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**Mixed Claims Commission Great Britain-Venezuela**

13 February and 7 May 1903

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MIXED CLAIMS COMMISSION  
GREAT BRITAIN-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, Fifth-eight Congress, second session, Washington, Government Printing Office, 1904, pp. 292-479.**



PROTOCOL OF FEBRUARY 13, 1903<sup>1</sup>

Whereas certain differences have arisen between the United States of Venezuela and Great Britain in connection with the claims of British subjects against the Venezuelan Government, the undersigned, Mr. Herbert W. Bowen, duly authorized thereto by the Government of Venezuela and His Excellency the Right Honorable Sir Michael H. Herbert, K.C.M.G., C.B., his Britannic Majesty's Ambassador Extraordinary and Plenipotentiary 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 British subjects.

ARTICLE II

The Venezuelan Government will satisfy at once, by payment in cash or its equivalent, the claims of British subjects which amount to about five thousand five hundred pounds (5,500) arising out of the seizure and plundering of British vessels and the outrages on their crews, and the maltreatment and false imprisonment of British subjects.

ARTICLE III

The Venezuelan and British Governments agree that the other British claims, including claims by British subjects other than those dealt with in article VI hereof, and including those preferred by the railway companies, shall, unless otherwise satisfied, be referred to a Mixed Commission constituted in the manner defined in article IV of this 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, or wrongful seizure of property, and consequently the questions which the Mixed Commission will have to decide in such cases will only be: (a) Whether the injury took place and whether the seizure was wrongful, and (b) If so, what amount of compensation is due.

In other cases the claims shall be referred to the Mixed Commission without reservation.

ARTICLE IV

The Mixed Commission shall consist of one Venezuelan member and one British 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.

<sup>1</sup> The English text of the Protocol may also be found in: *British and Foreign State Papers*, Vol. 96, p. 99; Hertslet's *Commercial Treaties*, Vol. 23, p. 1167; de Martens, *Nouveau Recueil général de traités*, 3<sup>e</sup> série, vol. 1, p. 48.

For a French translation see: Descamps-Renault, *Recueil international des traités du XX<sup>e</sup> siècle*, année 1903, p. 547.

## ARTICLE V

The Venezuelan Government, being willing to provide a sum sufficient for the payment within a reasonable time of the claims specified in Article III and similar claims preferred by other Governments, undertake to assign to the British Government, commencing the first day of March, 1903, for this purpose, and to alienate to no other purpose, 30 per cent in monthly payments of the customs revenues of La Guaira and Puerto Cabello. In the case of failure to carry out this undertaking, 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 questions as to the distribution of the customs revenues so to be assigned, and as to the rights of Great Britain, Germany and Italy 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 receipts 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 Venezuelan Government further undertakes to enter into a fresh arrangement respecting the external debt of Venezuela with a view of 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 VII

The Venezuelan and British Governments agree that, inasmuch as it may be contended that the establishment of a blockade of Venezuelan ports by the British naval forces has ipso facto created a state of war between Venezuela and Great Britain, and that any treaty existing between the two countries has been thereby abrogated, it shall be recorded in an exchange of notes between the undersigned that the Convention between Venezuela and Great Britain of October 29, 1834, which adopted and confirmed *mutatis mutandis* the treaty of April 18, 1825, between Great Britain and the State of Colombia, shall be deemed to be renewed and confirmed or provisionally renewed and confirmed pending conclusion of a new treaty of Amity and Commerce.

## ARTICLE VIII

Immediately upon the signature of this Protocol arrangements will be made by His Majesty's Government in concert with the Governments of Germany and Italy to raise the blockade of the Venezuelan ports.

His Majesty's Government will be prepared to restore the vessels of the Venezuelan navy which have been seized and further to release any other vessels captured under the Venezuelan flag on the receipt of a guarantee from the Venezuelan Government that they will hold His Majesty's Government indemnified in respect of any proceedings which might be taken against them by the owners of such ships or of goods on board them.

## ARTICLE IX

The Treaty of Amity and Commerce of October 29, 1834, having been confirmed in accordance with the terms of article VII of this Protocol, the

Government of Venezuela will be happy to renew diplomatic relations with His Majesty's Government.

Done in duplicate at Washington this 13th day of February, 1903.

Herbert W. BOWEN

Michael H. HERBERT

PROTOCOL OF MAY 7, 1903<sup>1</sup>

Whereas, by a Protocol signed on the 13th February, 1903, by his Excellency the Right Honourable Sir Michael Henry Herbert, G.C. M.G., C.B., His Britannic Majesty's Ambassador Extraordinary and Plenipotentiary in the United States of America, and Mr. Herbert W. Bowen, duly authorized thereto by the Government of Venezuela, it was agreed that certain claims by British subjects, including those preferred by the railway companies, against the Government of Venezuela should, unless otherwise satisfied, be referred, under the conditions specified in the Protocol, to a mixed commission, to consist of one British and one Venezuelan member, and that in each case where the commissioners came to an agreement their decision should be final; and that in cases of disagreement, the claims should be referred to the decision of an umpire nominated by the President of the United States of America:

Now the undersigned His Excellency Sir Michael Henry Herbert, G.C.M.G., C.B., His Britannic Majesty's Ambassador Extraordinary and Plenipotentiary in the United States of America and Mr. Herbert W. Bowen duly authorized by the Government of Venezuela, have further agreed as follows:

One member of the commission shall be appointed by His Britannic Majesty's Government and the other by the Government of Venezuela, and the umpire shall be nominated by the President of the United States of America.

If either of the said commissioners or the umpire should fail or cease to act, his successor shall be appointed forthwith in the same manner as his predecessor. The said commissioners and umpire are to be appointed as soon as possible.

The commissioners and the umpire shall meet at Caracas on the 1st day of June, 1903.

Before assuming the functions of their office, the commissioners, and the umpire, if necessary, shall make solemn oath or declaration carefully to examine and impartially decide, according to justice and the provisions of the Protocol of the 13th February, 1903, and of the present Agreement, all claims submitted to them, and the oath or declaration so made shall be embodied in 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.

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The decisions of the commission, and, in the event of their disagreement, those of the umpire, shall be final and conclusive. They shall be given in writing. All awards shall be made payable in sterling money of Great Britain, or its equivalent in silver at the current rate of exchange of the day.

<sup>1</sup> The English text of the Protocol may also be found in: *British and Foreign State Papers*, Vol. 96, p. 103; Hertslet's *Commercial Treaties*, Vol. 23, p. 1173.

For a French translation see: Descamps-Renault, *Recueil international des traités du XX<sup>e</sup> siècle*, année 1903, p. 592.

The commissioners, or umpire, as the case may be, shall investigate and decide the said claims upon such evidence or information only as shall be furnished by or on behalf of the Governments of Great Britain and Venezuela respectively. 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 Governments respectively in support of or in answer to any claim, and to hear oral or written arguments submitted 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 time for presenting the claim for a further period not exceeding three months. 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.

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 him in the transaction of the business of the Commission.

In the proceedings either the English or Spanish language may be used. Except as herein stipulated, all questions of procedure shall be left to determination of the commissioners, or, in case of their disagreement, to the umpire.

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

Michael H. HERBERT

Herbert W. BOWEN

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#### PERSONNEL OF THE BRITISH - VENEZUELAN COMMISSION

*Umpire.* — Frank Plumley, of Northfield, Vt.

*British Commissioner.* — Herbert Harrison.

*Venezuelan Commissioner.* — Pedro V. Azpurúa until June 20, 1903, when he was succeeded by — Carlos F. Grisanti.

*British Agent.* — Gilbert Mellor.

*Venezuelan Agent.* — F. Arroyo-Parejo.

*British Secretary.* — Thomas Guyatt.

*Venezuelan Secretary.* — Emilio de Las Casas.

*Umpire's Secretary.* — J. Earl Parker, of Washington, D.C.

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#### RULES OF THE BRITISH - VENEZUELAN COMMISSION<sup>1</sup>

##### I

The British agent shall present to the Claims Commission within the time specified in the protocol, a memorial on each claim, accompanied by documents and proofs.

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<sup>1</sup> For a French translation see: Descamps-Renault, *Recueil international des traités du XX<sup>e</sup> siècle*, année 1903, p. 795.

## II

The memorial shall be presented in the English language, accompanied by a translation into Spanish.

## III

The answers presented in writing by the Venezuelan Commissioner or agent shall be in Spanish, accompanied by a translation into English.

## IV

The British agent or Venezuelan Commissioner presenting a document shall, if required to do so, also supply a translation thereof and provide a sufficient number of copies for the use of the Commission.

## V

The memorial must specify with precision the sum claimed, clearly stating the currency in which the damage is calculated.

## VI

When a memorial is presented, a written receipt shall be given by the secretaries to the British agent. It shall then be inscribed in the appropriate register, a note being made on the memorial itself of the date of its receipt and its number.

## VII

The Venezuelan Commissioner shall answer in writing each memorial presented, taking whatever exceptions he may deem necessary, and refuting the proofs of the claimant with such counter proofs as he may think relevant, producing all necessary documents.

## VIII

The answer in writing shall be presented with as short a delay as possible, and at most within thirty days of the presentation of the memorial.

## IX

The answer of the Venezuelan Commissioner shall be registered, as above, and notified to the British agent, who may reply to it within fifteen days.

## X

The reply of the British agent shall be presented and registered, as above, and notified to the Venezuelan Commissioner or agent, who may make counter reply within fifteen days. The counter reply shall be presented and registered, as above, and notified to the British agent.

## XI

The British agent may, if he think fit, inform the secretaries that he renounces his right to reply to the answer of the Venezuelan Commissioner or agent. The secretaries shall thereupon notify the Venezuelan Commissioner or agent, who shall in that case have no right to make a counter reply.

## XII

As soon as the last notification prescribed by Articles IX and X shall have been made, the secretaries shall inscribe the claim in the list of claims for hearing, and shall forthwith notify the same to the Commissioners or agents of both Governments. The tribunal shall then fix a day for the hearing.



## XIII

The umpire shall be present at all formal meetings of the Commission, and his decision upon any point may be invoked at any stage of the case. When this decision is pronounced it shall be entered in the records of the proceedings.

## XIV

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 investigation is necessary, the tribunal may order such further investigation fixing the time and place thereof, and if the Commissioners can then agree, the decision may be rendered as provided in the first part of the article.

## XV

No one may attend the sittings of the tribunal except the agents of the Governments, the official secretaries, and the secretary of the umpire. The claimants or their representatives and other persons may attend if they obtain the authorization of the tribunal in writing.

## XVI

The secretaries shall keep, besides the register mentioned in Article VI, a book in which they shall 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 shall be kept in duplicate, one copy in English and the other in Spanish, and shall be verified and approved and signed by the tribunal. When the tribunal shall have completed its labors, the copies in English shall be delivered to the British agent, and those in Spanish to the Venezuelan Commissioner.

## XVII

All documents and records of the Commission shall be considered confidential.

## INTERLOCUTORY OPINIONS

## CROSSMAN CASE

Meaning of " wrongful seizure " in the protocol

*PLUMLEY, Umpire:*

James Crossman is a native of Cornwall, England, now resident at Puerto Cabello, but at the time of the happening of the events hereinafter stated was a resident of Pueblo Nuevo, Aroa, jurisdiction of the State of Lara, and a British subject.

On the 31st day of December, 1899, that division of the liberal restoration army which was under the command of Gen. Rafael Montilla entered Pueblo Nuevo and went into garrison in the fortress there situated. The dwelling house of the claimant was taken and used by General Montilla as quarters for some of his troops while he so remained in garrison. The exact time which elapsed while he was thus in garrison and in use of such dwelling house as aforesaid does not appear, but during the time an officer of this command took from the claimant his horse, a valuable one, and the saddlery. Also while in such occupancy of the house a gold watch of great value, some clothing, and furniture, which belonged to the claimant and were left in the house by him, were

taken from said house, and the claimant attributes this loss solely to the fact that it was so occupied by Government troops. His alleged damages are 2,500 bolivars; 800 for the horse and saddlery and 1,700 for the other property. There is no statement whether or not the troops quartered in his house were private soldiers, officers, or both. In addition to his own memorial and plea he submits two depositions as his proof in the case.

This claim was presented to the Commission on the 11th ultimo, and the learned agent for Venezuela made answer thereto on the 15th instant, using in part the language following:

In the opinion of the undersigned, the most favorable supposition on behalf of the pretext which the claimant can allege is the smallness of the amount claimed, because the evidence which might be derived from the testimonial justification presented is counterbalanced by the consideration that it was effected without the assistance of the party opposed in the judgment.

It might also be objected that the injurious acts mentioned were of a personal character and that, previously, the individual responsibility of their authors should be prosecuted. The tribunal and the court of Brussels, with the occasion of a claim founded by one Delbrouk of Limbourg, who with the pretext that, on the 8th of August of 1831, soldiers belonging to different corps of the army of Maes had caused him injuries, brought an action against the State for an indemnification. In compensating damages caused by acts of transgression of law, the tribunal said, the action must be brought against those who are civilly responsible for punishable deeds committed by military at their service. (See Fiore, *Droit Int. Pub.*, vol. 1, p. 576, note 1.)

In the present case it does not appear confirmed in any way that the troops obeyed superior orders, nor that the nearest military authorities could have avoided the damages done. Therefore the undersigned considers that, even in case the damages alleged by the claimant were true, these constitute a case of *force majeure*, a necessary calamity in view of the exceptionable circumstances under which the country where he resided was, and that the responsibility of Venezuela should not be declared, as an antijudicial precedent would thus be created.<sup>1</sup>

The issue presented raised no question of fact.

On the 17th instant the learned agent for the British Government made a reply to this answer by filing a written objection to the same, as follows:

CLAIM OF JAMES CROSSMAN — PRELIMINARY OBJECTION TO THE ANSWER

This is a claim for wrongful seizure of property. The protocol of 13 February 1903, provides:

“ARTICLE 3. The Venezuelan Government admit their liability in case where the claim is for \* \* \* wrongful seizure of property, and consequently the questions which the Mixed Commission will have to decide will only be:

- “ (a) \* \* \* whether the seizure was wrongful, and  
 “ (b) If so, what amount of compensation is due.”

Therefore, in this case, the only questions open to the Commission are:

- (1) Did the seizure take place?
- (2) Was the seizure wrongful or not?
- (3) If wrongful, how much is due?

Upon the presentation of this preliminary objection to the tribunal, it then being in session, the issue as made was discussed by the honorable Commissioners of this tribunal, and, failing to agree, the same was there and then referred to the umpire for his opinion thereon.

<sup>1</sup> Opinion of Venezuelan Commissioner not printed.

Concerning the interlocutory question thus raised, the undersigned, umpire by virtue of his appointment under said protocol, is of the opinion which follows:

The umpire has presented to him the alternative of a strict construction of and a close adherence to the minimum issues involved in the matter submitted to him preliminary to the determination of the question of liability on the part of Venezuela, or a broad and general interpretation of the questions permitting answer under the submission as it comes to him from the honorable Commissioners. To take the first alternative would require of the umpire less care and responsibility, and would be thus far gratifying in its aspect, but it would be much less helpful in the determination of the questions involved in this case, and would aid but little in preparing the way for the determination of other causes which may rest in whole or in part upon the fundamental propositions here made. After much careful consideration of the matter and some hesitancy for fear that he was overstepping the purpose and desire of the learned gentleman who first raised these interlocutory matters and of the honorable Commissioners who made final reference of the same to the umpire, he has decided that it was the wish of all these, and therefore his duty, that he should take the more broad and general view of the questions raised and express to the tribunal his opinion thereon.

If in the case before us there has been a wrongful seizure in its full and complete sense, then, in the opinion of the umpire, Venezuela has admitted her liability without reserve, and it follows that the subdivisions of inquiry suggested by the learned agent for the British Government in his preliminary objection are the only questions open for discussion and determination. There are, however, within these subdivisions main lines of inquiry and of consideration which must be passed upon before there can be an affirmative or a negative answer to the main proposition, and the assent of the umpire to these subdivisions as being exclusive rests upon the assumption that these are understood to be included within his list of subdivisions.

1. In a solemn agreement between nations referring to wrongs which one of the signatory parties thereto claims should be redressed by the other and which it is proposed shall be submitted to a tribunal to determine, what is the import and scope of the word "seizure?" Negatively it may be stated that it is not any wrongful taking of the property of a British subject by Venezuela. It does not mean property taken by robbery, theft, pillage, plunder, sacking, or trespass. Affirmatively it may be said that it is limited to a seizing under and by virtue of authority, civil or military. Necessarily it follows that it is always legitimate to inquire in any case raised under the protocol how, when, where, and by whom it was taken or used.

2. Given that a seizure is made out, there is yet to be established that it is wrongful, and therefore the import of the words in their connection and relation as used in the protocol is a necessary matter to determine. There is required in every case a wrongdoer as well as that wrong has been done or suffered. A wrong intent or willful purpose must accompany the act. It is not enough to know that a wrong has been suffered. Not only must the act be willful or with wrong intent, but it must be perpetrated by some one having a right whereby to declare and express a governmental will and intent.

These points, and without doubt others of a kindred nature, are calculated to assist in determining the question, "Has there been a wrongful seizure?" and are therefore relevant, important, and competent.

The meaning of the umpire in what he has here expressed may be illustrated by the case in hand. Was the taking of the horse and saddlery of the claimant

by an officer in General Montilla's command, in the manner and under the circumstances stated and established by the proof, a seizure in its proper sense, taken in its relations as used in the protocol? Is —

the evidence which might be derived from the testimonial justification presented counterbalanced by the consideration that it was effected without the assistance of the party opposed in the judgment,

as contended by the learned agent for Venezuela in his answer? Is it established that it was taken under superior orders, as questioned in the same answer? The umpire regards both of these points practically similar in their application as well made and necessary to be considered and determined before it can be said that there was or was not a seizure of the horse in the sense in which that word is used in the protocol.

How is it with the gold watch and furniture taken from the dwelling house of the claimant as established by his evidence? Was such taking a wrongful seizure as contemplated by the protocol? If it was a taking of army supplies for the benefit of the army, and of a character and nature proper subjects of military use, it might make an affirmative answer more easy. If it were the wanton and unauthorized destruction or taking of private property by private soldiers not under orders, and property of a character not suited to military use or to the uses of the military, then it could not be called a seizure under the protocol. And especially is this true if it is not shown to be applied to the use of the soldiers of the Government.

An act of pillage, plundering, or sacking is a direct antithesis of an act of seizure. The first implies not only a lack of authority, but an act done in immediate contravention of all authority. It disclaims and denies governmental responsibility, and is in direct opposition to that authority. To seize directly implies authority, warrant, and executive responsibility. In peace it ordinarily requires an officer duly commissioned, armed with a warrant duly issued. In war it likewise requires a condition of authority and power.

It is important in this connection to ascertain from the proof if the gold watch or furniture or any part thereof has been shown to have been in the possession of any of General Montilla's troops, and if anything has been shown in that regard further than the disappearance of the property while his army was garrisoned in the town and had quarters in this dwelling house.

These matters are all involved in the position taken by the answer of the learned agent for Venezuela in the parts heretofore quoted and are therefore matters of issue, and in the opinion of the umpire the facts admit of such issues.

On the other hand, if the umpire has the right conception of the learned agent's contention in the third paragraph of his answer, it is a point not well taken, but the issue there made is expressly excluded by the admitted liability of Venezuela in that part of the protocol quoted by the learned agent for the British Government in his preliminary objection thereto.

There is another view of that part of the case covering the taking of the gold watch and furniture which is raised by the answer of the learned agent for Venezuela in the expression "nor that the nearest military authorities could have avoided the damages done" which, in the judgment of the umpire, is of material importance in the final determination of this case, and under that head it is a proper matter of consideration to determine whether the taking of the house of the claimant by General Montilla as quarters for some of his troops did not place upon him and the officers of his command a special responsibility by proper and sufficient guards to prevent pillage, plunder, robbery, or sacking of the dwelling house of the claimant by his troops or by anyone while he, through his officers, had exclusive possession and control of the house and the

property therein. The measure of duty resting upon the Government, through its officers, in this regard may determine the question of its liability in this case.

