery of the requisitions of Marcano, which at that time did not possess the character of a claim, and the interested parties could not therefore regard it as such, since it was their intention to include it in the account with the Government, as was, in fact, done.

Such inclusion was foreseen, agreed to, and, so to speak, authorized by Marcano himself, as may be seen by the sentence in his own hand, contained in the receipts dated September 30 and October 15, 1899, which states that

dicha suma será pagada con las pensiones que deben satisfacer dichos señores al Gobierno Nacional por arrendamiento de la Empresa ya mencionada.

It is clear, therefore, that not only had the firm no interest in making this credit the subject of a claim, but that they were exercising an already recognized right when they inscribed it in the account current as a part of the rent for the mines.

On the other hand it could not be explained why Lanzoni, Martini & Co. were induced to abandon a credit of 60,600 bolivars for a compensation of 52,000 bolivars, which sum represented the reduction to one-half of the yearly rent, while this advantage, which the Government was according, finds a sufficient *raison d'être* in the renunciation of the other items mentioned in said letter.

From all this it appears that the credit on account of requisitions or loans enforced by Marcano, although anterior to September 6, 1900, was not an object of the transaction, and it is therefore equitable that it should figure as a partial discharge of the annual obligation owed by the firm to the Venezuelan Government.

It is moreover just that the sum of these credits be taken into account, since they are all supported by documents in the most unexceptionable manner, and caused, in part, by forced loans exacted for the support of the army, in part by requisitions for animals, and in part for repairs of arms of the troops; that is, for various and distinct items.

A somewhat ambiguous phrase in the Martini memorial — the one which terminates page 71 and begins page 72 — may have induced the honorable Commissioner for Venezuela to doubt that the "vales" had been given as an equivalent of the amount of the invoices ("fatture") signed by Marcano. This doubt, however, will appear wholly unwarranted when it is considered,

first, that the word "vale" was also used by the firm (see p. 72, line 5) to indicate "fatture" or invoices; and second, that the "vales" are of a date prior to that of the "fatture" themselves. Thus is explained the ambiguity of the phrase mentioned, and therefore of the one which reads, "to render his extortions legal, Marcano left receipt with us," and thus is excluded absolutely the idea that "vales" and "fatture" should mean one and the same thing.

(c) Destruction of 5,697 tons of coal stored at Guanta. The details of this fact are found at page 74 et seq. of the memorial, and the corresponding loss is fixed at 256,365 bolivars.

Before entering upon a consideration of this item the Italian Commissioner is in duty bound to call the attention of the honorable umpire to the fact that the Martini Company have acknowledged in effect (as has been stated by Gen. Pablo Guzmán) that 150 tons were excluded from this destruction and were used for and in the service of the railway. The value thereof, 6,750 bolivars, being necessarily subtracted from the previous amount, the firm have reduced this item to 249,615 bolivars. This destruction was ordered by the revolutionary general, and therefore, according to the rules laid down by the honorable umpire, would not in principle be susceptible to indemnity. But it must be observed that had it not been for the ineffective blockade of the port of Guanta the coal which was afterward destroyed might well have been sold, because at that time the strike in the United States had considerably increased both the price and demand (a fact which explains why the firm had fixed the price at 45 bolivars per ton), as will appear from two orders, which are found in fascicle F, and which it was impossible to fill, without adding that, given the agreement made between the firm and Del Buono, the coal could have been consigned to the latter and realized upon at an opportune moment, if the blockade had not prevented.

It must hence be admitted that if the Venezuelan Government had not resorted to this unlawful and, so far as the general interests of business in that section were concerned, injurious measure, and one particularly harsh with regard to the firm, which by reason of their contracts had special rights, the said firm would not have suffered the injury of which they now justly complain.

With regard to this destruction, the Venezuelan Government has submitted written evidence from which it appears that it took place in the presence and with the consent of Engineer Antonio Martini; that the order therefor was issued by Dr. Manuel Rodriguez Armas, formerly the attorney for the firm, and that in order to hasten and facilitate the destruction there were employed tins of petroleum brought there for the purpose by the same train which brought the revolutionary troops thither from Barcelona, as also it is said of Martini, who, it is further alleged, superintended the partial tearing up of the wharf to expedite the dumping of the coal into the sea.

From the evidence adduced it would seem as though the Government were endeavoring to create the impression that the destruction of the coal was the result of a tenebrous and dishonest collusion between General Guzmán and the firm, with the object on the part of the latter of either establishing the basis of a claim for an exaggerated loss, or of disposing at a high price of a quantity of coal of little value and of culm not otherwise merchantable.

Assuming that the coal was equal to that extracted from the mines — that is to say, good — and that the culm which the firm had accumulated in Guanta for the supply of its compressing plant (which reduces the culm to blocks) was not burned, since it could not have been used by the Government vessels, but remained there awaiting more favorable conditions, and was therefore not included in the account of 5,697 tons really destroyed, an examination of

the correspondence had between General Guzmán, then governor of Barcelona, and the firm proves beyond question that the latter not only was not in connivance with the enemy, but sought by all the means at hand to avoid a fact which could not but have most seriously prejudiced it, and which amounted to a disaster, given the very difficult situation to which it had already been reduced.

On being questioned by the writer as to the reasons for his (Martini) being present at the destruction, and as to the accuracy of the evidence submitted by the Government, the claimant furnished such explanations as to establish beyond doubt the inacceptability and the puerility of the counterproof. The Italian Commissioner sums up these explanations in his own words:

The firm has charge, according to its contract, of all the movable and immovable property of the concession, which it is bound to preserve, and which it must render an account of and restore in good condition at the expiration of its term. Having received the order for the destruction of the coal, and exhausted to no purpose all efforts to have same countermanded, the claimant thought very properly that his presence might be useful to the interests of the firm and of the Government as well, since while directing the operations the destruction of the wharf upon which a part of the coal had been deposited might be avoided, as well as of the station, the custom-house, the warehouses and the compressing plant, about which was piled the larger part of the coal, and this sufficiently accounts for his presence there. In order to obviate the complete destruction of the wharf he caused openings to be made in the flooring thereof that the coal might the more readily be thrown therefrom into the water, and in order that this might be done in the least injurious manner he furnished the troops with the necessary tools from the company's own stock — a circumstance which he fully explains, while the evidence furnished by the Government makes no mention of it. In order to secure from the troops a certain amount of good will and obedience he offered them rum, and this detail is likewise passed over in silence. The claimant admits that, generally speaking, the narration of events in that document is correct, but calls attention to the fact that they have been set forth in a somewhat disingenuous and biased manner. Judging from the attempt to impute a false and absurd meaning to the presence of Martini at the destruction mentioned, it may be noted that while it is true that De Armas had been the attorney for the firm he certainly was not aiding them at this time, when, as secretary-general of the State of Barcelona, and therefore of the existing Government, he was transmitting the order for the destruction of the coal. This would seem to fully account for *his* presence at the place and time of this unfortunate occurrence.

It is not true that Martini arrived at Guanta with the troops and on the same train, because on being informed of the order by telephone he took a trolley in all haste from Barcelona and arrived fully a hour after the troops had reached the scene of operations. He does not, however, attach any importance to the assertion that he came on the same train with the troops; it might have been better had he been able to do so, for then some of the damage might have been prevented.

The reasons for his presence in Guanta are so obvious that had he remained in Barcelona he might properly be charged with having been negligent. With regard to the coal oil, the evidence seems to imply that it was furnished by the firm, because it came on the train with the troops, and as alleged, with the claimant. This is not true. The oil was not supplied by Martini & Co. But suppose it had been; what then? Since the order had been issued and could not be rescinded the sooner the destruction was accomplished, and the less dangerous the points at which the fire was applied, the better for the surrounding

buildings. But what he does explicitly deny is that his presence should have been due to wrong motives, or that he was so inexperienced as to burn his property in the hope of subsequently obtaining an indemnity therefor, which, had it not been for the blockade of the powers, there was not the slightest chance of his getting, and which, based as it is in part on the question of revolutionary damages, may possibly not be agreed to in this Commission, notwithstanding the blockade and the provisions of the Washington protocol.

(d) Damages to shops and materials. The particulars in regard to this item are found at pages 79 et seq., and the amount of indemnity claimed therefor is 1,500 bolivars. The corresponding documents are in fascicle B, and are substantiated by the evidence of witnesses. In consideration of the small sum involved it is not deemed necessary to enter into a more detailed exposition.

(e) For violence and offenses to persons, amply set forth at pages 84 et seq. of the memorial and established by testimony and various documents, an indemnity of 500,000 bolivars is claimed.

It seems to the writer more appropriate that any indemnity allowed under this head be included in the sum total awarded by the honorable umpire to the firm. The firm of Martini & Co. claim, as reparation for the violence and offenses above referred to and as an indemnity for damages occasioned by the nonobservance by the Venezuelan Government of the agreements made with the firm — collected under three heads, according to the principles sanctioned by the Italian law in matters of renting (see arts. 1575 and 1579 of the civil code) and analogous to those admitted by the Venezuelan civil code, which are:

I. Change in the thing rented and failure to preserve same to the use for which it was intended.

II. Nonobservance of the special obligations of the contract.

III. Nonobservance of the guaranty of the pacific enjoyment of the thing located —

an indemnity amounting in all to 8,737,396.34 bolivars, which is believed to correspond to the sum of resulting damages, comprising those occasioned by the suit of Del Buono and the loss of future profits; that is, of those which the concessions of the mines and their operation would have enabled the firm to realize if their activity had been allowed free and peaceful development.

Before discussing this question of demand for indemnity it would be well to point out the value of two documents submitted by the Venezuelan Government to the examination of this Commission, to wit, the report of the consul of the Republic at Genoa, of August 13, 1903, and the partial account rendered by the custom-house authorities at Guanta of the coal exported by the firm during a period of ten months.

From the first of these two documents we learn that the functionary by whom it was compiled acknowledges that Mr. Pilade Del Buono, the moneyed partner of the firm, "an intelligent, active man with great ideas," has invested "large sums in the exploitation of the mines," and that this affair may be the "source of riches, not only for the contractors, but for the country as well," and that the firm, "by reason of the war, were compelled to suspend their operations and discharge their workmen."

This is precisely what Martini & Co. affirm, and these data enumerated by the consul figure among those on which the claim is based, at least in part. But the conclusions drawn by him from these premises are certainly illogical. He says that it is *evident* that Del Buono has not sufficient capital, even with the aid of his partner, Tonietti, to "undertake such an enterprise as that of the mines, of the railway, and of the port of Guanta."

Whence does he draw this information? If Del Buono, an adept in mining

matters, since he had advantageously superintended those of the island of Elba, is an intelligent man, how could he, without giving evidence of a lack of perspicacity, have dared to undertake an enterprise too great for him?

If he invested a large capital in Guanta, and if to procure other large sums (these are the words of the consular report succinctly) he mortgaged his property, and if he has a partner whose financial resources are unknown to us and presumably to this confidential agent of the Government of the Republic, how can the consul allege the foregoing?

It would appear that the consul's reasoning is not altogether consistent, and we may properly infer instead that Del Buono ceased to advance funds when he became aware that on account of the obstacles confronting him, it would have been sheer folly to continue doing so. This is probably why he no longer had recourse to that credit which, given his competency, his energy, and his economic position, would certainly not have been denied him.

The consul has long sought, and perhaps may still be seeking, the firm's headquarters in Italy. Consulting la Gazette Ufficiale del Regno, No. 167 of 1901, he would have found it, and Del Buono, in bringing his suit against the firm, knew very well where to send the summons. Did the consul suppose that the firm, paralyzed in their operations for nearly two years, were maintaining at Rome and at Partoperraio an office with numerous employees awaiting the resumption of the work in the mines, suspended for reasons already stated? He accuses the firm of an intention to speculate on the Government of Venezuela. If he refers to the future, it is an hypothesis or worse which is not worth discussing. If he refers to the past, it suffices to observe that the firm have so far lost time, money, and labor. "Speculation," in so far as regards the firm, may be excluded from consideration.

Lastly, the oft-quoted functionary formulates this query: "On what do these gentlemen base their claim? On the *reimbursement* of that which they *hoped* to realize, but so far have not realized?"

Exactly; when a contracting party, failing, as in this case, to fulfil the stipulated agreements, arrests or neutralizes the activities of an enterprise to its serious prejudice, the other injured party has a right to demand, not merely an indemnity for the damage actually suffered, and the reimbursement of lost capital, but also the payment of profits which it might justly have realized on the basis of the contract itself.

If the consul had consulted either the Italian or the Venezuelan civil code, he would have seen formulated the principles invoked by the firm and admitted by all tribunals.

Without going further, it must be evident that the report of the consul is only a tissue of puerilities and contradictions.

We come now to the other document, the object of which would be to demonstrate that the firm had produced very little coal, since, dividing the total tonnage of 1,765 into the time during which this amount was exported, the work of extraction appears utterly insignificant. But the document expressly refers to coal *exported*, not to coal *mined*, which changes the conditions of the question.

Let us begin by noting that the firm, precisely on account of the disastrous state of the mines at the time of consignment, were compelled (as appears in the memorial of the firm) to spend much time in the reorganization of the shops etc., foregoing the work of extraction, and that said firm had made no contracts for the delivery of coal until about the last of their dealings with Del Buono, and just at a time when operations were suspended on account of disorders.

What is complained of by the firm is that they were hindered in the manner set forth in the claim from exploiting the mines, as it was to their main interest

to do. It is alleged that in the brief period of peace and activity the firm spent more time in the preparation of the mines and the uncovering of new veins than in extracting coal for commercial purposes. This latter had not more than begun when all operations were paralyzed. So much for a general statement. Let us now come to details and figures.

The firm, by an account current, have reported a total extraction of 14,771 tons, on which a royalty of 7,385.50 bolivars was paid to the Government.

We see how all this agrees perfectly and with all the statements of the firm, as well as with that of the Government.

	<i>Tons</i>		<i>Tons</i>
Total production from the beginning of operations to July 12, 1902, date of suspension of operations, a period of two years and nine months . . .	14,771	Exported, as per custom-house report, Guanta, to September, 10, 1902 . . . . .	1,765
		Sold and consumed by workshops and Barcelona-Guanta railway from September, 1901, to July, 1902 . . . . .	2,735
		Destroyed by the revolutionists in Guanta . . . . .	5,547
		Total . . . . .	10,047
		Difference . . . . .	4,724
Total . . . . .	14,771	Total . . . . .	14,771

Of these 4,724 tons there are, as culm, partly at Guanta and partly at Narical 3,562 tons, more or less, because, after exposure to the elements for two years, a part must have been destroyed by wind and rain, there remains to be accounted for 1,162 tons, as follows:

1. The amount used by the railway and shops since the suspension of operations, i.e., from July, 1902, to the present time.

2. The total consumption of the mining machines during two years and nine months' work, as follows: One boiler for the ventilating apparatus, one hoisting engine, a pump for supplying the village of Narical, and the 120-horsepower boilers used in the compressing plant.

All this is shown by the few documents saved from destruction by troops and included in the papers of the claim, and the depositions of witness (see question No. 6). The firm would agree to submit these statements to any expert in such matters who would visit the spot in order to establish their truth.

The true value of the two documents submitted by the Government being thus determined, let us sum up the reasons in general upon which is based the firm's demand for an indemnity, in order that we may ascertain if and to what extent such demand may be received.

Lanzoni, Martini & Co. at first, and subsequently Martini & Co., invested considerable capital in the mines, as well as their personal energy for nearly five years and their credit — a fundamental element in all enterprises, whether industrial or commercial. The contrary proofs brought before the Commission are not based on severe and dispassionate criticism. The "justificativo" drawn up at the instance of Vittorio Cotta, a presumably not very impartial individual, as he had been employed by the firm but was discharged in 1891, can not only have no value as a counterproof, but should be totally rejected on account of its having been made in the absence of one of the interested parties. But in any case what does it seek to prove? That the firm had some accounts unsettled, and that the members thereof have individual debts — as for instance, one of them owes a bread bill; that the firm sold some cement

and a few utensils — for the purpose of morally discrediting the management.

As regards the sales, it is to be observed, as has already been stated, that if these took place, even in the small amounts mentioned in the document referred to, they were in the nature of a necessity created by the disastrous conditions confronting the firm. As regards the debts, either of the firm or the members thereof, they are not only specifically denied, but constitute in this circumstance an additional support for their claim, and it is well to note that the unsettled accounts to which the document refers are of the period in which every commercial and industrial activity of the firm was paralyzed. Martini & Co. admit having other debts than those mentioned by their ex-employee; were their condition flourishing they would not be counted among the Italian claimants.

A greater importance has, at first sight, the fact that the bill of John Davis was not paid in 1901, as well as the invoice of John Davis & Son; but this is but an isolated instance which it would seem more equitable to attribute to an irregularity arising out of a change in the administration of the company occurring shortly after that time and within the same year, rather than to a lack of funds ever since, or, worse still, to a lack of good faith — things clearly contradicted by numerous circumstances established from the documents of the claim.

Is it possible that a firm which paid in cash, or otherwise compensated for its annual royalty of more than 100,000 bolivars to the local government by equivalent services which it could not have furnished without undergoing heavy expenses; that settled its account with Marcano, amounting to 60,600 bolivars; that promptly met its checks on the house of De Caro, of Barcelona, for more than 400,000 bolivars; that purchased a steamer at a cost of 567,000 bolivars, including the necessary repairs, etc.; that had through the Bank of Venezuela (as it could readily prove were it not that that institution had again and again delayed the rendition of the account) deposited and subsequently employed in the works several hundred thousand bolivars; that had engaged in Europe and transported to Venezuela numerous detachments of workmen; that according to the agreement of March 22, 1902, was indebted to its partner, Del Buono, over 2,000,000 bolivars, evidently employed in the mines, and that by a document found in fascicle O is shown to have expended more than that in the works themselves — that such a firm, we repeat, could have gravely and intentionally jeopardized their credit for the petty sum of £155 sterling? Is it not much more consistent to suppose it to have been due to an oversight as above suggested?

This supposition seems natural enough, even when it is considered that though the firm have a heavy indebtedness of recent contraction, which is the result of the financial disaster into which they have been thrown, they have no known debts whose origin antedates the beginning of their claim to this Commission. It may be observed, incidentally, that the Lanzoni management did not settle with the other partners, in favor of which he withdrew in 1901.

It may be urged that the agreement between Del Buono and the firm, in virtue of which the loan of 2,000,000 bolivars was negotiated was not recorded, and that this fact diminished its value from the point of view of the proofs which have been sought to be deduced therefrom. This objection can not well be raised by the Venezuelan Government, which not only had knowledge of said agreement but agreed to the clauses therein regarding the delivery of coal. In fact, while up to April 12, 1902, the date when the agreement was made known to the Government, the receipts from coal supplies were credited to the firm, those of subsequent deliveries were credited to Del Buono.

The importance of this agreement is besides shown by the citation before

the civil tribunal of Rome (see fascicle I), by which Del Buono summoned the firm in order to obtain a judgment against them for the sums borrowed of him and a settlement of damages. The citation was regularly served upon the firm's office in Rome through Sig. Giuseppe Tarabella, upon the special agent for the representative of the firm, the Hon. Francesco Fazi, whose domicile is near that of his attorney, Felice Gualdi, at the Circo Agonale, No. 14.

It is here opportune to note that the amounts stated by Del Buono in his citation are not those employed by him in the working of the mines, but those which he advanced the firm as silent partner and banker. This observation should be given due weight, in order that the data resulting from the citation itself may not be stigmatized as contradictory with regard to those arising out of the agreement between Del Buono and the firm concerning the supply of coal (fascicle L).

In the citation it is explicitly stated that for the *acceptances alone*, Del Buono's credit amounted to nearly 800,000 bolivars.

Before proceeding farther with the examination of the claim, it would be well to state that on August 31 of the past year, as appears by documents in fascicle O, the balance between royalties due the Government by the firm and the sums paid in cash or by coal, services, and otherwise, showed a credit in favor of the firm amounting to 15,185.64 bolivars. From that date to the present time there have been no more settlements, either because the claim was already submitted, or because, with the exception of a partial operation of the railway, the firm had been reduced to entire inactivity.

This form of settlement between the firm and the Government was the result of a tacit understanding by which convenience and economy was secured to both parties, since it obviated the forwarding of funds often prevented by the conditions of the country, without taking into account that any other form of settlement would have been difficult, because of the refusal to examine the books during the war, as established by documents in fascicle M. It would, therefore, be contrary to equity to object against the firm that the amount of the royalty had not actually been paid to the Venezuelan Government, and raise an objection before this tribunal which said Government had not previously deemed possible.

It will be said, perhaps, that the firm took credit for services rendered the revolution, but when it is considered that the revolution was the government *de facto*, it would seem that the same rules that were adopted in the Commission in regard to the double payment of duties (see the Guastini claim<sup>1</sup>) should apply here, and that the firm have kept within due limits of right in including those amounts likewise, in every way acting therein in good faith. Besides, the amount charged for services to the revolution being 32,286 bolivars, and its credit on August 31, 1903, being 15,185 bolivars, the difference would at most be only 17,091 bolivars — a relatively negligible quantity.

Let us pass now to the consideration of other fundamental reasons, as a whole and interlinked, which operate in favor of Martini & Co. Such an examination would demonstrate that the action of the contracting government was the principal, if not the sole cause, of the ruin of the company, and how from this fact arises the right of the firm to an indemnity.

From the evidence of witnesses presented by Martini & Co., it seems clear that the revolution, as well as the Government, but mainly the latter (see especially the deposition of the witness Riva Verni and documents contained in fascicle B), by manifest infractions of contractual agreements, recruited at various times the native workmen of the company, and principally those

<sup>1</sup> See *supra*, p. 561.

assigned to the railway service, which could not well suffer interruptions and obstacles of any sort. General Marcano, president of the State, insisted upon having the complete list of the workmen, declaring publicly that he considered them as being wholly at his disposal. (See fascicle B.) It may here be objected that these recruitings in various instances did not go beyond mere attempts and threats; but the effects of these acts were otherwise injurious to the firm in that the workmen, not being able to foresee to just what extent these acts might proceed, fled and hid themselves to avoid any possible danger. Now, when we reflect that the work of the mines and of the railway must proceed in unison, and that their regular function depended entirely upon the harmonious collaboration of the two services, it must be admitted that the failure of one necessarily entailed the failure of the other, so that, for example, whenever the laboring element was lacking the technical or mechanical department of the enterprise remained in whole or in part useless. It is hence clear that a general disorder followed, involving grave damages to the firm, which was still compelled to pay and subsist the foreign element thus forcibly condemned to inactivity in the factories.

To this state of affairs and to other causes fully set forth in the Martini memorial, must be attributed the abandonment of the railway, shops, and factories in satisfaction of which the firm claim equitable indemnity, and which might erroneously be charged to the nonobservance on the part of the firm of its contractual obligations toward the Government.

The aggressions, arbitrary orders, stoppage of trains, seizing of goods, damages to real property, forced requisitions — in short, all the violence of which the firm complain, and which reduced their affairs to such a state that they were finally compelled, at a time when all communications were interrupted, to sell at a ruinous price materials imported from Italy, for their individual use, not for profit, seeing their exemption from import duties, but to procure means of subsistence, and to accept in charity from the Italian war vessel *Elba* gifts of flour and biscuit to satisfy the hunger of the operatives — were, indeed, partly the work of revolutionists; but from the documents submitted it is equally clear that the Government was pursuing a similar course, and this attitude on its part was doubly vexatious, since setting aside the actual damage to the firm, it induced in the rebels a conviction that everything was permissible against Martini & Co., the contract with whom was now practically a dead letter.

It is therefore not against the unavoidable consequences of war that claim is made, but against that accumulation of wrongs that under cover of this abnormal state were for so long a period unnecessarily perpetrated against them.

Most grave, in view of its consequences, was the aggression suffered at the siege of Naricual, in May, 1902, by General Mejia, of the Government. The circumstances thereof, which have been wrongfully sought to be excused under the plea of military necessity, are set forth in detail in the Martini memorial and in the testimony of the witnesses. The effects were truly disastrous because the foreign workmen, stricken with fear and convinced of the danger to their lives, since no protection was to be expected even from the Government authorities, became clamorous and demanded of the firm that they be sent back home. This completed the interruption of the work, and the enterprise, henceforth completely demoralized, was driven to new and serious pecuniary sacrifices, among which may be included the payment of 631 francs to each operative, to which the firm was compelled by the arbitral sentence contained in fascicle T.

The sacking of the station and warehouses at Guanta, the destruction of movables, and the aggression of General Mejia at Naricual, all of which are proved in the testimony, are events due entirely to the Government, and their

moral effects, particularly, have an exceptional importance. It was then that occurred the destruction and dispersion of documents, registers, and accounts, the loss of which fully explains the incompleteness of the claim in certain respects.

The ineffective blockade of the port of Guanta must be included among the measures which damaged the firm, not merely from a commercial point of view, in so far as it prevented exportation and the collection of duties at the port, but also from an industrial one, since it rendered impossible the replacing of the lost operatives by others, whether native or foreign. The duration of the blockade is shown from documents contained in fascicle P, in which is the decree of the governor of Trinidad, declaring that measure null and void from the beginning. As to its illegality the Italian Commissioner refers to his argument in the De Caro claim, No. 50,<sup>1</sup> which contains quotations from writers on international law and other authoritative opinions. He believes it opportune to add here that the question was discussed in the German-Venezuelan Commission,<sup>2</sup> which decided that, admitting the illegality of the noneffective blockade, damages should be awarded a claimant who based his demand for indemnity on damages produced thereby.

Among other culpable omissions of the Government there is that of not having stopped the abuse of power by the State authorities in imposing, contrary to provisions of section 11 of article 6 of the constitution of Venezuela, a duty on goods intended for exportation. This illegal exaction hinders commerce and drives it from the port of Guanta, necessarily prejudicing the firm by the consequent diminution of the port and railway rights, according to its concession.

By the decree of May 27, 1903, the Venezuelan Government violated its contractual concession by reducing the port of Guanta to a coast-trade port, thereby at once changing the very object of the concession. Aside from the direct damages arising from the reduction of the general export and import trade of that port, and the resulting diminution of railway business, it is clearly proved in the memorial above named that the exploitation of the mines is wholly impossible without perfect freedom of export from Guanta, because the transfer of goods to an authorized international port would impose a burden of 24 bolivars on each ton of coal, as shown by documents in fascicle S. Now, this measure can not be justified by an appeal to the faculty which the Government has of changing the character of a port for reasons of its own, because, so far as the port of Guanta is concerned, the contract made with the firm implies a renunciation on the part of the Government of the exercise of this very right. This measure was revoked, however, perhaps in consequence of the protest of the firm's home office in Italy, a copy of which was furnished the Mixed Commission by note of the royal Italian legation in Caracas of November 14, 1903. This tardy act of reparation of the local Government having been of no avail to the firm, now permanently incapacitated from resuming its labors, cannot constitute a guaranty of peace for the future.

The fact that the firm may suffer similar risks and the direct evils flowing therefrom seriously prejudices the enterprise from another point of view, as the concession is in fact negotiable, as shown by article 15 of that instrument. Now, what capitalist would think of investing in such a contract, in the face of a precedent which demonstrates the absolute instability of its relations with the Government and the looseness of the agreements in its behalf? It may be argued that the transfer of a concession is subject to the consent of the Govern-

<sup>1</sup> *Supra*, p. 635.

<sup>2</sup> Orinoco Asphalt Co. Case, *supra*, p. 424.

ment, but it cannot in equity be held that the Government should have agreed to this clause with the preconceived idea of refusing such a transfer in the event of the future holder of the concession being a person of consideration and means.

In short, the closure of the port shows that the Government in its relations with Martini & Co. may at any moment withdraw from its contractual obligations. Following this order of ideas, the firm call attention to the monopoly granted to one Feo of the shipment of cattle from Guanta. Feo is a Venezuelan, and either for this reason or because vessels flying the Venezuelan flag enjoy a reduction of 50 per cent on port duties, he finds it to his interest to sail his ships under the national colors; moreover Feo was bound by the Government to not cede his concession to foreign companies or individuals. Thus one of the principal resources of the port was for the firm reduced one-half.

The Italian Commissioner observes that it is here a question of a recent fact, and the firm recognize it as such in not making it the subject of special indemnity, but it merits being recorded as a proof of the hostility of the Government toward them, the more so in that the Feo concession constitutes an infraction of the provisions of article 9 of the Italian-Venezuelan treaty of 1861, still in force.

If such is the conduct of the Venezuelan Government toward the firm, it is no wonder that the revolutionists, following its example, cooperated in the work of destruction by which the company find themselves reduced to their present deplorable state. The Commission has adopted, against the opinion of the writer, the rule that no indemnity can be awarded for revolutionary damages; but this rule is counteracted by the other, which holds that when the Government has been guilty of apparent negligence damages should be considered as susceptible of indemnity. In the present instance the diligence of the Government appears to have been highly problematical. Its interventions not only have never been of assistance to the company or of a protective character, but, on the contrary, were pernicious to their interests. It is beyond doubt that the firm would have suffered much less from the revolutionists had these latter been permitted to operate undisturbed in the State of Barcelona during the last years. It is not believed that a single instance can be given where the Government adopted a protective measure in behalf of the firm, and even General Mejia, he who had captured the shops at Naricual, remained in his functions up to the time of his imprisonment by the revolutionists and held himself overbearingly and threateningly at the interrogatories of the witnesses, a transcript of which is submitted by Martini & Co.

It would therefore seem beyond question that the Government never exhibited the least desire to protect the interests of the company, and when it is considered that, in addition to its general obligations toward citizens and foreigners residing in Venezuela, there was incumbent upon it the further duties of a contracting party, and that it was recreant thereto, it must be evident that such negligence rightfully imposes upon it the payment of the indemnity claimed by the firm.