The umpire is aware that he has not touched upon many questions that might well be raised to assist in the determination of the issues in this case, and it has not been his purpose to write exhaustively thereon but to pass only upon such points as seemed to him certainly material and probably helpful in the final settlement of the case. It may be stated in general to be the position of the umpire that everything which helps to determine the primary question of a wrongful seizure under the facts and circumstances of this case so related to the Government of Venezuela that it is responsible therefor, and has admitted its liability concerning in Article III of the protocol, are properly before the Commission for its discussion and determination, and whether or not the facts and circumstances of this claim —

constitute a case of *force majeure*, a necessary calamity in view of the exceptionable circumstances under which the country where he (claimant) resided was, and that the responsibility of Venezuela should not be declared, as an antijudicial precedent would thus be created,

as contended by the learned agent for Venezuela in the conclusion of his answer, or a rightful duty and responsibility be cast upon Venezuela to recompense the claimant for his losses, will all depend upon the answer to the questions involved, in the consideration and decision of which the opinions of the umpire here expressed may be in some degree helpful and determinative.

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#### DE LEMOS CASE

##### Meaning of "injury" in the protocol

###### CONTENTION OF BRITISH AGENT — PRELIMINARY OBJECTION TO THE ANSWER

The Venezuelan agent is not entitled to set up any matter of principle as an answer to this claim, any such answer being against the terms of the protocol of February the 13th, 1903, which expressly provides for such cases:

ARTICLE III. The Venezuelan Government admit their liability in cases where the claim is for injury to \* \* \* property, and consequently the questions which the Mixed Commission will have to decide will only be:

(a) Whether the injury took place, \* \* \* and (b) if so, what amount of compensation is due?

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

I regret to differ from the British agent's interpretation of the protocol signed at Washington on the 13th of February last, as stated in his preliminary objection in which he states that the Venezuelan agent has no right to introduce any matter of principle in his objections to Mr. Ch. de Lemos' claim.

In my opinion, the Venezuelan Commissioner, as well as the agent of the Republic, always has the right of setting up the philosophical and juridic principles applicable to the case under examination, so that it is morally impossible that Great Britain, which ranks deservedly among the most enlightened nations of the world, should obtain a juridic decision, abstracting therefrom the principles of justice and the postulates of law, which comprise the most precious treasure of civilization.

The Venezuelan and British Claims Commission is a court, and to exclude justice, right, and equity from its deliberations is the same as depriving a man

of the essential attributes of his being, and nevertheless to continue considering him as a man.

The analysis of the language of the protocol strengthens the opinion held by the underwriter.

Article 3 of the protocol says in the second paragraph: "The Government of Venezuela admits their liability in cases where the claim is for injury to or wrongful seizure of property," etc. By this expression it is understood that we rely on some principle, cause, or reason; therefore the claim which has no legitimate foundation, and is not supported by juridic principles which regulate the conduct of civilized countries is inadmissible, and the tribunal of which I have the honor to be a member must reject it. The second clause says "or wrongful seizure of property." The Commission, therefore, has a right to decide with regard to the justice or injustice of embargoes.

The meaning given by the British agent to article 3 of the protocol would convert this tribunal into a mere appraiser of damages, causing it ipso facto to lose its powers of deliberation. I have shown clearly that the Venezuelan and British Claims Commission has the right and is bound to examine and decide in each case whether the claim is legitimate and whether Venezuela is bound to pay it or not; I consequently will proceed to explain the principles and reasons why the claim of Consul Ch. de Lemos is not a just one and therefore inadmissible.

A part of the troops at Ciudad Bolívar, having revolted against the National Government, the latter was under the unavoidable obligation of subduing the insurgents in order to reestablish order and make the people submit to the constitutional order from which they had suddenly withdrawn, which submission was absolutely essential for the well-being of the Republic, and to the security of national and foreign interests. The town was attacked with that object and naturally national and foreign interests were damaged. Among the latter, according to Mr. Consul de Lemos, his wife was injured.

Supposing that such a statement were proved, the Republic would not be compelled to repair the damage caused by the shells on the two houses of the above-mentioned lady. The attack on the city and the subsequent damage occasioned were not a deliberate act of the authorities, but a necessity imposed upon them in an unavoidable manner by the course of events.

Let us consult some renowned authors and eminent statesmen on international law.

363. Les gouvernements sont-ils ou non responsables des pertes et des préjudices éprouvés par des étrangers en temps de troubles intérieurs ou de guerres civiles? Cette question a été longuement discutée et finalement résolue par la négative.

Avant de fournir les preuves pratiques de notre assertion, nous développerons ici sur cet important sujet quelques considérations générales.

Admettre dans l'espèce la responsabilité des gouvernements, c'est-à-dire le principe d'une indemnité, ce serait créer un privilège exorbitant et funeste, essentiellement favorable aux Etats puissants et nuisible aux nations plus faibles; établir une inégalité injustifiable entre les nationaux et les étrangers. D'un autre côté, en sanctionnant la doctrine que nous combattons on porterait, quoique indirectement, une profonde atteinte à un des éléments constitutifs de l'indépendance des nations, celui de la juridiction territoriale; c'est bien là en effet la portée réelle, la signification véritable de ce recours si fréquent à la voie diplomatique pour résoudre des questions que leur nature et les circonstances au milieu desquelles elles se produisent font rentrer dans le domaine exclusif des tribunaux ordinaires.

364. A l'appui de cette doctrine nous citerons tout d'abord l'opinion exprimée en 1849 par M. le baron Gros, lors de sa mission spéciale en Grèce pour le règlement des célèbres réclamations pécuniaires de Don Pacífico. "En général," disait ce diplomate dans une de ses dépêches au gouvernement français qui a été plus tard

communiquée au parlement anglais, " il est admis en principe, et ce principe est conforme à l'équité, qu'il ne peut exister d'intervention diplomatique dans les différends où l'autorité locale ne se trouve pas en cause; c'est aux tribunaux et conformément aux lois du pays que la partie lésée, quelle que soit sa nationalité, doit recourir et demander justice."

Lord Stanley, traitant la même affaire au sein du parlement britannique, s'exprima ainsi: " Je ne crois pas que les gouvernements soient tenus, dans toute la rigueur de ce mot, d'indemniser les étrangers qui ont éprouvé des pertes ou des préjudices par suite de circonstances de force majeure. Tout ce qu'ils peuvent faire dans les cas semblables, c'est de protéger par tous les moyens en leur pouvoir les nationaux et les étrangers résidant sur leur territoire contre des actes de spoliation ou de violence." (Calvo. *Le Droit international théorique et pratique*. 3<sup>e</sup> édition, Vol. I, p. 434.)

Fiore, after establishing the principles which ought to guide the responsibility of the State for damage caused to foreigners in its territory, says:

674. Maintenant, nous allons indiquer l'application des règles que nous venons d'exposer à certains cas particuliers. Nous nous occuperons surtout de l'obligation qui incombe à l'Etat de réparer les préjudices soufferts par les particuliers pour les faits de guerre.

La règle générale qui nous paraît devoir servir à résoudre toute difficulté à ce sujet, c'est que la responsabilité des gouvernements par rapport aux étrangers ne peut pas être plus étendue que celle des souverains étrangers à l'égard de leurs propres citoyens. On ne pourrait pas, en effet, prétendre que les devoirs d'hospitalité pourraient limiter l'entier exercice du droit qui appartient à la souveraineté d'employer tous les moyens légaux pour pourvoir à la conservation de l'Etat, ou que les étrangers pourraient obtenir une position privilégiée, être exempts des conséquences fâcheuses des calamités publiques et être garantis de tout dommage qui pourrait résulter de la force majeure et de l'impérieuse nécessité de veiller à la sûreté de la chose publique.

675. Supposons qu'un pays soit agité par la révolution et par la guerre civile, et que le gouvernement pour réprimer le désordre emploie les moyens de répression requis pour sauvegarder les intérêts de l'Etat et qui ne sont pas absolument défendus par le droit international. Si par ce fait les étrangers éprouvaient un préjudice le gouvernement ne pourrait pas être déclaré responsable, ni être tenu de les indemniser du dommage par eux éprouvé. Si un gouvernement négligeait de faire tout le nécessaire pour protéger la propriété et les biens des étrangers, s'il ne s'occupait pas de réprimer les violences et les offenses causées par les citoyens, il serait tenu de répondre des conséquences de sa négligence coupable; mais si le préjudice était résulté de la force majeure il n'existerait aucune responsabilité légale. L'action d'un gouvernement ne pourrait pas être paralysée par la nécessité de protéger les droits des étrangers. (Fiore, *Nouveau Droit international public*, 2<sup>e</sup> ed., vol. I, p. 582.)

1231. Les habitants des pays envahis ou occupés, quoique ne prenant pas une part directe à la lutte, ont été atteints dans leur biens. Ils ont subi des dommages matériels ou des réquisitions, payé des contributions de guerre ou des amendes. Ont-ils droit à une indemnité, et, en cas d'affirmative, à qui peuvent-ils s'adresser pour l'obtenir?

Divisons la question.

Quant aux *dommages* résultant des faits de guerre, des actes de violence et de lutte, des combats, des assauts, des bombardements, des dévastations, des incendies, du pillage, des vols commis par les soldats, etc., etc., aucun recours n'est ouvert pour leur réparation. Le droit international ne peut admettre le principe d'une action. La guerre est pour le simple particulier un cas de force majeure. Elle est pour lui un mal inévitable comme l'est une grêle, une inondation. Il est victime d'un fléau, non d'une injustice, dit Bluntschli. Juridiquement, il n'a droit à aucune indemnité. (Bonfils, *Manuel de Droit international public*, 3<sup>e</sup> éd., p. 680.)

In 1849 England claimed of Austria compensation for losses sustained by some of Her Britannic Majesty's subjects at the assault of Leghorn, and in this connection Count Nesselrode said (May 2, 1850):

According to the rules of public law, as understood by the Russian Government, it can not be admitted that a State (compelled by a revolt to repossess itself of a town occupied by the insurgents) is bound to indemnify foreigners who may have suffered damages by reason of the attack. The foreigner who settles in a country accepts, voluntarily and in advance, the risks to which the country is exposed, and as he enjoys the advantages which the natives enjoy so also must he share their misfortunes. Foreign and civil war are clearly in the same category. (Calvo, Vol. III, p. 145; Seijas, Vol. III, p. 553.)

It would not be amiss to mention the principles of the law of nations, which have been strengthened by reason of the claims founded upon the bombardment of Valparaiso. March 31, 1866. An Anglo-American firm established there experienced losses due to the burning of their goods from the cannonading. The question arose as to whether they had any right to reclaim indemnity of Spain or Chile for the injuries done. The question was referred to the attorney-general, who decided in the negative. In his opinion he states that the act, although one of extreme severity, was an act of war and can not be said to have been contrary to the laws which regulate it. It is a well-established rule in international law that the alien who resides in a belligerent country can not claim indemnification for the losses suffered on his property due to acts such as those under consideration. The attorney afterwards states the case of the bombardment of *Copenhagen by the English in 1807, in which Great Britain did not allow any claim, although the foreigners of that town suffered very serious losses, and notwithstanding that there had been no previous declaration of war to Denmark nor any justifiable motive for the bombardment.*

He also called attention to the bombardment of San Juan de Nicaragua effected by the sloop *Cyane*, to the detriment of the French residents there — through their minister at Washington — but without the express sanction of the Imperial Government they presented a claim for indemnification. Mr. Marcy, then Secretary of State, replied:

The undersigned is not aware that the principle that foreigners domiciled in a belligerent country must share with the citizens in that country in the fortunes of war has ever been seriously controverted or departed from in practice. (Marcy, Secretary of State, to M. de Sartiges, Feb. 26, 1857.)

This maxim being the one which was proclaimed in the law of March 6, 1854, with respect to political disturbances; that which was projected in the law of Colombia of April 19, 1865; that which was the purpose of the Convention made by Mr. Toro in Santander in 1861; that which is found adopted by the treaty which this gentleman made with Italy in June of the same year, it is not understood why it has been protested against in some cases. The whole difference consists in the fact that there it was applied to a war between two States and here it is confined particularly to internal disturbances. Moreover all difficulty disappears if it is remembered that the latter either have a certain extent and other circumstances, and they are then called civil war, and they are governed by the same laws as those of international war; or they do not reach this importance, and in this supposition constitute only a private wrong such as an injury, pillage, robbery, for which no nation has ever thought to make other nations responsible. In the controversies which have given rise to the frequent claims made against Venezuela, no rule so just as well as suitable, has ever been invoked. (Report of Foreign Relations of Venezuela, 1869.)

The conduct of governments has been in perfect accord with the principles stated. The United States, in 1851, owing to the claims made by Spain in consequence of the disorders which took place in New Orleans on account of the war that harassed the Republic from 1861 to 1865; England (case above cited), in 1807; Spain, in 1850, owing to the claims of some of her subjects against Venezuela; France, in 1830, 1848, and 1871; Belgium, with regard to her struggles with Holland to obtain her independence, from 1830 to 1832 -- none



of these nations has admitted that they were under the obligation of indemnifying aliens for damages caused by the wars sustained in the above-mentioned years.

371. C'est encore ce même principe ou cette même jurisprudence que l'on a vu observer lors du dernier soulèvement de la Pologne, et durant le cours de la formidable lutte intestine qui a déchiré la République des Etats-Unis d'Amérique de 1860 à 1865.

Dans ces deux circonstances un grand nombre d'étrangers ont éprouvé de cruelles pertes, et pourtant aucune nation européenne n'a songé à en faire peser la responsabilité sur les gouvernements respectivement intéressés. (Calvo, *Le Droit international théorique et pratique*. 3<sup>e</sup> éd., vol. I, p. 438.)

Referring now, more precisely, if possible, to the attack of Ciudad Bolivar, as this was occasioned by an unavoidable necessity, absolutely against the will of the Government, it clearly shows *force majeure*, which exempts the State of all responsibility for damages caused in its dominions.

I consider it very opportune to quote here what Calvo says on this point. It is as follows:

Relativement aux droits de personnes appartenant à une nationalité neutre et résidant sur le territoire d'un belligérant, les jurisconsultes anglais, en 1870, pendant la guerre entre la France et l'Allemagne, exprimèrent l'opinion que les sujets anglais ayant des propriétés en France n'avaient pas droit à une protection particulière pour leurs propriétés, ou à l'exemption des contributions militaires auxquelles ils pouvaient être astreints solidairement avec les habitants de l'endroit où ils résidaient, ou bien où leurs propriétés étaient situées, et qu'ils n'avaient non plus, en toute justice, aucune raison de se plaindre des autorités françaises parce que leurs propriétés étaient détruites par une armée d'invasion.

Une famille de sujets anglais demeurant dans la commune de La Ferté - Imbault, à l'approche des troupes prussiennes hissa le drapeau anglais au-dessus de la porte du château qu'elle habitait, espérant que la présence de ces couleurs neutres la protégerait contre toute violence; mais elle n'en eut pas moins à souffrir de pillage, de menaces et de mauvais traitements de la part de la soldatesque. Elle adressa à ce sujet une plainte à lord Granville, qui lui répondit que, bien que le gouvernement anglais regrettât vivement les tracas et les pertes qu'elle avait éprouvés, il n'était pas en son pouvoir de lui faire obtenir aucune réparation.

Un autre sujet anglais, M. Lawrence Smith, qui habitait Saint-Ouen, s'étant plaint que, quoiqu'il eût arboré le drapeau anglais sur sa maison, des soldats prussiens étaient venus loger chez lui, lui avaient pris toutes ses provisions, avaient tiré une décharge de coups de fusil dans une cave où sa famille s'était réfugiée, avaient mis le feu à sa maison et forcé sa famille de se sauver à moitié vêtue dans un bois à travers la neige. Lord Granville répondit que le gouvernement anglais ne pensait pas en droit strict que la famille Smith fût autorisée à demander une indemnité au gouvernement prussien, mais qu'il était évident que la destruction de la propriété était un acte de violence commis par les troupes prussiennes par suite du relâchement de la discipline. En pareil cas il était d'avis que les faits pourraient être portés officiellement à la connaissance du gouvernement allemand, en exprimant l'espoir qu'il jugerait à propos d'ordonner aux autorités militaires de procéder à une enquête et d'ordonner, comme acte de justice, une indemnité pour les dommages commis sans raison. (Calvo, *Le Droit international théorique et pratique*, 3<sup>e</sup> éd., vol. III, p. 227, sec. 1942.)

Hence the principles of justice prohibit the admission of Consul de Lemos' claim.

There is one more reason for rejecting it; said claim is not legally proved. In the files are to be found as proofs:

First. Consul de Lemos' affidavit made on the 15th of January of the current year in presence of Mr. John Dennis Sellier, notary public. As a general rule

the testimony of a person in support of a fact is not admissible when that person is greatly interested in the establishment of said fact.

Second. The testimony of Benjamin Waithe and Antonio Villalobo, delivered in presence of the Consul de Lemos himself, is absolutely void. The fact is, that said consul can not be a judge of his own cause, and in receiving and authorizing those declarations, he has sought to be one, trying to assume two positions entirely incompatible.

Besides, in the taking of the proofs, the universally acknowledged and respected rule of *locus regit actum*, by which these declarations of witnesses should have been made before a territorial judge, has been violated.

PLUMLEY, *Umpire*:

Charles Herman de Lemos is a naturalized British subject, and at the time of the happening of the events hereinafter stated was, with his wife, Guillermina Dalton de Lemos, resident of Ciudad Bolívar, and His Majesty's consul at that city.

On the 20th, 21st, and 22nd of August 1902, the unfortified parts of Ciudad Bolívar were shelled by the Venezuelan gunboats *Bolívar* and *Restaurador*, throwing some 1,400 to 1,500 shells into the very heart of the city. Guillermina Dalton de Lemos was then the owner of two buildings situate in the said city of Bolívar, one in the Calle Miscelánea and the other in Calle Amor Patria, which buildings were then severally damaged by the said shells striking and breaking upon them, at an estimated damage of £300, for the payment of which this claim is presented to the Mixed Commission.

To this claim the learned agent for Venezuela made answer of June 18, 1903, which was presented to this tribunal on 26 June. In this answer there was no denial that the damage was inflicted substantially as in the claim presented, but these facts were alleged: A garrison in the capital of the State of Bolívar rebelled against the National Government, and the National Government, on account of the persistent rebellious attitude of the revolutionists, ordered the attack named in the claimant's statement in virtue of the right of defense and in fulfillment of its duties as such National Government for the purpose of recovering possession and control of the city, and it was in consequence of this attack and during this bombardment that the two buildings belonging to the wife of Consul de Lemos were injured. The insurrection of the forces at Ciudad Bolívar and the resulting attack on the city by the Government took place at the time when a revolution against the Government broke out in the country. Based upon the facts stated, it was claimed by the learned agent for Venezuela that the action complained of was a necessary and rightful act of the Venezuelan Government under the circumstances and conditions stated, and that the damage to the plaintiff's buildings was a natural and unavoidable damage; that this action of the Venezuelan Government was perfectly justifiable, and that there was in consequence no valid claim against his Government for the damages suffered by the claimant.

The learned agent for Venezuela made a further statement in his answer as follows:

As regards the claim, it is unacceptable under the light of principles of public law universally accepted. One of the principles is that the foreigner who establishes himself in a country accepts spontaneously beforehand the dangers and eventualities to which said country may be subjected, and in the same way that he partakes of the advantages of the natives, so he must submit to suffer the calamities that the natives suffer. To support arguments to the contrary would be establishing for the foreigner a privilege against the national sovereignty and absolutely unsupportable in accordance with principles of equity.

To this answer, at a sitting of this tribunal of June 26, the learned agent for the British Government made reply by filing an objection thereto as follows:

CLAIM OF DE LEMOS — PRELIMINARY OBJECTION TO THE ANSWER

The Venezuelan agent is not entitled to set up any matter of principle as an answer to this claim, any such answer being against the terms of the protocol of February 13, 1903, which expressly provides for such cases:

“ARTICLE III. The Venezuelan Government admit their liability in cases where the claim is for injury to \* \* \* property, and consequently the questions which the Mixed Commission will have to decide will only be —

- (a) Whether the injury took place \* \* \* and
- (b) if so, what amount of compensation is due.”

At a sitting of this tribunal on the 11th day of July the honorable Commissioner for Venezuela replied in writing to this preliminary objection, insisting that his Government had the right under the protocol and before the Commission always to adduce “the philosophical and juridical principles applicable to the case under examination,” and —

that it is morally impossible that Great Britain, which deservedly ranks among the most enlightened nations of the world, should accomplish a juridical act proscribing therefrom the principles of justice, the postulates of law, which form the wealthiest treasure of civilization.

The Venezuelan and British Claims Commission is a tribunal, and to exclude justice, right, and equity from its deliberations is the same as depriving a man of the essential attributes of his being, and, nevertheless, to continue considering him as a man.

The analysis of the dead lettering of the protocol strengthens the opinion held by the undersigned.

Article 3 of the protocol says, in the second paragraph: “The Government of Venezuela admits its responsibility in the cases in which the claim is founded on damages caused to property or on unjust seizure thereof,” etc. By *founded* it is understood we rely on some principles, cause, or reason; therefore the claim which has no legitimate base and is not authorized by juridical canons which regulate the conduct of civilized countries is unacceptable, and the tribunal of which I have the honor to be a member must revoke it. The second clause says “or on unjust seizure thereof.” The Commission, therefore, has a right to decide with regard to the justice or injustice of embargoes.

The sense given by the British agent to Article III of the protocol would convert this tribunal into a mere appraiser of damages, causing it *ipso facto* to lose its deliberative faculties. I have shown clearly that the Venezuelan and British Claims Commission possesses the right and is bound to examine and decide in each case whether the claim is legitimate and whether Venezuela is bound to pay it or not; consequently I will proceed to explain the principles and reasons why the claim of Consul C. H. de Lemos is not a just one and therefore unacceptable.

On the 15th of July, at a session of the tribunal, the learned agent for Great Britain made an oral reply to the parts of the reply of the honorable Commissioner for Venezuela that have been quoted herein, those being the parts which he considered germane to the preliminary issue by him raised, and reasserted his position as stated in the preliminary objection, and said, among other things, that it was intended in the protocol to do away with the necessity for long discussion on such points as were made in this case, and that the protocol was drawn with a view to its exclusion, and insisting that where in any case —

it was a question as to injury to property it was intended that the only question that was to be raised was to whether the injury took place.

He also said that in the reply of the Venezuelan Commissioner there had been brought in the word “founded,” which was not in the protocol as written and

signed by the high contracting parties, and that so much of the position of the honorable Commissioner for Venezuela as rested upon that was not well taken.

Following this oral reply, at the same sitting of the tribunal, the issue as made was submitted to the honorable Commissioners, who after discussion failed to agree. It was then passed to the umpire for his examination and decision.

Upon the preliminary case thus stated the undersigned, umpire by virtue of his appointment under said protocol, holds and decides as follows:

There can be no fair doubt that the language of the protocol contained in Article III and quoted by the learned agent for the British Government limits the discussion and determination of each case falling within its scope to the question of injury to the property of the claimant by the Venezuelan Government and the resultant compensation if injury is found.

As the case stands inquiry is limited to an interpretation of these expressions:

The Venezuelan Government admit their liability in cases where the claim is for injury to \* \* \* property, and consequently the questions which the Mixed Commission will have to decide will only be:

(a) Whether the injury took place \* \* \*.

The protocol bears proof throughout of the great care in its preparation and especially in the choice of words which with legal exactness and certainty state the several matters it contains. The importance of the document as a solemn agreement between independent nations and, in certain parts of it, the law of this Commission would be a warrant to assume all this; and examination confirms and emphasizes the assumption. It has also the qualities of conciseness, clearness, and brevity. These qualities may and in the part before us do compel a careful study of the text to determine the full force and significance of the language selected.

It is the opinion of the umpire that the word "injury" was chosen because of its legal adaptation and significance and not in its colloquial sense. To think otherwise would be to hold that the seizure of property occupied in the minds of the high contracting parties and should occupy before this Commission a position different from that of injury to property, a holding not consistent, for both are governed by the same general rules and spring from similar general conditions. To make a ruling that any injury to property and none but wrongful seizure of it was the purpose and purport of the protocol does not address itself to sound judgment.

The character of the signatory parties, the importance of the document, the evident care and skill with which it was drawn, its conciseness and precision, its rigor of expression, deny the assumption of a careless and indifferent use of words where care and discrimination was most required. It is therefore the opinion of the umpire that the word "injury" was taken by the signatory parties to import a legal wrong, and in accordance with its fixed and determinate use in law as involving and importing ipso facto an *intentional wrongdoing* on the part of those responsible therefor. This supplies the conditions concerning injury to property which are found in the protocol concerning the seizure of the same, and brings the two to a common level where in the judgment of the umpire they were placed by the high contracting parties. Without this reading of the word "injury" the two parts are dissimilar without reason, and with it they are similar with reason.

To give the word its common use would impel it over any and every damage, hurt, harm, mischief, or loss that might occur to property, whether accidental, incidental, proximate or remote, wrongful or otherwise, with or without intent, good or bad, indifferently and equally. This conclusion could find no basis of sensible acceptance if we had not the assistance of the other part of the clause

where responsibility and admitted liability are limited to wrongful seizure, but with this aid the conviction of its untenability is irresistible.

Seizure of property may be rightful or wrongful according to circumstances, hence it was necessary to define the character of seizure concerning which liability was admitted. The admission was intended to cover wrongful seizure only, and therefore it was so written down. The same limitation was intended in the expression "injury to property" and "injury" was selected because in itself it expressed that limitation. It is not to be considered there was intended a difference in responsibility to attach to these acts, and by the umpire's interpretation there is no difference. Without it there would be great and inexplicable difference.

By giving to this word its meaning in law and applying it to a document of peculiar legal importance drawn and carefully considered by minds of profound scholarship and erudition in law skilled in words accurate and apt, in sentences short, clear, and trenchant, it is certain we can do no violence to the thought. By adopting any other interpretation of the language used it becomes ambiguous indiscriminative, and inapt.

The umpire regards the section quoted from Article III of the same import and value as though it had been written:

The Venezuelan Government admit their liability in cases where the claim is for a legal injury to property, and consequently the question which the Mixed Commission will have to decide will only be:

- (a) Whether the legal injury took place \* \* \*.
- (b) If so, what amount of compensation is due.

The question in each case being whether by the law governing the facts in the case there has been such an injury.

The application of this holding to the case pending will admit therein discussion and determination only upon the questions thus involved. Was the shelling of Ciudad Bolivar in all the aspects of the case presented a wrongful or a rightful governmental act?

Was the result to the property of Mrs. Guillermina Dalton de Lemos under all of the facts in the case one which she must endure without recourse as a necessary sequence, or has she fixed responsibility upon Venezuela by some wrongful act or neglect of that country?

An answer to these questions determines the status of this case.

The range of inquiry and of discussion is limited but important.

To the learned and honorable gentlemen composing this Commission the umpire will not assume at this time to specify their limitations with any further particularity. A careful consideration of the question will easily determine for each the bounds within which facts and arguments are relevant, material, and competent.

#### DE LEMOS CASE (second reference to umpire)

(By the Umpire:)

Evidential value of statements improperly verified

#### CONTENTION OF BRITISH AGENT

#### PART I

The umpire has decided that the question for decision in this case is whether the "legal" injury took place, which is then particularized as being the question whether Mrs. de Lemos has fixed responsibility upon the Venezuelan Government by some wrongful act or neglect.

Before determining how the facts of the case are to be applied in answering this question, it is necessary first to inquire what is the standard by which we are to measure whether the act is wrongful or rightful.

In all arbitration under treaty the first and often the only standard is the rules, if any, laid down in the treaty for the conduct of the arbitration and any reservation therein made. The rules of the treaty are the law by which the decisions of the tribunal are to be given.

As long as the treaty lays down definite rules, general principles of international law are irrelevant.

It may here be observed that no point in international law can be said to be entirely free from doubt, so wide is the range and difference of opinion. On the other hand the contracting parties can lay down what they please as the basis of arbitration, and must be taken to have meant what they have said.

In this case the British Government had found it necessary to enforce a blockade of the Venezuelan ports. It was not until the present treaty was signed that arrangements were made to raise the blockade. The treaty must be read in the light of that fact.

What is the standard fixed in this case, and what are the rules laid down?

First of all, in Article III comes a reference of certain claims to arbitration. If that had stood alone the standard to be applied would undoubtedly have been the rules of international law as approved by the tribunal. Had that been what the contracting parties meant they would have said: "The claims shall be referred to the Mixed Commission without reserve."

That they would have done so is plain from the fact that certain claims are referred to the Commission in those words; that is to say, that in those latter claims every principle of recognized international law can be raised by Venezuela as a defense.

As regards the former claims, on the other hand, the Venezuelan Government "admit their liability;" that is to say, they agree not to avail themselves of certain defenses. An admission of liability by a defendant is an undertaking by him not to raise certain defenses otherwise open to him.

When, therefore, a defendant power in an agreement for international arbitration "admits his liability," he thereby implies that he agrees that he is not to avail himself of the principles of international law which might otherwise be considered an answer to the claim.

In the present case the protocol has said: "The Venezuelan Government admit their liability in cases of injury to property," and the question for determination is defined as being, "Has Mrs. de Lemos fixed responsibility on Venezuela by some wrongful act or neglect of that country?"

By what standard is the word "wrongful" to be construed?

It should be construed according to the terms of the protocol; that is, in the light of the words "admit their liability."

In other words, the Venezuelan Government has admitted that, for purposes of this arbitration only, certain acts shall be assumed to be wrongful which might or might not have been judged to be so, according to the rules of international law.

There is nothing unreasonable in this. This treaty was made under pressure of a blockade. Under such circumstances what is more natural than to find that the blockading power has insisted on its own standard of right?

To give other than the above meaning to the words "admit their liability" is to say that an entire section of an international treaty, carefully drawn up, is without meaning and without bearing on the effect of the treaty.

If it be suggested that "admit their liability" means that the Venezuelan Government agrees not to raise as a defense that these specially mentioned

claims are a matter for the law courts, it should be pointed out that if a claim which would otherwise be a matter for ordinary litigation is submitted to arbitration that fact alone means that all other jurisdictions are, as regards that claim, set aside and superseded by the jurisdiction of the arbitral tribunal. Therefore, the further provision that the Venezuelan Government "admit their liability" in the class of claims here referred to arbitration would be superfluous and meaningless.

It now remains to state what was intended to be the meaning of the admission of liability, in the light of the words of Article III, the circumstances under which the treaty was made, and, in cases not covered by express words, the general principles of international law.

The meaning is —

(I) The Venezuelan Government will pay compensation where damage has been intentionally or negligently caused to property by the Venezuelan Government, their agents, or persons employed by them, or by any other person for whose acts they must be held responsible, by reason of negligence, or other special circumstances.

(II) The Venezuelan Government will pay compensation wherever any right of possession or quiet enjoyment of property has been interfered with through seizure by any such persons.

The words in their natural and ordinary sense bear this meaning, and it can not be said that these were unreasonable terms for a blockading power to insist upon, from a country which has been for many years in a continuous state of revolution and unsettled government.

Moreover, to hold otherwise would be to render the whole of Article III, except the bare submission to arbitration, meaningless and superfluous.

The above interpretation should therefore be accepted.

In considering the language of the protocol two facts must be borne in mind.

(a) The language in Article III was originally proposed by Great Britain exactly as it now stands, and was accepted without alteration or demur.

(b) The rights of British subjects in Venezuela are protected by the following treaties:

- (1) Treaty of Bogotá, April 18, 1825, incorporated in —
- (2) Treaty of London, October 20, 1834.

In Article III of the protocol the admission of liability is, as regards persons, identical in both cases. As regards acts of injury to property, almost the only possible defense in cases likely to arise would be that of military necessity; this defense would probably be raised in cases of extensive damage, and in such cases British subjects have no special treaty protection; therefore Great Britain, holding certain opinions as to the internal affairs of Venezuela for many years past, thought it right to insist on an absolute admission of liability for the acts of persons for whom the Venezuelan Government might reasonably be liable.

In cases of seizure, British subjects are amply protected by treaty. Seizure, in contrast to injury, can in practice be justified on many and very diverse grounds, from some of which Great Britain might not wish to debar Venezuela. Great Britain, therefore, did not think it either necessary or desirable to insist on absolute liability, but thought it right that each case of seizure not covered by treaty should be judged on its merits, limiting the admission of liability to the same persons for whom Venezuela admitted responsibility in cases of injury to property.

It has been said that the words "injury to property" are not to be taken in their ordinary sense, but in their "legal" sense — that is, with some special technical meaning.

All writers agree that in interpreting treaties, words are to be taken, if possible, in their ordinary meanings.

Words are to be taken to be used in the sense in which they are commonly used. (Wheaton, p. 395.)

Common expressions and terms are to be taken according to common custom. (Halleck, Vol. I, p. 246, citing Vattel.)

It should be noted that in this protocol the word "injury" is only used in conjunction with "property."

There will be no dispute as to the common meaning of the expression "injury to property." It means no more than "damage to property."

If reference is made to Webster's Dictionary it will be seen that in the second passage quoted under the word "injury," it is used in the wide sense of damage, and under the verb "injure" it will be seen that when used in connection with property, the latter is rendered "to damage or lessen the value of, as goods or estate." In classical, then, no less than in ordinary English, when applied to inanimate things, the word is equivalent to damage. It is conceded that no word is to be pressed to include things which would destroy the sense of the whole passage in which they occur.

Injury in English is not the equivalent of "injuria" in Latin, which includes a different element. Except in exceptional circumstances "injuria" is not translated by the word "injury," but by the word "wrong," which word is its equivalent in English law. Moreover, in Roman law, "injuria," which necessarily implies some moral effect on the damaged person, is not, for that reason, joined with inanimate things in the way in which it is used here.

To sum up —

The word "wrongful" must be interpreted by reference to the protocol.

In the protocol the Venezuelan Government admit their liability, and thereby agree that for the purpose of this arbitration, injury, such as is found in the case of de Lemos, is not to be held justified — that is, they agree that for the purposes of this arbitration such injury is to be considered wrongful; therefore, the damage being admitted in principle, the claimant is entitled to an award.

## PART II

If this case has to be decided on general principles of international law without any reservation, the decision must depend upon the answer to the question whether the Venezuelan Government can prove justification. In other words the shelling of a town being an act of violence otherwise unjustifiable, can the Venezuelan Government prove that the act was a military necessity and so escape the liability otherwise incurred?

In matters such as these the decision must depend on the facts of each particular case, and historical instances of bombardments are of little value, firstly, because it is impossible to ascertain with sufficient accuracy whether the facts were or were not identical with the case under discussion, and, secondly, because incidents which would have been considered right and proper proceedings in warfare at the beginning of the last century and even later would to-day be held most reprehensible.

Fortified places are alone liable to be besieged; towns, agglomerations of houses or villages which are open or undefended can not be attacked or bombarded. (Wheaton, *Elements of International Law*, 3d ed., p. 543.)



If a town is as a whole open, with only one or two defended points (as distinguished from a fortress), and any shelling takes place, it is upon the attacking force to show that —

- (1) Imperative necessity demanded the bombardment, and
- (2) That the shelling was confined, both as regards direction and amount, to the necessities of the case.

As regards (1) the necessity must be proved to demonstration, and the evidence scrutinized with the utmost rigor, since the bombardment of the unfortified parts of towns is at best a cruel and barbarous proceeding, and repugnant to the principles of modern international law.

On this point reference may be made to Hall's International Law on page 556 (4th ed.), where the shelling of the private houses of even a fortified town during a siege is described as an exceptional proceeding, and clearly disapproved by the author on principle.

It may even be said that so great is the risk of needless and useless suffering and damage to noncombatants from this particular method of using shells, and this may be so widespread and so entirely beyond the control of the commander of the attack, that it is the modern rule of international law to discourage such a proceeding altogether (i.e. the shelling of the open parts of towns), and therefore, though it may be inexpedient to fix criminal responsibility on the commander, yet his government incurs the liability of having to compensate non-belligerents for injury, should any such occur. There is nothing in the recognized modern authorities to negative the justice of this principle, and it is supported by the fact that governments not unfrequently compensate their own as well as foreign subjects for damage done under such circumstances, showing that compensation in such cases is right and proper.

If, then, a government carries out a bombardment of the kind found here, it must be prepared to show that the State was in imminent danger, that there was no other way of meeting the difficulty, and if shelling be held justified at all, it will have to go on to show that the unfortified parts, as distinguished from the forts, must be mercilessly shelled.

In considering the facts of this case it is to be noticed first of all that this town is not a fortified town in the accepted sense, nor did this shelling take place in the course of a siege (Hall, *loc. cit.*). This being so from 1,400 to 1,500 shells were nevertheless fired into the open parts of the town.

It is submitted that these facts at once fix the Venezuelan Government with liability, as constituting an act not sanctioned by any rule of war.

The Venezuelan Commissioner does attempt to justify the above procedure and does so by urging the plea of military necessity; he has not, however, in any way proved this, and the difficulties in his way will appear upon consideration of the admitted facts.

In this case there was no fortified town and no siege, both of which circumstances are essential, it is submitted, to make a bombardment lawful. The shelling seems to have been for the purpose of harassing the insurgents and peaceful inhabitants indiscriminately, without at the time any prospects of being able to take or even invest the town, and in any case the shelling was in excess of the necessities of the occasion.

It is also a not unimportant consideration that the bombardment was unsuccessful, and the town was not taken in consequence; and in the second place when the town was recently taken, no injury to private property took place. This will be seen from the following passage taken from the official telegram from General Gomez, announcing the capture of the town:

Del bombardeo de nuestra escuadra no hubo ninguna víctima en los habitantes pacíficos ni tampoco daños en los edificios particulares.

These facts go to prove that the shelling, so far from being necessary, was utterly inexpedient and unnecessary, and the natural inference then would be that, even if there were any intention of capturing the town, the attack was made with a force so inadequate to the purpose that, instead of a serious attempt to meet a military necessity, it was a reckless, useless, and unjustifiable resort to a cruel procedure.

The danger of allowing, under such circumstances, the immunity from liability of a government for the acts of its military commanders needs no demonstration, and the disapproval of an international tribunal should be specially emphasized in the case of a country where revolution is the rule rather than the exception.

The Venezuelan Commissioner has quoted at length the work of M. Calvo. As regards the opinions of that author, it is submitted that, although his erudition and powers of research will always render his work valuable, yet his bias as a native of South America renders his judgments unsound on matters concerning civil war and the responsibility of governments.

As regards other authorities quoted or referred to in the answer of the Venezuelan Commissioner, they in no way contradict the present proposition, which is, that though there may be cases where shelling may be carried out under such circumstances that no liability attaches, there are other cases where without question liability does arise; that each case must be judged on its merits, and that upon the facts and circumstances found there the Venezuelan Government are liable for the damages claimed in this case.

As regards the contention that *locus regit actum* and the objection taken to the affidavits, reference should be made to the protocol of May 7, 1903:

The Commissioners, or, in case of their disagreement, the umpire, shall decide all claims on a basis of absolute equity without regard to objections of a technical nature or to the provisions of local legislation.

GRISANTI, *Commissioner*:

Part I of the British agent's reply is limited to supporting the interpretation which in his opinion must be given to Article III of the protocol of February 13, of the current year, and which openly contradicts the reasonable and proper interpretation given it by the honorable umpire in his very learned decision made on July 24 last. I consider this part of the statement irrelevant, because the decisions of the honorable umpire are definite and conclusive, according to the protocol signed at Washington May 7 last. Nevertheless I shall make some observations with regard to this part.

A treaty must be interpreted in the light of its own clauses, with due consideration of all circumstances preexistent to its execution and coexistent with the same; and this is precisely what the honorable umpire has done in a very masterly way.

The difference of the interpretations lies in the fact that the honorable umpire takes the word "injury" in its juridical meaning, and the learned agent for Great Britain thinks that the ordinary meaning should be attributed to this word.

To show the superiority of the former opinion over the latter, it suffices to compare the reasons set forth in support of each case.

In his award the umpire states:<sup>1</sup>

It is the opinion of the umpire that the word "injury" was chosen because of its legal adaptation and significance, and not in its colloquial sense. To think otherwise

<sup>1</sup> *Supra*, p. 367.

would be to hold that the seizure of property occupied in the minds of the high contracting parties, and should occupy before this Commission, a position different from that of injury to property, a holding not consistent, for both are governed by the same general rules and spring from similar general conditions. To make a ruling that any injury to property and none but wrongful seizure of it was the purpose and purport of the protocol does not address itself to sound judgment.