It has several times been pointed out in this Commission that if the firm not only failed to reap the benefits expected from the concession, but actually sunk their capital in the enterprise, this should not be charged to a nonobservance of the stipulations on the part of the Government or to damages suffered, but to the fact that the enterprise was essentially a nonprofitable one. Were this statement correct, it would follow that little faith could be placed on the Venezuelan reports, official in their nature, which magnify the productiveness of the mines and the quantity and quality of the coal. The firm will hold the Government blameless as to this, as before undertaking this enterprise they had fully investigated the conditions, as amply set forth in their memorial at

pages 2 et seq., and their reports accord substantially with that of Venezuela, the correctness of which they recognize and which the Government should not and can not deny.

The coal at Guanta and in the portions of the mines not yet developed is in sufficient quantity to supply the Caribbean Sea market for a great many years to come. As to its quality, the attention of the honorable umpire is invited to the dispatch of the minister of foreign affairs of Italy of December 1, 1899, and to other documents contained in fascicle R.

It has also been asserted that the Guanta coal is liable to spontaneous combustion, and testimony has been adduced to prove this, but where is the coal which will not under given conditions of weather or storage show similar tendencies? The coals of Pennsylvania and Cardiff are subject to like danger, as are all others. Are not fires on board steamers of frequent occurrence from this very cause, even where using coal other than that of Guanta? Is it likely that the Italian Government, as indicated in the above-mentioned dispatch, after the experiment of the Naricual coal, would have ordered the *Etruria* of the royal navy to fill its bunkers with said coal if it had been more dangerous in this respect than other varieties? Besides this, Venezuela has herself used it on her ships in recent years without thought of possible accident therefrom.

The Italian Commissioner flatters himself that he has in the foregoing summed up the chief reasons militating in favor of Martini & Co., and to enter into further details would be simply repeating what has been already well set forth in the memorial and what appears fully in the documentation of the claim. The demand for indemnity should be considered in its entirety, while holding in view the fundamental elements, to wit, the capital employed, a credit seriously compromised if not wholly lost, the energy spent by the members of the company, the impediments and injuries suffered as much from the Government as from the revolutionists, the nonobservance of agreements, the constant apathy manifested in preventing or obviating obstacles of various kinds, opposing the peaceful development of the enterprise, and the special nature of the relations and obligations existing between the lessors and lessees.

To judge this case upon the restricted and narrow ground of direct and material damages suffered by Martini would be illogical and unjust. The ruin of the company is palpably the result of an abnormal state of affairs, justifying the demand for indemnity here presented, because it has been abundantly proved that one of the contracting parties was not diligent in the performance of his duties.

The firm, taking into account the deductions from the original demand mentioned in the course of this paper, claim a total of 8,997,441.34 bolivars, including the judicial expenses indicated in fascicle Q. This demand is undoubtedly susceptible of further reduction, but between the extremes of the total claimed and the complete rejection of all demands, which the Venezuelan Commissioner hopes to obtain, the honorable umpire will doubtless find a mean which will satisfy the requirements of that equity which should control the conduct of the Commission, according such an amount to the firm as will compensate its direct and indirect losses, while alleviating the disastrous consequences arising therefrom, and providing a means of renewing its activities in the near future, and renew an important but now paralyzed industry, with manifest advantage not only to the company but also to the Republic.

ZULOAGA, *Commissioner* :

The Italian company Lanzoni, Martini & Co. leased from the Government of Venezuela, on December 28, 1898, the Guanta Railroad and the coal mines called Naricual, Capiricual, and Tocatoro, situated in the State of Bermudez,

for the annual rent of 104,000 bolivars, besides 50 centimos for each ton of coal extracted. This contract was approved by Congress on May 4, 1899, and ran for a term of fifteen years counting from that date. In order to carry out the contract the company Lanzoni, Martini & Co. was organized, which had a capital of 125,000 bolivars, Pilades Del Buono being a silent partner therein to the extent of 70,000 bolivars. (The latter seems to have furnished the cash capital for the company.) On July 19, 1899, the corporation augmented its capital on behalf of Del Buono to the extent of 375,000 bolivars. On July 7, 1901, Antonio Lanzoni withdrew from the company, which continued under the name of Martini & Co. Del Buono was not only the only partner who had money, but he was the only capitalist who gave credit to the corporation. By order and for the account of the company it appears that Del Buono purchased the steamer *Alejandro*, but this latter remained mortgaged for a portion of the sum advanced. Del Buono also paid some drafts drawn by Martini & Co., although with some difficulty. By February, 1901, the company was in such a state of insolvency and disrepute that, having given an order to the English firm of John Davis & Son for £155.14 of oil these gentlemen, fearing that it would not be paid, sent the goods to Messrs. Dominici & Sons, of Barcelona.

The employees of the custom-house at Barcelona appear because of an error or because of the petition of Martini & Co. to have delivered them the goods, and the English house lost the value of them, since they sought in vain at Rome and Barcelona to obtain payment from their debtors. (The English firm made a claim against the Government of Venezuela because the custom-house had delivered the goods to Martini & Co.)

In May, 1900, Lanzoni, Martini & Co. had addressed themselves to the Government of Venezuela, petitioning it to declare the mines exploited and insinuating that having suffered because of the war they would ask that the annual rent which they should pay should be reduced. The Government answered them on September 5, 1900, agreeing to declare that the mines were in operation; and to reduce to one-half the yearly rent which was due from June, 1900; that the rent for the months of May and June should be paid completely, and that Lanzoni, Martini & Co., upon accepting these propositions, should declare "that they had no claim against the Government of Venezuela by virtue of the contract nor any other reason." The cessionaries answered this note on September 6, "gratefully accepting the concessions which the supreme chief of the Republic had made them" and "any claims which they might hold against the Government being considered as satisfied." The development company has only paid the Government on account of the lease the sum of 21,666.25 bolivars in September, 1900, which was the rent for the months of July and August of that year (as will be seen from the account in file O). Martini & Co. have presented their account with the National Government until August 31, 1903. In the account they charge sums owed by the Government which they say the latter owed by reason of railroad, harbor, and other charges, and 60,600 bolivars which they said they delivered to Gen. Martín Marcano prior to May 1, 1900, for various reasons, according to the account which appears in the file called extortion by Martín Marcano. But it will be observed, first, that these extortions of Marcano are prior to the declaration of Martini & Co. of September 6, 1900, that they held no claim against the Government on any account; and consequently if they occurred in reality they were released by the claimants in consideration of the concessions which the Government made them, and Martini & Co. so understood it, as has been said in September, 1900, that they paid a draft against the *Crédit Lyonnais*; second that 32,286 bolivars appeared to be charged to the Government during the period from the 10th of August to the 25th of November, 1902, and during this

time the government of Barcelona was a revolutionary government, and third, that none of the other sums charged to the Government are accompanied by any proof. Martini & Co. are therefore debtors to the Government for rent due for the mines from September, 1900, and they have paid nothing for the coal extracted; that by February, 1901, they had neither capital nor credit sufficient even to pay for a shipment of oil to the value of £155.14, and nevertheless, according as they themselves say in their petition, page 13, in order to realize their plans it was necessary to spend at least £2,000,000 in the first two years.

Martini & Co., lessees of the mines of Naricual claim from the Government of Venezuela the sum of 9,064,965.42 bolivars, which they compute in their memorial at page 166, in the following manner:

Material injuries and moral offenses, damages, requisitions, confiscation of moneys and other things . . . . .	Bolivars 326,069.00
Direct damages to the quarries and implements . . . . .	1,000.00
Violences and offenses against the foreigners who compose the firm . . . . .	500,000.00
Failure to perform obligations of the lessor:	
Changes in the property leased and neglect to preserve it . . . . .	1,027,440.00
Failure to perform the special obligations of the contract of lease . . . . .	696,288.75
Failure to maintain the lessee in peaceful possession . . . . .	6,513,667.58
	<hr/>
Total . . . . .	9,064,965.42

In the 326,069 bolivars there are included the 60,600 bolivars of the so-called "extortions of Martín Marcano," which, as we have already said, were not demandable; but it is to be noted moreover that this is composed of two receipts of Martín Marcano for the value of 12,000 bolivars, each dated September 30, 1899, and October 15, 1899, and of various accounts admitted by Marcano as *compensation* for the sale of certain cattle and stacks of arms. The receipts of Marcano appear to be the amount of these accounts, since Marcano himself confesses when he says at folio 71 of the petition "that Marcano in *compensation*, and in order to give legal form to his extortions, signed these receipts." Martini, therefore, seeks to recover twice the quantity one time on the accounts and the other time upon the receipts. Besides, the total amount of these 60,600 bolivars on the one hand are credited as against the payment of rent, and on the other hand they are sought to be recovered as damages. Martini & Co. therefore seek to recover four times the amount of the supposed extortions of Marcano. The other damages which make up the 326,069 bolivars are attributable to revolutionists, and this is sufficient reason for their disallowance, but it is worthy of note that special reference is made to the value of some tons of coal which the revolutionary leader, Pablo Guzmán, ordered to be burnt at the custom-house of Guanta.

The agent of the Government of Venezuela has presented a deposition from which it is clearly proved that the destruction of this coal was with the consent of Martini; that he personally directed the operation, ordering that a part of it be burnt by making use of cans of coal oil, and that another portion of it be thrown into the sea; that it was known by all that the operation was gotten up by the lawyer of the company, and that the greater portion of the coal thrown into the sea was of a very poor quality, since it was only dust; that all the coal was not destroyed, and that Martini & Co. had since disposed of a portion of it for the use of the railroad and by selling it to individuals. By the destruction of the coal the cessionaries thought, as would appear, to carry out a profitable undertaking, collecting from the treasury of Venezuela for coal that was not marketable.

Martini & Co. seek to recover 500,000 bolivars for violence inflicted upon

the persons of those who constitute the firm, and these persons are Martini & Fazi, since Del Buono is not in Venezuela.

In the allegations which Martini & Co. make with respect to this point there are many injurious imputations cast upon the Government of Venezuela and upon the country; but nothing concrete and to the point. In the charge alone which treats of the supposition that an official of the Government by the name of Carmen Mejias entered into Naricual committing assaults upon the foreigners appears to be discredited by all the witnesses who are presented, who affirm exactly the contrary of what Martini says. The witness Casimiro Pinelli says — that the soldiers committed some wrongs, and that they themselves said that the Italians were no good, but that these latter suffered no personal injuries.

The witness Juan Caprara says —

that with respect to the recruiting of workmen, the troops took one Venezuelan laborer that he had under his charge, but that they did not recruit any Italians, nor did they interfere with them.

The witness Nicolás Amore says —

that the soldiers of Mejias took the horses of the company, but that he and other persons having spoken with Mejias, the latter decided that the animals should be returned, as was in fact done.

The witness Bartolo Tononi says —

that an attempt was made to recruit Venezuelans from the works of Martini & Co., but that this was given up by the mere friendly intervention of the engineers, Antonio Martini and Francisco Fazi; that they took a saddle horse from Mr. Martini, but that they returned it to him afterwards.

Martini & Co. seek to recover 1,027,440 bolivars for injury to their credit by reason of a decree of the Government of Venezuela, dated May 27, 1903, in which by virtue of its powers, in accordance with article 10, law 14, of the code of the hacienda, it temporarily suppressed the custom-house of Guanta. Those who had no credit in 1903 could hardly suffer therein — they were bankrupt since 1901. The partners were in that state of penury that the partner Fazi was not able, about September, 1902, to pay his baker an account of 165.45 bolivars, for which he made Martini & Co. responsible, and which they did not pay, either (p. 3 of the deposition of Victor Cotta).

The decree of the Government of Venezuela is perfectly lawful.

Martini & Co. seek to recover 696,288.76 bolivars under the name of “ failure to perform special obligations of the contract of lease,” because the Government recruited the Venezuelan laborers, violating article 13 of the contract; and thereby they seek to secure the return of the amount of rent from April, 1902, to May, 1903, amounting to 120,155 bolivars, or, say, the return of a sum which they themselves have not paid; and second, the delivery of imaginary sums which they say were necessitated to repair the railway to the mines, which, according to Martini & Co., is in the most deplorable state, since no repairs have been made. The repairing and improvement of the line were by an express stipulation of the contract to be at the cost of Martini & Co. If they have not fulfilled this obligation, as they declare, they have fundamentally failed to perform the contract, and it is a singular idea to seek to recover a sum which in any case they themselves owe.

The last item of the claim of Martini & Co. is 6,513,667.58 bolivars for “ the failure to carry out the guarantee of peaceful possession of the property leased.” The items which make this up are as inconsistent and absurd as those already considered, and it appears useless to make any specific observation

upon them, since they are in truth the same as those already considered and rejected.

The examination of this claim shows, moreover, that the alleged failure in this covenant, with respect to Martini & Co., is false, and that, on the contrary, the authorities have always protected them as far as was compatible with the disturbed state of the country. It moreover appears that Martini & Co. have not fulfilled the obligations which were imposed upon them by the contract; that they have not paid the rent; that they have not only not preserved the property leased to them, but they have allowed it to deteriorate for the want of the most simple repairs; that they have committed fraud against the Government of Venezuela, selling the Roman cement and other goods which they introduced free of duty for the use of the enterprise; that they have sold things belonging to the railroad, which is the property of the Government.

The claim should be totally disallowed.

Every claim arising out of the contract ought to be prosecuted before the courts of Venezuela. Martini can not claim before the Mixed Commission for supposed breaches of the contract, since the Government can oppose thereto objections arising out of the contract.

*RALSTON, Umpire :*

The foregoing reclamation has been referred to the umpire upon difference of opinion between the honorable Commissioners for Italy and Venezuela. Briefly stated, the facts are as follows:

On December 28, 1898, by contract approved by the Federal Congress on May 29, 1899, the Venezuelan Government granted to Lanzoni, Martini & Co., of whom the claimants are the successors, for the term of fifteen years from the date of the approval of the contract by Congress, a national enterprise known as Ferrocarril de Guanta y Minas de Carbón, denominadas Naricual, Capiricual y Tocaropo, situate in the Bolivar district of the State of Bermudez, including in the lease wharf for the embarkation of coal, warehouse, workshops, railways between Guanta and the mines, with rolling stock, material on hand, bridges, the said mines and the other rights and the actions belonging to the National Government in the said enterprise.

The territory so rented embraced 810 kilometers superficial area, and the railroad from Naricual to Barcelona was some 17 miles long, and from Barcelona to Guanta some 19 miles.

In consideration of the foregoing lease the company undertook to pay annually to the National Government in cash the sum of 104,000 bolivars, which was to be delivered in monthly quotas of 8,666 bolivars, 66 centimos. The company was further to deliver to the Government in lieu of other taxes 50 céntimos for each ton of carbon exploited.

The company was to have the right to charge the then existing tariff for passengers and freight and wharf rates, without the right to augment them in any case; the Government undertaking to preserve closed the port of El Rincón, or Guzmán Blanco, except for vegetables and certain small articles.

The National Government was to enjoy a reduction of 50 per cent upon the tariff ordinarily charged for its employees on business and for freight upon goods consigned to the Government.

The company was obliged at its own cost to make all improvements, repairs, and enlargements which were necessary for exploitation on a large scale, as well as to perfect the railway and rolling stock; all of which work was to be commenced within four months after the approval of the contract by the National Congress, and to be terminated eight months after such date, which might, however, be extended for four months more in case of force majeure.

The company undertook to give preference in employment to the laborers of Venezuela over foreigners.

If the company had fulfilled its contracts for the term of the lease, the Government was obliged to extend its concession for ten years more, at the end of which time the lessees obliged themselves to deliver to the National Government, under inventory and in perfect state of preservation, and without any right of idemnity therefor, all the stock given by the Government, with its improvements. The Government was obliged, even in case of war, to exempt from all military service the personnel employed in the mines, railways, or service of the enterprise.

It was further provided that the doubts and controversies which might arise upon the meaning or execution of the contract should be decided by Venezuelan tribunals in conformity with the laws of the Republic, without it being possible that they should be made in any case ground for international reclamation.

Inventories were had of the property leased the company, which inventories were accepted by Lanzoni, Martini & Co., September 9, 1899, and the work under the contract was officially declared commenced September 18, 1899. We may at this point remark that some of the complaints of the company are addressed to the fact that the property delivered to it was in much worse condition than it had expected at the time the contract was originally entered into, but the company having accepted the inventory, one is compelled to disregard all that is now said upon this point.

The company complains of various grievances occurring in the years 1899 and 1900, but these also must be dismissed with a word, because by its letter of May 23, 1900, the company applied to the Government for a rebate of rent on account of the injuries referred to, and under date of September 3, 1900, in response to this application, the company was notified that its annual rent would be reduced one-half for the year from July 29, 1900, to the same day in 1901, provided the company in accepting this concession should declare that it had no claim against the Government by virtue of the provisions of its contract, or for any other reason, and upon the following day (September 6) the company accepted gratefully the concessions made to it by the Chief of the Republic, recognizing as satisfied whatever claim it might have against the Government under the contract on account of the events in question. It is not, however, the opinion of the umpire that this settlement extended to the claims of the company under "vales" to the amount of 60,600 bolivars, issued by President Marcano, of the State of Bermudez.

Historically, it may be noted that on the night of August 9, 1902, Barcelona was taken from the Government by troops of the revolution, and the civil authorities were named by them; that on November 26, 1902, Barcelona was reoccupied by the Government; that on February 17, 1903, the governmental forces retired; and on February 19, 1903, the revolutionists took possession of the town, retaining such possession until after a bloody conflict, lasting from April 5 to 10, when they were ejected. In addition, there were many skirmishes in and about Barcelona within the dates mentioned, and the history of Guanta was much like that of Barcelona.

A paper blockade of the port of Guanta was proclaimed in August, 1902, Guanta then being in the possession of the revolutionists, and this blockade continued during all the time of the revolutionary possession. It is to be noted that for about two months, in December and January, 1902, and February, 1903, Great Britain, Germany, and Italy maintained a blockade by force. In addition, it may be remarked that on May 27, 1903, the Government reduced the port of Guanta to the third category, so that thereafter, and until February 1, 1904, it was not open to foreign commerce.

We may now enumerate the various heads of claims as set out in the memorial, as follows:

Material injuries and moral offenses:	<i>Bolivars</i>
1. Injuries, requisitions, appropriations of money, etc . . . . .	326,069.00
2. Direct damages to its quarries and implements . . . . .	1,500.00
3. Injuries and offenses against foreigners composing the undertaking . . . . .	500,000.00
Failure under the obligations of the lessor:	
4. Impairment of the thing rented and lack of its preservation, including return of rent and lost gains . . . . .	1,027,440.00
5. Lack of performance of the special obligations of the contract of rent, including lost profits . . . . .	696,288.76
6. Failure in the guarantee of the pacific enjoyment of the thing rented . . . . .	6,513,667.58
Total . . . . .	<u>9,064,965.34</u>

It is manifest from the above statement that the same items have been repeated several times, and that properly analyzed the claim should amount to about one-third of the above.

Before proceeding to study more in detail the various headings of the claim, we must bear in mind that the claimants are still in possession of the property rented to them, and that if the Venezuelan Government had fixed its rent upon the basis of a return of 5 per cent upon the value of the thing rented, the entire valuation of the subject-matter would be but 2,080,000 bolivars. It will also be borne in mind, before commencing a detailed examination, that as early as July, 1901, the company, through its offices, either in Venezuela or in Italy, was unable to meet the claim of John Davis & Son, of Derby, England, for the sum of £155, and besides was indebted to various individuals in different amounts, and in March, 1902, owed its limited partner, Del Buono, some 2,000,000 bolivars, with outstanding acceptances estimated at 800,000 bolivars.

Let us make a succinct summary of the various injuries of which the company complains, eliminating offenses committed by revolutionists and trivial offenses, such as personal insults to employees, and limiting ourselves as to the rest to proven offenses.

Early in the morning of May 29, 1902, the revolutionary troops passed through the town of Naricual, where were located mines and shops of the claimant. Two hours later Government troops, under the command of General Mejias, reached Naricual and fired several volleys into the town from different points, the shots piercing the habitations and injuring or destroying property, no lives being lost. At this time the general referred to attempted to carry off workmen, but after Martini's intervention recruited but one man.

The following day the Government troops returned and again attempted to recruit Venezuelans in the employ of the company, who, however, fled with one or two exceptions. The forces took some food and small articles. It is further stated that at various times Venezuelans were recruited even from the quarries of the company. As a consequence the Venezuelan laboring force was completely disorganized and its members terrified and dispersed. On many occasions Naricual was occupied by governmental troops who took hens, hogs, etc.

During the war the towns between Barcelona and Naricual abandoned care of the roads, and as a consequence the railway line was used as a means of transportation by men and animals and railway traffic was abandoned.

On September 16 and 17, 1902, the revolutionists threw into the sea or set on fire, to prevent national vessels from using it, some 5,697 tons of coal, worth

from 25 to 30 bolivars a ton, and it is said that the Government was responsible therefor, because, having closed the port of Guanta and prevented its exportation, it necessarily fell later into the hands of revolutionists.

It is further stated that during fights between revolutionists and the Government workmen were compelled to give up repairing the wharf, and the train officials were insulted and interfered with in their management of the trains.

On November 28, 1902, Venezuelan vessels of war fired on the Guanta custom-house and station. The proof upon this point is not uniform; some witnesses saying that there were 70 revolutionists who commenced the firing, and others fixing their number at 25, and some witnesses placing the responsibility for the beginning of the firing upon the Government. According to part of the testimony, both custom-house and station were occupied by the revolutionists. When the Government troops landed, it is said that they entered the custom-house and station and destroyed much property of the company, including all their books of account, and also destroyed the cattle corrals and injured the wharf.

We further find that on June 6, 1902, workmen were recruited and others could not be obtained, while President Marcano prevented the delivery of merchandise for eight or ten days in the same month. In many cases the consul at Barcelona sought a release of Venezuelans who had been recruited, often successfully and again unsuccessfully, while President Marcano at all times maintained his right to recruit them.

In the counter proof it is shown, among other things, that the company sold part and used another part of the coal said to have been burned by revolutionists, and it is contended that the company is heavily indebted on its account of rent to the Government, having only paid 21,666.65 bolivars.

The honorable Commissioner for Venezuela submits, as a preliminary question, objection to the jurisdiction, based upon article 16 of the contract, which reads as follows:

*Las dudas ó contraversias que puedan suscitarse en la inteligencia y ejecución del presente contrato, serán resueltas por los Tribunales de la República, conforme á sus leyes, y en ningún caso serán motivo de reclamaciones internacionales.*

Even if the dispute now presented to the umpire could be considered as embraced within the terms "*Las dudas ó contraversias que puedan suscitarse en la inteligencia y ejecución del presente contrato,*" in the judgment of the umpire the objection may be disposed of by reference to a single consideration.

Italy and Venezuela, by their respective Governments, have agreed to submit to the determination of this Mixed Commission the claims of Italian citizens against Venezuela. The right of a sovereign power to enter into an agreement of this kind is entirely superior to that of the subject to contract it away. It was, in the judgment of the umpire, entirely beyond the power of an Italian subject to extinguish the superior right of his nation, and it is not to be presumed that Venezuela understood that he had done so. But aside from this, Venezuela and Italy have agreed that there shall be substituted for national forums, which, with or without contract between the parties, may have had jurisdiction over the subject-matter, an international forum, to whose determination they fully agree to bow. To say now that this claim must be rejected for lack of jurisdiction in the Mixed Commission would be equivalent to claiming that not all Italian claims were referred to it, but only such Italian claims as have not been contracted about previously, and in this manner and to this extent only the protocol could be maintained. The umpire can not accept an interpretation that by indirection would change the plain language of the

protocol under which he acts and cause him to reject claims legally well founded.<sup>1</sup>

Let us now consider the various branches of the contentions, which, for convenience, may be divided as follows:

1. Assaults upon Italian workmen and interference with Venezuelan laborers employed by the claimant.

2. Interference with the contract rights of the claimant arising out of the paper blockade and the closing of the port of Guanta.

3. Various injuries to claimant's properties.

The first two grounds of the claim are so far interwoven with respect to the damages consequent upon the events complained of that it will be convenient to discuss them together.

Let us first consider for a moment in this discussion the assaults upon Italian workmen and interference with Venezuelan laborers employed by claimant.

As appears from the foregoing, on May 29 and 30, habitations of workmen at Naricual were fired upon ruthlessly by the Government troops, and as a consequence Italian laborers to the number of 54 protested before the Italian consul at Barcelona, and afterwards demanded their immediate repatriation, being in fact sent back to Italy on July 12. Fifty of these laborers afterwards submitted to arbitrators their claim against the company, and the arbitrators in their judgment dated September 3, 1903, said that:

The political situation of the country, troubled for many years by constant and ceaseless civil wars, rendered it impossible to carry on peacefully the work of the mines. \* \* \* Things got worse around May, 1902, so that the mining properties, the employees, and even the owners were exposed to very great dangers and threats by the Government troops without any cause or justification. \* \* \* The jury finds, moreover, that on May 29, 1902, the regular troops of Venezuela, without any justification, invaded the mines of Las Minas near Naricual, firing on the mining properties, factories, offices, and buildings and railroad stations, all belonging to the firm. Some of the Italian laborers ran the risk of being killed. The houses of some others were looted. Even Mr. Martini was in grave danger, while some of the native laborers were forced into the army in open violation of contract. These events caused a panic among the workmen, inducing them to what was described "a justifiable decision to leave Venezuela" in the protest filed by the firm with the minister of Italy at Caracas on July 10, 1902.

The members of the firm spared no care in defending their countrymen and employees, as was their duty as defendants of the men they had engaged, but the political situation was getting rapidly worse, as appears by the above-mentioned consular document; food was scarce and supplies were not to be had; banking transactions were impossible even on usurious terms; the native laborers all around Naricual caught by the panic fled, so that railroad service was severely crippled, and the work incidental to mining entirely stopped. Next the sanitary service, which the firm had been organizing, ceased operating; wages which theretofore for the same cause had been paid irregularly were now entirely suspended, and the transmission of money by the laborers to their families in Italy became rare and difficult. The workmen, who two days after May 29, after the actual panic had passed, had resumed their work found themselves face to face with the situation which the jury agrees with the complaints made by the firm in terming unbearable. This was rendered even worse and more painful by the letters received by the laborers from their families in Italy, setting forth the suffering at home from lack of the support they had been used to receive.

It further appears from the arbitral decision that not until September 1

<sup>1</sup> For full discussion of the points here decided see Orinoco case, vol. IX of these Reports, p. 181, Rudloff case, *idem*, p. 244; Turnbull, etc., case, *idem*, p. 261, and Selwyn case, *idem*, p. 380.

were the complaining laborers paid for work actually done at Naricual up to and including July 9, they sailing for Italy from La Guaira on July 17.

As the result of this arbitration the claimants were held liable for —

lack of the clear foresight regarding the work offered which is obligatory upon every employer of laborers, and especially upon one seeking men for work in places far from the mother country and which takes them away from the material comforts and moral comforts which are found in the bosom of the family and in the protection of the mother country.

The arbitrators allowed a total of 631 liras, equivalent to the same number of bolivars, to each one of the fifty complainants.

The umpire is disposed to accept the view that Venezuela is, to an extent, which he will endeavor hereafter to fix, responsible for assaults committed upon Italian laborers — assaults of such a nature as might well have deterred any others from taking their places — and is also responsible for the repeated acts of its military authorities in attempting to enlist in its armies Venezuelans employed by the company — acts which were in express derogation of the terms of the contract of rental hereinbefore recited.

Let us now, before considering the measure of damages, turn to the matter of the paper blockade and the closing of the port of Guanta by governmental order.

From about August 10, 1902, until April 10, 1903, save during the period of actual blockade by the allied powers, and the time of its possession by the Government, Guanta was blockaded by proclamation. No naval force, however, was maintained in the vicinity to enforce the blockade, and such blockade was therefore illegal under the authorities referred to in the case of *De Caro*<sup>1</sup> already decided.<sup>2</sup>

Shortly after the termination of the paper blockade, and on May 27, 1903, the Government reduced the port of Guanta to what is known as the third category of ports, and in so doing cut off its foreign commerce, and this condition lasted until the port was reopened by Executive order, dated February 1, 1904. In the opinion of the umpire, this closure, while entirely legal and within the power of the Government as against the world at large, rendered the Government liable to an extent hereafter to be discussed, under its original contract with claimant's predecessors. It will be borne in mind that by that contract, claimant's predecessors received possession of the wharf of Guanta, with the right to charge and collect port duties. It must be assumed that this right was obtained, and that the whole contract was signed upon the theory that the port of Guanta was to be maintained as a port of at least the same degree of importance it then possessed. The contract is to be interpreted in the light of the surrounding circumstances, and one of the most significant of them was the importance of Guanta as a port of entry. It is not to be supposed that Lanzoni, Martini & Co. received the contract with the idea that the Government retained the power the following or any subsequent day to change its provisions, destroying or impairing the usefulness of the points of ingress and egress to and from the railways and mines. To allow the existence of such a power in the Government as a contracting party would be to give one of the parties to the contract the right to destroy all the interest of the other party in it.

We arrive, then, at the very important question as to the measure of damages

<sup>1</sup> See *supra*, p. 635.

<sup>2</sup> The Convention of Paris, 1854, provides:

4. Les blocus, pour être obligatoires, doivent être effectifs, c'est-à-dire maintenus par une force suffisante pour interdire réellement l'accès du territoire ennemi. (*Revue de Droit International*, 1869, p. 157.)

for which the Government is responsible because of these several acts — that is to say, interference with the foreign workmen, with the native workmen, with the port by paper blockade, and with the rights of the contracting party by closure of the port.

As has already been demonstrated, the Government materially interfered with the labor of the foreign workmen, the natural result of its action being to prevent the employment of others. It interfered with the native workmen by a system of repeatedly attempted recruitings in plain violation of the contract. It (by paper) blockaded the port, and consequently diminished the value of the railroad concession for about five months, and it almost completely paralyzed operations under the concession by closing the port for a period of eight months.

It appears in proof that at the time the habitations of the foreign workmen were fired upon in May, 1902, the mine was capable of a daily production of 150 tons of the usual value of 25 bolivars per ton, upon which the company might ordinarily have expected a profit of about one-half, and the first question arising is whether the Government should be held responsible for this loss of profit during the period of twenty months from about the 1st of June, 1902, to the 1st of February, 1904.