The character of the signatory parties, the importance of the document, the evident care and skill with which it was drawn, its conciseness and precision, its rigor of expression, deny the assumption of a careless and indifferent use of words where care and discrimination was most required. It is therefore the opinion of the umpire that the word "injury" was taken by the signatory parties to import a legal wrong and in accordance with its fixed and determinate use in law as involving and imparting ipso facto an *intentional wrongdoing* on the part of those responsible therefor. This supplies the conditions concerning injury to property which are found in the protocol concerning the seizure of the same, and brings the two to a common level where, in the judgment of the umpire, they were placed by the high contracting parties. Without this reading of the word "injury" the two parts are dissimilar without reason, and with it they are similar with reason.

The learned agent for Great Britain states: <sup>1</sup>

It has been said that the words "injury to property" are not to be taken in their ordinary sense, but in their legal sense — that is, with some special technical meaning.

All writers agree that in interpreting treaties words are to be taken, if possible, in their ordinary meanings. "Words are to be taken to be used in the sense in which they are commonly used." (Wheaton, p. 395.)

"Common expressions and terms are to be taken according to common custom." (Halleck, p. 298.)

It should be noted that in this protocol the word "injury" is only used in conjunction with property.

There will be no dispute as to the common meaning of the expression "injury to property." It means no more than "damage to property."

If reference is made to Webster's Dictionary it will be seen that in the second passage quoted under the word "injury," it is used in the wide sense of damage, and under the verb "injure" it will be seen that when used in connection with property the latter is rendered "to damage or lessen the value of, as goods or estate," etc.

Although it is true that the common words used in a treaty should be taken in their ordinary meaning, this rule can not apply to technical terms; to which a meaning can not be attached other than the one they have in the science or art in which they belong.

Dans tous les cas d'amphibologie ou d'équivoque les mots doivent en général être pris dans leur acception ordinaire, dans leur signification usuelle, et non dans celle que leur donnent les savants ou les grammairiens; toutefois, les mots empruntés aux arts et aux sciences doivent s'interpréter suivant leur sens technique et conformément aux définitions données par les hommes compétents. — (Calvo, *Le Droit international théorique et pratique*, 3<sup>e</sup> éd., vol. I, p. 670, sec. 715.)

Technical terms must [says Bello] be taken in the proper sense given them by the professors of the respective science or art, except when it is known the author was not well versed in the matter. (Principles of International Law, 4th ed., p. 136.)

Can it be maintained with a semblance of reason that the eminent men who wrote and signed the protocol did not have a profound knowledge of the juridic meaning of the technical words they used in it? Such an opinion is inadmissible.

On the other hand, accepting the interpretation of the learned agent for Great Britain, the result would be an inexplicable difference in the cases of the

<sup>1</sup> *Supra*, p. 371.

claim being for the seizure of property and those being founded on injury to the same. In the first instance it is a necessary condition for the fixing of liability on the Government that the seizure be wrongful; in the second place that the liability always attaches, whatever be the nature of the injury, justified or unjustified, intentional or accidental.

The learned agent for Great Britain persists in trying to prove said difference, but he has not succeeded. The principles of law are adverse to him, and it is not possible to struggle against them successfully.

Ninety-eight per cent of all the claims are for injury to property, and according to the idea of the agent for Great Britain, said claims are already decided by the protocol in favor of British subjects. If this were so, what would the functions of this Mixed Commission be? With what object would England have sent out a lawyer of such great learning as His Britannic Majesty's agent, if it were not to argue on the grounds of justice and law? Reason can not conceive a court that does not pass judgment nor a juridic document from which law is excluded.

The interpretation insisted on by the British agent leads to an absurdity, and must therefore be rejected.

It is necessary to set aside every interpretation that might lead to absurdity. (Bello, *International Law*, 4th ed., p. 136.)

#### PART II

Ciudad Bolívar revolted at the time when a revolution had broken out against the Government in the whole Republic. The Government was under the unavoidable obligation of reducing the insurgent city, and this they had to carry with the only means at their disposal, which were the war ships at anchor in the port. The attention of the Government was occupied by many and serious events; it was forced to repair actively and energetically to different places to quell the civil war which was devastating the country; it was obliged to redouble its efforts. Perhaps the forces employed were not sufficient to subject the rebel city to the dominion of law; perhaps it was thought that the rebels would not offer such vigorous and indomitable resistance as they did. These circumstances, impossible to be foreseen or avoided, concur in proving, with irrefutable evidence, that the shelling of the city was not a deliberate act of the Government, but an act imperatively demanded by the force of circumstances.

On the other hand, war is nothing but the struggle of force against force, and the events which take place must not be considered as amid the repose and tranquillity of a cabinet, nor in the light of a high juridic philosophy. European and American statesmen have strived in vain, with extraordinary efforts and unremitting zeal, to mollify the conduct of war — it continues violating rights — wasting the treasure of civilization.

From the failure of the assault on the city, the British agent infers that it was not carried out with force proportioned to such an undertaking. The rigid rules of logic are not always applicable to affairs pertaining to war, and it is not possible, in all cases, to reach definite conclusions from the results of battles. History teaches us that military operations, maturely premeditated and executed with the most suitable means to attain a happy end, have failed, and that victory has at times been attained by plans emanating from a diseased and delirious mind.

Neither is it a juridic principle that unfortified cities should not be bombarded. The rule is that every city that offers resistance, be it fortified or not, must be

attacked with the means available, including bombardment; and that it is illegal to attack a city that opens its gates to the foe.

Toute ville qui se défend, peut, quoique ville ouverte et non fortifiée, être attaquée et soumise comme le serait une fortification; mais il faut une résistance sérieuse, une véritable défense se manifestant par des maisons crénelées, des barricades, etc. Quelques coups de fusils sont insuffisants pour autoriser le recours au bombardement. Le siège et les bombardements des places fortes et défendues est une mesure de guerre légitime et même nécessaire. La légitimité de l'agression ne dépend pas du fait de la fortification, mais de la défense à main armée d'une place. Il est illégitime de bombarder une forteresse qui ouvre ses portes. Il est nécessaire d'attaquer une ville ouverte qui est défendue militairement. Il est défendu de bombarder des villes ouvertes qui ne prennent aucune part à la guerre. Toutes les autorités du Droit International sont d'accord là-dessus. (*Manuel de Droit international public*, par Henri Bonfils, 3<sup>e</sup> éd., 1901, p. 608, sec. 1082.)

In my statement of July 11, last, I maintained, moreover, that the claim is not proved. In fact, Consul de Lemos brings forward as a proof, in the first place, his own testimony. As regards this point, I stated:

As a general rule, the testimony of a person in support of a fact is not admissible when that person is greatly interested in the establishment of said fact.

In the second place, the testimony of Benjamin Waithe and Antonio Villalobo, delivered in presence of the consul, Mr. de Lemos himself, is absolutely void;

and with regard to this testimony the undersigned stated the following opinion:

The said consul can not be a judge in his own cause, and on receiving and authorizing those declarations he has sought to be one, trying to assume two positions entirely incompatible. Besides, in the taking of the proofs, the universally acknowledged and respected rule of *locus regit actum* has been violated.

If my observations with regard to the testimony presented as proof are carefully read, it will be seen that these observations are not based on dispositions of any determined legislation, but on inferences drawn from a close study of the frailty of human nature. When a man is interested in testifying that a certain act took place his testimony can not inspire firm belief. The United States has fixed wise rules to which the claims against foreign governments are subject, and among them is the one copied below, which is very pertinent to the matter under consideration.

6. All testimony should be in writing and upon oath or affirmation, duly administered according to the laws of the place where the same is taken, by a magistrate or other person competent by such laws to take depositions, having no interest in the claim to which the testimony relates and not being the agent or attorney of any person having such interest, and it must be certified by him that such is the case. The credibility of the affiant or deponent, if known to such magistrate or other person authorized to take such testimony, should be certified by him; and, if not known, should be certified on the same paper upon oath by some other person known to such magistrate, having no interest in such claim and not being the agent or attorney of any person having such interest, whose credibility must be certified by such magistrate. The deposition should be reduced to writing by the person taking the same, or by some person in his presence having no interest and not being the agent or attorney of any person having an interest in the claim, and should be carefully read to the deponent by the magistrate before being signed by him, and this should be certified. (Department of State Circular, March 6, 1901.)

The act of taking the depositions of Messrs. Waithe and Villalobo, done by the consul, Mr. de Lemos, thus usurping functions which belong to the local courts of justice, is an attack upon the sovereignty of Venezuela, and therefore the Venezuelan commissioner hereby protests energetically against the behavior

of the consul, Mr. de Lemos, which behavior constitutes the infringement of laws he was under the obligation of respecting, not only in his capacity as a resident, but also in his capacity as a consul.

It is the opinion of the writer that the claim of Consul de Lemos should be disallowed.

PLUMLEY, *Umpire*:

When this case was sent to the umpire for his decision, it was requested by both Governments that the umpire should take his earliest opportunity to indicate to the tribunal whether he should require more evidence on behalf of the claimant than was placed before him in the papers filed in the case. Answering this proper request the umpire takes this occasion to state his position thereon.

When the case was first presented to the tribunal it contained a memorial, the printed affidavit of Consul de Lemos, and the declarations of Benjamin Waithe and of Antonio Villalobo. Upon the facts therein stated the case rested.

That portion of the affidavit of Charles Herman de Lemos, which states the fact of bombardment of Ciudad Bolívar on the 20th, 21st and 22nd of August 1902, by the Venezuelan gunboats *Bolívar* and *Restaurador*, is a matter of history.

At the time that the preliminary objection of His Britannic Majesty's agent was made there was before the tribunal the answer of F. Arroyo-Parejo, the Venezuelan agent before this tribunal, which was made on the 18th of June, 1903. In this answer is to be found the following:

The history of this case is as follows:

A garrison in the capital of the State of Bolívar, disloyal to their duties, rebelled against the National Government legally constituted. The Government, not only in virtue of the right of defense, but in the fulfillment of a duty of a pressing nature, on account of the irreconcilable attitude of the revolutionists, ordered the attack of the city, which attack was put into execution by maritime forces on August 20, 21, and 22, 1902. The consequence of the attack, a natural and unavoidable one, was that several houses of the city suffered damages, among them two which belonged to the claimant's wife.

Then follows in the answer propositions of law governing these facts and claiming therefrom immunity to Venezuela as claimed by said learned agent.

To the preliminary objection of His Britannic Majesty's agent the honorable Commissioner for Venezuela made reply, and in such reply the historical facts were admitted and extended in paragraphs 7 and 8, followed by an argument concerning the immunity of Venezuela under such facts, with citations and quotations of authority therefor, and at the bottom of the seventh page and throughout the eight page of said reply the question is raised that the claim is not legally in proof for the reasons therein given.

Article 7 of the rules of procedure provides for the written answer of the Venezuelan Commissioner and states what such answer may and should contain. In effect it requires that there and then be raised all of the exceptions and objections to the testimony, of form or fact, which it may seem necessary to raise at any time in said cause, and to therein set forth in addition the counter facts relied upon by Venezuelan in refutation of the claimant's proofs and to bring into the record with such answer all such evidential facts as are by him deemed important.

Articles 9 and 10 of the said rules provide for the registry of such answer, notice to the British agent, his right of reply thereto within fifteen days, its

presentation and registry and notice to the Venezuelan Commissioner or agent, in whom there is a right of counter reply within fifteen days.

In this case the answer was made by the Venezuelan agent instead of the Commissioner, but it was the answer provided for under article 7 of the rules and was received as such. It conceded all the facts alleged by the claimant and stated the facts upon which Venezuela relied for its protection in the given case, and to these facts brought upon the record by the Venezuelan agent the reply of the British agent was in the way of a preliminary objection raising the questions of law and equity upon the facts stated in the claim and in the answer of the Venezuelan agent, which reply admitted for the purpose of that objection the truth of the facts as stated by the agent of Venezuela in his answer.

When, therefore, there is found in the counter reply of the honorable Commissioner for Venezuela the points referred to above they must be read in view of the concessions as made by the Venezuelan agent in his answer, the logical results flowing from the British agent's preliminary objection, together with the status of the case and the rights of the parties as established by the rules of procedure above referred to.

It was the judgment of the umpire at the time of rendering his interlocutory opinion that it was not competent for, neither was it the intention of, the honorable Commissioner for Venezuela to attack or reverse the concessions and admissions made by the learned agent for Venezuela in his answer, but simply to call attention to the irregularities and informalities of the said testimony. It followed, therefore, that the umpire in such opinion on the first and second pages thereof assumed as admitted facts the claim as made in the affidavit of Mr. de Lemos.

Subsequent to the filing of such opinion by the umpire the learned British agent presented his counter reply to the aforementioned answer of the Venezuelan agent and reply of the honorable Venezuelan Commissioner, and this was followed by the counter reply of the honorable Commissioner for Venezuela, restating his objections to the proof of the claim and quoting in part from his first reply and including a quotation from the rules of the United States of America prescribed for the taking of testimony in such matters. No one, in the opinion of the umpire, would question the wisdom and value of the rule thus quoted.

In said counter reply of the honorable Commissioner for Venezuela he also makes the point that the act of taking the depositions of Messrs. Waithe and Villalobo, effectuated by Consul de Lemos, was in usurpation of functions belonging to the local courts of justice and was thereby an attack upon the sovereignty of Venezuela.

The umpire has thus brought upon the record the matters deemed by him substantial and important in the determination of the immediate question before him, which is: Does he require further evidence on behalf of the claimant in order to be satisfied of the truthfulness of his case?

The historical facts are unquestioned, and to those historical facts may be added the consulship of Mr. de Lemos, his residence and his nativity, as all these matters must be in the knowledge and possession of the Venezuelan Government, since for about twenty-five years he has been the consul of Great Britain resident at Ciudad Bolivar, and under the exequatur issued by the Venezuelan Government.

The matters to be determined from the affidavit of Consul de Lemos are the name of his wife, her ownership of the property in question, the fact that 1,400 or 1,500 shells were thrown into the heart of the city, and that her buildings were injured thereby to the amount of £300.

The declarations of Waithe and Villalobo, in the opinion of the umpire,

amount to no more than a carefully written statement over their respective signatures and are accepted by him as such only. They are not affidavits and they are not formal declarations. Mr. de Lemos could not in this case act in his official capacity and thereby make them such; but they are written documents or statements, and being such they come clearly within the provision of the protocol which provides that the Commissioners or umpire, as the case may be, shall be bound to receive and consider all written documents or statements which may be presented to them by or on behalf of the Governments, respectively, in support of or in answer to any claim;

and

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 evidential value of such statements is left to the decision of the tribunal when it considers them; but there is no question that they are to be received and to be given such value as in the given case they seem to be worth.

The facts testified to by Mr. de Lemos are not obscure in their character, not at all dependent upon his personal knowledge for their establishment, and are easily disproved if untrue. The claimed injury resulted from the bombardment, which is a historical fact, the official particulars of which are unquestionable in the possession of the Government of Venezuela, and it would be impossible to make such claims of injury and not have them susceptible to immediate denial and disproof if untrue, since the damage if it existed was easy to be seen, and if not existent easy to be determined to the contrary. The fact of ownership is a matter of registry as well as of general notoriety in that vicinity, and thus easily susceptible of denial and disproof if untrue. There is nothing about the case as it is presented to the umpire to raise a suspicion of its verity, and there is nothing to suggest any purpose to defraud Venezuela or to mislead the umpire in arriving at a just decision. The case seems to be shorn of such characteristics.

Taking into consideration the elements in this case as presented, including the concessions and admissions of the learned agent for Venezuela, and the fact that neither agent or Commissioner for Venezuela has denied anywhere that the facts are as alleged by the claimant, the ease with which the claim could have been refuted if not well laid, the general reasonableness of the facts asserted, the official position of Consul de Lemos, all tend to eliminate doubts from the mind of the umpire, to give respectability and character to the claim, and to permit him to say that he is satisfied that the facts are as alleged and to find the same to be true, leaving only for determination the questions raised as to the law and equity in the case.

The umpire will here state that it must be considered there was no intended offense to Venezuela in the act of Consul de Lemos in authenticating the declarations of the two witnesses used in this case, since it is to be remembered that from the time of the injury to these buildings until within a few days there have been no courts at Ciudad Bolívar loyal to the Venezuelan Government or representative thereof, and it was expressly stated in open tribunal by the learned British agent that these declarations were thus presented only because of the impossibility of obtaining any evidence through the regular procedure of Venezuelan law. It is in recognition of this state of affairs that the umpire more readily consents to their consideration.

Notwithstanding this holding, if the honorable Commissioner for Venezuela considers that the fact is not that 1,500 shells substantially were thrown into the heart of the city on the occasion of the bombardment in August, 1902; that Mrs. de Lemos is not the owner of the houses in question; that they were not



damaged in the way and to the extent substantially as claimed in the affidavit of Consul de Lemos; that injustice would be done to Venezuela by assuming such to be the facts, and that he desires opportunity to show that such are not the facts, the umpire may deem it necessary on a proper showing to grant an opportunity at this late hour for such proof, and in such event may deem it proper to permit the British agent to fortify his evidence by cumulative and rebuttal proof if he should desire.

#### SELWYN CASE<sup>1</sup>

Within the limits prescribed by the convention, an international tribunal created thereunder is a tribunal superior to the local courts, and it is not affected jurisdictionally by the fact that a question submitted for its decision is pending in the courts of one of the nations. Such international tribunal has power to act without reference thereto and, if judgment has been pronounced by such court, to disregard the same so far as it affects the indemnity to the individual, and has power to make an award in addition thereto or in aid thereof as in the given case justice may require.<sup>2</sup>

#### PLUMLEY, *Umpire*:

This case came to the umpire upon the disagreement of the honorable commissioners over the jurisdictional question raised by the Government of Venezuela.

In determining this question it is necessary that the umpire assume the truth of all the assertions on the claim. This is in no sense finding that they are true, but an assumption merely, and wholly for the purpose of this preliminary inquiry, and in event the jurisdiction is held this assumption ceases ipso facto and absolutely.

The grounds of objection to the jurisdiction of this tribunal as stated are three:

(1) That, if this claim is admissible otherwise, it is barred by the fact that a suit is now pending in the local courts, wherein the claimant is the plaintiff and Venezuela is the defendant, based upon the same right of action; and having elected to pursue his remedy there he can not change the forum of his own selection and present his claim to this Commission, especially since there has been no delay in court except through his own inaction.

(2) A certain provision of the contract between the Government and the claimant, because of which contract this claim exists, the language of which provision follows: "Any doubts and controversies that may arise regarding the spirit or execution of this present contract will be settled by the tribunals of the Republic and according to their laws without their being in any case a matter for an international claim."

(3) That this is a claim under a contract and that controversies of a contractual character, excepting the railway claims, are not submitted to this Commission, but instead, injuries to property of British subjects and matters akin thereto, as is to be seen by inspection of the protocol, which by specifically including the railway contractual claims inferentially and impliedly excludes all other contract claims.

Pending a decision in court parties may always agree to submit to arbitration the whole or any substantive part of the matter or matters in issue; and when the award is made it can be pleaded by the defendant in bar of the action in

<sup>1</sup> For a French translation see: Descamps-Renault, *Recueil international des traités du XX<sup>e</sup> siècle*, année 1903, p. 795.

<sup>2</sup> See additional authorities, *infra*, pp. 384, 385.

whole or in part, according as the submission was of a whole or a part of the controversy; or, if the submission is such, it may be reported into court in aid thereof or for its final action thereon, but always to the extent of the submission it supersedes action by the court. (*Amer. & Eng. Encyc. of Law*. 2nd ed., vol. 2, 562-568. Also the notes on these pages for cases cited and decisions quoted in support of this proposition.)

It is the judgment of the umpire that the rule above stated is the same, so far as it touches the question before this Commission, where the arbitration is between nations and the submission concerns private claims.

International arbitration is not affected jurisdictionally by the fact that the same question is in the courts of one of the nations. Such international tribunal has power to act without reference thereto, and if judgment has been pronounced by such court, to disregard the same so far as it affects the indemnity to the individual, and has power to make an award in addition thereto or in aid thereof as in the given case justice may require.

Within the limits prescribed by the convention constituting it the parties have created a tribunal superior to the local courts.

Concerning the particular feature here involved this is the limit there set:

The Venezuelan and British Governments agree that the other British claims, including claims by British subjects other than those dealt with in Article VI hereof, and including those preferred by the railway companies, shall, *unless otherwise satisfied*, be referred to a Mixed Commission constituted in the manner defined in Article IV of this protocol and which shall examine the claims and decide upon the amount to be awarded in satisfaction of each claim. (Art. III of the protocol of Feb. 13, 1903, and see also par. 1 of the supplementary agreement of May 7.)

It would seem that the claim being otherwise admissible at the time of the making of the treaty, it is not to be affected by anything save its subsequent payment or satisfaction. Whether it is actually pending in court or standing in judgment rendered is not made the test. Instead, and only, the criterion agreed upon is payment or satisfaction.

Under article 7 of the treaty between the United States and Great Britain of November 19, 1794, a Mixed Commission was provided for and given the power to award compensation to claimants who could not obtain it "in the ordinary course of justice."

The special claims to be considered were those founded on case of illegal and irregular capture or condemnation of the vessels and property of citizens of the United States. In the case of the *Sally*, Hayes, master, which was pending in the admiralty court at the time it was submitted to this Mixed Commission, the British Commissioners objected to its consideration, "as proceedings were still pending before the lords commissioners of appeal. \* \* \* It did not sufficiently appear that compensation might not at the time of concluding the treaty and might not still be had in the courts by judicial proceedings, \* \* \* and that the consideration of the merits of the claim should be postponed until it should further appear that compensation could not be obtained in the ordinary course of justice." The American Commissioners, the umpire agreeing with them, contended to the contrary, and a majority of the Board held in accordance with the latter's contention. The British Commissioners then entered a declaration on the journals of the Board "that they did not think themselves competent under the words of the treaty or of the commission under which they acted to take any share, without the special instruction of the King's ministers, in the decision of any cases in which judicial proceedings were still pending in the ordinary course of justice." And in the course of the discussion of the cases before them it was held in general by the agent for Great Britain that in the class of actions that had been decided in the high court of appeals the Commissioners had no jurisdiction because the sentences of that court were definitive; in the cases still pending before the high court of admiralty and the high court of appeals that the Commissioners had no jurisdiction because, if entitled to

compensation, it might be obtained in the ordinary courts before which for various reasons appeals had not been claimed or prosecuted; that the Commissioners had no jurisdiction because it was in consequence of the neglect of the claimants that they were unable to obtain compensation in the ordinary course of justice.

The matter in dispute was referred by agreement to the lord chancellor, who held that in cases of condemnation in the high court of appeals the decrees must stand so far as they affected the property, but there might exist a fair and equitable claim upon the King's treasury under the provisions of the treaty for complete compensation for the losses sustained by said condemnation. Where there had been decrees of restitution, but without costs or damages, or of condemnation without freight or costs, it might be just that the claimant might receive costs, freight, and damages, and the Commissioners had jurisdiction. In the case where the right of appeal had been lost the claimant might be able in a satisfactory manner to account before the Commissioners for his not having come personally forward with the appeal, and this was undoubtedly a case within the provisions of the treaty. The property could not be restored, but there might be an award, and it must be paid out of His Majesty's treasury. The Commissioners were not a court of appeal above the high court of appeals. They were, however, competent to examine questions decided by the high court of appeals as well as in other cases described in the treaty, and they could give redress, not by reversing the decrees and restoring the identical property, but by awarding compensation.

These decisions were substantially the claims of the American Commissioners and the umpire, so that we have the authority of both England and the United States upon that question. The English authority being a concession against their own pecuniary interests gives it greater force aside from the high judicial character of both the lord chancellor, the American Commissioners, and the umpire. (Moore, 2304, et seq.; 326, et seq.)

Wharton, in his *International Law Digest*, section 242, volume 2, says:

"It was maintained before the British and American Mixed Commission sitting in London under the treaty of 1794 that a decision of a British prize court estopped the party against whom it was made from proceedings, when a foreigner, through his own government. This was contested by Mr. Pinkney, and his position was affirmed by the arbitration, acting under the advice of Lord Chancellor Loughborough, and is now accepted law."

See the *Alsop* claims, Moore, 1627 - 1628.

See case of the *Neptune*, Moore, 3076 et seq.

See opinion of Mr. Pinkney on the same case, Moore, 3083, et seq.

See Garrison's case in Moore, 3129, decision by Lieber, umpire, in the United States - Mexican Commission, in which appears the following language: "It is objected that the case has been adjudicated by the proper Mexican court and can not be reopened before this Commission; that therefore it ought to be dismissed. It is true that it is a matter of the greatest political and international delicacy for one country to disacknowledge the judicial decisions of a court of another country, which nevertheless the law of nations universally allows in extreme cases. *It has done so from the times of Hugo Grotius.*

In the case of Reed & Fry, United States - Mexican Commission, convention of July 4, 1868, the case was heard of a vessel seized in Mexico by the proper officers and libeled in a court of competent jurisdiction on the charge of violating the revenue laws, and the court decreed confiscation. The Commission heard the case, found that the court should be sustained, and dismissed the claim. This, therefore, is authority on the question of jurisdiction after judgment by a local court. *Idem.*, 3132.

See *Bronner v. Mexico*, Moore, 3134, United States - Mexico, convention of 1868, Sir Edward Thornton, umpire, where the question in issue had been passed upon adversely to the claimant by the courts of Mexico and an award was given in his favor by the umpire.

See case of J. L. & Co., in same Commission, before the same umpire, who considered the merits of the case and disallowed the claim.

In Moore, 3148, case of Young, Smith & Co. v. Spain, United States - Spain, convention of November 10, 1879, Baron Blanc, umpire, holds that "article 5 of the agreement of 1871 confers upon this Commission jurisdiction of all claims for injuries

of that character. It makes no exception against those parties who may not have resorted to or *exhausted the remedies* offered by the courts of Cuba. The umpire, therefore, is constrained to hold that this is a proper case for the exercise of the jurisdiction of the Commission, and that he is himself bound to decide upon the merits of the demand presented by the claimants."

"Where the claimant in a foreign country has, by the law of such country, the choice of either the judicial or the administrative branch through which to seek relief and selects the latter, this does not make the arbitrary decision of the latter against him final and conclusive." (Mr. Fish, Sec. of State, to Mr. Nelson, Jan. 2, 1873.)

The same position of the United States with regard to the decision of the courts not being a bar to the claim by a neutral, which was held in the Commission with Great Britain, above referred to, was taken by the United States in claims growing out of the French Revolution, and was conceded by the United States when the relations were with reference to the claims arising from the late civil war (see Wharton, vol. 3, sec. 242, Appendix), and was further insisted upon by Mr. Bayard, Secretary of State, discussing a similar question with Mexico, who claimed that the matter had been duly adjudicated upon and was therefore barred from further consideration. (See sec. 243, p. 974, in vol. 3 of Wharton.)

"It may be said that the claimants, according to the ordinary practice in British courts, had a right of appeal to the lords of appeal, and that, as they did not avail themselves of that right, they must be presumed to have acquiesced in the decision of the admiralty courts. \* \* \* [To this] it may be answered that the claimants have incurred great expense in the prosecution of their rights before the admiralty court and had not the means for carrying the cause further in the form in which it was there presented." (Wharton, vol. 2, sec. 241, p. 677.)

Indeed, since objection No. 1 applied not at all to the merits of the case or its rightfulness as a claim in itself, it may well be regarded as falling within the class of technical objections which this Commission is expressly instructed not to regard by the provisions of the British-Venezuelan agreement of May 7, 1903.

To hold that this Commission has jurisdiction of a claim notwithstanding its pendency in the courts of Venezuela is in harmony with the action of other commissions now sitting in Caracas.<sup>1</sup>

If the pending suit of Selwyn in the local courts is based upon the contract, then, as it appears later in the opinion of the umpire, this claim is fundamentally different from the pending action, and hence from the sole objection that his action is so pending the question of jurisdiction can not be successfully interposed, even if the umpire considered, as he does not, that if the pending action and the claim were alike objection No. 1 must be sustained.

For the reasons above given it is the opinion of the umpire that objection No. 1 can not be sustained.

Concerning the next objection, the umpire bases his decision upon the ground that the claim before him has in no particular to deal with "any doubts and controversies \* \* \* regarding the spirit or execution of" the contract in which such terms appear. His reasons therefor will appear in his statement concerning preliminary objection No. 3.

The fundamental ground of this claim as presented is that the claimant was deprived of valuable rights, of moneys, properties, property, and rights of property by an act of the Government which he was powerless to prevent and for which he claims reimbursement. This act of the Government may have proceeded from the highest reasons of public policy and with the largest regard for the State and its interests; but when from the necessity or policy of the Government it appropriates or destroys the property or property rights of an alien it is held to make full and adequate recompense therefor.

<sup>1</sup> Rudloff case, *supra*, p. 254.

Pradier-Fodéré (sec. 402) says:

It is the duty of every state to protect its citizens abroad \* \* \*. It owes them this protection when the foreign state has proceeded against them in violation of principles of international law — if, for example, a foreign state has despoiled them of their property.

Vattel says:

Whoever uses a citizen ill indirectly offends the state, which is bound to protect the citizen, and the sovereign of the latter should avenge his wrongs, punish the aggressor, and, if possible, oblige him to make full reparation; since otherwise the citizen would not obtain the great end of the civil association, which is safety. \* \* \* But if a nation or its chief approves and ratifies the act of the individual, it then becomes a public concern, and the injured party is to consider the nation as the real author of the injury. (Book 2, ch. 6, secs. 72 and 74.)

Halleck-says:

There can be no doubt with respect to its [the state's] responsibility for the acts of its rulers, whether they belong to the executive, legislative, or judicial department of the Government, so far as the acts are done in their official capacity. (*International Law*, 3rd ed., Vol. I, Chap. XIII, p. 442.)

How much of the claim comes under this head it is not necessary to consider. The question of jurisdiction is determined if in any part the case falls within this class. The umpire has above stated that such is the fundamental feature of this claim, and hence that it is not a matter of contract, and is open to neither of the last two objections of Venezuela.

Holding thus, it does not become necessary, and it is therefore inexpedient, to pass upon the contention of the respondent Government that the protocol does not include matters of contract.

As stated at the outset of this opinion, the umpire does not herein pass at all upon the merits of the claimant's case, but only upon the jurisdictional question, assuming, as he must for such purpose, that the facts are as stated in the reclamation. What in truth the facts are remains to be determined upon the full proofs, which are in no sense prejudiced or predetermined by this opinion. That they may be ascertained and settled by this Commission in equity and justice, the umpire returns the case to the Commissioners for their consideration and action.

#### ADDITIONAL AUTHORITIES FURNISHED BY UMPIRE PLUMLEY

(1) Wharton, vol. 2, sec. 238, p. 671: The defense of *res adjudicata* does not apply to cases where the judgment set up is in violation of international law.

(2) Wharton, vol. 3, sec. 329*a*, p. 198 (prize courts): The prevalent opinion now is, that in international controversies a sovereign can no more protect himself by a decision in his favor by courts established by him, even though they be prize courts, than he can by the action of any other department of his government.

(3) Wharton, vol. 2, sec. 238, p. 670: A suit brought in Honduras courts by a citizen of the United States to recover estates in Honduras must be left to the determination of the courts in which it is brought, unless a positive denial of justice be shown. (Mr. Frelinghuysen, Sec. of State, to Mr. Hall, June 18, 1882.)

(4) Wharton, vol. 2, sec. 242, p. 697 (case of *Wheelock v. Venezuela*): A foreigner's right to ask and receive the protection of his government does not depend upon the local law, but upon the law of his own country. \* \* \*

(5) Wharton, vol. 2, sec. 238, p. 670: A collusive or irregular judgment by a foreign court is no bar to diplomatic proceedings by the sovereign of the plaintiff against the sovereign of the court rendering the judgment. (Mr. Evarts, Sec. of State, to Mr. Foster, Apr. 19, 1879.)

(6) Wharton, vol. 2, sec. 238, p. 679: A claimant in a foreign state is not required to exhaust justice in such state when there is there no justice to exhaust. (Mr. Fish, Sec. of State, to Mr. Pile, May 8, 1872. MSS. Inst. Vene.)

(7) 13 Howard, 115 (*Mitchell v. Harmony*): Private property may be taken by a military commander for public use, in cases of necessity, or to prevent it from falling into the hands of the enemy, but the necessity must be urgent, such as will admit of no delay, or the danger must be immediate and impending. But in such cases the Government is bound to make full compensation to the owner.

(8) 13 Wall., 623 (see Wharton, vol. 3, sec. 328, p. 247): Where private property is impressed into public use during an emergency, such as a war, a contract is implied on the part of the government to make compensation to the owner.

(9) Wharton, vol. 2, sec. 248, p. 710: If the nation disposes of the possessions of an individual the alienation will be valid for the same reason; but justice demands that the individual, be recompensed out of the public money. (Vattel, Book 1, Ch. 22, sec. 244.)

(10) Moore, 3720-3721 (*Elliott's case*; Lieber, umpire): It was held that General Corona had undoubtedly a right to appropriate Elliott's property if necessary for defense or to devastate it, if the war required it, but the Government must pay.

(11) Wharton, vol. 2, sec. 248, p. 711 (*Meade case*): On these facts the following conclusions were reached by the Court of Claims:

\* \* \* \* \*

A debt due to an American citizen from a foreign government is as much property as houses and lands, and when taken for public use is to be paid in the same manner.

The cases hereinbefore quoted and referred to were considered by the umpire in making up his decision in this case, and are submitted to be incorporated into said opinion as authorities in support of the same. Nos. 1, 2, 3, 4, 5, and 6 go to sustain the position of the umpire as to objection No. 1. Nos. 7, 8, 9, 10, and 11, his position as to objections Nos. 2 and 3.

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#### STEVENSON CASE

An international claim is not barred by prescription when it appears that there has been no laches on the part of claimant or his government in its presentation for payment.

#### PLUMLEY, *Umpire*:

This case came to the umpire solely on the preliminary objection of the honorable Commissioner for Venezuela that it was barred by limitation. The history of the case discloses that it was presented to the British Mixed Commission sitting at Caracas in 1869; that the Venezuelan Commissioner refused to consider the case in the ground that the proofs were formalized posterior to the date of the convention for the settlement of pending claims. It resulted that this, with several other cases similarly objected to, was withdrawn on the part of Her Majesty's Government, with the express reservation that such withdrawal was to be without prejudice to the claims.

Reference is made to this claim by Her Majesty's minister resident at Caracas in a letter dated at Caracas, April 25, 1872, and addressed to the claimant at Trinidad, in which, after stating the course of the claim before the Commission, this statement appears:

and that since the Venezuelan Government have declared that owing to civil warfare they can not attend to the arrangement or payment of foreign claims.

There is further reference to this claim by the British foreign office May 28, 1888, in a letter addressed to Mrs. Julia Stevenson, of Trinidad, widow of the late claimant, answering what is termed therein as her petition in regard to this claim, of date the 26th of April, 1888, and this extract is taken from such answer:

I am to inform you that since the withdrawal of this claim from the Mixed Commission of 1869 it has, together with many others, been classed as unrecognized by the Government of Venezuela. These "unrecognized" claims have not been lost sight of by Her Majesty's Government, but it is clear there is no chance of payment of any individual claim being made unless by a general settlement of all, and of this there is at present no prospect. Under these circumstances his lordship regrets that he is unable to hold out any hope of an early settlement.

It appears from the facts gathered with reference to the presentation before the Mixed Commission of 1869 and from the letters from which extracts have been quoted that the Venezuelan Government was in 1869, if not before, fully advised of the existence of this claim and of the details of which it was composed; that the Venezuelan Government had been addressed upon the subject of this claim since the withdrawal from the Mixed Commission, and had announced to the representative of the British Government that, owing to civil warfare, they could not attend to the arrangement or payment of it. By reference to the communication of May 28, 1888, it is learned that, some time subsequent to the communication of 1872 and the date of this last-named letter, this case had been brought up before the Venezuelan Government, and it was found placed among their list of "unrecognized" claims. It is also learned from this later communication that Her Majesty's Government was keeping track of this claim with others of its class and was simply waiting for such time as there could be made a general settlement of all such claims. Pursuant to that purpose, the British Government has taken advantage of this its first opportunity, and has presented the claim agreeably to its plan and its assurance to the claimant's widow.

It also appears that both of these communications were in reply to letters of inquiry or of petition, first from the claimant himself and lastly from his widow.

From this statement of the case as it appears before this Commission there can be claimed with right no laches on the part of either the British Government or of the claimant or his estate.

When a claim is internationally presented for the first time after a long lapse of time, there arise both a presumption and a fact. The presumption, more or less strong according to the attending circumstances, is that there is some lack of honesty in the claim, either that there was never a basis for it or that it has been paid. The fact is that by the delay in making the claim the opposing party — in this case the Government — is prevented from accumulating the evidence on its part which would oppose the claim, and on this fact arises another presumption that it could have been adduced. In such a case the delay of the claimant, if it did not establish the presumption just referred to, would work injustice and inequity in its relation to the respondent Government.

This case presents neither of these features. When first produced before the Mixed Commission of 1869, the claim for \$ 13,277.60 for injuries to the Río de Oro estate was alleged to be of date February, 1859, as was also the claim for \$ 77,645 on account of the La Corona, Mapirito, and San Jaime estate. The claim of the Bucural estate for \$ 43,660.80 was laid as happening in 1863, and the claim of the San Jacinto estate for \$ 1,260 was laid in 1869, March 6. So that the earliest claim was about ten years old, the next in order only six years, while the last claim was so late as to have been in fact subsequent to the

convention establishing that Commission. Here was placed before the Government a careful list, in number and character, of the losses suffered, and the different estates on which each separate claim rested, with the dates on which the different claims arose. This gave the respondent Government an opportunity to acquaint itself with the facts and to obtain counterproofs if found available or important. Since the withdrawal of this claim from the Mixed Commission of 1869 there can be no just allegation of laches properly chargeable to either the claimant or the claimant Government. The delay has been either in the inability or the unwillingness of Venezuela to respond to this claim. The occasion of this unwillingness and the reasons why it was placed on the list of "unrecognized" claims are properly matters for proof and consideration before this Commission, but it would be evident injustice to refuse the claimant a hearing when the delay was apparently occasioned by the respondent Government.

The umpire holds, therefore, that the case is properly before this Mixed Commission to be considered on its merits, and it is returned to the Commission for that purpose.

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#### TOPAZE CASE

Award of £ 20 each for officers and £ 10 each for seamen for one day's imprisonment held not excessive

PLUMLEY, *Umpire*:

The *Topaze*, a British steamship, was at Puerto Cabello on the 9th of December, 1902, shortly after the establishment of the British Pacific blockade. At 8 p. m. the captain and crew were taken from the ship by an armed guard to the custom-house without opportunity to put on reasonable clothing or to lock up their berths, and at 10 p. m. they were taken under armed guard and imprisoned in a small and badly ventilated cell, and were compelled to sleep on the stone floor. There were 10 officers and a crew of 20. They were thus confined until 10.30 at night of the next day, and, owing to the bad smells and want of ventilation, many of the crew were ill. No food was provided, and what they had was sent in by friends. They were taken back to their ship under an armed guard, and while absent various articles belonging to the crew were stolen. These facts are taken from the memorial in this cause, and there are no contradictory facts alleged by Venezuela.

Upon these uncontested facts the umpire was requested by the honorable Commissioner for Venezuela to express his unofficial opinion upon the question whether a demand by the British Government for £ 20 each on behalf of officers of the ship and for £ 10 each for the crew in the case as made is an excessive amount.

While it did not seem to the umpire at the time of the inquiry that it was in excess of the ordinary demand in such cases, he thought it important and wise that his answer should be given after reflection and upon some basis of action resting upon similar cases before commissions and the accompanying decisions. Following out that thought, he has made some investigation, and now brings forward the result for the use of the honorable Commissioner for Venezuela.

The umpire has had recourse to Moore on International Arbitrations, and the cases to be given are taken from the different volumes of that work.

(1) H. R. Smith (p. 3310): This was an arrest during the American civil war for treason. He was held fourteen weeks, or ninety-eight days, and before the British-American Commission was unanimously allowed \$ 1,540, which is an average of a little less than \$ 16 a day.



(2) Williams (p. 3119): Mexican Commission. Imprisoned twenty-five days. Allowed \$ 600, or \$ 24 a day.