It is the opinion of the umpire, several times expressed, that Venezuela is not to be held responsible for speculative profits, but the profits in the present case are not entirely speculative. In a question of contract presented to the Supreme Court of the United States, in *Howard v. Stillwell, etc., Manufacturing Company*, 139 U.S., page 199, it was said:

It is equally well settled that the profits which would have been realized had the contract been performed, and which have been prevented by its breach, are included in the damages to be recovered in every case where such profits are not open to the objection of uncertainty or of remoteness; or where, from the express or implied terms of the contract itself, or the special circumstances under which it was made, it may be reasonably presumed that they were within the intent and mutual understanding of both parties at the time it was entered into.

While this language is not absolutely in point, it indicates that if a clear measure of damages exists with relation to future business, it may be invoked.

We find that by a contract entered into between Del Buono and his associates in March, 1902, the company agreed to furnish coal to Del Buono for the first year thereafter at the rate of 30,000 tons, and for the second year 50,000 tons, with an additional amount in subsequent years, which, however, does not concern us. To this extent the company had an assured market, with a reasonably well-established profit on its business. We are informed that this contract was notified to the Government April 12, 1902.

Bearing in mind the proven capacity of the mine, this amount of coal could have been furnished — that is to say, from June 1, 1902 (about the time the troubles of the workmen commenced), to April 1, 1903, 25,000 tons; and from April 1, 1903, to February 1, 1904, 41,666.66 tons; or a total of 66,666.66 tons for the twenty months. From this may fairly be deducted for the two months of blockade of the allied powers 5,000 tons, leaving a net total of 61,666.66 tons, upon which it could have made an average profit at the rate of  $12\frac{1}{2}$  bolivars per ton, or 770,833.25 bolivars.

It would, however, be manifestly unfair to hold the Government responsible for this amount, because a very large part of the difficulty in working the mines was due to the direct action of revolutionists, with whom the Government was at war, and another considerable percentage must be attributed to the fact that the mines could not have been worked with thorough success even had the

Government properly performed its duties, because of the existence of a state of warfare in the neighborhood of the mines and railway, as well as at the port of Guanta, a condition for which the Government can not be held to contractual or other responsibility. The umpire, therefore, feels that he would be performing his full duty in solving this very troublesome question if he were to allow in favor of the company one-third of the amount it could have gained under the Del Buono contract, or the sum of 256,944.42 bolivars.

The umpire does not ignore the fact that the mine might have sold its coal to others than Del Buono, but he attaches little importance to possible sales of this character, because, as appears in the proof, from the opening of the concession to the 20th of February, 1901, only 7,271 tons had been extracted, and from the last date up to July 12, 1902, including about a month's work of the Italian laborers, only 7,500 tons additional were supplied, making a total from September 18, 1899, to July 12, 1902, of 14,771 tons, or a daily average of about 18 tons.

In the foregoing calculation, and in another to be subsequently made, the umpire estimates damages in favor of the claimant up to February 1, 1904, not ignoring, however, the fact that the last date upon which claims could have been presented before the Commission, and therefore, in his opinion, the last possible date to which, under ordinary circumstances, damages could be claimed, was August 9, 1903, but he is influenced by the legal principle stated in the American and English Encyclopædia of Law, 2d edition, volume 21, page 732, and expressed as follows:

When a court of equity grants relief by injunction for the abatement of a nuisance, it may award damages also if prayed and proved. In such case the usual practice is to assess the damages up to the rendition of the decree, in order to prevent further litigation.

To the above proposition many American and English cases are cited, and the damage in question, being continuous in its nature, is believed to fall within its clear reason.

By reason of the paper blockade and the closure of the port of Guanta, as well as interference with laborers, Italian and Venezuelan, the contract was broken by the Government, as hereinbefore set forth, and this breakage of contract forms an element of damage quite distinct from that involved in interference with the working of the mines. For if gangs of workmen employed in the maintenance of the railway were driven off and freight of all kinds could not longer be received at Guanta from abroad or carried to that port for exportation, then to perhaps an absolute point the concession became valueless. Such was the case, as we have seen, during the five months of paper blockade and eight months of closure of port, the interference with laborers bringing up the total time during which the contract was affected by governmental acts to twenty months. The rent due by the firm to Venezuela for this period would be 173,333.33 bolivars.

The umpire finds by the statement of account between the company and the Government presented by the company, made to September 1, 1903, that allowing the "vales" of General Marcano for 60,600 bolivars, which seem not properly embraced in the settlement of September, 1900, the Government was indebted to the company in the sum of 15,185.74 bolivars. In this account, however, credit is asked for 33,957 bolivars for services rendered the revolution. This must be rejected, leaving the company indebted to the Government on September 1, 1903, 18,771.26 bolivars. The account may, therefore, be stated as follows:

## CREDIT

	<i>Bolivars</i>
Rent allowed by this opinion and sentence based hereon from June 1, 1902, to February 1, 1904 . . . . .	173,333.33

## DEBIT

	<i>Bolivars</i>
Balance due September 1, 1903, to Government . . . . .	18,771.26
Rent to Government from September 1, 1903, to February 1, 1904 . . . . .	43,333.33
	62,104.59
Balance due lessees on this account . . . . .	111,228.74

This award must be made, however, without prejudice to the rights of the company to recover in other tribunals for services rendered after September 1, 1903.

Let us now refer to the third head of damages, to wit, the various material injuries to claimant's properties.

The most important of these is stated to be the throwing into the sea or the burning up by the revolutionists of 5,697 tons of coal on September 16 and 17, 1902. Responsibility is charged on the Government for this loss, the theory being that the Government, by its paper blockade of the port of Guanta, had prevented the exportation of the coal, thereby permitting its loss at the hands of the revolutionists. On the other hand, it is argued that at least 150 tons were sold to private parties or burned by the company itself, while it is suggested that much of the coal was doubtless worthless through long exposure prior to the blockade.

The umpire believes that the Government is responsible for the loss of the coal, having prevented its exportation, but he can not ignore the fact that some of it was used as stated, and that much of it in all probability, because of exposure, had slight value. He believes he will do full justice if he allows for the destruction of 2,500 tons, at 25 bolivars a ton, or a total of 62,500 bolivars.

Other damages than those above enumerated (including thefts) may be referred to, but although dwelt upon at length in the memorial, the proof does not show that the material loss involved was great. The umpire believes that for them an allowance of 10,000 bolivars will be ample.

No account is taken of the injury to the railroad track, consequent upon its being turned into a passageway for animals, the authorities being pecuniarily unable during the war to keep up the roads. This was an unfortunate consequence of war for which the company can claim no personal indemnity.

Many of the other claims for damage rest upon the existence of war, for which Venezuela can not be specially charged, however regrettable the facts in themselves may be.

It is strongly urged upon the umpire that large damages should be awarded under the head of lack of pacific enjoyment of the thing rented, and aid is invoked of the principle embodied in section 1575 of the Italian, and section 1529 of the Venezuelan Civil Code, making it the duty under any contract of the owner renting property to maintain the lessee in the peaceful enjoyment of the thing rented during the time of the contract. This simply means that such enjoyment shall be preserved as against the owner and others claiming title, but is no covenant against the action of trespassers. As far, therefore, as the Government may thus be legally responsible, the umpire has, in this opinion, sought to hold it to such responsibility.

An award will therefore be signed for 439,673.16 bolivars, with interest at the rate of 3 per cent per annum from October 30, 1903, to December 31, 1903,

without prejudice to the claimant to demand payment from the Government in any forum having jurisdiction for services rendered after September 1, 1903.

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POGGIOLI CASE

(By the Umpire:)

The widow and children of an aggrieved Italian, who were all born in Venezuela and have always lived in that country, can not claim as Italian subjects before this Commission (affirming Brignone and Miliani cases).<sup>1</sup>

Venezuela is responsible for damages inflicted upon the property of a foreigner where she has allowed serious offenses to be committed against him personally and the offenders, although known, to go unpunished, and where the authorities, in conjunction with such offenders and with others, have depredated his property and driven off his employees, and no relief been afforded, although frequent complaints were made.<sup>2</sup>

A general claim for loss of credit is too indefinite and uncertain to be taken into consideration.

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<sup>1</sup> Pp. 542 and 584.

<sup>2</sup> In addition to the authorities upon this point cited in the decision, attention is called to the Ruden case (Moore, 1653-1655).

It was shown that on January 14, 1868, the inhabitants of Motupe invaded the claimant's plantation of Errepon and burned the buildings and fences; that on February 14, 1868, Ruden appealed to the executive power and demanded an indemnity, at the same time charging guilty omission on the part of the authorities: that the executive power two weeks later asked the prefect of the department for a report, and that the prefect ordered the subprefect to make one; and that the latter, on May 22, 1868, reported that Errepon had been burned, but that he could not then go to the plantation and ascertain the value of the property burned, as the roads were bad. No further steps were taken by the authorities till, three months afterwards, the prefect, urged on by Ruden, directed the subprefect to make another report: but in reply to this order the first report, which was deficient and passionate, was merely repeated. In July, 1868, the executive power, without having come to any decision, sent the papers to one of the government attorneys. A third petition of Ruden met the same fate, having been held without action for fourteen months. The facts were not investigated, nor were the guilty parties prosecuted. An order was indeed given for an investigation, but it was avoided. The judicial authorities, when appealed to for an investigation of Ruden's claim, refused to entertain it, on the ground that an executive order had forbidden the trial of suits against the treasury. And while justice was thus denied, it was charged that the local authorities were concerned in the attack on the plantation. A report of the consular body, drawn up at the place, declared that the burning of estates, both native and foreign, at the time and place in question, was committed by armed forces under the command of officers. On all these grounds the umpire held Peru liable for the burning.

The case of Johnson (Moore, 1656-1657) was similar to the Poggioli case in many respects, it being borne in mind that the laws of Venezuela only recognize responsibility for the acts of officials working in a public capacity. In the case now referred to the claimant's

property was destroyed, and he was personally and permanently injured by armed bands, headed by the governors of adjacent towns, instigated by the superior authorities of the province, who were dependent upon and immediately represented the supreme government. The supreme government issued a decree to the effect that the injuries should be redressed, but nothing substantial was done, nor were any of the malefactors punished. The Peruvian Commissioner had contended that it was necessary that Johnson should have had recourse to the courts and have been denied justice. But it was known that the judges of the province of Lambayeque were menaced and controlled by the mob, and, if not in sympathy with them, in a panic; and that it would have been useless to appeal to them. Mr. Elmore (the umpire) declared, however, that there had been an actual denial of justice. By the circular of the minister of justice of Peru of September 13, 1853, the judges were forbidden to receive expedientes affecting the law of December 25, 1851, closing the consolidation of the public debt. By that circular the courts were closed against the sufferers at Lambayeque. Mr. Elmore cited two cases of the actual denial of petitions of persons injured in Lambayeque on the ground of the circular referred to. One of these was the case of Ruden & Co., who applied April 2, 1868, to the judge of Lambayeque and were denied a remedy on that ground. The claimants were thus without hope. If they applied to the courts they were told they had no remedy. If they applied to the commission they were told that they must apply to the courts. Mr. Elmore therefore awarded the claimant the sum of 11,480 Peruvian silver soles.

No allowance will be made for the closure of a port, whatever reasons may have induced it, when no contract relations between the government and the claimant are in question.<sup>1</sup>

Allowances will be made for loss and destruction of crops consequent upon violence and depredations inflicted by agents of the government, together with unpunished malefactors.

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

The claim which Silvio Poggioli, for himself and the heirs of his deceased brother, has submitted to this Commission, excels in accuracy and efficiency of proof. The writer supports it warmly, and by way of preamble will cite the opinion of Fiore (*Treatise on Public International Law*, Vol. I, sec. 651), on which he bases his own, regarding the responsibility of the Venezuelan Government toward the claimants. Here are the words of the eminent jurist:

Let us suppose that, having examined the circumstances, it is found that the public officials who by their own act injured the interests of foreigners while operating with a common intent in such a manner as to justify the assumption that they were under the orders of higher authority; or let us imagine that a government has neglected to take timely steps to avert certain acts, or that it has directly or indirectly approved the doings of its officers. In these and all similar instances justice and equity require that the state be held diplomatically responsible therefor, and be obliged to repair the damage.

Before entering into a detailed examination of the claim the Italian Commissioner deems it proper to observe that, in accordance with the views expressed by him in former claims, he holds in this, that the widow, no more than the children of the deceased Poggioli, can be excluded from a share in whatever indemnity may be awarded. To the juridical reasons which he has in this

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The fundamental principles affecting the responsibility of the respondent are discussed by Commissioner Little, of the American-Venezuelan Commission of 1890, who held in the de Hammer case (Moore, 2968) that —

Venezuela's responsibility and liability in the matter are to be determined and measured by her conduct in ascertaining and bringing to justice the guilty parties. If she did all that could be reasonably required in that behalf, she is to be held blameless; otherwise not. Without entering upon a discussion of the investigation instituted and conducted by her, it seems there was fault in not causing the leaders, at least, of this lawless band to be arrested. It was notorious who they were. It does not seem that any attempt was made before any local authority to bring them or any of the band to justice.

In the same case Commissioner Findlay held (Moore, 2969) that —

a state, however, is liable for wrongs inflicted upon the citizens of another state in any case where the offender is permitted to go at large without being called to account or punished for his offense or some honest endeavor made for his arrest and punishment. (Opinions of American-Venezuelan Commission of 1890, p. 486.)

The rule laid down by Bluntschli in *Le Droit International Codifié* (sec. 380) seems in point:

*L'état a le droit et le devoir de protéger ses ressortissants à l'étranger par tous les moyens autorisés par le droit international. \* \* \**

*(b) Lorsque les mauvais traitements ou dommages subis par un de ses ressortissants ne sont pas directement le fait de l'état étranger, mais que celui-ci n'a rien fait pour s'y opposer.*

We may add as follows:

The responsibility of the state results from its neglect or inability to control the conduct of its subjects, or its neglect or inability to punish the offenses and crimes which they commit. (Halleck, *International Law*, Ch. XI, sec. 6, citing Vattel, *Droit des Gens*, liv. 2, ch. 6, secs. 71, 72; Phillimore, *International Law*, Vol. 1, sec. 218; Rutherford's *Institutes*, b. 2, ch. 9, sec. 12; De Felice, *Droit de la Nat.*, tome 2, sec. 15; Burlamaqui, *Droit de la Nat. et des Gens*, tome 4, pt. 3, ch. 2.

<sup>1</sup> Compare Martini case, *supra*, p. 644.

regard expressed on previous occasions he desires to add arguments based on equity.

Americo Poggioli was, presumably, murdered by one of the men who, as will appear in the sequel, had attempted the life of his brother Silvio, and who were arbitrarily liberated by Gen. Diego Bautista Ferrer. However this may have been, he was the victim of an act committed on Venezuelan soil, and the perpetrators remained unpunished. Under these circumstances the writer finds another reason why the heirs of the victim should not be denied the right to apply to this tribunal for redress. Should the foregoing contention not find acceptance with the honorable umpire, it will certainly not escape his diligent examination of the case that Silvio Poggioli was, before as well as after the death of his brother, the sole manager and responsible agent of the commercial affairs of both. From the contract drawn up between them in March, 1892, it appears, further, that the assets of the firm were, on December 31 of the preceding year, 2,803,524 bolivars, and the liabilities 1,234,729 bolivars, including 72,000 bolivars due Manuela Rosales; that therefore the net balance amounted to 1,568,795 bolivars; that the personal share of Silvio was 501,703 bolivars, the common share 1,067,092 bolivars, and that consequently the total amount of Silvio's interest, 1,035,249 bolivars, constitutes 65.99 per cent of the whole, and even under the most unfavorable estimate he would be entitled to a proportionate share of the indemnity on the basis of this calculation.

Should the honorable Commissioner for Venezuela raise a question of principle and deny the right of the Poggiolis to appeal to this Commission, on the ground that they were not included among the Italian claimants for indemnity for the war of 1892, whose claims were subsequently quieted by the representations of the royal minister, Count Roberto Magliano, to the Venezuelan Government, the undersigned would hasten to reply that in his opinion such an exception should not be sustained, for the reasons set forth in his memorial anent the claim of Constantino Murzi.<sup>1</sup>

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<sup>1</sup> No opinion was filed by Doctor Zuloaga in this case, and it never reached the umpire. Mr. Agnoli's opinion is as follows:

The honorable Commissioner for Venezuela rejects the above claim on a question of principle — that is, he holds that the claimant has forfeited every right to demand indemnity before this Commission, because his claims go back to and have their origin in the civil war of 1892, after which the Italian Government had settled with the Government of Venezuela on account of other claims arising from the same war.

The Italian Commissioner, without reiterating the reasons given by him on former occasions why, in general, the opinion of his honorable colleague should not be accepted as establishing the forfeiture of the right of Italian citizens to urge their claims before this arbitral tribunal for damages occurring prior to wars of the last five years, observes that this special objection, as regards the claims of 1892, is singularly inconsistent, since various claims of that period, and particularly that of Giuseppe Menda, No. 199, and that of Giuseppe Lasala, No. 6, have been discussed and favorably received.

Doctor Zuloaga's objection seems to be based on the fact that Count Magliano, formerly Italian minister in Caracas, in his private note of August 30, 1894, addressed to the Venezuelan minister of hacienda, referred to a "final settlement of all claims arising out of the revolution of 1892."

The phrase employed in the aforementioned note has led the Commissioner for Venezuela to the conclusion that that settlement of indemnities was general and comprehensive.

Against this conclusion the Italian Commissioner, proceeding from the consideration that the word "surjidas" may not be applied to other claims than those the demand for settlement of which was pending before the Italian diplomatic representation, believes it opportune to call attention to the fact that the last phrase of the letter of the Venezuelan Government, to which the above-mentioned note of Count Magliano was an answer, proves beyond question that reference was made to some, not all, of the claims arising from Crespo's revolution, since by it there was asked the exoneration of Venezuela from every ulterior responsibility toward the Italian Government and toward claimants "for all such claims for indemnity as were by that agreement forever extinguished."

There remained, however, undetermined the rights of those whose claims had not been examined.

In any case this exoneration of Venezuela from all responsibility the Italian Government is not willing to accord, even with regard to the claims then settled, in the name and on account of which it refused, as appears in the letter of Minister Pirrone of December 14, 1894, to make any declaration whatsoever "inasmuch as "

With these premises laid down, he will now proceed to a detailed study of the circumstances and motives of the present claim.

The Poggiolis asked for indemnity for five kinds of damages, to wit:

1. Requisitions of animals and merchandise and destruction of crops and property.
2. Arbitrary closure of the port of Buena Vista.
3. Personal insults, threats, and imprisonments.
4. Forcible separation from their property, and consequent abandonment of their business from daily annoyances; total lack of protection and safety, with resulting economic loss.
5. Judicial and other expenses connected with the preparation of their claim.

A separate examination of these five heads is now in order for the purpose of establishing the amount of indemnity due thereunder.

(a) Requisition of 95 mules, at 520 bolivars each, equal 49,400 bolivars.

It is well known that the price of cattle in the State of Andes is somewhat higher than it is in Caracas. At all events, the witnesses have asserted that the sum mentioned was the value of these mules, and it is well to note that the witnesses summoned by Poggioli to prove the damages suffered by him have been selected from among the best known and most respected persons in that State. Among those whose names appear in the "guistificativo" No. 2, which refers to this requisition and other damages, are Gen. Ramón Rueda, who was governor of Trujillo; Dr. José Antonio Hernández, a noted physician who is favorably known in Caracas; Col. Juan de la Paz Peña, and Col. Carlo Hernández, wealthy and esteemed merchants and landowners; Adolfo M. Sanchez, ex-public register and now district judge of Escuque; Luis F. Carrasquero, repeatedly jefe civil and president of the municipal council of said district; Jesús Contreras, highly esteemed merchant and proprietor of the neighborhood, and other respectable persons.

The testimony of such witnesses should be accepted without the slightest hesitation or reserve.

It is true that in the contract with Mr. Ribero (Document I) a part of the mules had been valued at 400 per head in 1890, but the increase in price is easily accounted for when it is understood that the animals were taken at a time when both the Government and the "Legalista" revolution (which culminated in the advent of General Crespo to the Presidency of the Republic) were greatly in need of draft and pack animals, as well as cattle, for their respective armies.

For these reasons it is just that the amount claimed for the mules should be allowed, and for similar reasons the estimate of 200 bolivars per head of cattle should not be deemed exorbitant, although the cattle contracted for by Ribero was in part valued at 150 bolivars per head, the total under this item being 20,000 bolivars.

The sacking of the store at San José de Palmira is proved by the testimony set forth in fascicle 2, both as regards the fact itself and the quantity of the goods

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says the letter, "to the understood agreement there had been given the character of a decision by reasons of equity adopted by the junta of public credit within the sphere of its competency."

This note of Pirrone, as well as the others concerning the negotiations in question, is special in its nature and proves once more the official and limited character of those acts by which neither one party nor the other assumes a more extended obligation than that which constitutes the explicit object of the stipulated agreement.

Among the claims then examined that of Constantino Murzi did not appear, nor did those of Menda and Lasala, above referred to, and others now pending, and the first-named, as well as any other dating from that period, would be wrongfully excluded by this Commission on the exception so tardily raised by the Commissioner for Venezuela.

On questions of fact in this claim it does not seem probable that disagreement may arise between the Commissioners. They are nevertheless respectfully submitted to the decision of the honorable umpire.

taken. The importance of that business house is shown by documents contained in fascicle II — that is, by the contracts with Mr. Barone, administrator of the same, and by the relative accounts and invoices. It is consequently equitable to concede an indemnity of 32,000 bolivars for this item.

The requisition of merchandise made upon the highway between Arapuez and Monte Carmelo is established by the declarations of Martinez and Nieto. The testimony of Martinez includes in general all the facts referred to in that document. The other is apparently restricted as to quantity, but taken as a whole the testimony is to the effect that all the merchandise en route was levied upon, and Silvio Poggioli declares most positively and is willing to swear that none of those goods ever reached him. Therefore, while giving due respect to any appraisalment the honorable umpire may see fit to make of this loss the Italian Commissioner holds that an indemnity of 4,800 bolivars should be allowed therefor.

The damages caused by the Government's agents in burnings at the port of Buena Vista, and by the destruction of five bridges on the road leading to said port, are estimated at 24,000 bolivars (see fascicle 2), which should be granted without prejudice to the indemnity for other damages following as the immediate and necessary consequence of said destruction and of the arbitrary closing of the port, which will be referred to further on.

We should now consider a series of damages suffered by the Poggiolis at the hands of four individuals, namely, Rudecindo Hernandez, Carlos Solarte, Rafael M. Trejo, and Faustino Suarez, who wounded Silvio Poggioli. While these persons were on trial they were arbitrarily liberated by Gen. D. B. Ferrer. The records in the case were spirited away. Notwithstanding the accusations of the claimants and orders received from the central Government at Caracas, which, however, took no steps to insure their execution, as will be more fully explained in the course of this paper, the authorities of Monte Carmelo, and generally those of the State, not only allowed them to remain undisturbed, but actually used them as instruments in persecuting the Poggiolis. The negligence and malice of the authorities toward these latter, as clearly shown by all the documents exhibited to us, had one of its clearest manifestations in the passive attitude toward and encouragement of these four malefactors, and constitutes one phase in the system of persecutions which has led to the ruin of the Poggiolis.

Wherefore the Italian Commissioner insists that there was an implied responsibility on the part of the Government in these events, even if only a part of them were executed by its agents, because all were by them at least suggested or tolerated.

Let us proceed to the specification of these damages:

1. Burning of house and stores at St. Rafael (fascicle 19, question 2), valued at 4,000 bolivars.
2. Renewed destruction by fire of the same buildings (fascicle 19, question 3), valued at 4,875 bolivars.
3. Burning of 10 hectares of sugar cane ready for the mill (it would scarcely have burned green; fascicle 19, question 4). The sum of 1,600 bolivars claimed for this loss represents the cost of planting and cultivating the cane, which would have produced for ten years or more with ordinary attention.
4. Loss of sugar from the cane for the first year, 1893 (fascicle 19, question 3), 12,000 bolivars.
5. Loss, by destruction, of coffee and banana plantations on the St. Emigdio property (fascicle 19, question 6), which occasioned a damage estimated at 12,800 bolivars.

6. Destruction of a coffee-cleaning mill on the same property (fascicle 19, question 6), 500 bolivars.

7. Destruction of 5,000 banana trees on the Miraflores property (fascicle 19, question 7), 800 bolivars.

8. Burning of a house, by a Government official, on the Pescado property (fascicle 19, question 8), 1,000 bolivars.

9. Destruction, by Government officials, of two coffee-cleaning mills on same property (fascicle 19, question 9), 7,200 bolivars.

10. Killing and maiming of animals on San Emigdio place (fascicle 19, question 10), 1,728 bolivars.

The total of clearly established damages, which have been moderately appraised by Messrs. Poggioli, therefore amounts to 176,703 bolivars, and this loss, occasioned either by the direct acts of the authorities or by the connivance or apathy of the same, should be indemnified.

Let us now consider the damages coming under item 2, referred to in the beginning of this opinion, i.e., the unwarranted closure of the port of Buena Vista, a measure easily understood and accounted for by the animosity displayed against the brothers Poggioli, as seen in documents contained in fascicle 35.

The authorities attempted to attenuate the arbitrariness of this measure by declaring the port closed through reasons of public order and to prevent the revolutionists from procuring arms and munitions of war. But that this was a mere pretext is demonstrated by the fact that at the same time the port of La Dificultad, 1,200 meters away, was permitted to remain open, though just as liable to be used for contraband purposes as the other.

At No. 13 of fascicle 2 it is shown that during the first year of the closure the damages resulting therefrom to the brothers amounted to 24,000 bolivars, that port serving not only their purposes, but being used likewise by a number of importers and exporters of Monte Carmelo and surrounding neighborhood, for the exchange of produce with Maracaibo, by paying the appropriate duties. It is true that some three months after the closure the port was reopened, but this reparation was too tardy to be of avail so far as the Poggioli interests were concerned, either because the port buildings and bridges leading thereto had been destroyed, or because the Poggiolis could not, menaced and persecuted as they had been, return and restore these things to working order with neither money nor credit. And inasmuch as their enforced absence from Monte Carmelo lasted three years, it seems to the Italian Commissioner that the indemnity under this head should be at the rate of 24,000 bolivars per year, or 72,000 bolivars.

We come now to the third class of damages. From all the papers in the case it appears that General Ferrer instituted against the claimants an absurd suit for alleged introduction of arms for the revolutionists. Before the beginning of the suit they were thrown into prison, having been taken from Monte Carmelo to Valera, where they remained from April 29 to June 9, 1892, just at the time when coffee was to be gathered. Both brothers were subsequently again imprisoned, Silvio for fifteen days from September 26 of the same year and Americo for five days in January, 1893.

All these details, as well as the declaration of the superior court of Trujillo establishing the innocence of the brothers, appear from the documents of the claim. In fascicle 15 the court of first instance, referring to the imprisonment and trial of the claimants, acknowledges as "fully demonstrated the injustice and political passion of the usurpers of the public powers (and these could have been none others than the magistrates and agents of the legal Government) against the said Italian subjects, the Poggioli brothers."

The persecutions of the claimants were so varied and numerous and so long

continued that we can not but regard them as proving the existence of a plot well organized and of long standing, prosecuted with a most diabolical malignity and with the connivance of the Government, which thus failed in its principal duties.

The undersigned therefore concludes that the indemnity of 100,000 bolivars asked on account of illegal and arbitrary imprisonments, threats, etc., given the position of the claimants and the importance of their commercial affairs, can not be considered excessive.

The fourth class of losses is the most consequential; from it has come, as an immediate and direct consequence, the utter ruin of the claimants.

The proofs of daily prosecutions suffered by them either from public officials or with their connivance, appear clearly and indisputably from the papers in the case.

In 1891 Silvio was seriously wounded by Rudecindo Hernandez, in complicity with Carlos Solarte, Rafael María Trejo, and Faustino Suares, and remains a cripple for life.

The perpetrators were put on trial, and when it appeared they would be convicted they were arbitrarily discharged by General Ferrer, while the records of the case were caused to disappear. Afterwards they went about Monte Carmelo for years, terrorizing the inhabitants or inciting them against the Poggiolis, burning and destroying the property of the latter, while the authorities remained impassive, notwithstanding the denunciations of the dependents of the claimants, and the orders from the minister of the interior, Felice Azevedo, at Caracas, dated July 27, 1893, to punish the malefactors, and institute a trial for the disappearance of the records. This order remained a dead letter, and the central Government took no further heed of the matter. In fact, the proceedings were never reversed, and the four criminals are living at liberty in the neighborhood of Mérida.

In 1899 Americo was barbarously murdered, and among the suspects of this crime figures Carlos Solarte.

In 1892 the claimants were subjected to an odious trial, from which they were freed only in 1893, after having been harshly arrested and thrown into prison for a long time; 95 mules, used by them in their business, were requisitioned, as were likewise 100 steers; they were robbed of merchandise at San José de Palmira and on the road to Arapuey from Monte Carmelo; their houses, etc., at the port of Buena Vista, another essential element of their business, were destroyed by fire. The bridges leading to the port were ruined, and the port closed, though afterwards reopened when it had become impossible for the Poggiolis to use it.

Twice were the stores at St. Rafael burned, and plantations of cane in the same locality ravaged, as were plantations of coffee and bananas at San Emigdio and Miraflores. The coffee-cleaning mills at San Emigdio, Santa María, and Pezcado, and at the latter place another house, shared the same fate, with accompanying inundation.

The authorities either perpetrated these abuses or tolerated them, and even incited not only the banditti, but also the employees of the firm to commit outrages of all sorts on the property, and to refuse the payment of dues and rents, creating a system of most unjust war and persecutions and a situation profoundly immoral and subversive of order, as reported by the minister of the interior, Dr. Gen. José Ramón Nuñez at the session of Congress of March 28, 1895.

In 1892 Silvio Poggioli is again arrested, and Americo twice, in 1893 and 1894.