(3) In the case of Parr (p. 3302), before the British - American Commission, it was held that his original arrest and a reasonable detention were lawful, but a detention of four months was not justified. He was unanimously given \$ 4,800, or \$ 40 a day.

(4) Ashton (p. 3288): Arrested and detained ninety-three days. Discharged without trial. Allowed by the same Commission \$ 6,000, an average of about \$ 65 a day.

(5) Julius Le More (p. 3311): Arrested by General Butler, while in command at New Orleans, on charge of aiding the enemy. Held forty-three days in custom-house. No claim of bad treatment. Was allowed by the commission \$ 4,000, or a little over \$ 93 a day.

(6) Crowther (p. 3304): Arrested in Baltimore. Brought before the provost marshal on charge of using seditious language during the civil war. Was held by the provost-marshal eight hours in a hotel. He claimed before the commission to have been talked to in an insulting manner personally and concerning his Government by the provost-marshal. Allowed \$ 100.

(7) Montejo (p. 3277): Arrested and detained thirty-nine days. Allowed \$ 3,900, or \$ 100 a day.

(8) Rozas (p. 3124): Arrested and detained one hundred and forty days. Allowed by commission \$ 14,000, or \$ 100 a day.

(9) Powers (p. 3274): Arrested and detained forty days. Allowed by commission \$ 4,000, or \$ 100 a day.

(10) Edwards (p. 3268): Arrested. Detained forty-six days and discharged without hearing. Allowed \$ 5,000, or almost \$ 109 a day.

(11) McKeown (p. 3311): Arrested by commanding officer for disloyal and seditious language. Held thirteen days. Alleged improper treatment by commanding officer while in detention. Was discharged without a hearing, and was unanimously allowed by the British - American Commission \$ 1,467, or about \$ 113 a day.

(12) Cauty (p. 3309): Arrested for violating neutrality laws. Charge not sustained, and he was not tried. Held seventy days with no allegation of bad treatment. Allowed \$ 15,700, or about \$ 224 a day.

(13) Le More (p. 3311): Arrested by General Butler, while in command at New Orleans, on the charge of aiding the enemy. For eleven days he was in prison and obliged to wear a 32-pound cannon ball and 6 pounds of chain; and for thirty-two days following he was detained in the custom-house, making in all forty-three days. Was allowed by commission \$ 10,000, or \$ 232.50 a day.

(14) Montgomery (p. 3272): Arrested. Detained four days. Allowed \$ 1,000, or \$ 250 a day.

(15) Patrick (p. 3287): Arrested on false information. Held thirteen days. Allowed by commission \$ 5,160, or about \$ 397 a day.

(16) Monroe (p. 3300): Detained two days on board steamer and twelve hours in military prison. While he was in the prison his trunk on board ship was broken open, and money, wearing apparel, and other articles were stolen from it. Unanimously allowed by commission \$ 1,540 for two and one-half days, or \$ 616 a day.

(17) Sartori (p. 3120): Detained in fact four months, but it was held by the umpire that all but two days of that time was under circumstances permitting a detention. For the two days of unjustifiable detention the umpire allowed \$ 5,000, or \$ 2,500 a day.

(18) Forwood (p. 3307): Arrested in New York upon suspicions that he was aiding the enemy in the American civil war, and without any justifiable fact he was held in the office of the chief of police of New York city four hours. He was allowed by the British - American Commission \$ 25,000.

We have here eighteen cases, <sup>1</sup> in every one of which there was a claim more or less well founded that the person arrested was guilty of an offense justifying

<sup>1</sup> For additional like cases see Italian - Venezuelan Commission (Note to Giacomini Case) in Volume X of these *Reports*.

the arrest, and in each case it turned out that the cause was not sufficient in proof to require a hearing. The persons thus arrested were men of more or less substance and character, but none, exclusive of those receiving the two high sums awarded, occupied any particular official rank or position, and the awards in each case meant substantially the measure in the given case of the value set on individual liberty and the indignity to that personal liberty by an unauthorized and unlawful arrest and detention. Excluding the two large sums as not being of particular value in this inquiry and taking the sixteen cases remaining, we find that the average sum allowed is a little over \$ 161 a day. Out of the sixteen cases there are four for sums less than \$ 100 a day. There are six at \$ 100 a day, or approximately that sum, and there are five for more than \$ 200. Judged by this analysis of the opinions of other arbitral tribunals, the sum of \$ 100 seems to be the one most usually acceptable, while a sum less than \$ 100 is quite in the minority.

The purpose of the umpire has been to obtain as nearly as might be the average judgment of arbitral commissions on matters of import similar to the one in question, and aside from that criterion the cases were taken substantially in the order in which they appeared in the work cited, and hence are worthy of reliance as expressing the common finding upon this question by several different commissions.

It will be noted that in the case in hand there was no claim that the parties arrested and detained had themselves committed any offense or done any wrong against the Government of Venezuela, which is a proper feature to consider in estimating the indignity of arrest and detention to the individual and the complaining government.

The umpire believes, therefore, that he can properly advise, unofficially, the honorable Commissioner for Venezuela that a sum not exceeding \$ 100 a day is not an excessive demand, but approaches the minimum sum rather than the maximum allowed in cases for illegal arrest and detention, and is apparently the favored allowance by arbitrators.

## OPINIONS ON MERITS

### COMPAGNIE GÉNÉRALE DES ASPHALTES DE FRANCE CASE

- A Venezuelan consul resident abroad has no right to demand of the captain of a vessel that he procure passports as a condition precedent to the clearing of his ship, and no Venezuelan law on this subject can possibly affect the case, which is governed by international law.
- A Venezuelan consul who assumes to collect customs duties at Trinidad on goods to be entered at Venezuelan ports commits an act of Venezuelan sovereignty on British soil, which is an offense to the latter Government.
- The refusal of the Venezuelan consul to clear a vessel for Venezuela, on the ground that because of complaints made of him to the colonial authorities at Trinidad his Government had refused him permission to make such clearances, is unlawful, because it is an act which not even a sovereign could perform for such a cause.
- Ports in the hands of revolutionists can not be closed by governmental order or decree.<sup>1</sup>
- Blockade of such ports can only be declared to the extent that the government declaring it has the naval power to make it effective.
- Governments are alike responsible for the acts of their agents, whether such acts be directed or only ratified by silence or acquiescence.
- Expenses of translations in preparation of claim allowed.

<sup>1</sup> See Italian - Venezuelan Commission (De Caso Case and Martini Case) in Volume X of these *Reports*.

PLUMLEY. *Umpire*:

The commissioners failing to agree on this claim it came to the umpire for his consideration and decision thereon.

The claimant is an English company, incorporated under the companies acts, having its office at 19 Coleman street, London, E. C., and owning a mining concession which it purchased at Guanipa, in the State of Sucre, Venezuela, upon which it commenced operations in March, 1902, the product being asphaltum or bitumen. In the prosecution of its work of mining it was obliged to depend solely for its laborers and food therefor upon importations from Trinidad, which laborers and food were sent to Guanipa from Port of Spain in sailing craft chartered by the company.

April 15, 1902, the company's attorney at Trinidad applied to the Venezuelan consul at Port of Spain to clear one of the company's sailing craft with a supply of food for the laborers at its mining concession, the goods to be shipped to Guanipa. This such consul refused to do unless he was then and there paid the full duties chargeable in Venezuela on such goods imported into that country, and also the sum of \$ 20 for passports which had been on a previous occasion required by such consul to be issued to certain of the company's laborers. Under the compulsion of necessity, in order to prevent suffering among these laborers, and under a protest, the company's attorney paid to the consul the full amount of such duties, and also the required sum of \$ 20 for the passports.

June 12, 1902, an agent of the company, a merchant of Port of Spain, asked such consul to clear the company's chartered vessel, the British cutter *Euterpe*, bound for Pedernales, in Venezuela. This the consul refused to do unless paid in advance the import duty payable in Venezuela and \$ 20 for passports for persons then taking passage, as required in the previous instance. Again, under the compulsion of urgent necessity, the agent paid such consul said sum of \$ 20 for passports and the full sum of said import duties, paying the duties on the ship's stores only, as she was leaving in ballast.

June 30, 1902, said agent again applied to such consul for a similar clearance, and it was granted under and upon the same conditions (except as to passports) as last previously mentioned and upon the payment of the full import duty payable in Venezuela.

On and after the 10th day of July, 1902, such consul refused to clear any vessel at all on behalf of this company, stating as his reason therefor that the company had made complaint to the colonial authorities at Trinidad of his previous action, as above stated, and that the permit enabling him to clear vessels for the mining companies had been withdrawn.

As a result of this refusal the company was unable to make use of its schooner *Euterpe*, lost three months of the charter, and was forced to maintain the crew while the ship was idle. It was also prevented from sending food and supplies to the mines, and the employees at that place, being in the verge of starvation, were compelled to leave their employment and go to Trinidad in open boats, and all mining operations of this company ceased.

It appears in the case that throughout the period from July 10 and afterwards other vessels were cleared by such consul for other mining companies in Venezuela.

The total claim, including cost of preparing the same, is £ 240 18s. 5d.

It also appears in the case that the ports of Pedernales and Guiria were during a part of the time covered by this complaint, if not during all of such time, in the hands of the revolutionists, and the country around about was also in their hands; and the fact that the port of Pedernales was understood by the consul to be in the hands of revolutionists at the time he was applied to, just previous

to the 15th of April, 1902, to clear the boat, was given by him as a reason why he was unable to dispatch the boat, since that was a port where this particular boat would call to pay the customs duties; but he, on being assured that the revolutionists had left Pedernales for Maturín on the 4th of that month, promised to dispatch the boat whenever the agent of the company was ready; but it was following this statement by the consul that the necessary papers were presented to him by the company's agent, and he declined to grant the clearance unless the sum of \$ 20 for passports, issued on a previous occasion, was then paid him, and it was immediately following the payment of the \$ 20 that the consul then declined to issue the clearance unless the full customs duties, which should be collected at a Venezuelan port, were paid to him in Trinidad in advance. Offers were then made by the agent of the claimant company several times, on the 14th and 15th of that month, to leave the amount on deposit with the consul, with the understanding that if the revolutionists collected anything on account of duties such payment was to be deducted from the amount so placed on deposit; but to this the consul would not consent.

It also appears, from the examination of the blue book, whenever a cargo was taken it had to go to the port of Guiria, as the boat could only enter the port of Pedernales when in ballast; that the proposition to go to Pedernales was on the occasion when the company's boat went in ballast, and because Guiria was at the time in the hands of the revolutionists. For the latter reason the consul refused to make out a clearance for Guiria, and the suggestion of Pedernales was made by the claimant's agent because of such refusal; and the reason the consul gave for demanding the duties at Trinidad was that he was afraid their boat might come across revolutionists, who would collect them. It also appears that the consul on one of these occasions required the agent of the claimant company to make out his papers in blank with permission to the consul to fill in the destination, and that the consul filled in the name of Guanipa, which was, in fact, a virgin forest, having no settlement excepting that of the claimant company, and having no Venezuelan representative there, and although the consul wrote in the papers the name of the commandant of Guanipa, there was no such person there and no government official of any kind.

It also appears, as early as April 23, 1902, that the colonial secretary, by order of the British governor at Trinidad, advised the consul that in demanding customs duties payable on the cargo of such vessels to the Government of Venezuela he had exceeded his powers and had assumed the right to commit an act of Venezuelan sovereignty on British territory.

It further appears that, in connection with refusing the dispatch unless the import duties were payable in advance, it was threatened that unless so paid the vessels would be destroyed as soon as they reached Venezuelan waters by the Venezuelan ship of war then in the harbor of Trinidad. It is also understood to be historic that on June 28, 1902, navigation of the Orinoco was prohibited by presidential decree, and in the same decree the extent of its coast line which embraced its mouth was declared blockaded, and the ports of Guiria, Caño Colorado, and La Vela de Coro were declared closed to navigation.

The honorable commissioner for Venezuela denies pecuniary losses to the company, since the duties were not in fact collected in Venezuela; insists that the refusal of clearance for Guanipa and the demand for passports were lawful, and that in nothing has the company suffered losses or made payment whereby it has a rightful claim against the Government.

The learned agent for the claimant Government does not press the repayment of the sum of \$ 20 for passports paid April 15, 1902, and hence this part of the claim is not entertained by the umpire.

The question of passports as presented is not that the captain of the *Eulerpe*

asked for them or for their extension on June 12, in which case there would be no question that the consul should receive a proper fee therefor, but the claim is that the consul made the issuing of passports for that occasion and the payment of his fees therefor one of the conditions precedent to his clearance of the boat, and that this requirement it was unlawful for him to make; that such demand was in violation of international agreement and the general laws and principles of commerce, and hence was in fact an illegal extortion of money for which a right of recovery exists.

Concerning passports the umpire understands the law to be that the Venezuelan consul resident at Trinidad has not the authority to issue them to a British subject, and can only countersign them *if requested* so to do; that it was wholly in the right of the captain of the *Euterpe* to sail for any port in Venezuela without having the passports of his passengers countersigned by the Venezuelan consul at Trinidad; that the matter of passports had nothing to do with the clearance of the *Euterpe*, and that it was error for the Venezuelan consul to insist upon their being a condition precedent to such clearance. No law of Venezuela, were there such, could change this right, which does not come from national but from international law. A Venezuelan law, as the umpire understands it, is limited in its application to Venezuelans. This holding as to passports seems to be in conformity with the Venezuelan law published in the Official Gazette at Caracas Monday, June 19, 1899.

To assume to collect in Trinidad import duties on goods to be entered at Venezuelan ports was an act of Venezuelan sovereignty on British soil. It was wholly without right and directly against the right of sovereignty which inhered in the British Government only. It could not be countenanced or permitted by and was a just cause of offense to that Government.

To take the other step and make the payment of these duties on British soil a condition precedent to the clearance by the Venezuelan consul of a British ship bound for a Venezuelan port was a most serious error on the part of such consul.

As between nations, the proprietary character of the possession enjoyed by a State is logically a necessary consequence of the undisputed facts that a State community has a right to the exclusive use and disposal of its territory as against other States, and that in international law the State is the only recognized legal person. (Hall's International Law, p. 48.)

Consular jurisdiction depends on the general law of nations, existing treaties between the two Governments affected by it, and upon the obligatory force and activity of the rule of reciprocity. \* \* \* (Wharton, vol. 1, sec. 124, p. 797.)

A consul of the United States in a foreign port has no power to retain the papers of vessels which he may suspect are destined for the slave trade. (Wharton, vol. 1, sec. 124, p. 798, citing 9 Op. Attys. Gen., p. 426.)

The act of the Haitian legislature referred to can not be regarded as in conformity with that stipulation. It authorizes the consuls of that Republic to charge exorbitant fees on exportations from the United States; among others, 1 per cent on the value of cargo of the vessel. This, besides being illiberal in its character, is tantamount to an export duty, acquiescence in which by this Government would be a concession to that of Haiti of an authority in ports of the United States which has not been conferred on this Government by the Constitution. (Wharton, vol. 1, sec. 37, p. 143.)

In that reply the Haitian minister was informed, with respect to that portion of his note which related to the authentication by the consular officers of Haiti in this country of the invoices of the cargoes of vessels bound to the ports of that country, that the charge of 1 per cent on values for that proceeding is, after the most deliberate consideration, believed to be unduly exorbitant and tantamount to an export tax, which it does not comport with the dignity of this Government to allow to be exacted by any foreign authority within the jurisdiction of the United States.

\* \* \* \* \*

The Government of the United States being by its Constitution expressly prohibited from levying an export tax, it can not allow any foreign power to exercise here in substance or in form a right of sovereignty denied to itself.

No denial was made of the right of the Haitian Government at its discretion, so far as this may not have been limited by treaty, to impose duties on the cargoes of vessels from this country arriving in Haitian ports, but it was complained most positively that the present grievance of a consular fee of this character exacted in our ports is in its form derogatory to the sovereignty of the United States and that this character was not removed from it by the Haitian citation of the axioms of political economy that all duties are ultimately paid by the consumer. (Wharton, vol. 1, sec. 37, p. 144.)

[The charge of] 40 cents a head on cattle exported from Key West to Cuba is held by the Government of the United States to be a restriction on commerce of the United States and a burden onerous on American citizens engaged in American commerce, and must have the effect of excluding them finally from the Spanish colonial markets. It is a charge, moreover, upon whatever ground it may be placed, that is in itself anomalous. (Summary from Wharton, vol. 1, sec. 37, pp. 147-148.)

Our complaint is that as our commercial intercourse with Spain is mainly with her possessions in this hemisphere, exorbitant consular charges on United States vessels and their cargoes bound to such ports are virtually an export tax, which assuredly no foreign government can be allowed to exact in our ports, especially as such a power has not been granted to this Government. (Summary from Wharton, vol. 1, sec. 37, p. 156.)

There is but one way in which the proposal to collect 10 cents per ton of cargo from the vessels of the United States in Spanish ports could be regarded as defensible under international law, and that is by abandoning altogether the sophistical contention that it is a consular fee and collecting it as a distinct import tax *levied in Spanish ports* in addition to customs and other import dues prescribed by existing law. If *so levied* and collected on all foreign cargoes *brought within Spanish jurisdiction* without distinction of flag, this Government could not controvert the perfect right of Spain to adopt such a measure, but it could not look with equanimity on any partial measure the practical result of which would be the imposition of a discriminating duty of 10 cents per ton against the cargoes of vessels going from the United States to ports of Spain. (Wharton, vol. 1, sec. 37, p. 156.)

It does not appear to this Government a sufficient or just reparation for a wrongful act admittedly perpetrated by the Spanish officers of the consulate at Key West since 1876 to give orders that hereafter the wrongful tax shall not be collected. The case is conceived to be one where no less a reparation than the return of the illegally collected excess could satisfy either the right pertaining to the United States or the high sense of justice of Spain. It will doubtless be enough for you to call the attention of the minister of state to this point to insure the cheerful correction of the oversight and a prompt offer to refund the overcharge in question. (Wharton, vol. 1, sec. 37, p. 158, quoting Mr. John Davis, Sec. of State, June 23, 1883, to Mr. Foster.)

It is not material to the determination of the two preceding questions to discuss here other points which might be regarded as involved. So far as they have juridical value they will be treated inferentially at least in disposing of the questions next to be considered.

It was not in accordance with commercial usage, international law, or treaty agreement between the British Government and the Venezuelan Government that the Venezuelan consul should refuse clearance to the British ship *Euterpe* for Venezuelan ports because the asphalt company had complained to the colonial authorities of his previous acts. It is true he claimed that because of such complaints his Government had refused him permission to make such clearances. This, if true, would not aid the refusal, because it is an act which even a sovereign power could not rightfully perform for such a cause. But the umpire acquits Venezuela of any such charge. The consul must have misinterpreted his instructions in that regard. To destroy the established and

important business of several companies established under the concessions and with the direct approval of the Government, to imperil the lives of a large number of laborers for such a frivolous reason might seem possible to the consul, but it is without the comprehension of the umpire, and he is confident no such order based upon such a reason ever issued from the hands of the Venezuelan Government.

You will state that this Government does not question the right of every nation to prescribe the conditions on which the vessels of other nations may be admitted into her ports; that, nevertheless, those conditions ought not to conflict with the received usages which regulate the commercial intercourse between civilized nations; that those usages are well known and long established, and no nation can disregard them without giving just cause of complaint to all other nations whose interests would be affected by their violation; that the circumstance of an officer of a vessel having published in his own country matters offensive to a foreign government does not, according to those usages, furnish a sufficient cause for excluding such vessel from the ports of the latter \* \* \*. (Wharton, vol. 1, sec. 37, p. 140. quoting Mr. Conrad, Acting Sec. of State, to Mr. Barringer, Oct. 28, 1852.)

An arbitrary refusal of the Spanish consul at New York to authenticate the signature of the Secretary of State, "an act appropriately belonging to the consular functions," on the ground that "he or his Government had conceived some displeasure toward the persons who have executed some of the papers accompanying the signature of the Secretary," is in contravention of international law and practice. (Wharton, vol. 1, sec. 123, p. 792, quoting Mr. Marcy, Sec. of State, to Mr. Magallon, Jan. 19, 1854.)

There shall be between all the territories of His Britannic Majesty in Europe and the territories of Colombia a reciprocal freedom of commerce. The subjects and citizens of the two countries, respectively, shall have liberty freely and securely to come with their ships and cargoes to all such places, ports, and rivers, in the territories aforesaid, to which other foreigners are or may be permitted to come, to enter into the same, and to remain and reside in any part of the said territories, respectively; also to hire and occupy house and warehouse for the purposes of their commerce, and, generally, the merchants and traders of each nation, respectively, shall enjoy the most complete protection and security for their commerce; subject always to the laws and statutes of the two countries, respectively. (Treaty of Apr. 18, 1825, between the Government of Great Britain and State of Colombia, ratified and confirmed by the Government of Venezuela, Oct. 29, 1834, Art. II.)

Indeed, the honorable Commissioner for Venezuela carefully avoids making any allusion to this statement of the consul and rests his opinion upon the other branch of the consul's contention, namely, that his action was founded on the fact that the port of Guiria was occupied by the rebels, stating that the consul "is forbidden to communicate with authorities imposed by the revolution." Such being the case, the consul must obey. It is also true that on June 28 the National Executive had declared all of these ports closed.

However important it was to Venezuela in its fight for the integrity of its Government to close these ports, it is historic that it was unable physically to establish an effective blockade of any of the ports in question. To close ports which are in the hands of revolutionists by governmental decree or order is impossible under international law. It may in a proper way and under proper circumstances and conditions in time of peace declare what of its ports shall be open and what of them shall be closed. But when these ports or any of them are in the hands of foreign belligerents or of insurgents, it has no power to close or to open them, for the palpable reason that it is no longer in control of them. It has then the right of blockade alone, which can only be declared to the extent that it has the naval power to make it effective in fact.<sup>1</sup>

<sup>1</sup> See the Italian - Venezuelan Mixed Claims Commission (De Caro Case, and Martini Case, in Volume X of these *Reports*.)

There is, however, one form of closure which states are not free to adopt. In case they are attempting to put down a domestic revolt, they can not shut up ports in possession of the insurgents by merely declaring them no longer open to trade. Great Britain maintained this position successfully in 1861 against both New Granada and the United States. The Government of each of these countries claimed a right to close, by municipal regulation and not by blockade, certain ports held by revolted citizens. The discussion which followed made it quite clear that such a claim can not be sustained. A state is free to exclude both foreign and domestic vessels from any harbor over which it actually exercises the powers of sovereignty. But when its authority is at an end, owing to insurrection or belligerent occupation by a hostile force, it must fall back upon warlike measures; and the only warlike measure which will lawfully close a port against neutral commerce is an effective blockade (Lawrence, p. 584. Also cites Wharton, *International Law Digest*, secs. 359, 361. Glass, *Marine International Law*, pp. 105-107. Also see Hall, p. 727, where there is a note treating at length on this subject.)

It is noticed that the Venezuelan minister for foreign affairs lays much stress upon the fact that the consul of that Government at Trinidad warned some of the steamers not to repair to ports which were in possession of the insurgents, and claims that by going thither, despite the warning, they violated the law, and, therefore, that the Venezuelan Government is exonerated from accountability. Such an act, if it have any force, is obviously tantamount to blockade by proclamation only, an expedient which it might have been hoped was long since as obsolete as it is contrary to the law of nations. (U. S. - Vene. Claims Com., Convention of 1892, p. 454, J. C. B. Davis, Acting Sec. of State.)

The consul's warning and his threat of confiscation were alike unlawful. The danger of giving such warnings, if they are acted upon by the parties warned, is illustrated in the award that was rendered unanimously by the British - American Commission against the United States (United States Commissioner Fraser delivering the opinion) on account of a warning given by an officer of the United States Navy (Edward C. Potter) to a British vessel not to enter the port of Savannah after he had prevented her from entering the port of Charleston, when in fact no effective blockade was then established against Savannah. (See Vol. VI, Papers relating to the Treaty of Washington, pp. 153, 252-254. U. S. - Vene. Claims Com., Convention of 1892, pp. 488-489.)

The United States adheres to the following principles:

\* \* \* \* \*

Third. Blockades, in order to be binding, must be effective. (Mr. Seward, Sec. of State, to Mr. Jones, Aug. 12, 1861; Wharton, vol. 3, sec. 342, p. 280.)

The mandate of the Mexican Government was obviously tantamount to a blockade by notification merely, the illegality of which has invariably been asserted by the United States, and has been agreed to by Mexico in the treaty. (Wharton, vol. 3, sec. 361, p. 372. Mr. Forsyth, Sec. of State, to Mr. Monasterio, May 18, 1837, MSS., Mex.)

(England took the same position toward Brazil in 1827. Wharton, vol. 3, sec. 361, p. 372.)

It may be admitted that neither France nor the United States has acknowledged the legality of the blockade of an extensive coast by proclamation only, and without force to carry the same into effect. (Wharton, vol. 3, sec. 361, p. 372. Mr. Webster, Sec. of State, to Mr. Sartiges, June 3, 1852, MSS., France.)

Thus it has ever been maintained by the United States that a proclamation or ideal blockade of an extensive coast, not supported by the actual presence of a naval power competent to enforce its simultaneous, constant, and effective operation on every point of such coast, is illegal throughout its whole extent, even for the ports which may be in actual blockade; otherwise every capture under a notified blockade would be legal, because the capture itself would be proof of the blockading force. This is, in general terms, one of the fundamental rules of the law of blockade as professed and practiced by the Government of the United States.

And if this principle is to derive strength from the enormity of consequences resulting from a contrary practice, it could not be better sustained than by the terms of the original declaration of the existing Brazilian blockade, combined with its subsequent



practical application. (Wharton, vol. 3, sec. 359, p. 353. Mr. Forbes, minister of the United States to Buenos Ayres, to Admiral Lobo, commanding the Brazilian squadron blockading Buenos Ayres, February 13, 1826. Brit. and For. St. Pap.)

Lord John Russell said, "The question is one of considerable importance. The Government of New Granada has announced, not a blockade, but that certain ports of New Granada are to be closed. The opinion of Her Majesty's Government, after taking legal advice, is that it is perfectly competent for the government of a country in a state of tranquillity to say which ports shall be open to trade and which shall be closed; but in the event of insurrection or civil war in that country it is not competent for its government to close the ports that are de facto in the hands of the insurgents, as that would be an invasion of international law with regard to blockade." (Wharton, vol. 3, sec. 359, p. 355.)

This Government, following the received tenets of international law, does 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 ports.

Mr. Lawrence thus states the rule drawn from the positions taken by the administrations of Presidents Jefferson and Madison during the struggles with France and England which grew out of the attempt to claim the right of closure as equivalent to blockade without effective action to that end: "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 limits 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." (Wharton, vol. 3, sec. 361, p. 376. Lawrence's note on Wheaton, Pt. III, ch. iii, sec. 28, 2nd annotated ed., 846.)

Professor Perels, judge of the imperial admiralty court in Berlin, in a treatise on international maritime law, published in 1882, holds that there can be "without blockade no closure of a port not in possession of the sovereign issuing the decree." (Wharton, vol. 3, sec. 361, p. 378.)

Mention is made in the memorial that throughout the same period in which the consul was refusing to clear the vessels of the claimant company he was clearing the vessels of other mining companies, subjects or citizens of certain other countries who had concessions or mining interests in Venezuela accessible through the same ports. This might be an important factor, but as the claim is determined on other grounds, it does not become necessary or wise to consider it or to pass upon it.

The umpire holds that the contentions of the claimant government concerning compulsory payment for passports and of duties and damages for detention of the *Euterpe* are well founded, and that the question of responsibility of Venezuela for the acts of their consul at Trinidad is found in the failure of the Government of Venezuela, after knowledge thereof, to make seasonable disclaimer of his acts and seasonable correction of his mistakes. If the respondent Government authorized or directed some of these acts, or only ratified them by silence and acquiescence, its responsibility is the same. In determining the issues raised in this case, especially those following June 28, 1902, the umpire is not passing, in any part, upon the propriety or wisdom of the governmental policy of Venezuela in that regard. He can readily assume that it seemed to those in power that the exigencies of the situation required drastic measures for the preservation of the national life. In such case, however, it must have been appreciated that loss would ensue and that reparation therefor must follow.

A State is responsible for, and is bound by, all acts done by its agents within the limits of their constitutional capacity or of the functions or powers intrusted to them. When the acts done are in excess of the powers of the person doing them the State is

not bound or responsible; but if they have been injurious to another State it is, of course, obliged to undo them and nullify their effects as far as possible, and, where the case is such that punishment is deserved, to punish the offending agent. It is, of course, open to a State to ratify contracts made in excess of the powers of its agents, and it is also open to it to assume responsibility for other acts done in excess of those powers. In the latter case the responsibility does not commence from the time of the ratification, but dates back to the act itself. (Hall's International Law, 4th ed., sec. 106, p. 338.)

In case of *Saml. G. Adams v. Mexico*, brig *Geo. B. Prescott*. Here the brig arrived at Tampico, Mexico, shortly after the garrison had declared for the reactionary revolution of Zuloaga, and subsequently General Garcia of the constitutional government besieged and blockaded the place, and as the brig was leaving the port after having paid all port dues he claimed her, demanding that the dues, amounting to \$ 38, should be paid to him. In consequence of the refusal of the master to comply with his demand the brig was detained for a number of days. Claim was made before the Commission for the detention, and it was allowed. (Moore's Int. Arb., 3065.)

In case of the *Galaxy*, before the United States - Mexican Commission, convention of 1839. The vessel entered the river Tabasco, in Mexico, intending to proceed up the stream to the city of that name. In consequence of "political disturbances" she was not permitted to do so. The captain and his ship were kept at the mouth of the river from January 1, 1830, till the 5th of February following, by order of the military commandant of the city of Tabasco, "in consequence of political dissension in which the said commandant was engaged with the commandant of the principal bar." The umpire and commissioners joined in allowing for the detention of the vessel and for the detention of the captain. (Moore, 3265.)

In case of the *Only Son*. Mr. Bates, umpire of the mixed commission under the convention between the United States and Great Britain of 1853, awarded \$ 1,000 to the owners of the schooner *Only Son* for the wrongful action of the collector of customs at Halifax, Nova Scotia, in compelling the master of the schooner, whose intention was merely to report for a market and proceed elsewhere if circumstances rendered it advisable, to enter his vessel and pay duty on his cargo. The amount allowed was about the amount of the duties paid. In the diplomatic correspondence which preceded the British Government acknowledged its liability to pay any loss sustained by reason of the act of the collector, but claimed that no loss was suffered. (Moore, 3404-3405.)

In the case of the *William Lee*, whaling ship, detained three months by the captain of the port, who refused to give him a clearance. During its detention ship was damaged so that \$ 4,000 was required to repair, and the whaling season was over. The Government of Peru admitted their liability for the sum required to repair the ship, and there was added to this by the umpire \$ 1,500 for expenses during detention, and interest at the rate of 6 per cent per annum and a certain amount for demurrage, so that all amounted to \$ 22,000. (Moore, 3405-3406.)

In the case of the *Labuan*, American and British Claims Commission, treaty of May 8, 1871. On the 5th of November, 1862, ship was in New York laden with merchandise destined for Matamoras. On that day her master presented the manifest to the proper officer of the custom-house at New York for clearance, but such clearance was refused, and refusal continued up to the 13th of December, 1862, on which date it was granted. The memorial claimed that the ship was detained by reason of instructions received by the custom-house officers from the proper authorities of the United States to detain the *Labuan* in common with other vessels of great speed destined for ports in the Gulf of Mexico, to prevent the transmission of information relative to the departure or proposed departure of a military expedition fitted out by the authority of the United States. Damages were claimed in the nature of demurrage at the rate of \$ 1,000 per day, thirty-eight days. The Government of the United States claimed a right through necessary self-protection to detain the ship. The counsel for the claimant maintained that the detention of the *Labuan* was, in effect, a deprivation of the owners of the use of their property for the time of the detention for the public benefit; that it was, in effect, a taking of private property for public use, always justified by the necessity of the State, but likewise always

involving the obligation of compensation. He cited 3rd Phillimore, 42, and Dana's Wheaton, 152, n.

The Commission unanimously made an award in favor of the claimant for \$ 37,392. (Moore, 3791.)

In the case of the brig *Ophir*. In the mixed commission between the United States and Mexico, under the convention of April 11, 1839. This vessel was detained at Vera Cruz in consequence of an inhibition issued by the local authorities of the territory of the departure of a vessel from the port. This inhibition was based upon the existence of local political disturbance. The umpire awarded \$ 400, with interest, for its detention. (Moore, 3045.)

See also Moore, 3119-3120, 3624-3625, 4612-4617; Maxims of Heffter, adopted and found in Woolsey's International Law, 85-86.

It does not appear to this Government a sufficient or just reparation for a wrongful act, admittedly perpetrated by the Spanish officers of the consulate at Key West since 1876, to give orders that hereafter the wrongful tax shall not be collected. The case is conceived to be one where no less a reparation than the return of the illegally collected excess could satisfy either the right pertaining to the United States or the high sense of justice of Spain. (Wharton, vol. 1, sec. 37, p. 158.)

The umpire is not disregardful of the claim of the honorable Commissioner for Venezuela that, since the duties were not, in fact, again paid, the claimant company has suffered no loss, and hence, in equity, has no rightful demand for their repayment; but it is the opinion of the umpire that an unjustifiable act is not made just because, perchance, there were not evil results which might well have followed. The claimant Government has a right to insist that its sovereignty over its own soil shall be respected and that its subject shall be restored to his original right before consequent results shall be discussed. The umpire having found that the requirement of import duties before clearance was an unlawful exaction and a wrongful assumption of Venezuelan sovereignty on British soil, it is just and right, and therefore justice and equity, that these duties be restored to the claimant company.

The honorable Commissioner for Venezuela having objected to an allowance for expenses attending the preparation of this claim the umpire allows only so much thereof as was incurred in making translations for the use of this Commission, which sum he deems just and equitable.

The umpire expresses his hearty appreciation of the able and thorough manner in which this case has been presented to him both orally and in writing by the members of this Commission who have performed that duty for their respective Governments.

The umpire allows interest at the rate of 3 per cent per annum for one year, and holds the respondent Government liable to the claimant Government in the sum of £ 214, for which amount the award may be prepared.

#### KELLY CASE

Participation in a revolutionary movement so as to deprive the claimant of the right of intervention by his government, must be proved beyond all reasonable doubt in order that it may be pleaded as a valid defense to a claim for the value of neutral property destroyed by government troops.

#### PLUMLEY, *Umpire*:

This is the case of James Nathan Kelly, a native of the island of Trinidad, a British subject, and who for some thirteen years prior to the 12th of March, 1901, had lived near Río Grande, not far from Guiria, and was a shopkeeper and the owner of a cocoa plantation, and was also the owner of a cutter of about 3 tons. He complains that in January, 1900, some \$ 100 worth of goods

were taken by one Tomasito Guerra, at the head of a regiment, understood by the umpire to have been Government troops, and that in January, 1901, the Venezuelan troops under Colonel Rueda, the chief in command being General Faia, came, and this time he was ruined; that he was arrested and taken before a court-martial. While he was gone his shop was broken into, his dwelling house entered, his furniture destroyed, his clothing and jewels taken, as were 40 bags of cocoa and \$ 947; that, later, to protect his wife from outrage he sent her under cover of night over the hills and rivers from Río Grande to Guiria on foot, and that she paid her passage money of \$ 18 and sailed from Guiria to Trinidad; that he himself was concealed in the woods for nearly a month, when he made his escape to Trinidad, where he still remained at the time of giving his affidavit, December 23, 1902. He claims his losses to consist of —

Cash (\$ 150 and \$ 947) . . . . .	\$ 1,097
Cocoa, 40 bags, at \$ 41 per bag (200 pounds) . . . . .	1,640
Shop goods . . . . .	150
Furniture . . . . .	250

The claimant himself and his wife make their several affidavits. He also introduces the affidavit of one Julio Cortes. By this witness it is stated that the shop was fairly stocked; that Kelly was arrested; that they took away a good deal of cocoa belonging to Mr. Kelly, and that Mr. Kelly had a very fine cocoa estate, which yielded very well. There is no statement by this witness as to the amount, condition, character, or value of the furniture in the house, or that Kelly lost any furniture, and there is no statement by either Mr. Kelly or his wife as to the amount, condition, or character of his furniture or any description of the contents of his shop or what kind of business he was doing as a shopkeeper.

Inspection of the testimony of Mr. and Mrs. Kelly shows serious contradiction on an important matter. He says that at the time of this raid by Colonel Rueda he had 12 bags of dried cocoa in his house, and that this was taken by these troops. He also states that he had 28 bags of dried cocoa in his house, which he was about shipping, which were also *taken by them*. Mrs. Kelly says that at the time of this raid they had 12 bags of cocoa, which were partly under the bed, and which were taken away, and that *on a former occasion* 28 bags, which her husband was about shipping, and which were *then on the beach*, were taken; that these 28 bags were not in the house at this time, but had been placed upon the beach for shipment, and while on the beach were taken — by whom or when she does not say. Her statement is too vague to be of probative value taken alone, but it is absolutely contradictory to that of Mr. Kelly, and if she is to be believed he can not be on that point.

By witnesses on the part of the respondent Government, some of whom treat the case apparently very fairly, it is learned by combining their testimony that the furniture in the house consisted of seven chairs, two cedar tables, two benches, one old bed and mattress on two benches; and it seems to the umpire that their estimate of value at 200 bolivars, or \$ 40, is a very liberal estimate. It conforms altogether better with the umpire's judgment as to the probabilities of value than the claim of Mr. Kelly in that regard.

The umpire also thinks that the value placed on the stock of goods in the shop by some of these apparently open-minded witnesses called by the respondent Government is much nearer the actual facts than the claim of Mr. Kelly, and that a valuation of \$ 60 is very liberal. But as the umpire understands the claim of \$ 150 to cover both the instance of 1900 and of 1901 he is inclined to allow it without reduction.

Since it was the duty of Mr. Kelly to give such a detailed statement of the conditions underlying the claims made as to put the triers of his case into as close a relation to the facts as can be done reasonably, he has entirely failed in this regard both as to his furniture, which he claims was taken or destroyed, and as to the goods which comprised the store of which he claims to have been deprived. It is important in a case of this kind to know whether the goods taken were such as might properly enter into the use of the Government of Venezuela, so that it could be said to be benefited in any way by the taking. From the general trend of the evidence for the defense — and it is there we are obliged to look for all the details and for all the supporting evidence in matters of detail, at least for Mr. Kelly — we find that he is accredited with a plantation substantially as he has alleged, but that he is not accredited with having on hand any large deposit of cocoa at any one time. This does appear, however, that Mr. Kelly was heard to demand of Colonel Rueda a return of 3 bags of cocoa, which he claimed were taken by the troops of this officer while under his command. It also appears there were 9 bags of cocoa, which were taken from his boat at the time he was prevented from making his trip to Trinidad by the advent of the Government steamer *Augusto*, and when returning to the beach he stored his cocoa, evidently awaiting an opportunity to take it to Trinidad when he would not be intercepted by the Venezuelan Government. So that Mr. Kelly is supported through different sources in his claim concerning cocoa to the extent of 12 bags in all, and 12 bags is all that his wife says were taken at this time, and as to the 28 bags there is no evidence excepting the thoroughly contradicted evidence of Mr. Kelly himself that these were ever taken by Government troops.

The evident exaggeration by Mr. Kelly as to his stock of foreign goods and the cocoa makes the umpire very uncertain as to the amount of money which he lost; but as he and his wife support one another substantially as to the \$ 947, he stating the precise sum and she saying that it was nearly \$ 1,000, and as there is nothing to antagonize that claim either in the claim itself as being improbable, or as being improbable that it should be kept in the house by people who are living remote from a large town or city, and who are well known to be jealous of banks, and as Mr. Kelly and his wife are evidently thrifty people, industrious and saving, so far as the umpire can gather from all the testimony, he is inclined to credit their statement and accept it for the sum of \$ 947. He does not find proof satisfactory to him of any other sum of money to be added to this.

The question then arises whether the facts shown by the Venezuelan Government by their witnesses are sufficient to establish practically beyond a reasonable doubt that Mr. Kelly was a revolutionist; that he was so entangled in the political affairs of Venezuela that he had practically denationalized himself, and had rendered it impossible for the British Government to intervene in his behalf.