In 1894 they are again brought to trial, but the reason assigned was so absurd

and unjust that General Fernandez ordered the suspension of the trial, thereby committing an act contrary to law but according to justice.

The Poggioli brothers, threatened, deprived of every safeguard for themselves and families, for their property, were thus obliged to abandon the seat of their business, while their dependents, seeing them thus driven and persecuted, became emboldened to refuse obedience and payment of their just dues and considered as common property all things belonging to the masters, since they had reason to believe these latter would never return to claim. The few dependents who had remained faithful were in their turn persecuted by the Government for no other reason.

In fascicle 16 the honorable umpire will find, among other things, the sworn statement of Gen. G. B. Araujo, a man whose integrity is recognized throughout Venezuela, from which statement it appears that the object of General Ferrer, the author or instigator of the persecutions showered upon the Poggiolis, was the possession of their property. It is clear that to carry out this scheme he had to resort to all kinds of iniquitous measures, some of which it is impossible to specifically prove.

The credit for which the claimants had labored and upon which they had counted was and still remains utterly lost.

In January, 1894, Americo attempts to return to Monte Carmelo, in order to resume the management of his affairs, but is arrested. Silvio betakes himself to Palmira the same year, but being again threatened, gathers together a few faithful dependents and tries to flee from an ambushade in which he is fired upon and his life attempted, and this with the connivance of the authorities.

By a letter of February 4, 1894, the president of the State of Los Andes (see fascicle 18) acknowledges that the Messrs. Poggioli, by reason of the persecutions to which they are exposed, are unable to establish themselves in the parish of Monte Carmelo, and in a letter of February 13, 1894, Gen. Antonio María Rincón, chief of the district of Escuque, states to the jefe civil of Monte Carmelo that when Americo Poggioli returned on two occasions to said locality to look after the interests of the firm and ascertain what measures had been taken against the four bandits above named, he was arrested, and testifies that the denunciations of Poggioli were well founded.

Finally, by letter of November 5, 1894, that appears in fascicle 21, Gen. Luis F. Carrasquero, jefe civil at that time of the district of Escuque, acknowledges and testifies to the long series of vexations and persecutions suffered by the claimants, and offers them the necessary guaranties to enable them to return to their homes. The same officer, by letter of the following day, informs the jefe civil of Monte Carmelo that the Poggiolis will return to the direction of their business through guaranties finally obtained from the president of the state, and gives orders that there be no repetition of the occurrence which took place in October of that same year, to wit, the requisitioning of a train of eight mules by an armed guard of the Government.

Fascicle 36 contains the proof furnished by the Venezuelan minister of the interior that up to the end of 1895, though for years the "Legalista" revolution had been triumphant, there was no security in the state for persons or property, and for this condition of affairs the Government was and is responsible.

This fully accounts for the Poggiolis being compelled to leave their several properties, their interests, and their business up to the end of the year 1894. At that time their persecutions finally ceased, after having lasted since 1891, and having been most severe in 1892, 1893, and 1894.

What has been the direct and necessary consequence of all this, if not the entire ruin of the family?

The Poggioli brothers had, as appears from the partnership contract of

March 4, 1892, at that time a liability of 1,162,729 bolivars, exclusive of the 72,000 bolivars which they owed to Manuela Rosales de Poggioli, wife of Silvio (see fascicle 7). It is shown at fascicle 2 that they were paying an interest of between 12 and 15 per cent per year—that is, about 157,000 bolivars each year.

During the three years of the abandonment of their factories they lost, in the first, 6,000 quintals of coffee, and in the other two 4,000 quintals each, and these latter do not represent more than half the average production of their haciendas in Monte Carmelo. This is an extremely moderate estimate, since the actual loss exceeds half the average yield per year, the price of which then was 72 bolivars per quintal, as shown in fascicles 2, 28, and 32. The total actual loss is stated at 1,008,000 bolivars.

The burning of the port of Buena Vista and the compulsory removal of the Poggiolis was injurious to them from another point of view, in that it prevented the opportune shipment of various quantities of coffee stored in Monte Carmelo, in San José de Palmira, and in San Cristóbal de Piñango, and the merchandise was spoiled in consequence. The loss under this item is estimated at 78,400 bolivars.

The plantations having suffered an almost total abandonment for four years (since neither the Poggiolis nor anyone else, whether native or foreigner would have dared to care for them, as by so doing they would have incurred persecution from the authorities of Monte Carmelo), became, from fruitful fields, a wilderness of noxious weeds, and it seems just that such an injury should be compensated. For this item the sum of 100,000 bolivars is claimed.

The greatest of all their disasters, however, was the inevitable loss of their credit as the direct consequence of the above-named facts. In their character of industrious, intelligent, and wealthy inhabitants, they enjoyed, before the beginning of the persecutions mentioned, a credit of considerable proportions, but subsequent to these they were unable to meet their liabilities, either principal or interest, from 1892 to 1894. Those who had reposed in them a well-merited faith now seeing them become the objects of daily attacks, hindered in different ways from exercising their industries and enjoying the fruits of their labors and fearing that this odious condition would be prolonged indefinitely, and result finally in the loss of every opportunity to recover their capital, closed their coffers to the claimants, and within only three months of the time when they were enabled to resume operations, compelled them to give up everything, their property passing into the hands of an administration which controls it to this day for the benefit of the creditors.

Had the Poggiolis on the contrary been permitted to work their property during those three years when coffee was selling in Monte Carmelo at 72 bolivars per quintal, they would have been able to meet their liabilities, instead of which they have to-day only a property encumbered by the same debts which burdened it in 1892, and by interest at 5 per cent which it has not been possible to pay, because coffee has fallen as low as 20 bolivars per quintal at Monte Carmelo, while the cost of production is 15 bolivars per quintal.

It is not urged that the ruin of the claimants is due to this fall in the price of coffee. They would have borne this without great difficulty had it not been that their property was mortgaged to the extent of 1,200,000 bolivars, undiminished at the beginning of 1895, and increased by the interest due on an additional sum of 150,000 for the years 1892, 1893 and 1894, solely because during said three years they could not harvest their coffee, which was then bringing remunerative prices, as already mentioned.

The Poggiolis are not as yet bankrupt because the contract for the management of their property was made for ten years from 1895 when the coffee was

still fairly remunerative, but at the close of this contract, unless the indemnity awarded them by the umpire is such as to enable them to meet their obligations, they will be utterly ruined.

These exemplary settlers, who, by their energy, opened a large territory to cultivation, established a port, canalized a stream, erected mills, populated a semi-deserted region, are, by the hostility of the Government and its agents, to whom patriotism, common sense, and justice should have suggested the opposite course, driven to the verge of beggary.

The Government is clearly responsible for their financial disaster, brought about by the loss of credit (that most cherished possession of the merchant), the fatal consequences of which have been summed up in the foregoing, and for which they claim an indemnity of 1,000,000 bolivars. This sum does not appear excessive when it is considered that it includes the stipend of 144,000 bolivars for the managers of the Poggioli estate for a period of ten years, and which they were compelled to pay on account of the persecutions inflicted upon them by the agents of the Government.

The liabilities of the claimants, which would have been discharged in 1892, 1893, and 1894, had they been permitted in that period of prosperity to manage their property unmolestedly, amounted, as has been said, to nearly 1,200,000 francs in 1895. With the direct damages suffered by them should be included the interest on the above to date; but the claimants intend to reduce their demand under this item to interest at 5 per cent on 969,015, as appears in the contract of May 7, 1895 (see fascicle 27), the other creditors having accepted partial settlements. It is certain that this accumulated interest, which constitutes one of the causes of the impending ruin of the Poggiolis, would never have been incurred had they been allowed to enjoy the freedom and personal guaranties in the management of their affairs to which they were entitled. Said interest, calculated at 5 per cent as per the contract of 1895, and including all of 1894, would amount to 436,056 bolivars, and this special indemnity is considered due them as well as the others, and for similar reasons.

The last category of damages suffered by the Poggiolis relates to the expenses of the two political trials to which they were subjected and for the preparation and prosecution of their claim, comprising the cost of Silvio Poggioli's residence in Caracas on two occasions for a considerable period; one from 1893 to 1894, and another at a later period, and also the costs of contract with creditors; in all, estimated at 52,313 bolivars, which is deemed within reason.

The claim of the Poggiolis is equitable from every point of view, and even in the determination of the responsibility of the Government in the events of which they were the sufferers, they have followed rules of moderation and reason. In fact, they make no claim for the wounding of the one and the assassination of the other, notwithstanding these may be considered as the first and last links in the chain of violences and persecutions mentioned in this paper. The responsibility for other maltreatments appears sufficiently established. It needs but to examine the odious animosity displayed by General Ferrer in his dealings with the unfortunate Poggiolis, in which he took the initiative and set the sad example of the vexations suffered by them.

The honorable umpire should consider the autograph letter of that officer in fascicle 37, in which he orders the destruction of 2,000 coffee trees belonging to one Felice Terán, solely because he had refused the General a loan, rendered impossible by reason of serious illness. See also a letter by him addressed to the jefe civil y militar of Monte Carmelo, of April 28, 1892, in which he orders the capture of the Poggiolis, and the seizure of all their mules and cattle without regard to any jurisdiction or respect for any law but that of his own will, justifying his odious procedure by referring to the refusal of the Poggiolis in the

exercise of their right as foreigners to furnish 40 mules on an arbitrary requisition of that officer, as a proof that they were themselves revolutionists and enemies of the Government. In that letter reference is made to verbal instructions mysteriously transmitted to General Briceño. What these instructions were, subsequent events adequately demonstrate.

General Ferrer was at that time invested by the Government with supreme authority in the State of Los Andes, in Barquisimeto and Zulia. If this was the conduct of one who should have been the best guarantee of the rights and liberty of the inhabitants what could logically be expected of the subordinate authorities?

It appears, besides, from documents in fascicle 35, that Generals Vásquez and Briceño, who were filling important positions in the State of Los Andes at the time of Ferrer's administration, were likewise enemies of the Poggioli brothers.

Is it admissible that he who is intrusted with the delicate and important duties of a public functionary should suffer his actions to be controlled by his sympathies or animosities?

This sufficiently explains how the persecutions and arbitrary treatment which precipitated the claimants from the height of their commercial prosperity to the condition of actual ruin lasted so long and took so many diverse forms.

The "giustificativo" and counterproof submitted by the Government to this Commission on March 12, 1904, can not overcome the full and complete documentation submitted by the claimants. As a matter of fact, it was prepared in the absence of Silvio Poggioli and on the basis of declarations of persons notoriously inimical to the claimant family. The facts therein alleged are effectively contradicted by the memorial presented to the royal Italian legation by the claimant on the 22d of April, 1904.

The honorable Venezuelan Commissioner alleges that many of the damages suffered by them were the outcome of private feuds engendered by their conduct toward certain of their creditors, whose property they had seized in satisfaction of debts under harsh foreclosures, and in support of this opinion he cites the case of Rudecindo Hernandez, who wounded Silvio Poggioli and who lost five haciendas by the latter seizing them in satisfaction for a few loads of coffee.

Upon an examination of the circumstances attending this affair it appears that Hernandez, in 1885, was indebted to the Poggiolis for 154 loads of coffee to the value of 15,800 bolivars, plus 11,367.78 bolivars in money. They awaited in vain for the settlement of the account to October, 1890, and on the 23d of that month an agreement was drawn up by mutual accord and recorded the 1st of December of the same year, by which 23,280 bolivars was acknowledged as due the Poggiolis, who granted the debtor delays in the payment of said amount in coffee and money.

The first payment fell due in February, 1891, with the condition that if payment was not then made the creditors would be authorized to seize the property held as security therefor. Hernandez did not meet his obligation in February, and on the 28th of May he fired upon and wounded Silvio Poggioli at night, in the plaza of Monte Carmelo, perhaps as a means of avoiding the fulfillment of the clauses of his contract. After this, Poggioli had no further hope of securing payment of the debt, and could not in reason be expected to show friendliness or regard toward Hernandez. In October of that year he obtained judgment from competent authority, and by a decree which explains and justifies the attitude then taken by the claimant secured possession of the property of the debtor.

Whatever of odiousness there was in this transaction can not certainly be

attributed to Poggioli, who used his right only after daily proof of forbearance and after a delay of years in its exercise. It will be noted further that at this time Hernandez was in jail for the wounding of Poggioli, and but for the arbitrary intervention of Ferrer would probably have remained there some years, leaving in abandonment the property held as security for the payment of his debts.

In conclusion, the Italian Commissioner asks that the present claim be recognized in the total sum of 3,023,472 bolivars, which, unless the undersigned has erred in his calculations, is the amount asked by the claimants, of which sum, Silvio Poggioli's share is 1,955,033 bolivars, or 65.99 per cent of the whole, while the share of the heirs of Americo Poggioli is 1,028,439 bolivars. Should the honorable umpire not recognize the latter as entitled to claim before this Commission, it is asked that his decision against them be without prejudice to their rights in the manner employed by him in former cases.

*ZULOAGA, Commissioner :*

Silvio and Americo Poggioli, Italians, domiciled in Monte Carmelo, Escuque District, State of Los Andes, were associated under the firm name of Poggioli Hermanos from 1885 to 1895, and dealt in coffee and cultivated it, whereby they constantly acquired new properties. Poggioli Hermanos were very much disliked in the neighborhood, so much so that on May 28, 1891, an attempt was made to kill Silvio, who was wounded by a shot fired from ambush. The deed was charged against Rudecindo Hernandez, Rafael Trejo, Carlos Solarte, and Faustino Sanches (the first of those named had sold a plantation to the Poggiolis). Process was instituted against these persons, but they escaped from the jail of Trujillo during a revolution; no action was taken and the suit was dropped. In 1892 a terrific civil war broke out in Venezuela, and the State of Los Andes, together with the government there, supported it. The Government at Caracas sent Gen. D. B. Ferrer against the government of Los Andes. When he arrived there the Poggiolis were denounced to him as revolutionists and the possessors of firearms, and Ferrer having demanded of them a certain number of animals and cattle for the army they refused to deliver them. Ferrer took the animals and cattle and put the Poggiolis in prison, ordering that they be tried, as appears from the order of April 23, addressed to the civil and military chief of Monte Carmelo, which reads as follows:

The refusal of the Poggiolis to deliver over the 40 mules which I have demanded of them, and other reasons which you will verify with General Briceño in a judicial manner, gives rise to the presumption that they are revolutionists and enemies of the National Government, and to this end, and in order to prove them such, you shall follow the verbal instructions which I have given Briceño, who will bear the original of what I communicate.

The Poggiolis were released by Ferrer himself, but later, on June 6 of the same year, the judge of the first instance ordered that they be taken prisoners in order that the suit pending against them might proceed; and they were imprisoned on September 26 of said year, and sent to Valera, but later set at liberty. The Caracas Government, in whose service Ferrer was, having been defeated and the revolution having triumphed in Los Andes, the tribunal constituted thereby, on February 7, 1893, dismissed the suit against the Poggiolis, declaring that in said action could be discerned the political passion of the partisans of the Government which Ferrer served. This judgment was confirmed by the court.

The Poggiolis having returned to their home, they were again antagonized by their numerous private enemies. Private individuals burned down small properties of the Poggiolis, they cut down some plantations of bananas (5,000

trees), they killed a saddle horse and 3 head of cattle, and at the time when Silvio was going to take charge of certain plantations, certain unknown persons discharged firearms on him from ambush. Some witnesses state that public opinion attributed it to persons who were delinquent with respect to payment of mortgages on certain coffee plantations which did not belong to the Poggiolis. In a letter from Poggioli to Ferrer it is said that Garceliano Usma and Santos Rivero had taken possession of the real estate of which in due form they had transferred title to him.

In the year 1891 the affairs of the Poggiolis prospered, but they had made free use of credit and owed more than 1,000,000 bolivars, and they paid thereon an interest of from 1 to 1½ per cent monthly. The Poggiolis from 1892 had found themselves in commercial difficulties, and this state grew worse until in 1895 they were forced to deliver their property to their creditors. The Poggiolis ascribe this situation solely to the persecutions suffered. They say that in 1892 during the days they were imprisoned in May and June they lost three-fourths of their crops which they could not harvest; that they lost as estimated 4,500 quintals of coffee in the Escuque District in Trujillo and 750 loads in the Miranda District, in Mérida; that they suffered other losses because coastwise trade was forbidden in the port of Buena Vista, on Lake Maracaibo, etc. It appears, however, that the loss of the coffee crop, if there was any, did not fall alone on the Poggiolis, since L. F. Carrasquero says, in answer to the eighth interrogatory (record 2, p. 9), that the crop was lost *not only by the Poggiolis but by all the farmers of that district*. The coffee crops (in so far as they were not gathered, but according to the evidence submitted at that time — the time of the imprisonment — they were already harvested), were lost, no doubt because not only the government of the State which was in the revolution but also the general in campaign from Caracas recruited soldiers, and men who were not in the army, fled and hid themselves, workmen therefore being scarce. The imprisonment of the Poggiolis could not materially influence the harvest of the coffee. The plantations, no doubt, had their foremen or overseers and they could carry it out.

The Poggiolis, in their complaint to the minister of Italy, charge a large portion of these persecutions to the parish authorities who were their personal enemies, "who owned real estate and commercial houses in the district where the Poggiolis were residing and to whom their absence was very advantageous." Witnesses testify that the authorities of the town provoked uprisings against the Poggiolis, in order that they should not deal with the latter and should sell to Cheuco Brothers, Terán & Moreno, etc. The Poggiolis appear to have complained to the higher authorities and the latter took steps, in October, 1894, against these acts counteracting the measures of the local authorities. The civil chief of the district, L. F. Carrasquero, gave orders to the local authorities and in a letter of November 5, 1894, said to the Poggiolis: "Considering the great number of unjust damages, injuries, and persecutions that had already occurred, principally because of an avaricious spirit of mercantile rivalry, taking advantage of the political advantages in order the better to injure their interests, etc.," it was pleasing to him to offer, in the name of the president of the State, the amplest protection. Said Carrasquero, as appears from the evidence, was a great friend of the Poggiolis and is still their attorney in many matters. Some years later (the date does not appear precisely) Americo Poggioli was assassinated by an unknown person, and Silvio charges his death to his long-standing private enemies.

The cause of these deep hatreds toward the Poggiolis and of the *private* violences which followed upon them, is easily discerned in the documents submitted in support of the case. The Poggiolis had rapidly become rich, and

had obtained a large part of the coffee plantations in the neighborhood where they had located themselves, notwithstanding that they labored under a heavy indebtedness, for which they paid dearly, since they paid interest at from 1 to 1½ per cent per month. Under these circumstances it is not natural that they should prosper greatly in their farming business, which does not in itself make large returns; but the Poggiolis were very overbearing and oppressive to the small farmers of the locality, an ignorant and candid people, with whom they entered into extremely advantageous contracts, which allowed them to acquire these properties at an extremely low price.

The contract for sale with the right of repurchase is very common in Venezuela for the purpose of borrowing money as a loan, with security, and although the purchaser may retain possession of the property, if after the term of repurchase has elapsed the vendor does not repurchase it, this being regarded as usurious is rarely done. Therefore the buyer gives repeated extensions to the vendor or debtor. The Poggiolis did not act thus, and conforming with the original clause of limitation of time for repurchase, they imposed new and additional obligations upon the debtor. In the titles accompanied by the claim for destruction, incendiarism and destruction, it is seen in that passed by Rudecindo Hernandez that the latter was paying to the Poggiolis 25 loads of coffee in annual installments, of which the first 25 loads of coffee had to be delivered in February, 1891. Because this first 25 loads of coffee were not delivered the Poggiolis took possession of the property called "San Rafael," planted with sugar cane, together with the sugar mill, buildings, improvements, and pastures; of the coffee property "San Emigdio," of the ranch "Miraflores," planted with bananas; of another plantation of coffee and small fruits, the house and mill; and of another coffee plantation, a dwelling house, and plowed field.

The Poggiolis obtained all this from Rudecindo Hernandez under enforced execution because he had not paid them 25 loads of coffee. Hernandez believed himself wrongfully dispossessed.

Likewise the deeds of sale with the privilege of repurchase are found from Rafael Rivera to his ranch "Santa María" planted in coffee and small fruit with a water-power mill for the treatment of coffee, a tile oven, etc. The price of the conditional sale was 5,506 bolivars to be paid in March, 1888, and thirteen and one-half loads of coffee; and in the same month of other years following the same amount (neither the price nor the quality of coffee to be delivered are fixed). The Poggiolis took possession of the estate in 1887 for default in payment of *part* of the first installment — about 400 bolivars. There is also in evidence the deed by virtue of which Francisco Antonio Gonzales sold the Poggiolis with the privilege of repurchase his plantation of coffee and bananas, dwelling house, grinding mill for coffee, etc., for 7,840 bolivars. This amount Gonzales was to return to them by delivering 20 loads of coffee each year. The contract was executed in 1891. In 1892 Gonzales did not pay the first installment and the Poggiolis took the ranch. These were the sort of negotiations which the Poggiolis were carrying on in Monte Carmelo, as appears from the few deeds which have been produced. These plantations were, as is said, cut down or burned by unknown parties. It is not difficult to imagine the motives.

The facts which give rise to the Poggioli claim are as follows: First. Wrongful imprisonment by Ferrer in 1892, and subsequently the process which he instituted against them. Second. Indirect damages caused by this imprisonment, such as the loss of crops and loss of credit. Third. Direct damages for the confiscation by General Ferrer of 95 mules and 100 head of cattle and the confiscation of merchandise in the village of Palmira. Fourth. Indirect damages because of the closing of the coastwise port of Buena Vista by order of the civil and military chief of the State of Trujillo, whereby they believe they

suffered in their credit. Fifth. Damages for local antagonism after 1892 until 1895.

First. The imprisonment which Ferrer ordered is justified by the denunciation which the Poggiolis themselves declare their enemies made to said general, of being enemies of the government of Caracas, a denunciation which was corroborated by the refusal to deliver him mules. Ferrer immediately compelled the proper trial to be instituted, and the subsequent imprisonment of the Poggiolis by virtue of the decree of the judge until the action was discontinued is perfectly lawful and can not give rise to any claim.

Second. The indirect damages which the Poggiolis may have suffered by reason of the imprisonment, even in case they were proved, could not be recovered, in the first place, because the imprisonment was justified, and, in the second place, because the Commission, in accordance with the fixed rule always followed by the Commissioners and umpire, does not allow indirect damages (see case of Giacopini decided by the umpire, p. 765), and in the matter of loss of crops in other commissions the point has been decided against the claimants. It is not certain, moreover, that the losses of the Poggiolis were caused by their imprisonment but by the misfortunes which in general wars bring, such as the scarcity of workmen, the difficulty of transportation, limitation of credit, etc.

Third. It appears that the Poggiolis suffered losses because General Ferrer took from them 95 mules, valued at 49,400 bolivars, and 100 head of cattle, valued at 20,000 bolivars; because of merchandise taken by the forces of General Ferrer at San José de Palmira, about 32,000. The half of these three amounts, or say 50,700 bolivars, belong to Silvio Poggioli, and I agree that it is owed by the Government of Venezuela. The other half belongs to the widow and son of Americo Poggioli, who are Venezuelans, and it can not be awarded by this Commission.

Fourth. The indirect damages claimed because the Government closed the port of Buena Vista. In the first place, it is not true that they exist, since the witnesses attribute the damages, not to the closing of the port, but especially to the lack of means of transportation; but even supposing that they might exist, they would not be recoverable, because beyond all doubt it is the right of the authorities to close a way of communication because it believed it expedient for military operations.

Fifth. Damages because of local antagonism from 1892 to 1895. The acts charged to the local authorities are not substantiated. The burning and devastation of some properties, which are the same ones that the Poggiolis so cruelly wrested from Rudecindo Hernandez, appear to be charged by the witnesses to this latter individual and to others who had escaped from prison and had succeeded in freeing themselves from a voluminous process which the judge of the first instance of Trujillo had instituted against them. No concrete determined damage can be found or ascertained. The bases of this item of the claim are the same as in the case of Victor de Zeo<sup>1</sup> and ought therefore to be disallowed for the same reasons as those expressed by the honorable umpire.

The coffee crop, even in the cold regions, is not gathered after January.

The instrument of 1891, in which the association of the Poggiolis appears, is not executed before the commercial judge; nevertheless if it be examined it will be seen that the real estate was not large.

The Poggioli claim amounts, for losses of the crops of certain plantations and other agreements of a temporary nature, to more than double the whole of their

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<sup>1</sup> See *supra*, p. 526.

capital. Naturally this capital is exaggerated, and the damages are not asked except for the loss of the *products* of the capital.

The true cause of the losses of the Poggiolis in their interests is to be found in their immense debts, on which they were paying high interest, in the general depression in the time of war, and in the falling of the price of coffee during all these years.

This claim was presented to the Italian legation in 1892, and the claim ended, since the legation did not take any account of it, and therefore it is not admissible.

In the case of Giacomini <sup>1</sup> the honorable umpire disallowed indirect damages very similar to those of the Poggiolis.

I maintain that the loss of the Poggiolis is not a direct damage of the Government.

RALSTON, *Umpire*:

The above-entitled claim for 3,419,223.28 bolivars is referred to the umpire on difference of opinion between the honorable Commissioners for Italy and Venezuela.

Silvio and Americo Poggioli, natives and subjects of Italy, were domiciled in Venezuela long prior to 1892, the period when the larger share of the losses for which claim is made, was experienced. They had been in partnership for many years in the cultivation and sale of agricultural products, being, besides, the owners of considerable mercantile establishments at several points.

In the spring of 1892 the Legalista revolution broke out in the State of Los Andes, and early in its career, on the 26th of April, 1892, General Ferrer, who was the governmental chief in charge of the headquarters at Valera, demanded from the brothers a certain number of mules, which were not furnished, Americo insisting that they were no longer the property of the Poggiolis, but by contract belonged to another firm. He was given three days in which to produce them, at the end of which time, the mules not appearing and the Poggiolis being in Monte Carnelo, about 10 leagues away, some 85 soldiers were sent to that point, and they were put under arrest, retained there for a few days and afterwards transported elsewhere, remaining prisoners for forty-two days, when they were set at liberty.

About the time of their arrest a charge was instituted against them, at the instigation of the highest military officials, of having imported arms and ammunition intended for the use of the revolutionists, and witnesses were, according to the testimony, by subordination, threats, and promises, made to appear to sustain it. This charge, however, after being fully investigated by the court of first instance, was found to be without foundation, both by that court and its superior court.

About the time of the imprisonment of the Poggiolis there were taken from them 95 mules and 100 cattle, of the entire value of 69,400 bolivars.

After the release of the Poggiolis they went to Mendoza to recover their health, which had been injured by imprisonment, but before they were completely restored Silvio was again, in the following month of September, arrested, being kept in confinement this time some fifteen days, when he was released.

The arrest of the Poggiolis was the signal for the destruction of their extensive properties, since we find that by government authorities their sugar mill and house at San Rafael were at once destroyed, with a loss of 4,000 bolivars. Being reconstructed, they were again burned and robberies committed, the

<sup>1</sup> *Supra*, p. 594.

additional loss being 4,875 bolivars. Heavy losses at San Antonio, San Rafael, San Emigdio, Los Ranchos, and Miraflores were attributed to an understanding between the criminals hereinafter referred to and the authorities, whereby was established a plan with fire and machete to devastate the properties. Ten hectares of sugar cane were destroyed, which, had it been harvested, would have yielded 12,000 bolivars. At San Emigdio there were destroyed coffee and a coffee mill of a total value of 6,900 bolivars. At Miraflores were destroyed banana trees, capable of producing to the value of 800 bolivars. At El Pescado a house worth 1,000 bolivars was burned by Juan Torres, agent of the government and commissary of the Caserio Cristóbal. At Santa María and El Pescado coffee mills worked by water, and worth 7,200 bolivars, were destroyed by agents of the government. When the employees of the Poggioli brothers complained to the authorities of the parish, some were recruited in the army and others expelled. At Emigdio 3 cattle were killed and a horse injured, at a total loss of 1,728 bolivars. The authorities at Monte Carmelo took and destroyed property to the value of 48,500 bolivars.

It is further stated circumstantially that high government officials convoked the agents and debtors of the Poggiolis, threatening them with all sorts of injuries unless they should give up their management of the properties of the brothers and refuse to pay their debts to them, and in many cases those who continued their friendship were finally driven off by violence. As incidental to the dispersal of their agents, and their own enforced absence, the Poggiolis claim to have lost, but without giving satisfactory details, 100,000 bolivars through neglect of their properties.

While the Poggiolis were prisoners, they had at Monte Carmelo 600 loads of coffee ready for shipment; at San José de Palmira 725 loads, and at San Cristóbal de Piñango 250 cargoes, but the port of Buena Vista was closed and exportation there and at the port of La Dificultad prevented, with a consequent loss of 24,000 bolivars.

Packages of merchandise on the road from Arapuey to Monte Carmelo, valued at 4,800 bolivars, were taken by the government troops.

The agents of the civil government, under General Vásques, burned the bodega at Buena Vista and other houses; the total loss of materials and labor at that point amounting to 24,000 bolivars.

The mercantile establishment of the brothers at San José de Palmira, containing a large quantity of merchandise, was completely sacked, and coffee destroyed of a total value of not less than 32,000 bolivars.

The preceding year B. Hernandez, C. Solarte, R. H. Trejo, and F. Suares had attempted the life of Silvio Poggioli, and in consequence were arrested and found guilty. They nevertheless were allowed to enter the army, while the expediente showing their guilt disappeared. The Poggioli brothers repeatedly called the attention of the superior authorities of the state, commencing at least as early as May 12, 1892, to this condition of affairs, insisting that these men should be rearrested, but in vain. So far from being retaken, they seemed to have received the tacit protection of the authorities at Monte Carmelo, who would warn them when there was danger of their being disturbed, and who with other officials joined with them in the larger part of the various offenses committed against the Poggiolis, this continuing to be the case until 1895, when the Poggiolis, were at last, after repeated efforts, finally assured of a proper administration of justice; competent and reliable authorities at Monte Carmelo replacing those against whom the Poggiolis had protested, even to the secretary of the interior of Venezuela.

Until the last of 1894 the Poggiolis were unable to return to their home at Monte Carmelo because of the events narrated, one effort resulting in the

attempted assassination of Silvio, and their properties therefore being meanwhile utterly neglected.

That the general condition in Los Andes was bad and a reign of anarchy existed we may readily believe, from the fact that on March 27, 1895, the minister of interior affairs at Caracas refused to favor calling elections because the State of Los Andes was "an eternal slaughterhouse," and laws protecting life and property were for the time being nonexistent. Another index of the local conditions is afforded in the fact that the officials of Monte Carmelo were changed seven times between April, 1892, and September, 1893.

As late as 1894 the Poggiolis were again called upon to defend themselves against an unfounded charge of introduction of arms, but this claim was quickly disposed of by the intervention of the superior authorities, although for the time being it subjected them to inconvenience and trouble.

They were compelled to expend in defending themselves from the various false charges 7,615.34 pesos, and they further expended to send Silvio Poggioli to Caracas to advance their claim the additional amount of 3,407 pesos.

As the result of all the acts herein set forth, the Poggiolis fell into a state of bankruptcy.

As early as June, 1893, Silvio Poggioli presented to the Venezuelan Government an account of the damages and injuries to which he and his brother had up to that date been subjected, and as a consequence on June 27, 1903, the secretary of the interior wrote to the President of Los Andes, ordering that the criminals be immediately imprisoned and an inquiry had as to the authors of the suppression of the expediente against them, in order to punish them severely. This was regularly transmitted to the authorities of Monte Carmelo, who filed it away without attention.

The foregoing is not a complete statement of the offenses and annoyances to which the Poggiolis were subjected, but gives a sufficient and at the same time concise account of their most grievous troubles.

It is urged, by way of excuse or defense, that the Poggiolis were usurers and had entrapped their neighbors into many contracts extremely disadvantageous to them, and that all of the difficulties to which they were subjected were to be attributed to personal animosities born of their conduct rather than to the acts of officials for which the government should be liable, and, supporting this, it is said that Hernandez himself lost his property because of an unfair contract executed by him at the instance of the Poggiolis, which they rigidly enforced, and that his activity in the various offenses committed against them was to be attributed to personal enmity. In addition, it is to be noted that General Francisco Vásquez, civil and military chief of the Trujillo section of the State of Los Andes, and Gen. Gabriel Briceño, who took part against the Poggiolis, were personal enemies of theirs before the war, while in the letter of Carrasquero, chief of the district of El Pescado in November, 1894, promising protection to the Poggiolis, their difficulties were spoken of as arising from commercial rivalries.

Again, some of their troubles with relation to loss of coffee sent by them to the port of La Dificultad for exportation seem to have relation to the fact that they refused to pay taxes thereon, which had been ordered, apparently illegally, by district councils.

These excuses are not, however, of a character to affect liability if it otherwise existed.

Since the events of which we speak, Americo Poggioli has died, having in fact been killed by a musket ball fired by one of the garrison stationed at Valera, and, it is suggested, by Solarte, one of the criminals who had assaulted Silvio Poggioli in the year 1901, and who had escaped confinement, practically

receiving in fact Government protection. However this may be, the claim of Americo Poggioli died with him, so far as this Commission is concerned, as his only heirs consist of his widow and children, all of whom are Venezuelans by birth. The claim of his heirs is therefore Venezuelan, under the rules heretofore adopted by the umpire, particularly in the Brignone and Miliani cases.<sup>1</sup>

As a preliminary question, it is suggested that all the Italian claims originating because of the acts of the revolution in 1892, were settled by an arrangement entered into between the Italian minister accredited to Venezuela and the Venezuelan Government, and some language contained in the expediente of the correspondence and negotiations between the two parties gives color to this opinion; for instance, a private letter from Count Magliano de Villar San Marco, the Italian minister, speaks of giving a definite solution to all the Italian reclamations arising from the revolution of 1892. An examination of the papers, however, fails to show that the Poggioli claim was ever taken into consideration between the two Governments, so far as the settlement in question is concerned, although it is manifest from the expediente under present consideration that during practically all the period when Italian claims were being adjusted, this claim was being urged by the Italian legation, receiving attention from the Venezuelan Government down to 1896.

The umpire is therefore disposed to consider that it was not the intention of the two Governments to determine the claim of the Poggioli brothers at that time, and he is confirmed in this belief by the fact that the Venezuelan *direccion de crédito público*, in its letter of March 9, 1895, addressed to the *tesorero del servicio público*, speaks of the amounts considered under the agreement as for aids (*suplementos*) to the national revolution, and the account accompanying the letter refers, not to all Italian claims, but to the Italian claims recognized by the *junta de crédito público*, and similar language is used in further communications of the Venezuelan Government. At a later period, in giving a list of the claims, those then settled are referred to as being for "*suplementos*" for the national revolution. Again, attached to a letter from the *direccion de crédito público* dated July 5, 1895, reference is made to what is entitled "*Convención Entre la Legación Italiana y el Ministerio de Hacienda,*" which contains a *résumé* of the claims for "*suplementos,*" etc.

Further, the *junta*, under the law of June 9, 1893, giving it special jurisdiction of claims arising out of the revolution, could scarcely have given an award indemnifying for all or any large portion of the offenses complained of in this case.

Before in detail passing upon the facts before us and the responsibility of the Venezuelan Government incident thereto, it may be worth while to state as nearly as may be some of the general principles to be applied to them.

Not many cases have been presented to international tribunals in which responsibility was claimed for the acts of private individuals, or for trespasses committed by civil authorities. The only cases brought to his attention are recited in the opinion of this umpire in the *De Zeo* case,<sup>2</sup> and to be found in 3 Moore, pages 3018 and 3032. In one it was claimed that the Government of Mexico had tolerated, and even set on foot, disorders affecting the claimant's business, and the Commission thought that so grave a charge should be maintained by the most unquestionable proof and alleged as a distinct act and ground of reclamation; and in the other (for the seizure of a boy by the governor of a State) relief was refused, because it did not appear that ample redress might not have been obtained by resort to the judicial tribunals of the country.

<sup>1</sup> See *supra*, pp. 542 and 584.

<sup>2</sup> See *supra*, p. 526.

Had the courts of Mexico been closed to the claimant and justice denied him, that might have constituted a ground for a claim of indemnity against the Government of Mexico. No such case, however, is presented. No appeal was made by the claimant to the courts, and no denial of justice had been proved. Under these circumstances, the board can not regard the Government of Mexico as responsible.

Let us now consider the question from the standpoint of text writers.

Calvo says:

SEC. 1263. Dans l'intérieur des limites juridictionnelles, les agents de l'autorité de toute classe sont personnellement seuls responsables dans la mesure établie par le droit public interne de chaque État. Lorsqu'ils manquent à leurs devoirs, excèdent leurs attributions ou violent la loi, ils créent, selon les circonstances, à ceux dont ils ont lésé les droits un recours légal par les voies administratives ou judiciaires; mais à l'égard des tiers, nationaux ou étrangers, la responsabilité du gouvernement qui les a institués reste purement morale et ne saurait devenir directe et effective qu'en cas de complicité ou de déni de justice manifeste.

Bonfils, in his *Manuel de Droit International Public*, section 330, says:

Des étrangers, établis ou transitants sur le territoire d'un État, sont lésés à l'intérieur de ce territoire par des fonctionnaires en violation des lois. La responsabilité de pareil acte pèse sur les fonctionnaires qui en sont les auteurs. La partie lésée peut les poursuivre par les voies légales, judiciaires ou administratives. En principe, l'État n'est pas plus responsable vis-à-vis de ces étrangers qu'il ne l'est à l'égard de ses nationaux. Mais si l'acte dommageable était suivi d'un déni de justice; si les tribunaux locaux refusaient d'entendre l'étranger, d'accueillir son action à raison de son extranéité même, l'État qui tolérerait une pareille lésion deviendrait responsable du déni de justice, et le souverain de l'étranger pourrait par voie diplomatique demander que réparation soit accordée.

En ce qui concerne les actes réguliers et légaux d'instruction, de juridiction et de répression exercés sur des étrangers, le principe est que l'étranger reste soumis au régime de droit commun qui pèse sur les nationaux eux-mêmes.

After denying that a state is ordinarily responsible for the acts of its subjects, he adds (sec. 330):

Mais le gouvernement doit avoir pris les précautions nécessaires et ordinaires, ne pas laisser ces faits impunis quand il vient à les connaître, ou, si sa législation propre l'y autorise, livrer les coupables à l'État offensé.

Creasy says, page 343:

Apply then to a state the analogous test of whether it has been as diligent to provide itself in its neighbor's behalf with a sufficient system of criminal process as it is diligent in providing itself safeguards against mischief in its own important affairs; and, furthermore, bear in mind that the mere proof of an affirmative in answer to this interrogation would not be a sufficient justification against complaints if it appeared that the inculcated state was habitually and grossly careless and disorderly in the management of its own affairs. But if it appeared that the state in question was civilized, and was reasonably firm and orderly in its self-government, an answer in the affirmative would be sufficient.

Halleck says, ch. 11, sec. 7, that —

The sovereign who refuses to cause a reparation to be made of the damage done by his subject, or to punish the guilty, or, in short, to deliver him up, renders himself in some measure an accomplice in the injury and becomes responsible for it.

Hall says, page 227, fourth edition:

With private persons the connection of the state is still less close. It only concerns itself with their acts to the extent of the general control exercised over everything within its territories for the purpose of carrying out the common objects of

government; and it can only therefore be held responsible for such of them as it may reasonably be expected to have knowledge of and to prevent. If the acts done are undisguisedly open or of common notoriety, the state, when they are of sufficient importance, is obviously responsible for not using proper means to repress them; if they are effectually concealed or if, for sufficient reason, the state has failed to repress them, it as obviously becomes responsible, by way of complicity after the act, if its government does not inflict punishment to the extent of its legal powers.

With regard to responsibility for the acts of administrative, official, naval, and military commanders, he holds, page 226, that —

Presumably, therefore, acts done by them are acts sanctioned by the state, and until such acts are disavowed, and until, if they are of sufficient importance, their authors are punished, the state may fairly be supposed to have identified itself with them. Where, consequently, acts or omissions which are productive of injury in reasonable measure to a foreign state or its subjects are committed by persons of the classes mentioned, their government is bound to disavow them, and to inflict punishment and give reparation when necessary.

Again, on page 232, he speaks of the higher degree of responsibility of the state which is “not reasonably well ordered.”

Let us first seek to apply generally the principles above enunciated to the facts before us.

It appears that in 1891 an attempt was made upon the life of Silvio Poggioli by four people who were subsequently recruited into the Venezuelan army, and who have to this day escaped punishment, although guilt appears to have been completely established and although repeated requests were made of the higher officials in the state, judicial and administrative, that they be rearrested and subjected to proper punishment for their act. We find that one of these requests was made within two weeks after the wrongful arrest of the Poggiolis, and occasioned by the fact that these criminals were then engaged in ravaging their properties and driving off their employees.

After this demand for relief the criminals still remained at large, with the connivance of the authorities, who seemed to have notified them on at least one occasion of the danger of their arrest, so that they might temporarily conceal themselves. As late as 1894, notwithstanding express orders given by the Central Government at Caracas, we find the State authorities so blind to their duties that, although they thereafter afforded the Poggiolis the protection they had lacked for two previous years, they failed to make any arrests. It seems to the umpire that under these circumstances the local authorities of Venezuela were derelict in their duty and were guilty of a denial of justice, for justice may as well be denied by administrative authority as by judicial.<sup>1</sup> And it further appears to him that when the authorities of the State of Los Andes have acted in apparent conjunction with criminals, and have with them and under the circumstances heretofore detailed joined in the commission of offenses against private individuals, and no one has been punished therefor and no attempt made to insure punishment, the act has become in a legal sense the act of the government itself. One can not consider that the acts were the acts of a well-ordered state, but rather that for the time being some of the instrumentalities of government had failed to exercise properly their functions, and for this lack the Government of Venezuela must be held responsible. We are the more justified in this conclusion because of the opinion of the minister of interior affairs already quoted, and notwithstanding the undoubtedly correct intentions of the National Government.

Reviewing the authorities, it seems to the umpire that this case differs from

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<sup>1</sup> 13 Opinions Attorneys-General, p. 547.

those cited from Moore's Arbitrations,<sup>1</sup> in that it is sustained by the clearest proof following distinct allegations, and that there has been in fact a denial of justice by the administrative authorities of the State; that the considerations herein narrated come within the language of Calvo, who finds responsibility "in case of complicity or of manifest denial of justice," for there certainly was complicity on the part of the officials and denial of justice as set out; that the criterion suggested by Bonfils was exactly met by the administrative refusal to grant relief when the local government failed to take ordinary and necessary precautions and allowed the offenses complained of to go unpunished after becoming known; that the State of Los Andes, during the years in question, in the language of Creasy, was "habitually and grossly careless and disorderly in the management of its own affairs;" that by its failure to make reparation or punish the guilty, Venezuela has, through the fault of Los Andes, rendered itself "in some measure an accomplice in the injury" and has become "responsible for it," and that, according to Hall, the acts complained of being "undisguisedly open and of common notoriety" and being of importance, the State "is obviously responsible for not using proper means to repress them," and has not inflicted "punishment to the extent of its legal powers."

The first considerable offense committed against the Poggiolis was their arrest and imprisonment; first, for a period of forty-two days, and second, of Silvio for a period of fifteen days. It is conceivable that such arrests might take place upon misinformation or mistake even of law, and that, honesty at any rate being assumed, no recourse would have remained for the unfortunate victim. In the case under examination, however, it is clearly manifest that the arrests took place pursuant to the order of the general in command, and that they were merely the result of bad feeling engendered by a very proper refusal on the part of the Poggiolis to surrender without compensation mules and other animals to the use of the Government. In another case<sup>2</sup> the umpire has awarded in favor of men of considerable financial means the sum of 250 bolivars for each day of detention, and the same award may now be made in favor of Silvio Poggioli; that is to say, the sum of 14,250 bolivars.

It is strenuously urged that an allowance should be made for the loss of credit to which the Poggiolis were subjected, but this item is entirely too indefinite and uncertain to be taken into consideration by the umpire.

A large claim is presented because threats of violence were made against agents and debtors unless they should give up their management of the properties of the Poggiolis and refuse to pay their debts to them. For the destruction of the properties involved in this situation, a sufficient award is made, but no award will be made for the refusal to pay the debts; the reason being that the debts might have been collected at a subsequent period, together at least with interest on them, which would measurably at any rate offset the important temporary loss to the Poggiolis. Aside from this, however, the loss is too indirect and uncertain.

Large damages are claimed for the closing of the port of Buena Vista with consequent injury to the commerce of the Poggiolis, and it is argued that the reason given for the closing of the port — that is, that arms were imported there for the use of the revolution — was insufficient, inasmuch as the port of La Dificultad, 1,200 meters distant, still remained open, where the same offense could have been committed, if there were foundation for the charge, and it is urged, therefore, that the port was closed simply as a matter of spite toward the Poggiolis. This may have been the case, but the umpire has nothing whatever

<sup>1</sup> Referred to and relied upon in the De Zeo case, *supra*, p. 526.

<sup>2</sup> Giacomini case, *supra*, p. 594.

to do with the reasons inducing the Government to close the port. The umpire assumes that it was within its police power to close it, and no contract existing between the Poggiolis and the Government (as in the Martini case <sup>1</sup>), by virtue of which damages could be claimed for the closing of the port, the power of the Government must be regarded as plenary and the reasons for its exercise beyond question.

An award is asked of 1,008,000 bolivars for the loss of the coffee crops, estimated at 14,000 quintals, during the three years of the enforced abandonment of the Poggioli plantations. In the opinion of the umpire, this claim is greatly exaggerated. Payment for a large part of the crop of the year 1892 taken and destroyed by Government officials and others is provided for in this opinion, and the Poggiolis returned to their properties in the latter part of the year 1894. The umpire believes he will be doing full justice if he makes an award for 5,000 quintals at 72 bolivars per quintal (less 15 bolivars per quintal for the cost of production) or a total of 285,000 bolivars. In the judgment of the umpire this loss was the direct result of the actions of the agents of the Government, joined with those of unpunished malefactors, and for which the Government was responsible, and is not at all to be classed as indirect, the umpire adhering to the rule in this respect laid down by him in the Martini case,<sup>1</sup> no suggestion being made that considerable crops were not or could not have been made during the time in question.

Without reciting in further detail the surrounding circumstances, an award will be made covering the following losses:

	<i>Bolivars</i>
Burning of San Rafael sugar mill and house (first time) . . . . .	4,000
Burning of San Rafael sugar mill and house (second time) . . . . .	4,875
Destruction of bodega and other houses and property at Buena Vista . .	24,000
Merchandise and coffee at San José de Palmira . . . . .	32,000
Cost of defending wrongful charges of importation of arms . . . . .	30,460
Trip to Caracas to submit claim to legation and Venezuelan Government	13,628
Taking of mules and cattle . . . . .	69,400
Destruction of 10 hectares of sugar cane and crop . . . . .	13,600
Destruction of coffee and coffee mill at San Emigdio . . . . .	6,900
Destruction of banana trees at Miraflores . . . . .	800
Burning of house at El Pescado . . . . .	1,000
Destruction of Santa María and El Pescado coffee mills . . . . .	7,200
Cattle killed and horse injured at Emigdio . . . . .	1,728
Sacking, etc., of store at Monte Carmelo . . . . .	48,500
Injuries to properties from driving off agents, etc. (loss reckoned in ab- sence of details) . . . . .	25,000
Taking and destruction of coffee at San José de Palmira, San Cristóbal, and Monte Carmelo . . . . .	24,000
Taking of merchandise on road to Monte Carmel . . . . .	4,800
Loss of coffee from various points, taken or prevented from exportation at Buena Vista or La Dificultad . . . . .	2,400
Loss of coffee crop during abandonment of plantations . . . . .	285,000
Total . . . . .	599,291

It is said that the assets of the firm on December 31, 1901, were 2,803,524 bolivars and the liabilities 1,234,739 bolivars, including 72,000 bolivars due Manuela Rosales. The net worth of the firm was 1,568,795 bolivars. It appears, therefore, by a careful calculation made by the honorable Commis-

<sup>1</sup> See *supra*, p. 644.

sioner for Italy, that Silvio Poggioli's interest amounted to 65.99 per cent of the whole, and all allowances made on account of injuries to the partnership are to be represented by an award of this percentage in favor of Silvio Poggioli, without any award to the heirs of Americo Poggioli for reasons above stated.

A sentence will therefore be signed in favor of Silvio Poggioli for 14,250 bolivars, plus 395,672.13 bolivars, with interest at the rate of 3 per centum per annum on 395,672.13 bolivars from July 1, 1893, to December 31, 1903. And the claim of the heirs of Americo Poggioli will be dismissed without prejudice to their right to relief in any appropriate forum.

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MIXED CLAIMS COMMISSION  
MEXICO - VENEZUELA  
CONSTITUTED UNDER THE PROTOCOL OF  
26 FEBRUARY 1903

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**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. 875-888.



## PROTOCOL, FEBRUARY 26, 1903<sup>1</sup>

*Protocol of an agreement between the Ambassador from Mexico to the United States of America and the Plenipotentiary of the Republic of Venezuela for Submission to Arbitration of all unsettled Claims of Mexican Citizens against the Republic of Venezuela.*

The United States of Mexico and the Republic of Venezuela, through their representatives, Manuel de Azpiroz, Ambassador of the United States of Mexico, and Herbert W. Bowen, the Plenipotentiary of the Republic of Venezuela, have agreed upon and signed the following protocol:

### ARTICLE I

All claims owned by citizens of the United States of Mexico 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 State and Foreign Relations of Mexico, or in its name by its agency 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 the President of the United States of Mexico and the other by the President of Venezuela.

It is agreed that an umpire may be named by His Majesty the King of Spain. If either of said commissioners or the umpire should 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 May 1, 1903.

The commissioners and the umpire shall meet in the city of Caracas on the first day 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 carefully to examine and impartially decide, according to justice and the provisions of this convention, all claims submitted to them, and such oaths 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 of 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.

### 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

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<sup>1</sup> For the Spanish text see the original Report mentioned on page 693.

them by or on behalf of the 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 day 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 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 language of both countries, to assist them in the transaction of the business of the commission. 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 to the umpire for their services and expenses, and the 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 the 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, 30 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

It is understood that if before the 1st of June, 1903, the claims of Mexico, above mentioned, are settled by an agreement between the claimants and the Government of Venezuela, or decided in favor of said claimants by the high court of Venezuela, said claims shall not be submitted to the arbitration agreed upon in the preceding articles.

In any case the sum determined by settlement, by judgment or by award shall be paid in accordance with the stipulations of article V of this protocol.

Done at Washington, D.C., to-day, February 26, 1903.

M. DE AZPÍROZ. [SEAL.]

H. W. BOWEN. [SEAL.]

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## PERSONNEL OF MEXICAN-VENEZUELAN COMMISSION

*Umpire.* — Ramón Gaytán de Ayala, minister of Spain to Venezuela.

*Mexican Commissioner.* — Fernando Duret.

*Venezuelan Commissioner.* — José Vicente Iribarren.

*Mexican Agent.* — Ricardo R. Guzmán.

*Venezuelan Agent.* — F. Arroyo-Parejo.

*Mexican Secretary.* — Bartolomé López de Ceballos.

*Venezuelan Secretary.* — Delicio Abzueta.

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 RULES OF THE MEXICAN-VENEZUELAN COMMISSION

1. As soon as the claim is presented by the Government of Mexico, or in its name by its agency at Caracas, such presentation shall be made known to the agent of Venezuela.

2. The agent of Venezuela shall be allowed fifteen days to answer, which may be extended, at the judgment of the Commission. This time having elapsed without any answer being presented the claim shall be considered as traversed, and action shall be taken to decide it upon the proofs submitted. If a claim be answered, the adverse party, if it desires to reply, may do so within the space of seven days, and an equal term is understood to be allowed for the rejoinder.

3. Parties, if they be able to do so, shall present, together with their claims, the documents and proofs upon which they base them.

4. If any of the parties be compelled to request an extension of time for the production of proofs, the Commission shall decide how long shall be allowed them.

5. The proofs having been presented, or the time fixed for their production having expired, arguments of the parties shall be heard, if desired, unless they elect to present written arguments within the same time.

6. The arguments of the parties having been completed, or their written briefs presented, the claim shall be decided by the Commissioners within the term of five days if they agree, and in case they disagree, within the five following days they shall draw up their opinions in writing, substantiating them briefly. The point or points upon which they disagree shall ipso facto be submitted to the decision of the umpire.

7. If any case require, in the judgment of the commissioners, or of the umpire, as the case may be, a special mode of procedure, it shall be outlined as soon as this necessity is known and manifested.

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 OPINIONS IN THE MEXICAN-VENEZUELAN COMMISSION

## DEL RIO CASE

Under the protocol the Commission has no jurisdiction to decide claims of Venezuela against Mexico; but an exchange of notes of the foreign offices of the two countries giving consent that the Commission take this course, confers jurisdiction to hear such claims.

Where a sum of money loaned is procured at a premium and unpaid, the amount of this premium will be allowed as a resultant damage; but interest will only be allowed on the amount actually received by the debtor.

Where money is loaned for a specific period and it is stipulated that no interest for this period is to be charged, interest will nevertheless be allowed on the amount due after the debt falls due.

In the absence of a stipulated rate of interest, interest will be allowed at the current rate at the time of the contracting of the loan, especially where this rate has been acknowledged to be equitable by the predecessor in interest of the debtor.

The present legal rate of interest in Venezuela can not control where a debt has been contracted prior to the statute.

Where a debt is to be paid at a specified time it is not compulsory upon the creditor to make demand upon the debtor in order that the latter may be in default, and for that reason interest will be allowed upon a claim from the time the money fell due, and not merely from the day that demand was made.

A claim for damages on the part of Venezuela which can not be fixed in amount, and which is not the property of the Government of Venezuela, can not be set up as a counterclaim against the claimants who have only assumed the liability of Mexico for counterclaims of Venezuela.

A claim of an individual against a government does not become international in character until demand has been made on the government debtor.

Credit will be allowed Venezuela for a proportionate part of moneys paid by the old Republic of Colombia on account of the debt for which claim is now made.

No claim can be maintained for services rendered by ships of Colombia where it was expressly stipulated in the contract for their hire that payment should begin to be made from the date of their departure from Colombian ports for Mexico, and they never did, in fact, depart until after the time for which claim is made for their services.

#### SUMMARY OF CLAIM

The agent of the Government of Mexico presented a claim against Venezuela arising out of a loan of £63,000 to the old Republic of Colombia, made on April 7, 1826.

This debt was assigned by Mexico to Martinez del Rio Hermanos, and at present belongs to their successors in interest who are Mexican citizens.

The origin of the debt is set forth in an instrument executed in London April 7, 1826, before Mr. Windale, mayor of the city, by Vicente Rocafuerte and Manuel José Hurtado, the former chargé d'affaires of Mexico and the latter minister of Colombia accredited to the Court of St. James.

The essential parts of the instrument were included in the assignment of the debt in favor of Martinez del Rio Hermanos, executed by the Government of Mexico on August 16, 1856, which was placed in evidence. They are as follows:

1. B. A. Goldschmid & Co., holders of a considerable sum of money belonging to the Republic of Colombia, having failed, the payment of £63,000, destined to cover the dividend of the payment of the public debt, which was to fall due on May 1, 1826, was suspended.

2. Señor Hurtado proposed to Señor Rocafuerte that he advance to him (Hurtado) the necessary funds for the payment of the dividend which he had at his disposition with Messrs. Barkley, Herring, Richardson & Co. on account of money advanced on a loan negotiated for Mexico.

3. Señor Rocafuerte agreed to the request of Mr. Hurtado and gave orders to Messrs. Barkley, Herring, Richardson & Co. to pay, out of the money belonging to Mexico in their hands, the sum of £63,000 to meet the interest and other expenses of the Colombian loan which would fall due on May 1, 1826, on the bonds issued on April 2, 1824.

4. Señor Hurtado made solemn and formal promise on the part of the United States of Colombia to repay the said sum of £63,000 without interest within the space of eighteen months.

Upon the termination of the existence of the Republic of Colombia, which had been made up by the union of New Granada, Venezuela, and Ecuador, each one of these became a sovereign and independent state; the two former

entered into a convention concerning the division and assumption of the debts of the old Republic of Colombia at Bogotá on December 23, 1834, providing for the payment of said loan of £63,000 in the following manner:

The Republic of Venezuela was to pay  $28\frac{1}{2}$  per cent, the Republic of New Granada 50 per cent, and Ecuador  $21\frac{1}{2}$  per cent. The amounts, therefore, respectively due were, by Venezuela, £17,955; by New Granada, £31,500, and by Ecuador, £13,545.

The ratifications of the convention were exchanged at Bogotá on the 7th of February, 1838.

Although Ecuador was not a party to the convention, it accepted it afterwards in toto, the ratifications being exchanged between that Republic, Venezuela, and New Granada on the 22d of February, 1838.

Finally, the act of the Venezuelan Congress of April 8, 1840, expressly recognized the debt, referring to the convention of December 23, 1834, and making provision for the appropriation of 160,000 pesos annually from the customs receipts for the payment of the part of the interest, which, according to said convention, was acknowledged due by Venezuela on the foreign debts of 1822 and 1824, reserving the right to provide respecting the Mexican debt as soon as it should be liquidated.

As soon as the Mexican department of foreign relations learned of the action of Señor Rocafuerte in making this loan to the Colombian representative, it addressed a note to the Treasury Department, which disapproved the action of Messrs. Barkley, Herring, Richardson & Co., because of a different order given concerning the money on deposit with the house.

Although the Mexican Government did not authorize the loan nor, once it was made, approve it, it was obliged to submit to it.

Having awaited for the expiration of the eighteen months, the Government of Mexico ordered the Mexican consul in London to institute negotiations with the minister of the Republic of Colombia for its repayment. These negotiations did not secure the desired result, but the Government of Colombia offered to sell Mexico two frigates, built for the Colombian navy, on condition that £63,000 should be deducted from their price. This proposition was rejected by the Government of Mexico.

The most important step taken by Mexico to obtain the payment of the debt was made in 1855 through her minister plenipotentiary to the Republics of New Granada, Venezuela, and Ecuador. The results of this negotiation were the following:

Señor Plata, secretary of the treasury, admitted that the debt claimed was a debt of honor, and that New Granada was disposed to make a prompt settlement with Mexico concerning it.

Said secretary of the treasury stated that the principal of the debt should be fixed at £72,622.44, the sum which the £63,000 actually cost Mexico, and that said sum should bear an annual interest of 6 per cent, thus far acceding to the demand of the Mexican representative, Señor Morao, for £115,659 and *compound interest*.

The mission of Señor Morao thus terminated without his being able to obtain a settlement of the debt claimed.

On August 16, 1856, by an instrument executed before the notary, Don Ramón de la Cueva, the secretary of the treasury and public credit of Mexico, assigned to del Rio Hermanos its demand against New Granada, Venezuela, and Ecuador, ceding to said assignee all the rights and actions concerning the said debt which belonged to Mexico, and the assignee undertaking to assume any debts due the old Republic of Colombia by Mexico.

The succession of the present claims to the rights of the original assignees from the Government of Mexico was clearly shown.

In view of the foregoing, the Mexican agent made claim for £20,697.40, which, in accordance with the convention of December 23, 1834, between the three Republics which formerly made up the old Republic of Colombia, had been assumed by Venezuela, demanding, further, simple interest at 6 per cent from October 7, 1827, this being the day of the expiration of the eighteen months during which time it was to bear no interest.

Interest at 6 per cent was demanded in view of the fact that this was the rate suggested by the Colombian representative to Señor Morao in 1856, as above stated; also stating that other debts negotiated by Mexico at the same time bore interest at 6 per cent.

This demand was reduced by 28½ per cent of 3,500 pesos (say \$1,938), which had been paid to the Mexican representative, Señor Torrens, in Bogotá, in March, 1829.

GAYTÁN DE AYALA, *Umpire*:<sup>1</sup>

Arbitral award in the claim presented by the United States of Mexico against the Republic of the United States of Venezuela, arising out of the loan of £63,000 made by Mexico to the old Republic of Colombia in accordance with an agreement executed April 7, 1826, a debt which was assigned by Mexico to Messrs. Martínez del Río Hermanos, and which actually belongs to their successors, Doña María Martínez del Río de Castiglione, Doña Angela Martínez del Río Tomás, Doña Julia Martínez del Río de Gonzalez Pavón, Don Manuel Martínez del Río, Don Pablo Martínez del Río, Don Nicolás Martínez del Río, Don Ventura Martínez del Río, all Mexican citizens, and in the claims presented by the Government of the United States of Venezuela against the United States of Mexico:

1. For the unlawful collection of duties upon export products.
2. For the value of the ship and cargo of the schooner *Carmen*, a prize of the Colombian cruiser *Zulmé*.
3. For the sum of money paid by Colombia in March, 1829, to the chargé d'affaires of Mexico.
4. For the aid of naval vessels asked of Colombia by the Government of the United Mexican States during the years 1824 and 1825 to cooperate in the siege of the fortress San Juan de Ulúa.

Don Ramón Gaytán de Ayala y Brunet, envoy extraordinary and minister plenipotentiary of His Majesty the King of Spain to Venezuela, umpire of the Mixed Venezuelan-Mexican Commission, constituted in Caracas by virtue of the protocol of Washington, February 26, 1903, having been requested by the respective Commissioners of the two interested nations to render judgment upon the points of difference to which the claim of Messrs. Martínez del Río Hermanos, and those which the Venezuelan Government has presented against Mexico, have given rise;

In view and by consequence of the disagreement existing between said commissioners at the close of their deliberations concerning this matter, and inspired by the desire to merit the confidence which the two said Republics of Venezuela and Mexico have mutually shown by submitting to his decision a matter of such importance, and subjecting himself in every way to the provision contained in Article I, paragraph 3, of said convention of Washington to decide all the claims upon a basis of absolute equity;

<sup>1</sup> For the Spanish text and for a French translation see Descamps-Renault, *Recueil international des traités du XX<sup>e</sup> siècle*, 1903, p. 848.

As a preliminary and indispensable explanation relative to the competency and power belonging to the Commission, states:

That in said protocol of Washington, of February 26 of the present year, it is provided that the object of the Commission is to examine and decide the claims of citizens of the United States of Mexico against Venezuela. Its attributes can not, therefore, extend beyond the limit agreed on, notwithstanding the wishes, manifested by the representatives of the two interested nations, so as to include and submit to the determination of the Commission the claims which the Government of Venezuela has presented against the Mexican Republic.

In order to overcome this difficulty arising out of the limits of the international agreement itself, the Commission has determined that it is sufficient to obtain from the Governments of the interested Republics an express declaration of their consent to the demand of the extension of the powers in question, specifying that they confer the necessary power upon the members who form the Mixed Commission already constituted, to exercise with respect to the claims of Venezuela against Mexico the same powers as those given it by the protocol at Washington with reference to the claims of Mexico against Venezuela.

Under date September 26, 1903, the President of the Commission received from the Government of Mexico a telegram couched in the following terms:

SPANISH MINISTER, *Caracas* :

Mexican Government authorizes arbitral commission to examine and decide counterclaims presented by Venezuela.

ALGARE.

The Government of Venezuela, on its part, in a note dated September 23, 1903, addressed by its minister of foreign relations, His Excellency Alejandro Urbaneja, to the Commissioner of Venezuela in the Mixed Claims Commission, gave its consent in the terms expressed in said note, which is annexed to the record of the claim.

The Commission, in the session of September 28, 1903, took cognizance of both documents, its jurisdiction being thus established to examine and decide all the questions submitted for its judgment.

These questions are the following:

1. The Government of Mexico claims from the Government of Venezuela as the original capital giving rise to and underlying the claim of Messrs. Martinez del Rio Hermanos the sum of £20,697.40.
2. It demands interest at 6 per cent per annum on the foregoing sum, counting from the 7th of October, 1827, to the 31st of December of the current year.

The Government of Venezuela demands —

1. Payment in compensation for the sum unlawfully collected for import duties on cocoa coming from Maracaibo and Guayaquil:
2. Compensation for the value of the ship and cargo of the schooner *Carmen*, a prize of the Colombian cruiser *Zulmé*, left in the port of Campeche;
3. The return of 28½ per cent of 8,500 pesos fuertes delivered by Colombia on March 18, 1828, to the chargé d'affaires of Mexico, Col. Anastasio Torrens; and
4. Payment of an indemnity for the naval aid agreed on between Mexico and Colombia for the purpose of cooperating in the capture of San Juan de Ulúa.

1. Question. To the demand of the Commissioner of Mexico asking that there be acknowledged as to the principal of the loan made to Colombia the sum of £20,697.40, the Commissioner of Venezuela answers that said Republic can not accede to it because it was only £17,955, the sum in cash received by

the representative of Colombia at the time the loan in question was negotiated. It is not just nor equitable to make the Republic liable for a greater sum than that received. And he bases his denial, furthermore, on the provisions of the contract of the loan made in London April 6, 1826, which appears in evidence.

The Commissioner of Mexico proves, by documents duly legalized, which are also to be found in the evidence of the claim, that the sum of £17,955 cost Mexico £20,697.40, because said sum was taken from funds obtained by means of a loan negotiated by the Government of Mexico with the house of Barkley, Herring, Richardson & Co., of London, and effected at a discount of 13¼ per cent; wherefore the sum in cash of £17,955 delivered to Colombia was in reality worth £20,697.40 claimed by Mexico from Colombia.

Taking into consideration the fact that the validity of the debt is recognized in principle by both interested parties, taking into consideration the foregoing observations of both Commissioners and the correctness of the facts set forth in every document having been ascertained;

Considering that, even though it be true that the sum received in cash by the representative of Colombia is set out in the contract for the loan mentioned, it is also evident that its real value, with respect to Mexico, is what the agent of that Government now demands in favor of the interested party, as is shown from the proof as to the origin of the funds out of which the loan was furnished;

Considering that because it is of the greatest importance, with respect to future decisions, to determine in a clear, precise way the nature of the various sums which constitute the debt, the sum of £17,955 is, in justice, to be considered as the original capital which was received in cash by the representative of Colombia, and to consider as a resultant damage, arising out of the transaction, the difference between this sum of £17,955 and £20,697.40 claimed by the Mexican Commissioner, which is £2,742.40.

2. Question. The representative of Mexico demands interest at the rate of 6 per cent per annum upon the principal of the loan, counting from October 7, 1827, until December 31 of the current year.

In support of his right to claim interest, he invokes the principle of justice, universally recognized, that the debtor is liable for the damages and injuries caused by the nonfulfillment of his obligations and "in treating of ascertained sums of money, these damages and injuries are repaired by the payment of interest." With respect to the rate at which said interest must be fixed, he maintains that it can not be other than 6 per cent per annum, and he bases this rate of interest upon the recitations contained in the contract for a loan between Mexico and Colombia, upon the laws which were at that time in force, upon similar cases between the two nations interested, and upon arrangements for the negotiation of loans made as well by Colombia as by Mexico under similar circumstances of time and place.

The Venezuelan Commissioner is of opinion that Venezuela is not bound to pay the interest claimed, because it was thus provided in the Rocafuerte-Hurtado contract, and because the exact amount of the debt is not determined, and in case the arbitral award should conform to the demand of claimant, he asks that the rate fixed may be 3 per cent per annum.

Taking into consideration these foregoing opinions of the Commissioners, and having examined the considerations to which the Commissioner of Mexico refers, and having been convinced of the correctness of his statements;

Considering, as an argument of special importance, the fact that the Republic of New Granada, in proposing at Bogotá, on June 30, 1862, the settlement of the affair of which we are treating, in so far as one of the original republics of

old Colombia was liable for the loan in question, it acknowledged interest at the rate of 6 per cent per annum to be just and equitable;

Considering that the loan negotiated by the Mexican Government, from which loan the £63,000 lent to Colombia were procured, bore interest at 6 per cent per annum, as the evidence shows;

Considering that Colombia paid interest at 6 per cent per annum upon the loan, for the payment of one of the installments of which Señor Hurtado asked and obtained from Señor Rocafuerte the loan of the £63,000;

Considering that several other loans which are shown in the evidence bore a like rate of interest;

Considering that the reason invoked by the agent of Venezuela, that the loan was stipulated to be without any interest according to the instrument establishing it, can not be considered in justice as discharging the obligation to pay interest, because it is not permissible to infer that the contracting parties desired to extend this stipulation to the failure to fulfill the agreement;

Considering that the legal rate of interest which is actually in force in Venezuela, and which the Venezuelan Commissioner likewise invokes, can not serve as a guide for fixing the rate of interest on obligations contracted in the year 1823;

Considering that the rate of interest provided for in the loan negotiated by Mexico in the house of Barkley, Herring, Richardson & Co., from which the sum received by Colombia was taken, as is shown by the Rocafuerte-Hurtado contract, was 6 per cent per annum;

Considering finally that at the time when Colombia contracted the obligation it was a principle of justice, as it is to-day, according to the legislation of the most advanced nations, that the debtor is to be considered in default by the sole fact of the nonperformance of his obligation, without the necessity of making demand after the day of the expiration of the term allowed him;

By reason of the foregoing, which is proved by the evidence, it must be decided that Venezuela is obliged to make reparation to Mexico for the damages and injuries resulting from delay in the fulfillment of its obligation, by paying interest at the rate of 6 per cent per annum, upon the original capital of the debt, counting from the 7th day of October, 1827.

#### CLAIMS OF THE GOVERNMENT OF VENEZUELA

I. Question. Payment in compensation for the sum unlawfully collected by New Spain, now Mexico, for import duties on cocoa coming from Caracas, Maracaibo, and Guayaquil.

The Government of Venezuela claims from the Government of Mexico the amount of certain duties unlawfully collected on the importation of cocoa coming from Caracas, Maracaibo, and Guayaquil, and the Commissioner of Mexico accredited to this Commission rejects the demand, relying in so doing upon proofs and public documents which are to be found in the record.

Considering that the agent of Venezuela, in his argument of July 11 of the present year, adopts the report of the solicitor of the public treasury, Mr. Juan Bautista Calcaño, addressed to the minister of state in the department of the treasury of Venezuela, relative to the claim of Messrs. Martinez del Rio Hermanos, and that in this report Doctor Calcaño admits that it is not possible to present this claim in proper form because it is not possible to fix the amount thereof;

Considering that the claim concerning this cocoa belongs to individuals whose nationality is unknown and whose heirs are likewise unknown;

Considering that Messrs. Martinez del Rio Hermanos are not liable except for debts against Mexico which are of an international character;

Considering that in official documents published by the department of foreign relations of Venezuela, which are to be found in the record, the Government of said Republic acknowledges that the claim concerning which there is question is not invested with the aforesaid international character;

Considering, finally, that the Government of Venezuela has not been able to produce proofs of the validity of this debt;

On account of all the foregoing the umpire decides that there is no reason for indemnity, and that Messrs. Martinez del Rio Hermanos are released from all liability in this respect.

2. Question. Compensation for the value of the ship and cargo of the schooner *Carmen*, the prize Colombian cruiser *Zulmé*, deposited in the treasury of the port of Campeche.

The proofs and documents relative to this matter having been examined, and considering that the value of the ship and cargo of the schooner *Carmen*, deposited in the treasury of the port of Campeche, is the property of individuals, because the value of prizes belongs by law to the privateer which captures them;

Considering that the existence of said owner is not known, and that neither he nor his heirs, if there be any, have claimed anything upon this particular from the Republic of Mexico;

Considering that in this case the claim is not of an international character, which is an indispensable requisite for its validity;

On account of the foregoing, the umpire decides that no indemnity is due, and that Messrs. Martinez del Rio Hermanos are released from all liability in this respect.

3. Question. The return of 8,500 pesos fuertes delivered by Colombia in March, 1829, to the chargé d'affaires of Mexico, Col. Anastacio Torrens.

It appears established by the evidence that the two interested Governments agree concerning the validity of this debt.

Considering that Venezuela only has a right to 28½ per cent of the aforesaid amount;

It is ordered, adjudged, and decreed that Messrs. Martinez del Rio Hermanos are obliged to pay to Venezuela the sum of 28½ per cent of 8,500 pesos fuertes, or, say, 2,422.50 pesos fuertes.

4. Question. Payment for the naval aid agreed on by Mexico and Colombia for the capture of San Juan de Ulúa.

The agent of Venezuela maintains (adopting, as his report of the solicitor of the treasury, Doctor Calcaño) that by virtue of Article II of the convention, made on the 19th of August, 1825, by Señor Torrens, minister plenipotentiary of Mexico, relative to the naval aid destined to cooperate in the capture of the Fortress of San Juan de Ulúa, the Government of Mexico obligated itself to pay the expenses which said aid might occasion until forty days after the surrender of said fort, or for a longer time if by common accord it were found necessary, and, relying on this obligation, he presents the account of the expenses, which is to be found in the record; and

Considering that Article II, relied on, formally establishes that the obligation to pay this expense should begin to run "from the day on which each of the auxiliary ships should leave the ports of Colombia bound for the Gulf of Mexico;

And it appearing in the proofs that none of the Colombian ships complied with this indispensable requisite;

Considering that the account presented by the Government of Venezuela concerning said naval expenses of the Colombian squadron are not accompanied by proofs in any way appreciable in justice;

Considering that it appears from the correspondence exchanged between the high officials of Colombia and Mexico, respectively, that up to the 21st

of January, 1826, these countries considered the agreement to furnish naval aid to Mexico was dissolved;

Considering, finally, that the surrender of the fort of Ulúa, which was the object for which the squadron was destined, was accomplished by Mexico without the help agreed on with Colombia;

For these reasons the umpire decides that there is no reason for indemnity, and that Messrs. Martinez del Rio Hermanos are released from all liability in this respect.

Concluding the examination of each and all of the questions submitted for his decision, and taking into account the reasons and declarations which precede, the undersigned, the umpire, decides that he must decree, and he does thereby decree, that the Government of the United States of Venezuela is obliged to indemnify the successors of Messrs. Martinez del Rio Hermanos, in payment of the claim presented in their name by the Governor of the United States of Mexico, in the sum which may result from a liquidation in the following manner:

1. For 28½ per cent which is due from Venezuela of the sum of £6,300, considered as the original capital of the loan delivered to Colombia by virtue of the Rocafuerte-Hurtado contract, dated at London, April 7, 1826, £17,955.

2. For interest on the original capital, that is to say, £17,955, from October 7, 1827, until October 2, 1903, £81,859.50.

3. For indemnity for the damages and injuries caused by the bonus of 13¼ per cent, which the above-mentioned £17,955 cost Mexico, £2,742.40.

4. Messrs. Martinez del Rio Hermanos shall credit the Government of Venezuela for 28½ per cent of the 8,500 pesos fuertes paid by the Governor of Colombia on March 6, 1829, which belongs to it, \$2,422.50, or, say, £484.50.

## LIQUIDATION

Original capital . . . . .	£17,955.00
Interest at 6 per cent per annum for 75 years 360 days . . . . .	81,859.50
Indemnity for damages and injuries . . . . .	2,742.40
<b>Total</b> . . . . .	<b>102,556.90</b>
Less the sum delivered Señor Torrens . . . . .	484.50
<b>Balance</b> . . . . .	<b>102,072.40</b>

It follows, therefore, from the preceding liquidation that the Government of Venezuela is obligated to pay Messrs. Martinez del Rio Hermanos as a final balance for claims and counterclaims respectively presented to this Commission by the countries interested the sum of £102,072.40 in American gold, or its equivalent in silver, as provided in the last paragraph of article 1 of the protocol of Washington of February 26 of the present year.



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

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**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<sup>1</sup>

*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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<sup>1</sup> 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.

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### 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*,<sup>1</sup> 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

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<sup>1</sup> 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 :<sup>1</sup>

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 *Kummerow v. Venezuela*, before the German-Venezuelan Mixed Commission, late sitting in Caracas, concerning the late civil war in Venezuela, held as follows :<sup>2</sup>

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

<sup>1</sup> *Supra*, p. 499.

<sup>2</sup> *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.)

\* \* \* \* \*

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 be 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<sup>1</sup> 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;<sup>2</sup>

<sup>1</sup> Vol. IX of these Reports, p. 402.

<sup>2</sup> British Foreign and State Papers, Vol. 54, p. 1330.

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

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.

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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*:<sup>7</sup>

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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<sup>1</sup> Idem, Vol. 53, p. 1050.

<sup>2</sup> Idem, Vol. 79, p. 632.

<sup>3</sup> Idem, Vol. 75, p. 39.

<sup>4</sup> Idem, Vol. 77, p. 1090.

<sup>5</sup> Idem, Vol. 84, p. 137.

<sup>6</sup> Idem, Vol. 74, p. 298.

<sup>7</sup> For a French translation see Descamps-Renault *Recueil international de traités du XX<sup>eme</sup> 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: <sup>1</sup>

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

<sup>1</sup> 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.

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#### 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.<sup>1</sup>

#### 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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<sup>1</sup> 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 <sup>1</sup> (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.

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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.<sup>2</sup>

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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<sup>1</sup> *Supra*, p. 713 and cases therein referred to.

<sup>2</sup> 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 Roblin assigned and transferred to Gen. Joaquín 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.

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## BAASCH &amp; 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.<sup>1</sup>

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.

<sup>1</sup> 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. I, 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 recueillir 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-Sommiers, *Synthèse du droit intern. privé*, t. I, sec. 396-402; Rolin, *Principes de droit intern. privé*, t. I, sec. 251-291. Vareilles-Sommiers, *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, I, 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, 1<sup>er</sup> 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 sténographique, 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 conférerait. 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." Geouffre 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, 2<sup>e</sup> 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 *1,628.05 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

	<i>Bolivars</i>	
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.

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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.<sup>1</sup>

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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<sup>1</sup> 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 uncontrolled 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.

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## 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.

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#### 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.<sup>1</sup>

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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<sup>1</sup> 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.<sup>1</sup>

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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<sup>1</sup> *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.

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MIXED CLAIMS COMMISSION  
SPAIN - VENEZUELA  
CONSTITUTED UNDER THE PROTOCOL OF  
2 APRIL 1903

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**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. 917-942.**



## PROTOCOL, APRIL 2, 1903<sup>1</sup>

*Protocol of an Agreement between the Plenipotentiary of the Republic of Venezuela and the Envoy Extraordinary and Minister Plenipotentiary of His Majesty, the King of Spain, for submission to arbitration of all unsettled claims of Spanish subjects against the Republic of Venezuela.*

The Republic of Venezuela and His Majesty, the King of Spain, through their representatives, Herbert W. Bowen, Plenipotentiary of the Republic of Venezuela, and His Excellency, Emilio de Ojeda, Envoy Extraordinary and Minister Plenipotentiary in Washington, have agreed upon and signed the following protocol:

### ARTICLE I

All claims owned by subjects of His Majesty, the King of Spain, 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 Government of His Majesty, the King of Spain, or his 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 the President of Venezuela and the other, by his Majesty, the King of Spain.

It is agreed that an umpire may be named by the President of the Republic of Mexico. If either of said commissioners, or the umpire, should fail or cease to act, his successor shall be appointed forthwith in the same manner as his predecessor. Said commissioners and umpire shall be appointed before the first day of May, 1903.

The commissioners and the umpire shall meet in the City of Caracas on the first day 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 carefully to examine and impartially decide, according to justice and the provisions of this convention, all claims submitted to them, and such oaths 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 of 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 made shall be payable in Spanish gold or its equivalent in silver.

### 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

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<sup>1</sup> For the Spanish text see the original Report referred to on page 735.

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, 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 every claim within six months from the date 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 language of both governments, to assist them in the transaction of the business of the commission. Except as hereinafter 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 to the umpire for their services and expenses, and the 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 or other nations, the government of Venezuela shall set aside 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 decisions of The Hague Tribunal.

In case of 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 Venezuela in respect to 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 Spain shall be promptly paid in accordance with the terms of the respective awards.

Done in duplicate in the City of Washington on the second day of April, 1903.

H. W. BOWEN [SEAL]

E. DE OJEDA [SEAL]

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PERSONNEL OF SPANISH-VENEZUELAN COMMISSION<sup>1</sup>

*Umpire.* — Luis Gutierrez-Otero, of Mexico City, Mexico.

*Spanish Commissioner.* — Juan Riaño, Chargé d'Affaires at Washington, D.C.

*Venezuelan Commissioner.* — F. N. Guzmán Alfaro.

*Spanish Agent.* — Aristides Tello.

*Venezuelan Agent.* — F. Arroyo-Parejo.

*Assistant Venezuelan Agent.* — José T. Arnal.

*Spanish Secretary.* — José Gil Delgado y Olazábal.

*Venezuelan Secretary.* — Luis Julio Blanco.

## OPINIONS IN THE SPANISH-VENEZUELAN COMMISSION

## EXTENSION OF TIME FOR SUBMISSION OF CLAIMS

Under the terms of the protocol no general extension can be allowed for the presentation of claims; but on cause shown any particular claim may be admitted for consideration and decision for ninety days after the time set for its presentation under the protocol.

*GUTIERREZ-OTERO, Umpire:*

The umpire, having examined and reached a decision concerning the point on which the Commissioners have disagreed, relative to the extension of time which the Legation of His Catholic Majesty in Venezuela demands for the presentation of claims of Spanish subjects to this Mixed Commission;

Has decided that a general decision, which would permit the presentation of *any* claim without exception after thirty days, and during the three months additional, to which the second clause of the protocol refers, would not be compatible with a true interpretation of the protocol in question;

Nor could the decision be made limiting its effects to claimants who reside in the State or territory of Venezuela where a difficulty or lack of communication exists, which is considered sufficient to prevent their presentation during the first thirty days, since there is no reliable information upon which to base such a finding; besides this means might not always be in accord with absolute equity, which ought to control the decisions of the Commission.

But as equity demands — and it is universally recognized as justice — that the length of time granted for the exercise of a right should be sufficient and should be properly taken advantage of by the interested parties, it is certain, that in accordance with the proper interpretation of the protocol and the motive of its execution, the Commission may receive during the three additional months mentioned in the article already cited, claims which could not have been presented during the first thirty days, provided that in the judgment of the commissioners, or of the umpire, as the case may be, it is shown that a sufficient cause for not having made prompt presentation existed;

And thus the umpire decides this question which has arisen and been submitted for his determination.

## ESTEVES CASE

Spanish nationality of claimant may be shown by production of certificate from consulate of Spain showing that claimant is enrolled on register of Spanish citizens resident in Venezuela.

<sup>1</sup> No rules of procedure were formulated in this Commission.

GUTIERREZ-OTERO, *Umpire* :

In the record of the claim which Miguel Esteves presents, claiming to be a Spanish subject, and demanding payment for various merchandise and animals which he asserts were taken by revolutionary and government forces during the civil war which terminated in the year 1900, a preliminary question, not decided by the commissioners, has arisen because the Commissioner of Venezuela is of opinion that said claim is not admissible, inasmuch as the claimant has not presented his certificate of naturalization, and it appears in the record that he is a native of Tetuan, a city of Morocco.

The Commissioner of Spain holds that, having a certificate of Spanish nationality, as appears by the certificate in evidence coming from the Spanish Legation, and in which it is stated that Esteves is enrolled upon the register of nationality of the vice-consulate in Villa de Cura, he is entitled to claim as a Spaniard. Because of a disagreement, the question has been submitted to the decision of the umpire.

It is not denied by the Commissioner of Venezuela that, although Esteves may be a native of Morocco, he could have acquired Spanish nationality, but he limits himself to claiming the necessity of the presentation of the document, which directly and originally evidenced this change of nationality, believing, no doubt, that by this means only it could be proved that said Esteves can rightly avail himself of the provisions of the protocol of April 2 of this year, signed at Washington by the representatives of Spain and Venezuela, relative to claims which *Spanish subjects* should make against this latter Republic.

In deciding if this necessity exists, the umpire has taken into account the following considerations:

It is a principle that it is the province of the internal legislation of States to declare or concede nationality to the individuals who form them, establishing the means by which it may be acquired, preserved or lost, and the manner that said States shall consider the character of their nationals as fixed.

The Spanish law, in article 26 of the civil code, provides that Spaniards who transfer their domiciles to foreign countries are under obligation to prove in every case that they have preserved their nationality, and so declare to the Spanish diplomatic or consular agent, who shall be obliged to enroll them, as well as their wives, if they be married, and their children, if they have any, in the *register of Spanish residents*.

The Spanish law, in articles 26 and 32 of the consular regulations, also provides that it is an attribute of Spanish consuls in foreign countries *to grant letters of residence or security to their nationals*, and it charges them with the duty of making a *register of the Spanish residents in the district*.

The enrollment in this list or register puts the party inscribed in it in possession of a letter which proves his nationality, and the letters with which Spanish residents in the Republic of Venezuela are provided, granted by the legation in the exercise of its powers as consulate-general which are united in it, or by their consulates and vice-consulates in the exercise of the faculties which ordinarily belong to them, prove that the holder of one of these letters is a subject of Spain, to which the protocol of May 30, 1845, made by the above-named powers, refers.

Thus it is that the enrollment and the letter mentioned constitute proof of nationality, which can give way only to a more convincing proof to the contrary, which has not been attempted, nor made in the present case.

To these considerations strictly of a juridic nature to which said case belongs,

others of admitted equity are joined which serve to support the idea of the sufficiency of this proof, since, on the one hand, certificates of enrollment have been considered sufficient by the decisions of this Mixed Commission to prove Spanish nationality, and, on the other hand, the umpire has diligently inquired concerning the manner in which such inscriptions are made in the register of the Spanish consular offices and has learned that they are not made unless the interested parties also produce proof of their character as subjects in the Kingdom of Spain. This last is in accord with the terms of the treaty of 1845,<sup>1</sup> already cited, in which it was provided as an indispensable requisite for the conservation of their nationality that Spaniards who at that time desired to reacquire it, as well as those who in the future might migrate to Venezuela, should have themselves inscribed in the consular register.

Finally, it must be considered:

First. That as a general rule and in the same manner as provided for Spanish consuls those of all nations are charged with the keeping of a register of their nationals.

Second. That even though it be true that the claimant, Miguel Esteves, stated in writing, which he executed before the judicial authority of Zamora, that he was a native of Tetuan, in the same document he began by stating that he was a Spanish subject and he continued to designate himself thus in all his proceedings without giving rise to any motive to suppose, all things being equitably considered, that the faith placed in his statement concerning his original origin by birth should contradict his statement relative to the nationality which he enjoys.

For these reasons the umpire decides that the claim of Miguel Esteves is to be admitted as one of a Spanish subject, and that the record should therefore be returned to the consideration of the commissioners, that they may consider it on the merits.

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#### PADRÓN CASE

It is an accepted principle of international law that States are not responsible to aliens resident in their territory for damages and injuries inflicted upon them by persons in revolt against the constituted authorities.<sup>2</sup>

This principle if invoked before a court of absolute equity becomes a technical objection which is expressly barred by the terms of the protocol.

The fact that this principle was expressly agreed to by both Venezuela and Spain for all future claims in a treaty of 1871 does not bind Spain and Venezuela so as to prevent them from entering into a new agreement waiving this stipulation.

In the absence of express stipulations in the protocol an arbitral court must decide according to the accepted principles of international law; but a tribunal called upon to decide on a basis of absolute equity renders judgment in accordance with the conscience of the arbitrators.

#### GUTIERREZ-OTERO, *Umpire*:

With respect to record No. 4, made up by the claim of the Spanish subject María García de Padrón, in whose favor payment of 1,300 bolivars is demanded, to indemnify her for the price of the rent of her house in Naiguatá occupied by the forces of the Government, and those of the revolution, from the month of September, 1899, to May, 1900; for the sum which she expended in repairing it on account of the damages which the occupants caused it; and the value of

<sup>1</sup> British and Foreign State Papers, Vol. 35, p. 301.

<sup>2</sup> See cases of Aroa Mines, Vol. IX of these Reports, p. 402; Kummerow, *supra* p. 370; Sambiaggio, *supra*, p. 499; J. N. Henriquez, *supra*, p. 713; Salas, *supra*, p. 720.

a shed destroyed by them, the commissioners because of difference of opinion have pronounced no judgment, and therefore the decision of the case has been left to the umpire.

The Venezuelan Commissioner has declared in his opinion relative thereto that he absolutely disallows the claim, and the Spanish Commissioner has stated that, in his opinion, the Government of Venezuela ought to be held responsible for the damages caused by the revolution and that the claimant has a right to the amount that she demands.

In the written memoranda<sup>1</sup> which the Commissioners have made to support their opinions, are explained the absolute opinion given by the Venezuelan Commissioner supporting the principle of irresponsibility of States for acts done by troops, or bands in rebellion against, or separated, in any way from, obedience to the constituted authorities; and on his part, the Spanish Commissioner holds that responsibility of States is not avoided by reason of internal or external changes, that it extends to injuries caused by political factions that strive to acquire power; and that if the Spanish subjects in Venezuela were not protected by indemnity for damages which the revolution has caused them, they would be in an oppressive position, and at the mercy of the misfortunes that it caused them, without resources on the one hand to prevent them, and on the other without a right to recover therefor.

This manner of arguing shows how the commissioners have forced the issue and drawn it into a state of absolute difference of opinion, indicated by the Venezuelan Commissioner in contending that States are not responsible for damages which insurgents cause foreigners, and in deducing from this statement or general rule that the claim made in this particular case should be disallowed.

And the strictness of the principle which has been brought out in its application by the one invoking it, has been followed to such a point that he has not taken into account for the purpose of making a distinction the circumstance which the claimant alleges, and concerning which she produced proofs, that the damages were caused her not only by forces of the revolution, but also by those of the Government; and concerning this point, the Commissioner of Venezuela claims that the extreme vagueness of the expression *troops of the Government*, which is used, makes it impossible to determine if regular forces are meant whose acts could affect the responsibility of the nation.

Thus the decision asked of the umpire has been understood to be with respect to this particular case of which we are treating, whether as a consequence of the application of the general principle which the Venezuelan Commissioner cites, who, in order to strengthen it and show that practically it has been accepted in the relations of his nation with Spain, refers to the convention of 1861,<sup>2</sup> made by both powers concerning some Spanish claims, and in which it was agreed that Spanish subjects injured by revolutions are obliged to prove the negligence of the constituted authorities in the adoption of the proper measures to protect their interests and persons, or to punish or reprimand those at fault; and that this provision, and the others that the convention contains, shall serve as invariable rules after it may be formally and explicitly ratified in the pending negotiations and those that may arise in the future.

The umpire will endeavor to render his judgment clearly and minutely, giving scrupulous attention to the important nature of said points, and the others he may have to touch on.

It is true that, with respect to international law, it is admitted that it em-

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<sup>1</sup> Opinions of the commissioners not reported.

<sup>2</sup> British Foreign and State Papers, vol. 53, p. 1050.

braces certain principles and rules, deduced, more or less from its various aspects, but as Calvo remarks (preface to fifth edition, q. v):

Il n'existe point de code universel applicable aux questions et aux conflits de toute nature qui surgissent entre les Etats. Cette absence de loi suprême, de règle commune, est la source de nombreuses hésitations parmi les publicistes, de contradictions infinies dans la jurisprudence et la pratique des peuples, de désaccords sans cesse renouvelés dans les relations internationales, qui, n'obéissant point à des principes nettement définis et invariables, s'inspirent quelquefois plutôt de l'arbitraire que de la justice, de la force que de l'action du droit.

The same author remarks how difficult, if not impossible, it is to give a complete definition of international law, among other reasons because its signification changes or is modified according to the advances of civilization, which is what has suggested to Wheaton the following very general formula:

International law, as understood among civilized nations, may be defined as consisting of those rules of conduct, *which reason* deduces, as consonant to justice, from the nature of the society existing among independent nations; with such definitions and modifications as may be established by general consent. (Boyd's Wheaton, sec. 14, p. 22.)

It is unquestionable that this lack of a universal code common to all nations, and the necessity of deducing the principles and rules of international law from the various sources which constitute their origin, impress upon these principles and rules, as expounded and considered, be it by the states themselves in the relations of their governments; be it by local or international tribunals when they resolve questions of this sort; be it by the publicists in designating and explaining them, converting them into a doctrine; not the character of a written law, which no one has the power to give them, but necessarily the exclusive character of technical or scientific conclusions, rationally founded, capable of more or less contradiction, according to the force and clearness of their premises; more or less firm according as they are immediately or mediately deduced, and more or less general, more or less subject to modifications and exceptions, according to the subject-matter to which they refer.

This precise explanation having been made, it may be admitted as an established truth, that after a much debated discussion concerning the responsibility of states for damages which revolutionists cause to the persons and properties of foreigners residing in their territory, a negative solution has predominated and been accepted among the rules and principles, to which the umpire has heretofore alluded, that no right to demand indemnity for such damages exists; a principle, on the other hand, to which there have been pointed out various — we may say, numerous — exceptions which it is not necessary to state for the purposes of this decision.

Now, then, does this principle govern the case of María García de Padrón in such an absolute manner that it should be decided upon this point exclusively?

The protocol of April 2 of the current year, signed at Washington by the plenipotentiaries of Spain and Venezuela, and to which this Commission owes its origin, provides that *each claim* be examined and decided, and textually orders that —

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.

There have, therefore, been imposed on the said commissioners and on the umpire the three following rules of an imperative nature, and from which, in order not to place themselves in conflict with the instrument which gives them

jurisdiction and confers on them their only powers, it is not permissible for them to depart:

First. Each claim must be specially and separately examined, without it being permissible to pronounce an abstract resolution conceived in general terms by which it might be supposed that, overlooking said consideration and decision of each case, different claims would simultaneously be decided. Therefore, in order to comply with the protocol, in each case the proper attention shall be paid to the general and special considerations which may be fitting and proper; and if it be necessary, the influence which is owed to the former shall be accorded them.

Second. In exercise of the right which nations naturally enjoy when they agree to create tribunals of arbitration, to establish the principles which must guide them in the decision of the disputed points which they submit to them, it has been made binding with respect to the members of this Commission *that they must found their decision upon a basis of absolute equity*.

Third. In order to dispel the least shadow of a doubt with respect to the scope of the preceding rule, and letting it be known that this Commission was created as a tribunal of equity only, it was provided, finally, that objections of a technical nature or provisions of local legislation should not govern or be taken into account as against the spirit and rule that their decisions should be reached in that sense.

The last of these rules would suffice to make it clear that the principle of the irresponsibility of states for damages which insurgents cause is incapable, unless we attribute to it an absolute force, to determine by itself the decision in the case of María García de Padrón.

This principle, like any other similar one, does not support any except a technical objection, and those of this nature are precluded by the protocol, in so far as they are opposed to the criterion of equity which must be the basis of their decisions.

Moreover, conceding to said principle any abstract force or merit desired, there is still room to inquire what the concrete force or merits that it has are in a case which must be decided by this tribunal of absolute equity.

In tribunals of internal arbitration the principle of equity holds a most important place, and it is to be borne in mind and applied by all of them, whether rules for pronouncing their judgments have been conventionally fixed, since in the many difficulties which may arise they shall resort to the principles of law moderated by equity to decide them, or if no rules have been prescribed for them.

Because with the soundest reason they can appeal to equity when the *compromis* is mute, says Mérignac, concerning the principles on which they should rely, or finally if absolute liberty has been allowed them, since, in that case, as the author cited repeats, no rule restrains them in principle and they are free to render judgment in accordance with their personal conscience. (Mérignac, *l'Arbitrage International*, No. 305 et seq., p. 297.)

To the *provisions* which leave the arbitrator at entire liberty, as the same author continues further on, belong those which permit him "to decide according to justice and equity." This vague expression operates in effect so as to leave him at absolute liberty.

The creation of tribunals of equity in which the arbitrator decides according to his conscience has been frequently put into practice; and it has been considered so regular and convenient that the Institute of International Law included in it the rules of August, 1875, which it proposed and recommended for States when they sought to negotiate agreements for arbitration. Article 18 runs as follows:

Le tribunal arbitral juge selon les principes du droit international, à moins que le compromis ne lui impose des règles différentes ou ne remettre la décision à la libre appréciation des arbitres. (Revue de Droit International, 1875, p. 281.)

For this reason, referring to the varied nature of tribunals of international arbitration, M. Lafayette, cited by Calvo and Tchernoff, says:

Quand c'est d'après leur conscience, les sentiments d'équité ou les principes de droit naturel, que les arbitres doivent rendre leur sentence, ils constituent un *tribunal d'équité*; si, au contraire, c'est d'après les principes de droit formulés dans la convention ou d'après les principes déjà établis du droit international, l'on a un tribunal de justice. Les uns comme les autres forment de véritables corporations judiciaires et, en cette qualité, jouissent d'une entière indépendance vis-à-vis des parties dont ils tiennent leurs pouvoirs. (Cited by Calvo, *Inter. Law*, Vol. III, p. 464, Note I. Tchernoff, *Protection des Nationaux*, p. 378.)

And this character of tribunals of equity is especially adapted to mixed commissions, which are almost always constituted nowadays to decide cases of protection, since amongst other considerations proper for an intimate appreciation of justice, in which that character places them, is found the one that enables them to take into consideration those claims which the States refuse to recognize as not touching the principle nor the pecuniary debt, confusing the two things in the same opposition; an opposition which becomes so profound, as one of the authors just cited remarks:

que l'Etat y persiste même quand il se trouve en face d'un individu dont la situation mérite incontestablement une attention particulière. (Tchernoff, *Protection des Nationaux*, p. 382.)

Pursuing the logical order of ideas concerning the nature of mixed commissions the Institute of International Law agreed at its session of September, 1900, after having adopted a resolution concerning the responsibility of States on account of damages caused to foreigners during an insurrection or civil war, to unite to it this recommendation: <sup>1</sup>

Recourse to international commissions of investigation and to international tribunals is in general recommended for all differences that may arise because of damages suffered by foreigners in the course of a revolt, an insurrection, or a civil war. (Annuaire de l'Institut de Droit International, Vol. XVIII, pp. 254, et seq.) <sup>2</sup>

In discussing this recommendation thus definitely drafted at the request of Mr. Lyon Caen, and as appears in the record of the 10th of September, attention was called to the fact that damages suffered by foreigners could be of two kinds, "those caused by the authorities and those caused by individuals." It was then further suggested that if the text did not comprise the second class it would be better to say "injuries caused *in the suppression* and not *during the course* of a revolt." The person who drew up the project and he who made the foregoing observation both expressly declared that the object was to exclude indemnities for damages caused by individuals; and after the declaration of the ideas of Mr. Descamps, asserting that while the institute was considering the proceeding and the conclusion it did not intend to exclude responsibility for damages which individuals might cause; and the explanations which the writer, Mr. Brusa, repeated, stating that by making no distinction the Commission had intended to include damages caused by individuals as well as the others, the proposal, such as it was and is drafted, was adopted and approved.

The institute relied evidently upon the principle that the tribunals to which they would be referred would be tribunals of equity.

<sup>1</sup> See *supra*, p. 561 for fuller extract.

<sup>2</sup> For translation of all of these recommendations, see p. 561.

In a case which occurred years ago, that is in 1892, and as to which the United States of Venezuela agreed with the United States of America to constitute a mixed commission of arbitration, to which they accorded the attributes of justice and equity, so that in accordance with these and the principles of international law it might decide the claim of the Venezuelan Steam Transportation Company; and Mr. Seijas, representative of the first of these powers, being aware of what the inclusion of equity among the considerations of the judgment signified, proposed, at the conference of July 1 of the year mentioned, that "the word 'equity' be stricken out, not only because of the conflict that existed between the doctrines of justice and equity, *but also to prevent the commissioners from believing themselves arbiters and not arbitrators in law, which is what Venezuela intended to name.*"

The American plenipotentiary did not consent to the change, and replied "that, in his opinion, the use of the word 'equity' would result more favorably than adversely to Venezuela, because it would *enable the commissioners* to better take into consideration all the circumstances of the case." Thus the protocol was drawn, and accepted as such, the concept of *equity* admitted as a rule to decide in a mixed commission, it permits it to do so without conforming to the law, which is what essentially characterizes arbiters.

And concerning this difference, between what the law does not exact and equity may nevertheless allow, there exists an example most important in its scope, which is the reparation by the State, because of the internal law, of damages caused by revolts or civil wars.

This example, which has been followed by several nations, emanates from France, where, in consequence of the revolution of 1848, the decree of December 24, 1851, was made, which in the pertinent portion reads as follows (Calvo 5th ed., Vol. III, p. 152, note):

Considering that according to the terms of the law of the tenth of Vendemaire, year 4 (October 1, 1797), communities are responsible for wrongs committed by violence in insurrections, as also for the damages and actions to which they may give rise; \* \* \*

\* \* \* Considering that even if the State *is not subject to any legal obligation*, it is in conformity to the rules of *equity* and of sound politics to repair unmerited misfortunes and obliterate, as far as may be possible, the sad recollections of our civil discords;

It is decreed:

ARTICLE I. That there be opened in the ministry of the interior a credit \* \* \* to pay the indemnities for damages occasioned by the revolution.

In that case, as well as in the others of reparation after the war with Germany the insurrection, and commune, said equitable reparations were affected without distinction as to damages inflicted by the authorities or the insurgents, and as well to nationals as to foreigners.

The foregoing is more than sufficient to show what are the points and attributes of international tribunals of equity, of which sort this Mixed Commission is, created by a protocol that does honor to the powers that signed it, in doing which they not only gave evidence of a lofty spirit, cutting off recourse from both to any principle or rule which smothers the inspirations of an upright and lofty conscience, but also of the most ardent desire that they show practically to foster the Institution of International Arbitration, conceding to it a broadness of scope that increases its efficacy and augments the number of cases intrusted to its cognizance and decision.

The umpire, therefore, believes it to be incontrovertible that classifying, as may be desired, the general principle of irresponsibility of States for damages which insurgents cause — that is to say, as a doctrine which gives rise to tech-

nical arguments, or as an inflexible rule of law — it can not govern in a positive way the case of María García de Padrón; and it being far from obligatory to decide it in accordance with the terms thereof, the positive duty of this Commission consists in deciding without taking into account a necessity which does not exist, resting upon a basis of absolute equity.

The preceding conclusion is in no way weakened by the circumstance that in the convention made in 1861<sup>1</sup> between Spain and Venezuela relative to Spanish claims, it was agreed that subjects of that nationality injured by revolutions were obliged to prove the negligence of the lawful authorities, and that this rule should be unalterable in the pending negotiations and those that might arise in the future, since if it be true that it was so agreed at that time it is also true that both powers retained the natural and absolute power to agree upon a different course whenever they might desire, and as they have in effect done by means of their above-cited protocol of the 2d of April of this year, which they negotiated for the settlement of the other claims which in their *entirety* must be decided *equitably*.

“The commissioners,” says the protocol, “or, in case of their disagreement, the umpire, *shall decide all claims upon a basis of absolute equity.*” Thus it is that the application of the rule of 1871 as a requisite in order that the claims, for the decision of which this Commission was established, might prevail and be decided favorably, is clearly incompatible with the principle of equity exclusively and imperatively set down for its judgments.

Having arrived at this point the occasion also appears to have arisen for the umpire, in accordance with the foregoing principles which he has established, to pronounce the decision which he believes equitable and fitting concerning the claim; but, as he understands that it was the intention of the commissioners to consider the case anew, if the umpire did not disallow it because of its revolutionary origin; and it is to be desired that in effect they may do so since they will once more evince their intelligence and impartiality, of which they have given so many proofs, the undersigned decides:

That this record return to the examination of the commissioners so that they may be pleased to decide the claim presented on behalf of María García de Padrón, considering that the principle of irresponsibility of States for damages which insurgents cause does not govern it, since it is not submitted for judgment on any other basis than that of absolute equity.

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#### LOZANO CASE

Under the terms of the protocol the Commission is bound to receive and consider all documents submitted by either government.<sup>2</sup>

GUTIERREZ-OTERO, *Umpire*:

In the record of the claim made in the name of the Spanish subject, José Lozano, demanding the payment of 15,000 bolivars as indemnity for the damages which the revolutionary forces inflicted upon him in his mercantile establishment, situated in the city of Barquisimeto, on the 1st of October, 1899, there has arisen a preliminary question concerning the admissibility of the proof produced with the claim, since, while the Commissioner of Venezuela maintains that it is inadmissible because the evidence presented was given before the vice-consul of Spain, and because, therefore, the evidence given for

<sup>1</sup> British and Foreign State Papers, vol. 53, p. 1050.

<sup>2</sup> See Vol. IX of these Reports, p. 147, and *supra*, p. 438 and note, and *supra*, p. 596.

him was of no value, the Spanish Commissioner is of the opinion that the declarations made before the consular agents of his nation ought to be admitted, since many times it is the only means of which Spanish subjects have been able to avail themselves to prove the facts upon which they base their claims. In an exposition of his belief said commissioner stated:

That the consuls of his country were authorized to receive the declarations of witnesses; that said faculty is in general inherent in all consuls, and that, at all events, it is to be borne in mind that this Mixed Commission is not a tribunal of justice, but that it ought to take into consideration all proofs that may be presented, giving to them the weight which they ought to have in accordance with equity, as prescribed in the protocol.

This point concerning the inadmissibility of the proof was submitted to the decision of the umpire, who, in rendering such opinion, believes that the express clause of said protocol, signed in Washington, April 2, of this year, by the representatives of Spain and Venezuela, are to be applied, in which, rules that must be observed are prescribed for this Commission, which can not assume powers which the protocol denies it. nor refrain from fulfilling the obligations which it imposes upon it.

The second article of the protocol cited, provides:

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 documents or written statements which may be presented by or on behalf of the respective governments in support of, or in answer to, any claim.*

And since the documents or statements, which tend to support the claim here considered, have been presented in writing and by the legation of Spain in the name of the Government, the Commission is bound to examine and consider them in order to take them into consideration in pronouncing the judgment which it may deem justified by the merits.

Nevertheless, the question of admissibility of the proof presented shall not prejudice its efficacy, which shall be appreciated by the commissioners or the umpire, as the case may be, as they may determine to proceed in accordance with absolute equity without regard to objections of a technical nature, or provisions of a local legislature, as prescribed as a binding rule.

Therefore the umpire decides that the proofs submitted with the claim made in the name of the Spanish subject, José Lozano, is admissible, and that the claim should be returned for the investigation of the commissioners, in order that they may decide it, examining and taking into consideration said proofs.

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#### MENA CASE

It is an accepted principle of international law that states are not responsible for damages and injuries caused by persons in revolt against the constituted authorities; but this principle under the terms of the protocol can not be invoked by Venezuela.<sup>1</sup>

GUTIERREZ-OTERO, *Umpire.*

In record No. 5, presented in the claim of the Spanish subject Domingo Gonzalez Mena, in favor of whom the payment is claimed of 34,744 bolivars

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<sup>1</sup> See Aroa mines case, Vol. IX of these Reports, p. 402; see also *supra* cases of Kummerow, p. 370; Sambiaggio, p. 499; J. N. Henriquez, p. 713; Salas, p. 720; Guastini, p. 561; Padrón, p. 741.

as the value of 670 head of horses and mules situated upon the ranches belonging to him, the former having been destroyed by the belligerent forces in the war beginning in May, 1899, and the latter having been entirely lost during the same time, there arose a question concerning which the commissioners did not agree, and which, as a preliminary question, has been submitted to the umpire.

The Commissioner of Venezuela, referring to the circumstances, says that there is no exact statement concerning which force said troops belonged to, nor the name of the leader who commands them; and that there is question of the losses suffered because of war; he maintains that the State is only responsible for acts of its authorities, and also that strangers ought to suffer the consequences of wars which the country undergoes, and should not claim damages on this account, because they are produced by force majeure, which in no case can render said State responsible.

From this he deduces that Venezuela is not responsible for the damages which Gonzalez Mena says he suffered by reason of the war of 1899.

The Commissioner of Spain is of opinion that the interests of the claimant have not received the protection to which the treaties in force give them a right, and he maintains that said responsibility does exist.

The question set down in this way by the commissioners, it appears in the record that:

Not being in accord upon this point, its resolution shall pass to the decision of the umpire.

In reality the two following principles are invoked by one of the commissioners, in order that they may be applied and govern the case:

Primarily, the State is responsible only for the acts done by its agents, and not for damages which insurgents cause to foreigners, and therefore Gonzalez Mena has no right, from this point of view, to claim damages which the revolutionary forces may have caused him:

In general, the State is not responsible for damages caused as a consequence of war because damages of this sort are considered as caused by force majeure, which exempts it from liability.

Do these principles in fact govern the case of Gonzalez Mena in such an absolute way, that, by reason of both, it is not permissible to take into account any other consideration in order to decide it and make it necessary to reject it summarily?

With respect to the first of these two rules which have been cited, the umpire has, upon another occasion,<sup>1</sup> already decided that although after a long discussion the theory has undoubtedly prevailed concerning the irresponsibility of states for damages which insurgents cause to the persons or property of foreigners living in their territory, and such a principle is now considered as a rule properly called one of international law, it does not govern a tribunal of the nature of this Mixed Commission, which, according to the protocol that created it, should, on the contrary, necessarily base its judgments upon absolute equity and not take into consideration objections of a technical nature which may be raised before it.

This character of a tribunal of equity, which is considered sufficient for the submission to arbitration of cases of protection, has been recognized as giving absolute liberty for a decision which is not against good conscience inspired by a true estimation of absolute justice, and which permits, finally, taking into consideration of all the circumstances of the case, conceding equitably what is

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<sup>1</sup> *Supra*, p. 741.

not a matter of obligation and can not be demanded, and, in a word, proceeding, as arbitrators proceed, that is, without regard to law.

The umpire has shown that the protocol of Washington, of April 2 of this year, by its own terms, and in accordance with the most reliable opinions which in this particular case can be produced, among them another protocol made in 1890 by the United States of Venezuela and the United States of America, places this Mixed Commission in that position.

Concerning the second principle — and even with more reason — substantially the same must be said, since if this doctrine to a certain degree did absolutely exist, that the acts of war do not give rise to the responsibility which obliges states to make arbitration, it would be modified by the theory that the distinction between these cases should be made as to those which, properly speaking, are defensible, and those which are not, therefore, of the nature of a fatal necessity.

Upon this point Fiore, cited by Tchernoff, says:

S'il est incontestable, dit un auteur, que la guerre a le caractère de nécessité fatale et de force majeure, tout ce qu'un gouvernement peut faire et entreprendre pour satisfaire aux justes exigences de la défense, en prévision d'une guerre, ou pendant la guerre, n'a pas en lui-même le caractère de nécessité fatale. La guerre imminente ou déclarée peut, sans doute, nécessiter certains faits contre la propriété privée, et autoriser les détériorations de cette propriété dans l'intérêt public de la défense militaire: mais ce que l'autorité publique peut faire dans un but stratégique revêt toujours le caractère de l'entreprise légitime dans un intérêt public, et non toujours celui de nécessité fatale, caractère qui devrait être réservé uniquement aux faits accomplis durant l'action et rendus nécessaires pour résister à l'ennemi qui s'avance pour commencer la lutte. (Tchernoff, Protection des Nationaux Résidant à l'Etranger, p. 309, citing Fiore, France Judiciaire, X, 1, p. 193.)

Tchernoff contends, that the council of state in France established the distinction with respect to the demolition of real estate in the zone of the defense of Paris from between those which constituted a measure of this nature until the disaster of Sedan, and those after this event considering the latter as an act of war, which did not give, as the first did, a right to indemnity.

That the French court of cassation has decided that the damages caused to private property by the works completed, even in case of necessity for the defense of a stronghold in a state of war, give a right to indemnity in all cases where they do not constitute a case of force majeure;

And finally that an author, cited in La France Judiciaire, expresses himself as follows:

Si, au lieu de s'en tenir à la forme, on va au fond des choses, qu'il s'agisse des dommages résultant de travaux de défense antérieurs à l'action, ou des dommages résultant d'opérations militaires d'attaque ou de défense durant l'action, il y a toujours, dans un cas comme dans l'autre, des citoyens qui souffrent un dommage dans l'intérêt collectif de la patrie.

Dès lors, la collectivité des citoyens, ou le gouvernement qui la représente, doit indemniser intégralement les particuliers des pertes qu'ils ont subies dans l'intérêt commun, soit avant, soit après l'action. Du reste, le système contraire est tellement injuste, que ses partisans n'osent pas le pousser jusqu'à ses dernières conséquences logiques, mais le mitigent en disant que l'équité doit conseiller à l'Etat, même lorsqu'il s'agit des dommages causés durant l'action, à faire la charité aux victimes de la défense nationale. (Tchernoff, Protection des Nationaux Résidant à l'Etranger, pp. 311, 312; citing a note of the translator of La France Judiciaire, X, 1, p. 192.)

Thus it is that although without taking into consideration that the case of Gonzalez Mena is submitted to a mixed commission, which is obliged to decide according to equity, the question of indemnity for acts of war appears, moreover, to be a question recommended in general for its decision to the same criterion

of equity, but these considerations which fix the necessity of deciding this claim upon its merits in no way prejudices the facts nor entail an opinion concerning the nature of those facts which have been the subject of the proof produced.

It is for this reason that the umpire in declaring that the rules invoked in an absolute sense with respect to damages caused by the revolution or by acts of war do not govern the case proposed, necessitating its disallowance decides expressly and exclusively:

That this record is to be returned to the commissioners in order that they may decide the claim presented on behalf of the Spanish subject Gonzalez Mena, bearing in mind that it is not subjected in this respect to any other criterion than that of absolute equity.

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#### FRANQUI CASE

In the absence of an express provision to the contrary, the Commission has the right to adopt whatever means it determines upon to obtain evidence. A witness can not discredit by subsequent retraction statements made by him as a governmental authority, especially where his statements have been corroborated at the time they were first made.

GUTIERREZ-OTERO, *Umpire*:

In record No. 70 relative to the claim made on behalf of the Spanish subject Alonzo Franqui a difference of opinion has arisen, and it is submitted to the umpire for his decision because upon the Venezuelan Commissioner's demand that Gen. Maurice Aguilar, whose testimony has been presented in support of said claim, should be heard by the whole Commission, the Spanish Commissioner was of opinion that the protocol, in its second article, expressly limits the persons whom said Commission ought to hear, and therefore the declaration of Gen. Maurice Aguilar is not to be admitted; and the undersigned takes into consideration and decides this point in the following manner:

First. That the protocol, signed in Washington on April 2 of this year by the representatives of Spain and Venezuela for the establishment of this Mixed Commission, does not limit the means of proof which may be made use of before it, and only demands in the first part of the second article that the proof shall be rendered by the respective Government or in their name; and in the second part of the same article that the Commission shall receive and consider all documents or written statements which may be presented by the Governments in support of or in answer to any claim.

Second. That in the absence of an express prohibition concerning the admissibility of determining means of proof, it is the unanimous conviction of the most conspicuous writers upon international law, which Mérignhac expresses in these terms:

\* \* \* Alors le tribunal arbitral demeurera libre d'employer, pour s'éclairer, tous les genres de preuves qu'il croira nécessaires; et il ne sera lié, à cet égard, par aucune des restrictions qu'on rencontre dans les lois positives, spécialement quant à l'administration de la preuve testimoniale. (Mérignhac, *Traité de l'Arbitrage International*, No. 272, p. 269.)

The Institute of International Law, in article 15 of the Rules for Arbitration between Nations, proposes substantially the same thing.<sup>1</sup>

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<sup>1</sup> *Revue de Droit International*, 1875, vol. 7, p. 280. (See *supra*, p. 744.)

Third. That although supposing that the text of the protocol of Washington was doubtful, and demanded to be interpreted for want of clearness, the interpretation ought to be made in a broad sense because the general principles of legislation and jurisprudence provide a broad scope in this matter of proof; and because it is clearly a general rule that the oppressive [in the protocol] ought to be restricted and what allows freedom of action extended in interpreting it; and finally because this broadness of interpretation should be more binding when there is question, as with this Commission, exclusively of a tribunal of equity.

Fourth. That the duty imposed by said protocol in the second part of Article II to hear oral or written arguments which the agent of each nation may make concerning each claim does not mean more than that they shall not be prevented from being heard, and the acknowledgment that it is incumbent upon the agents to argue for their respective Governments; but by no means does it include, according to the concept of the umpire, the other prohibition to receive specific proofs, and much less to hear those who naturally are to take part in them.

Fifth. That considering the broadness of the powers of the Commission and its character as a tribunal of absolute equity, there is no reason for not considering included in them the right to accede to the request of one of the arbitrators, who spontaneously for his own information and that of his colleagues believes it opportune and proper that there be heard by all, and examined if it please them, a person who in his public, civil, and military character has already given testimony in the matter under consideration; and this proposition, which is not *ex parte*, since it is not the request of any agent in the name of his Government and merits attention because of the impartiality of its origin and the benefit of its purpose, is to be counted in order to be accepted, with the reasons heretofore set forth, and perhaps even with other superior ones.

Therefore the umpire decides:

That Gen. Maurice Aguilar is to be heard by this Commission in accordance with the request of the Commissioner of Venezuela for the purposes which have already been expressed.

After this opinion was delivered, General Aguilar was called as a witness before the Commission, and testified that in the official letter given by him to the claimant, setting forth the latter's loss, he had overestimated the value of the property.

The Commissioners for Spain and Venezuela, being then unable to agree as to the decision of the case, it was passed to the umpire for his judgment, and after reciting in detail the facts and evidence of the case, he decided in the following manner with respect to the weight of the oral testimony of General Aguilar:

The umpire considers:

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Fourth. That with respect to the valuation of 250,000 bolivars, the umpire is of opinion that it ought to be accepted, because if it is true that General Aguilar in fact has retracted his statement concerning it, and testified before this Commission as to his want of knowledge, and the extraordinary inaccuracy with which said valuation was conducted, he can not succeed in discrediting with his later statement, given now, the official act of that time, when exercising the duties of public authority, namely, as civil and military superior of that locality, he estimated the loss caused during a battle in which he took part as one of the officers engaged.

His statement of that time is corroborated by the testimony of the bookkeeper, who testified relative to the character of the losses suffered; and by the declaration of Franqui, who, although the person injured, and the interested party, enjoyed the

reputation of unblemished integrity according to the declaration of witnesses, who affirm that the conditions of the houses of said Franqui could have suffered damages to the amount indicated, and in general by the nature of the event capable, no doubt, of producing the loss of whatever was situated in the place where such a dreadful disaster occurred; besides, it is to be remembered that, not only before this Commission, General Aguilar expressly said that before answering he had at various times thought what he was asked; but six months after having given his answer in writing and made the valuation aforesaid, he corroborated them judicially under oath, stating that their contents were true. He has also testified before this Commission that the reputation for honesty and integrity of Franqui was unassailable and generally known. Thus it is that a latent sense of justice indicates that the first testimony of General Aguilar is entirely credible.

After making various deductions on other grounds, the umpire awards the sum of 191,000 bolivars.

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#### CORCUERA CASE

Where the Government of Venezuela has admitted and agreed to pay a debt due a Spanish subject for services, such debt becomes a portion of the national debt of Venezuela, and the obligation will not be extinguished by a clause of a treaty between Spain and Venezuela of a later date canceling all pending Spanish claims.

#### GUTIERREZ-OTERO, *Umpire*:

In record No. 120, which contains the claim of the Spanish subject Gen. Leonardo Corcuera, in favor of whom the payment of 2,201.96 bolivars is demanded, in accordance with an order recognizing and ordering him paid this debt by the minister of war, issued on February 18, 1898, a disagreement between the commissioners has arisen, and the case has been referred to the decision of the umpire.

The claimant presents the order referred to, and, moreover, a confidential note of the minister of foreign relations dated May 24, 1898, in which it is announced to the Spanish minister that the President of the Republic, lamenting that immediate payment of the order can not be made, has decided to do it in monthly installments of 500 bolivars, which would begin to be paid in the following June. Payment, however, has not been made in any way, and for that reason Corcuera has made a claim before this Commission.

The Commissioner of Venezuela is of opinion that the claim can not be admitted, and that no jurisdiction over it can be taken, because the claim is prior in date to February 25, 1898, when, in accordance with the convention of June 21 following, all Spanish claims then pending were canceled.

The Spanish Commissioner holds that Corcuera has a right to enforce his credit.

The umpire considers:

1. That with respect to the existence and legitimacy of the amount of the debt there is no doubt, because the claimant possesses an official document of the minister of war which acknowledges and orders this debt of the Government of Venezuela to be paid, the origin of which, moreover, is explained in detail, which shows that it arose because of military service furnished, which Corcuera performed by order of the minister of that department.

2. That this recognition and order were of February 18, 1898, and consequently constituted the debt from then on as a portion of the public debt of Venezuela and an asset which had become the property of Corcuera; it is not comprised among the credits canceled according to agreement of June 21 of the same year, because said credits were only the pending claimants, which

were ordered to be paid by a stipulated sum. This debt being of such a nature, it was by no means included among pending reclamations.

3. That this correct understanding of the agreement of June 21, 1898, is set forth in the text thereof, because it appears therein that for the renunciation on the part of Spain to the recovery and payment of another credit existing and recognized, as was that of the installments of the Spanish debt which were not recovered during eleven months, running from May, 1892, to April, 1893, an express stipulation was made, and the cancellation of the other pending reclamations until February 25 was not sufficient to include it.

With respect to the debt due Corcuera, no renunciation existed, as it was indispensable in order that it should be excluded from his property.

4. Besides, on May 18 it was already known that pending claims would be canceled, because it was thus agreed in the convention of December 20, 1897, and it was also announced in the judgment of February 25 following, rendered by the commissioners charged with the settlement of said claims, both of which documents served as premises for the agreement of June 21, which did no more than refer to such acts; and, notwithstanding this undeniable knowledge of the facts, on said 18th day of May the Government agreed, and so communicated to the Spanish legation, that it would pay the debt of Corcuera by monthly installments of 500 bolivars.

Because of all the foregoing, and the umpire also making it known that, although the claimant rendered military service to Venezuela, he did so with the permission of his Government, and therefore preserved his nationality, decides that the claim of the Spanish subject Leonardo Corcuera falls within the jurisdiction of this Commission and must be allowed for the sum of 2,201.96 bolivars, and that, therefore, the Government of the United States of Venezuela should pay a like sum to His Majesty the King of Spain for the services of this subject.

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#### SANCHEZ CASE

Where the evidence produced in support of a claim is too vague to enable the Commission to determine the amount of the claim, said claim will be dismissed.<sup>1</sup>

GUTIERREZ-OTERO, *Umpire*:

In record No. 74, which comprises the claim of the Spanish subject J. Manuel León Sanchez, in favor of whom an indemnity of 50,000 bolivars is demanded for material damages which he says were caused by preventing him from continuing a periodical publication, legitimately established, a disagreement has arisen between the commissioners, and the case has been submitted to the umpire for his decision.

The claimant says:

That his said periodical leaflet which was called *Movimiento Marítimo y Comercial y Noticias Universales* was established by permission of the government of the Federal District granted on the 18th of December, 1902, and produced for him a profit from the start so encouraging that he was able thereby to satisfy all his obligations and outlays of expense, and to realize a monthly return of from 1,700 to 1,800 bolivars.

That upon the 15th of February following there was verbally announced to him by agents of the police an order, first from the prefectura and afterwards from the government of the district itself, that this publication should be suspended.

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<sup>1</sup> See also *supra* De Zeo case, p. 526.

That in vain he sought, by all the means in his power, for the revocation of the order; that he did not procure the aid of the lawyers who might defend his rights before the tribunals and help him in a claim for damages which he might wish to bring.

That in view of these circumstances, and suffering the inevitable execution of an order which was not based upon a true cause of complaint, which had been made without right, which was not even couched in legal form, he found himself obliged to realize upon all his business in Venezuela by an inopportune sale of his printing establishment, and to emigrate to another country to seek support for his family.

To the foregoing statement of facts, and to support it, León Sanchez annexed the original permission to publish his leaflet; a letter from the manager of the French cable, which certified that he had never altered any translation or notice which were received by said manager; copies of various private publications, which were made for the purpose of procuring the withdrawal of the order of suspension; copies of various periodicals in which the notice of this order was published, and the cause attributed for it, which was the inaccuracy of said translation; two letters of persons who assert that León Sanchez was the manager of two newspapers; that later he was the owner of the *Movimiento Marítimo*; that this was suspended in the manner stated; that Sanchez endeavored to procure the revocation, devoting himself to the steps before mentioned; that he did not seek redress before the tribunals, because everybody considered it useless; and that there were printed and distributed from 300 to 350 copies of each one of the editions of the *Movimiento Marítimo y Comercial y Noticias Universales*.

Such are the complaints and proofs exactly and minutely set forth.

The Venezuelan Commissioner is of the opinion that León Sanchez has no right to demand any indemnity for the suspension to which there is reference, and he cites in support of his opinion the decree issued on May 10, 1902, by which the President of the Republic suspended, among other guarantees or constitutional rights, that of free expression of thought by word of mouth or by means of the press.

The Spanish Commissioner maintained that where there is question of an enterprise legally established with previous permission of the Government of Venezuela the latter is responsible for the damages caused claimant.

The umpire does not take up this question of responsibility, because, in the supposition that it might be determined abstractly or in principle against Venezuela, it would not be possible to fix these terms concretely in order to make it effective, because the claimant has not proved even one of the facts necessary to estimate and determine any indemnity.

In order that this want of evidence might clearly appear, the undersigned made the detailed enumeration of the proofs presented, which do not relate to the value of the publication, nor to the expenses incurred, nor the income, nor even to the profits and possibilities of its being maintained, nor upon the necessity which the facts imposed on León Sanchez of selling his printing establishment and absenting himself from the Republic, nor upon the value of this establishment, nor upon the price for which it was necessary to sell it, nor in a word, upon anything that might justify the amount of property lost or injured.

Such an extreme in this respect was reached that not even when the private testimony of two persons was asked upon the fact of there having been published and distributed from 300 to 350 copies of each one of the editions of *Movimiento Marítimo* was there any proof as to how many of these editions there were, if they ceased to be published any day, and what expenses and profits they

produced, nor whether these later circumstances refer to each edition, each day, or each month of the two months which the publication approximately lasted. In no case, therefore, could the umpire enter into an equitable appreciation of the facts which are not alleged and proven, nor much less invent them, in the want of all proofs produced by the interested party.

These reasons suffice to render it unnecessary to examine and resolve other questions, and make it necessary to decide, as the umpire does decide:

That there is no reason for granting (because of the reasons alleged in this record) any indemnity in favor of the Spanish subject, J. Manuel León Sanchez.

#### BETANCOURT CASE

In the absence of an express mention of a liquidated and acknowledged debt due from the Government of Venezuela to a Spanish subject in a stipulation of a treaty cancelling all pending Spanish claims, such obligation will not be released.<sup>1</sup>

For the proper interpretation of a treaty all the circumstances antecedent to its execution may be examined by the Commission.

GUTIERREZ-OTERO, *Umpire*:<sup>2</sup>

In record No. 71, which comprises the claim of the Spanish subject Federico Betancourt, in favor of whom the payment of 43,300 bolivars is demanded on account of the formation and management of an expedition of immigrants from the Canary Islands to the port of La Guaira in the year 1892, and the damages and injuries which he alleges to have suffered because of the failure of prompt payment, the commissioners have not agreed, and the case has been submitted to the decision of the umpire.

The claimant shows:

That in February, 1892, he brought into Venezuela, through the port of La Guaira, an immigration from the Canary Islands comprised of 389 persons, whom he brought over in the Spanish bark *La Fama*, in accordance with a contract which he had entered into with the government of the Republic, and that although the immigrants were carefully chosen and the inspection of them which the officers officially named for this purpose made of them resulted satisfactorily, not only at the point of sailing, but also at the place of arrival — that is to say, in the Canary Islands and in La Guaira — nevertheless, he estimated that the debt which was acknowledged for the passage should be fixed at the sum aforesaid, and not at the larger sum which the law of the subject matter fixed and that he believed that he had merited, in all justice, on account of the proper fulfillment which he made of the contract entered into by him.

He further shows that, notwithstanding the time elapsed since the debt was liquidated and fixed and the necessary steps which he has taken administratively in order that he might be paid it, it still remains unsettled, and thereby he has been caused grave injuries, on account of which he demands to be indemnified, besides having the principal debt paid him.

To determine these damages he enters into an explanation of various operations, which he could have undertaken with the value of the debt, if he had received it, and states that he is willing to consider it entirely satisfied with the result of any one of them.

<sup>1</sup> See Corcuera case, *supra*, p. 753.

<sup>2</sup> For a French translation see Descamps-Renault, *Recueil international des traités du XX<sup>ème</sup> siècle 1903*, p. 893.

To prove his debt he put in evidence various documents, and among them a certified copy which, by order of the minister of fomento, on the 16th of January of this year, was issued to him, and also of another certification given on September 24, 1892, by the director of statistics and immigration, certifying that in the archives of the office there existed a record, properly substantiated, in which it appears that Betancourt brought the immigration aforesaid, composed of 389 persons, as appears in the list sent to the minister by the subordinate commission of immigration of La Guaira, in accordance with the law in the premises, and therefore the Government owed said Mr. Betancourt the sum of 43,320 bolivars according to the accounting which his commission found in said record.

In order to show what is the interest which is customarily collected here in negotiations of loans, he presents two letters from the banks of Venezuela and Caracas, in which their representatives state that it is 12 per cent per annum.

When the claim was presented to the commissioners, the Venezuelan Commissioner considered that it ought to be disallowed because the diplomatic convention of June 21, 1898, made by the ministers of foreign relations and public credit of Venezuela and the ministers plenipotentiaries of Spain and this Republic canceled it, and consequently it was excluded from the examination of this Commission in accordance with Article I of the protocol of Washington.

The Spanish Commissioner was of opinion that the claimant ought to be allowed the sum which he demanded, because there was question of a contract which he entered into with the Government of Venezuela, the fulfillment of which he had been attempting, and to obtain in an administrative way without being able to accomplish its fulfillment, and that the claim of Betancourt did not form a part of those which were readjusted by said convention.

The umpire considers:

That Article I of the protocol signed at Washington on April 2 of this year places under the jurisdiction and decision of this Commission all claims of Spanish subjects which have not been settled by diplomatic agreement or by arbitration between the two Governments of Spain and Venezuela, and the first thing to be done, therefore, is to investigate with respect to the claim of Betancourt if it was included in the agreement of 1898 and was canceled thereby, as the learned Commissioner of Spain and Venezuela has contended.

That said convention of 1898 acknowledged as a precedent another convention of December, 1897, concluded at a conference, which at that date the minister of hacienda of Venezuela and the plenipotentiary of Spain had, and in the text of which it was expressed that said conference treated all claims still pending made by various Spanish subjects for injuries suffered during the war of 1892, and for other reasons; and that one person was named by the minister of hacienda and another by the legation of Spain, who examined all claims and determined the total sum which the Government of the Republic should pay therefor. They decided thereafter the terms of the payment and it was agreed providing:

That as soon as the bonds of the diplomatic debt which should be issued for the sum which might be determined should have been delivered, the legation of Spain would renounce with full authorization of its Government all other claims of Spaniards against Venezuela up to date, and also any claim that might arise from the suspension of the monthly payments during the duration of the past war.

That in the record of the conference held on June 21, 1898, which resulted in the convention of that date, successively approved by all the executive and legislative powers of Venezuela, it appears:

That an exact transcription was made of the other protocol of 1897, relative to the adjustment of claims pending by Spanish subjects by reason of the war suffered in 1892, and for other reasons, and attention being called that in said protocol it was agreed that the legation of Spain should renounce every other claim of Spanish subjects up to that date; and also every other claim that might have originated on account of the failure of payment of the eleven monthly installments during the duration of last June, 1892;

Wherefore the minister of Spain declared that at no time could there be demanded from the Government of the Republic the payment of said eleven monthly installments.

It likewise provided that the persons named to adjust all the claims and fix the amount that on account of them should be paid, accomplished their mission, and determined the sum which ought to be delivered to the Government of Venezuela for the different cancellation of all pending claims.

Finally the terms of the convention of that date, June 21, 1898, were definitely fixed, the first part of which reads as follows:

All claims of Spanish subjects up to the date of this judgment, or say February 25, 1898, shall be canceled.

That having considered the inducements which the convention of 1898 had and the definite text which has just been cited, it appears with entire clearness to the judgment of the umpire:

First. That all the claims which were canceled, were all those pending which were intrusted to the determination of the commissioners named for that purpose, and for the payment of which a specified sum was designated;

Second. That in no sense was there made or acceded to any claim which would likewise cancel debts which at that time were liquidated and acknowledged by the Government of Venezuela in favor of Spanish subjects, and which formed, therefore, a part of the public debt.

This proper understanding of the convention is corroborated by these very terms, since it being desired that there should be included also the cancellation or renunciation of another debt already liquidated and acknowledged, as was that of the eleven monthly installments, due on account of the Spanish debt, which were not paid from May, 1892, until April, 1893; with respect to this, particular and express stipulation was made, and it was not considered as included in the cancellation of the pending debts, which were the object of the transaction and the agreement to pay intrusted to the commissioners who were named for these purposes.

In a separate clause the following was agreed in said convention of 1898:

The legation of Spain declares that at no time may it demand from the Government of the Republic of Venezuela the payment of eleven monthly installments that were owed in 1892-93.

That was the only renunciation contained in the convention, and there were no other debts then existing for the determination and acknowledgment of which the Government of Venezuela might have made, and which also, therefore, belonged to the patrimony and property of the creditors.

That the debt of Federico Betancourt belongs to those of this sort, supposing that an entirely trustworthy certification, because it proceeds from the ministry which has in custody the antecedents of this negotiation, proves the true amount and acknowledgment thereof before the convention of 1898 was made; consequently it was not included in the pending claims which at that time were adjusted and canceled in said year, nor was it the subject of any negotiation which might abstract it from his property.

That from the foregoing it is deduced upon the most secure basis that said credit, now that there is an attempt to collect it because it has not been satisfied, is not in any way excluded from the jurisdiction of this Mixed Commission, and that besides, in accordance with every sentiment of justice it must be declared that it ought to be paid, even if to this end it was necessary to apply equity as far as possible.

That upon this point it must be taken into consideration that although a long time has expired since the liquidation ought to have been made, since even in September of 1892 the debt was ascertained and acknowledged, and that without it the claimant must have experienced damages on account of the refusal to pay, they can not be repaired in any of the ways which he indicates and with respect to which he renders no proof.

Nor at the rate of 12 per cent per annum upon the capital, because, even supposing that he might have maintained a suit to ascertain these damages at this rate of interest, he would not have accomplished his intention.

Equity does no more than allow him for this capital a total and complete indemnity which is almost equivalent to 5 per cent per annum as long as it has been unsatisfied, and that the umpire should fix the sum of 14,295 bolivars and 70 centimos as corresponding exclusively to a period of eleven years exactly.

For the foregoing reasons the umpire decides that the claim of the Spanish subject Federico Betancourt must be allowed for the total sum of 57,615.60 bolivars; and that, therefore, a like sum must be paid by the Government of the United States of Venezuela to His Majesty the King of Spain destined to satisfy said claim.

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MIXED CLAIMS COMMISSION  
SWEDEN AND NORWAY - VENEZUELA  
CONSTITUTED UNDER THE PROTOCOL OF  
10 MARCH 1903

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**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. 945-954.**



## PROTOCOL, MARCH 10, 1903<sup>1</sup>

*Protocol of an Agreement between the Plenipotentiary of the Republic of Venezuela and the Envoy Extraordinary and Minister Plenipotentiary of Sweden and Norway at Washington, for submission to arbitration of all unsettled claims of citizens of Sweden and Norway against the Republic of Venezuela.*

The Republic of Venezuela, Sweden and Norway through their representatives, Herbert W. Bowen, Plenipotentiary of the Republic of Venezuela, and A. Grip, Envoy Extraordinary and Minister Plenipotentiary of Sweden and Norway at Washington, have agreed upon and signed the following Protocol:

### ARTICLE I

All claims owned by citizens of Sweden and Norway against the Republic of Venezuela which have been settled by diplomatic agreement or by arbitration between the Governments and which shall have been presented to the commission hereinafter named by the Counsel General of Sweden and Norway 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 the President of Venezuela and the other by His Majesty the King of Sweden and Norway.

It is agreed that an umpire may be named by His Majesty the King of Spain. If either of said commissioners or the umpire should 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 day 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, careful to examine and impartially decide, according to justice and the provisions of this convention, all claims submitted to them, and such oaths 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 events 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.

### ARTICLE II

The commissioners, or umpire, as the case may be, shall investigate and

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<sup>1</sup> For the Spanish text see the original Report referred to on page 761.

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 the 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 date 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 language of both countries to assist them in the transaction of the business of the commission.

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 to the umpire for their services and expenses and the 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 to the above claims 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 unspecified awards in favor of Sweden and Norway shall be promptly paid according to the terms of the respective awards.

Done in duplicate at Washington this tenth day of March, 1903.

H. W. BOWEN [SEAL]  
A. GRIP [SEAL]

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PERSONNEL OF SWEDISH-VENEZUELAN MIXED COMMISSION<sup>1</sup>

*Umpire.* — Ramón Gaytán de Ayala.  
*Swedish and Norwegian Commissioner.* — Guillermo Valentiner.  
*Venezuelan Commissioner.* — F. A. Guzmán Alfaro.  
*Venezuelan Agent.* — F. Arroyo-Parejo.  
*Swedish and Norwegian Secretary.* — Ch. Piton.  
*Venezuelan Secretary.* — Luis Julio Blanco.

## OPINIONS IN THE SWEDISH-VENEZUELAN COMMISSION

## THE CHRISTINA CASE

Claim referred to umpire on question of the allowance of interest, the Commissioners having agreed upon the amount of the principal of the indemnity. Interest at 5 per cent allowed on the principal award for damages from the date that claimants were proved to have been in their right.

GAYTÁN DE AYALA, *Umpire*:<sup>2</sup>

The writer, umpire of the Swedish-Norwegian-Venezuelan Mixed Commission, constituted by virtue of the protocol signed at Washington on March 10, 1903, and named by His Majesty, the King of Spain, at the request of the Government of Sweden and Norway, states:

That the record filed to prove the validity and amount of the claim in question having been examined;

That the arguments presented in defense of the rights of their respective constituents by the commissioners of Sweden and Norway and Venezuela, and their opinions relating to the demand for the payment of interest on the amount allowed on the claim which the commissioner of Sweden and Norway presents;

Whereas it appears from the opinion of the Venezuelan commissioner:

That neither the diplomatic nor consular representatives of Sweden and Norway in presenting the *Christina* claim to the commission demanded interest on the sum claimed;

That the creditor has no right to interest for default, except when there has been a delay in payment chargeable to the debtor, and in the present case the delay which has transpired can not be charged to Venezuela, since the Government of the Republic has given notice that it was willing to satisfy the claim, provided it was reduced to a just amount;

That the Government of Venezuela was right in refusing to acknowledge as just the estimate of the damages and injuries made by the owner of the bark *Christina*, as is seen from the award of the commission, by virtue whereof only the fifth part of such claim has been allowed;

That the persistence on the part of the claimants in demanding excessive damages — more than has been agreed were their due — should be considered as the sole cause of delay; and therefore it is neither just nor equitable that Venezuela should be liable for the losses caused by the rash pretensions of said claimants;

That the Venezuelan commissioner calls the attention of the umpire to the rate of interest that is demanded in favor of the claimants, and to the date

<sup>1</sup> No rules of procedure were formulated in this Commission.

<sup>2</sup> For a French translation see Descamps-Renault *Recueil international des traités du XX<sup>ème</sup> siècle 1903*, p. 889.

from which said interest should run, alleging with respect to the first point that the rate of 6 per cent per annum is very much too high, and with respect to the second that the claim was not officially presented to Venezuela until the month of September, 1895.

And whereas it appears from the opinion of the commissioner of Sweden and Norway:

That the fundamental spirit of all the protocols signed in Washington is to decide all the claims upon a basis of absolute equity, and that equity has no criterion of making satisfaction for damages and injuries except to reinstate the injured person in the same condition in which he would have been had the damages and injuries not occurred.

That in support of the foregoing doctrine he cites the general rules as to the payment of the claims approved by mutual agreement of all the representatives of the interested powers after and on account of the Boxer uprising at Peking, which rules provided, in Article I, section 5: <sup>1</sup>

Persons who may have suffered damages and injuries as a consequence of the Boxer movement shall be restored to the situation in which they would have been had not the aforesaid uprising taken place.

That said principle is especially applicable to the case of the *Christina*, and that because there is question of damages committed in the year 1892, which was not decided until 1903, when they were estimated at one thousand pounds sterling, this circumstance implies, as against the perpetrator thereof, the obligation to pay interest for the time elapsed;

That he determines 6 per cent per annum as the rate of interest, relying therefore upon the facts that in Venezuela 18 per cent per annum is frequently paid, and that the commercial rate is 12 per cent per annum, and that it is certain that the owners of the *Christina* earned in their business a rate much higher than the said 6 per cent;

The writer, bearing in mind the foregoing opinions of the interested parties, and

Considering that even though the fact alleged by the Venezuelan commissioner be true — that neither the minister nor the consul-general of Sweden and Norway demanded interest upon presenting the claim under consideration — the fact that they did not do so does not involve the express or implied waiver of interest upon claiming specifically, since those officials in demanding a cash indemnity for the damages and injuries caused to their constituents did not abandon the rights that might arise by lapse of time during negotiations of the claim;

Considering that the right to demand the payment of interest arises in the present case out of the length of time it has taken the representatives of the two parties to agree upon the proper amount of the claim, but that said delay can not be attributed exclusively to the negligence or ill will on the part of Sweden and Norway, since on several occasions propositions of settlement were proposed which the Government of Venezuela rejected, for reasons which do not enter into the subject-matter of the discussion before this commission;

Considering that it is a principle of justice universally recognized that the measure of damages should be made coextensive not only with the material direct damages suffered by the injured person, but also with the profits of which he has been deprived;

Considering that when there is question of ascertained sums of money the

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<sup>1</sup> Examine Foreign Relations for 1901 (Appendix), p. 107 of the original Report referred to on the title page of the Swedish-Venezuelan Commission.

profits of which the injured party has been deprived are compensated for by the payment of interest which may be general or special, as the case and circumstances connected with the nature of the business in which the interested party devoted himself;

Considering that in cases like that of the *Christina* it is proper to allow interest at the rate generally adopted in the negotiations of owners of ships;

Considering that the legal interest of 3 per cent per annum urged by the commissioner of Venezuela is only applicable by virtue of specific stipulations, or in case of loans of money under absolute security, and not when there is question of industrial or commercial undertakings in which this requisite is necessarily lacking;

Considering that Venezuela pays its creditors interests varying in rate between 9, 6, 5, and 3 per cent per annum, according to the circumstances and sort of the debt;

Considering that the Venezuelan commissioner in calling the attention of the umpire to the rate of interest which the honorable commissioner of Sweden and Norway demands, shows secondarily how it is possible to allow interest in accordance with the principles of justice and equity which are to inspire this decision;

Considering that these very principles of equity and justice hold that interest should be allowed the injured party by reason of the damage suffered from the day when the party causing the injury incurred the inherent liability to pay the same, and that this liability should be considered as fixed in the case of the *Christina* from the day on which the owners and claimants herein proved their blamelessness for the act which gave rise to the detention of said bark;

Whereas Article II, paragraph 1, of the protocol signed at Washington by the representatives of Sweden and Norway and Venezuela on March 10, 1903, the commissioners of the two interested parties agreed upon the amount of the indemnity which ought to be allowed the claimants and fixed it at one thousand pounds, sterling;

Whereas by the disagreement of the commissioners with respect to the payment of interest on the one thousand pounds sterling agreed upon as the amount of the claim, and as a consequence thereof by the disagreement concerning the rate of said interest and concerning the time from which it should run, the writer is required to decide the foregoing disagreements, and bearing scrupulously in mind the provisions of Article I, paragraph 3, of the protocol above mentioned, which says:

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 of the provisions of local legislation.

He decides —

1. That interest should be paid.
2. That the rate of interest shall be 5 per cent per annum, which is the rate that Venezuela pays commercial companies on her external debt.
3. That interest should begin to run from the day when the blamelessness of the claimants in the act which caused the detention of the *Christina* was proved; that is, from the 7th day of July, 1892, until the date of the present award.

In case of the commission of a crime in the territory of a State the State is bound, without being requested, to prosecute the criminals before the proper local authorities, and in case of failure of the country to prosecute the wrongdoers it will be held liable in damages to those who have suffered.

A State is responsible in damages committed by revolutionists where it subsequently appoints the participants and leaders of the revolution to office, thereby tacitly approving their conduct.

Where it is shown that documentary evidence can not be produced, the statements of witnesses will be accepted.

GAYTÁN DE AYALA, *Umpire*:

The writer, umpire of the Mixed Swedish and Norwegian Claims Commission, organized at Caracas by virtue of the protocol signed at Washington by the representatives of the two interested nations on March 10, 1903,

Requested by the commissioners of Sweden and Norway and Venezuela to render the award which equity and justice require concerning the claims of the Swedish and Norwegian subjects, Carl Bovallins, Henry Hedlund, and Edwin Bovallins, for the amounts and because of the reasons hereinafter expressed.

Carl Bovallins:	
For cash and articles paid for by him . . . . .	£875
For injuries . . . . .	10,000
	10,875
Henry Hedlund:	
For clothes, jewels, papers, etc . . . . .	£130
For imprisonment and injuries . . . . .	10,000
	10,130
Edwin Bovallins:	
For personal property, cash, and effects . . . . .	£351 10s
For personal suffering . . . . .	10,000
	10,351 10s

Having examined the documents produced to prove the validity and amount of these claims;

Having considered the arguments presented by the commissioners of Sweden and Norway and Venezuela in support of the rights and obligations of their respective constituents;

Having weighed the argument presented by the agent of Venezuela and the report of the commissioner, Dr. T. A. Guzmán Alfaro; and

Considering that the forcible attack by an armed force and other facts set forth by the claimants are proved;

Considering that if the opinion of the agent of Venezuela that the perpetrators of the violence were wrongdoers and sharpers be accepted, it would follow that the obligation of prosecuting and punishing the criminals rested on the competent local authorities, without its being necessary that any request be made by the injured parties for that purpose;<sup>1</sup>

Considering that at the time when the acts complained of were committed, and since then, the delinquents have not been chastised or prosecuted, but, on the contrary, their principal leaders have occupied for some time official

<sup>1</sup> See Poggioli case, *supra*, p. 669.

positions, having been appointed by the present Government of Venezuela, and that they are cloaked with authority in the very region where the events took place;

Considering that this circumstance is sufficient in itself to show that the claimants have not been able to address themselves to the local authorities for the purpose of taking the testimony necessary to legally prove the damages and injuries suffered;

Considering that during the greater part of the time elapsed since the outrages occurred until to-day the region where they transpired has remained in a state of war;

Considering that all the acts perpetrated by the authors of the sackage, of which the Orinoco Shipping and Trading Company was the victim, induce one to characterize the bands of armed men in question as revolutionists;

Considering that the Government of Venezuela, by conferring various public offices in the government of the country upon the principals of the said revolutionary forces, tacitly approves their conduct, and according to the principles recognized by public law makes itself responsible for all the acts done by them;

Considering that the persons who assaulted the offices of said Orinoco Shipping and Trading Company, burned and destroyed all the books and documents belonging to the same and to its employees, depriving the latter of the means of producing written detailed proofs of the damages and injuries suffered;

Considering that the claimants have presented the only ones which they could obtain and that they concur in their respective statements sworn to before the competent consular authorities;

Considering that the agent of said company in that region, Carl Bovallins, was absent from Venezuela when the outrages complained of occurred, and that therefore he has no right to the indemnity with respect to the damages like those suffered by his brother, Edwin Bovallins, and by Henry Hedlund, which he demands in his complaint;

By reason of everything stated, and in the name of equity and justice, the umpire decides:

That the Government of Venezuela should pay —	
To Carl Bovallins for loss of cash and personal effects . . . . .	£200
To Henry Hedlund for loss of money, clothes, jewels, and private documents . . . . .	£130
For eight days in prison, for sickness contracted thereby, and loss of time . . . . .	400
	<hr/>
	530
To Edwin Bovallins for the loss of money and personal effects . . . . .	£240
For five days in prison, bodily sufferings, and loss of employment . . . . .	400
	<hr/>
	640

NOTE. — In this commission Mr. Christian Anker, owner of the Norwegian bark *Christina*, made claim for £5,000, consisting of the following items:

For the maintenance of the captain and crew for four months during their detention . . . . .	£1,000
For the use of the ship in transporting troops during this time . . . . .	2,000
For the loss of an advantageous charter . . . . .	1,000
For damages caused to the ship during the transportation of troops . . . . .	1,000
	<hr/>
	5,000

The commissioners disagreed with reference to the allowance of interest from the date of the seizure of the vessel, but agreed in the allowance of £1,000 on the claim.

In the claim of Serine Meling, payment of 84,600 crowns was asked on account of the death of her husband, commander of the steamship *Jotun*, caused by the discharge of artillery upon the vessel at St. Felix on the 11th of June, 1902. The commissioners allowed on this claim the sum of 71,520 crowns.

The claim of the Ydun Life Insurance Company, because of the life-insurance policy which the company had paid to the widow of Captain Meling, was disallowed.

The claim of Messrs. Madsen and Jespersen, owners of the steamer *Jotun*, was for the sum of 4,379.31 crowns, on account of damages caused them by the death of Captain Meling, who commanded the ship. On this claim the sum of 1,244.61 crowns was allowed.

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