As this charge is a very grave one, involving acts which are treasonable if he were a citizen of Venezuela, justice and equity require that even in a civil matter the facts themselves and the deductions to be made therefrom should rest upon indubitable proof, and so strong and forceful as to practically do away with all doubt concerning the charge made. Concerning this we have, first, the negative facts, which after all have an affirmative value, of the witnesses for the respondent Government from the vicinity of Mr. Kelly's home, none of whom assert any knowledge that Mr. Kelly had been a leader in revolution or a revolutionist at all. On the contrary they say that they know nothing of that kind, although one or two state that they had heard he was mixed up in political matters, but knew nothing to that effect. So much of the evidence for the respondent Government taken from his own vicinage counts in Mr. Kelly's favor

quite decidedly. Then there is the testimony of the man who says that he saw Kelly as a revolutionary leader with one guerilla, and that Kelly apologized or explained his being in the revolutionary ranks by saying that he had been compelled to do this as he had been robbed by the Venezuelan Government.

The testimony tending to establish the fact of Mr. Kelly's relation with revolutionary matters is to show that he was assisting in the revolution of General Hernandez, and we have the authority of the honorable Commissioner for Venezuela that this revolution began on the 22nd of October, 1899, and ended in June, 1900. This claim for damages is based on the wrongful acts of Government troops in January, 1901; and it appears that after these damages occurred Mr. Kelly hid in the woods for a month, and then took boat to Trinidad, where he remained and where he was at the time of giving his affidavit in this case, which was the 23rd of December, 1902. So that it is absolutely impossible that the witness can be correct in this statement. He either has mistaken his man or he has mistaken the facts. In either case he becomes a doubtful witness, and his testimony is too badly shaken to place any reliance upon it in a matter so important. In the matter of the evidence tending to show that Mr. Kelly made some preparations in association with some of his neighbors to meet with force the anticipated raid from the war sloop *Augusto*, it is sufficient to say that it amounted to nothing. Nothing is shown to have been done, excepting that for a few days or nights they were banded together and took turns on sentry duty; but they made no attacks upon anyone, and, so far as it appears, were not attacked, and their fears were fortunately groundless and their labors happily fruitless. It does appear that there were well-grounded fears that the advent of Government troops, no less than revolutionary troops, meant pillage, plunder, devastation, destruction, and anticipated outrage of their women, instead of protection, peace, security in property and person, which is the relation that the troops of the Government should sustain, so far as possible, in the midst of revolution, and that under such conditions men arm and even shoot in defense of their property and their homes is to be commended, and the umpire finds nothing in this to criticise and nothing in it to extract a single grain of proof that Mr. Kelly was a revolutionist. Again, the witnesses who claim to connect Mr. Kelly with the army of the revolution attach him to General Ducharme and make him so intimately connected with this general as to be the bearer of his dispatches and his confidential personal oral orders, so that it is impossible not to conclude that if Mr. Kelly had been thus associated with him he would have known of the fact. Hence the importance of his testimony, which is that Mr. Kelly was never engaged in any of the political matters of his district and has never been connected with him in any of his revolutionary efforts. The testimony of two other witnesses who claim to know assert positively that Mr. Kelly was not engaged in any way in the political matters of Venezuela.

Out of this conflicting testimony the umpire can certainly find no fact so settled and so certain as therefrom to establish that Mr. Kelly had been so far engaged in any political matters in Venezuela or so opposed to the Government of Venezuela as to deprive him of his rights as a neutral subject of Great Britain to the intervention of his Government for protection, when such intervention is otherwise permissible.

It is therefore the opinion of the umpire that the claim of Mr. Kelly should be allowed in the sum of £ 297, which amount is the sum allowed for damages to property and 3 per cent interest thereon from the 12th of March, 1901, the date when this claim was first presented to the Venezuelan Government, to October 20, 1903, the date of this award.

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## AROA MINES (LIMITED) CASE — SUPPLEMENTARY CLAIM

(By the Umpire:)

Damages will not be allowed for injury to persons, or for injury to or wrongful seizure of property of resident aliens committed by the troops of unsuccessful rebels.<sup>1</sup>

Interpretation of the meaning of the words "claim," "injury," "seizure," "justice," and "equity," as used in the protocol.

## CONTENTION OF BRITISH AGENT

In supporting the claim of the Aroa mines for damages due to the action of revolutionaries, it is desirable that the position taken up by His Majesty's Government should be clearly stated and explained.

During the events which led to the signing of the protocol of February 13, 1903, and when a decision was necessary as to what demands ought to be made on the Venezuelan Government, the question of damage due to the acts of insurgents naturally became prominent. His Majesty's Government, having carefully considered the past and present circumstances of Venezuela, which are of a very exceptional kind, came to the conclusion that in dealing with claims of this nature two alternative methods were possible:

(1) That foreign claimants should not receive compensation for damage caused by revolutionaries.

(2) That if any foreign claimants received such compensation British subjects should receive the same treatment.

Great Britain enjoys by treaty the advantages of the most-favored nation, and for this as well as other reasons took the view stated above. To show that His Majesty's Government had always consistently held this view, it may be pointed out that in forwarding claims to the Venezuelan Government the British minister had, long before the blockade, always asked that they should be settled on the same principle as might be applied to other nations.

In the view of His Majesty's Government it was preferable that of the two principles stated above No. 1 should be the one adopted, failing this it was essential to secure the alternative, No. 2.

At the same time it was considered that, owing to the light in which revolutions had come to be regarded by the people of Venezuela, there would be nothing contrary to justice in acting upon the latter principle.

The only way to give effect to these views seemed to be to obtain from Venezuela an agreement wide enough to cover the second principle if it should become necessary to act upon it.

His Majesty's Government have throughout acted consistently on these lines and have made no secret of the position taken up by them on the matter.

Accordingly, upon the sitting of the Commission, His Majesty's Government brought forward only such claims as were based upon the acts of the Venezuelan Government itself, without in any way giving up the right to present those of the other category if it should prove necessary. This course was followed until revolutionary awards had been made in favor of French and German claimants.

<sup>1</sup> This principle was followed in the cases of A. A. Pearse, F. G. Fitt, heirs of Christian Philip, W. N. Meston, W. A. Guy, Fortunato Amar, L. L. Michenau, and Abdool Currim, which are not reported in this volume. For discussion of principle here laid down see the German - Venezuelan Commission (Kummerow Case), the Italian - Venezuelan Commission (Sambiaggio Case, Guastini Case) and the Spanish - Venezuelan Commission (Padrón Case, Mena Case), in Volume X of these *Reports*.

Since therefore, it was no longer possible to act upon the principle originally favored, it was decided to present to the Commission claims for damages due to the acts of the insurgent forces. These claims are supported upon the ground that the recovery of damages so caused is recognized by the protocol of February 13.

In order to show what the terms of the protocol were meant to include, it is necessary to refer to the circumstances under which the protocol was signed and to what had occurred previously.

His Majesty's Government having for a long time presented to the Venezuelan Government claims due not only to the acts of their own troops, but also to the acts of insurgents, without being able to obtain any redress, were at length compelled, in common with the German Government, to declare a blockade of Venezuelan ports. This blockade was not raised until after the signing, and upon the terms of the protocol of February 13.

This protocol was settled after negotiations between His Majesty's representative and Mr. Bowen as representing the Venezuelan Government. In order correctly to interpret the terms of the protocol regard should be paid to the stage of the negotiations at which the exact words ultimately used first appear, and to the connection in which they are there used.

The first step taken by the Venezuelan Government toward the raising of the blockade was a communication from Mr. Bowen through the Government of the United States to His Majesty's Government, asking that they and the German Government would refer "the settlement of claims for alleged damage to the subjects of the two nations during the civil war to arbitration."

To this a reply was sent by the two Governments, which is here quoted, December 23, 1902:

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.

Apart, however, from this some of the claims are of a kind which no government would agree to submit to arbitration. The claims for injuries to the persons and properties of British subjects owing to the confiscation of British vessels, the plundering of their contents and the maltreatment of their crews, as well as some claims for the ill usage and false imprisonment of British subjects, are of this description. The amount of these claims is apparently insignificant, but the principle at stake is of the first importance, and His Majesty's Government could not admit that there was any doubt as to the liability of the Venezuelan Government in respect of them.

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 the 29th of July and again on the 11th of November 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 Government found themselves



reluctantly compelled to have recourse to the measures of coercion which are now in progress.

His Majesty's Government have, moreover, agreed already 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 or 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, so far as the British claims are concerned, are 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 claim is for injury to or wrongful seizure of property, the question which the arbitrators will have to decide will only be (a) whether the injury took place and whether the 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. \* \* \*

It will be seen from this that in the first place all claims are to be submitted to arbitration; that as regards claims "arising from the recent insurrection" where such claims are for injury to or wrongful seizure of property the allied Governments will only accept arbitration on the express terms "that in such cases a liability exists must be admitted in principle." Finally, in the case of other claims arbitration without any reserve is accepted.

It is clear that a meaning beyond the ordinary submission to arbitration must be given to this very pointed and special admission of liability. It admits as not open to discussion some principle which might be open to argument if nothing more than a bare submission to arbitration were found.

As it occurs in this document the meaning is plainly that —

As regards all claims arising out of the recent insurrection, whether due to their own acts or to those of insurgents, the Venezuelan Government must admit their liability. Otherwise the blockade will not be raised.<sup>1</sup>

These particular terms were never afterwards discussed. In the protocol the Venezuelan Government admit their liability in these very words, and therefore with the same meaning.

There is nothing unreasonable in this. This treaty was made under pressure of a blockade. Under such circumstances what is more natural than to find that the blockading power has insisted upon its own standard of right?

To say that in face of the words "the Venezuelan Government admit their liability" the Venezuelan Government are only to be held liable under accepted and recognized principles of international law is to say that these words carefully and deliberately inserted in an important section of a treaty are without meaning or bearing on the effect of the treaty.

If it be suggested that "admit their liability" means that the Venezuelan Government agree not to raise as a defense that these specially mentioned

<sup>1</sup> See Appendix to original report, p. 1033. Not reproduced in this series.

claims are a matter for the law courts, it may be pointed out that if a claim which would otherwise be the subject of ordinary litigation be submitted to arbitration, that fact alone means that all other jurisdictions are, as regards that claim, set aside and superseded by the jurisdiction of the arbitral tribunal. Therefore, the further provision that the Venezuelan Government admit their liability would be superfluous and meaningless in the class of claims here submitted to arbitration.

This admission, then, is an acknowledgment on the part of the Venezuelan Government that they take upon themselves liability for all claims of the kind specified arising out of the insurrection, whether done by themselves or by insurgents.

Since injury to or seizure of property is necessarily wrongful in the case of insurgent forces, it is only needful to prove that they took place and arose out of the insurrection, and liability at once attaches to the Venezuelan Government, the only remaining question being one of amount.

It has already been indicated that this liability for the acts of insurgents in the case of a country so circumstanced is a doubtful point of international law, depending as it does upon the question whether the country is "well-ordered to an average extent" (Hall, p. 226). a point difficult and embarrassing to discuss. The admission of liability found here is therefore just such as would be expected under the circumstances.

It is not necessary to pursue the matter further, since, for the present purpose, it is sufficient to rely on the liability admitted in the protocol, without reference to the principles of international law. Attention is called to the point merely to show that His Majesty's Government have not acted in an arbitrary or unreasonable manner.

Upon another ground also this tribunal ought to interpret the words "admit their liability" in the sense above stated.

The treaty between Great Britain and Venezuela contains the following provision:

In whatever relates to the safety of \* \* \* merchandise, goods, or effects, \* \* \* as also the administration of justice, the subjects and citizens of the two contracting parties shall enjoy \* \* \* the same liberties, privileges, and rights as the most favored nation.

All awards given by the Mixed Commissions are to be paid out of one fund. It would therefore, in view of the above treaty, be a denial of equity if the subjects of any other nation were to be paid sums of money out of this fund upon a more favorable principle than British subjects.

German and French subjects have now obtained awards for damage caused by revolutionaries, which will be so paid.

When, therefore, words have to be interpreted which admit of any possible doubt as to their meaning — though it is contended that no such doubt exists here — regard must be paid first to the treaty, and secondly to the provision of the protocol, that decisions are to be based upon absolute equity. In such a case it is the duty of this tribunal to give to the words the most favorable possible interpretation as regards British subjects if by so doing the treaty rights of British subjects will be the better maintained. Therefore, in view of the treaty, the admission of liability must be read in the sense of a stipulation that, in awarding payments out of the common fund, British subjects shall be paid on as favorable a principle as the subjects of any other nation.

That is, since subjects of other nations receive payments on the ground of the liability of the Venezuelan Government for acts of insurgents, "admit their liability" must be read as conceding to British subjects the right to be paid

on the same principle. i.e.. for damages caused by the acts of revolutionaries.

GRISANTI, *Commissioner*:

His Britannic Majesty's learned agent in his last argument confines himself almost exclusively to examining the circumstances and discussions which preceded the signing of the protocol of February 13, 1903, maintaining that the Government of Venezuela is liable for damages caused by revolutionists to British subjects.

The most suitable manner of interpreting a treaty between nations and a contract between private parties is to analyze carefully and minutely, without prejudice, the clauses of the treaty, which are the plain, true, authentic, and solemn meaning intended to be conveyed by the contracting parties, and of the reciprocal duties assumed by them by virtue of their mutual agreement. The examination of the preliminary work only entails the examination of the contentions and arguments which each of the contracting parties made and attempted to maintain, contentions and arguments which must necessarily be at variance and even contradictory, as thus only could the controversy exist. With regard to the preparatory work of legislation, Laurent says:

En apparence, les travaux préparatoires sont le commentaire authentique de la loi, puisque c'est le législateur lui-même qui nous apprend ce qu'il veut; en réalité, ces travaux nous font seulement assister à l'élaboration de la loi, ils ne sont pas l'œuvre du législateur, mais de ceux qui ont contribué à faire la loi. Le texte seul a une autorité légale. Tout ce qui a été dit pendant que la loi s'élaborait n'est pas la loi, et on ne peut s'en prévaloir pour ajouter au texte, ou pour le modifier en quoi que ce soit, car ce ne sont que des opinions individuelles de ceux qui ont concouru à faire la loi. (*Cours Élémentaire de Droit Civil*, Vol. I, p. 22.)

This same criterion must be applied to the study of preliminary conferences leading to the negotiation of a treaty, and consequently to those preceding the protocol, confining its application, naturally, to the contracting parties. Because, although it is true that the blockade and cannons of the allied powers greatly strengthened their demands, it is not true that they could enforce their absolute will. Such will had to be held in check, but unfortunately it was not curbed as much as justice demanded.

Now, confining myself to the argument of His Britannic Majesty's agent in regard to the protocol itself, I am sorry to have to say that the meaning he gives to Article III is at variance with the proper interpretations of conventions.

Said article provides that "The Government of Venezuela admit their liability in cases where the claim is for injury to, or wrongful seizure of, property," etc., which clause can only be understood in its legal sense — that is to say, that the Republic answers for injuries caused by the National Government and by such persons as represented it. For Venezuela to assume responsibility for damages caused by revolutionists contrary to the principles of unquestioned justice in the general opinion of statesmen, and in the practice of nations, it would be necessary that it should be so stipulated in the protocol expressly and in the clearest manner; and it is not so stipulated. Justice and equity do not admit of amplifying the clause of the protocol to include and sanction an obligation which is contrary to principle. In case the clause was not plain (which it is) it could not be interpreted in a sense which would burden the party bound (that is, Venezuela) as violating accepted juridic principles. These keep powerful parties within the bounds of law, whereby they support the weaker and maintain the peace of the world.

His Britannic Majesty's agent affirms that Great Britain considered it preferable to strike a medium between these two extremes:

1. That foreign claimants should not receive compensation for damages caused by revolutionists.
2. But that if any foreign claimants received such compensation British subjects should receive the same treatment.

And that, although she considered the first preferable, she adopted a general form which would embrace the second if necessary.

This argument, which is of itself inadmissible, has already been refuted. From the moment two nations enter into a treaty they must agree in the sense and meaning of the same; and it is not right for one of the parties to reserve to itself *in pectore* the privilege of enlarging its scope in performance for reasons independent of the intention of both. It must be observed that this Mixed Commission has been acting since June 1, and it was not until September that His Britannic Majesty's agent decided to present the first claim for revolutionary damages; such determination was made in view of two awards made by the umpires of the Venezuelan-French and the Venezuelan-German mixed commissions. It is therefore evident that these awards caused the British Government to set aside their primary conviction, which was wholly in accordance with justice and equity.

His Britannic Majesty's agent asserts that by virtue of Article IX of the treaty of 1835 between Venezuela and Great Britain the subjects of the high contracting parties shall, in the territory of the other nation, enjoy the same privileges, prerogatives, and rights as those of the most-favored nation. This is true, but said clause can only apply to the matters purposely designated in the article which contains this stipulation, v.g., in everything relating to loading and unloading of vessels; security of merchandise, goods, and articles; the acquisition of goods of all kinds and denominations by sale, donation, exchange, testament, or any other way whatsoever; as also to the administration of justice. The latter point being the only one which, though in a most remote way, might have any connection with the claim in discussion, means only that British subjects in Venezuela, just as Venezuelan citizens in England, have the same warranties, securities, and recourses as other aliens for the protection and maintenance of their respective rights before the courts of justice established by the local laws of each nation. Said clause is not applicable to these mixed commissions, which are of a very extraordinary nature; and if it were, other countries which have agreed with Venezuela upon the provision of the most-favored nation would already have protested against some of the clauses of the Venezuelan-British protocol. On the other hand, as these mixed commissions proceed separately and absolutely independently of one another, and as the persons who constitute them must use their own individual judgment in order to render their decisions according to their own belief and conscience, the decisions of other commissions can not be set up to serve as a guide for those which this Commission will have to make.

The argument contained in the following paragraph is no more forcible:

All awards given by the mixed commissions are to be paid out of one fund. It would, therefore, in view of the above treaty, be a denial of equity if the subjects of any other nation were to be paid sums of money out of this fund upon a more favorable principle than British subjects.

Equity would be violated in injuring Venezuela, who is held liable to pay claims which are entirely unfounded.

In the preliminary discussion which arose in the case of Consul de Lemos, I demonstrated that publicists, such as Calvo, Fiore, Bonfils, and Seijas, in addition to the statesmen — Lord Stanley, Count Nesselrode, Lord Granville, and Lord Palmerston — are unanimously of opinion that nations are not

liable for injuries sustained by foreigners in times of war, considering such irresponsibility *absolute* when said injuries are caused by revolutionists or by Government functionaries when compelled by the fatality of circumstances, confining the obligation of repairing only willfully committed injuries by the same. I consider it unnecessary to reinsert those quotations, which, moreover, would make this statement extremely long. I might likewise cite the opinions of other publicists and statesmen, but I do not consider it necessary, as the point is not capable of being disputed on the policy and practice of nations. Governments are not obliged to compensate for injuries committed by insurgents. His Britannic Majesty's agent having so understood, has sought to fix the liability from the terms of the protocol.

By virtue of the reasons stated I ask that the supplemental claim of the Aroa Mines (Limited) be declared inequitable and unlawful.

Great Britain has always professed the principle that governments are not liable for damages caused by rebels; Venezuela has likewise upheld the same doctrine at all times, as is shown by the executive decree of February 14, 1873. (Official Compilation of Laws, vol. 5, p. 243, No. 1820, art. 6.)

It is impossible for these two nations to have revoked said principle in the protocol without having expressly and definitely so stated.

PLUMLEY, *Umpire*:

At the beginning of the umpire's opinion upon the important questions involved in this case, he desires to express his sense of obligation to the learned agents and the honorable Commissioners of both Governments for their very able and painstaking presentation of their views upon the points raised, and for their valued assistance in the matter of authorities and documents.

This case raises the question whether the Government of Venezuela shall be held responsible to indemnify the claimants for injuries and losses received at the hands of revolutionists during the last civil war.

Before entering upon an analysis of the case itself there are several matters which may well be considered.

It is insisted upon by the claimant Government and resisted by the respondent Government that the paragraph in Article III of the February protocol, in which occurs a certain admission of liability on the part of Venezuela, is, when properly interpreted and applied, an absolute and unavoidable admission of liability for all claims arising out of the recent insurrection, whether due to their own acts or to those of insurgents.

In the claim of de Lemos, upon the preliminary objection of the learned British agent, raising the question that upon the terms of the protocol of February 13, 1903, "the Venezuelan agent is not entitled to set up any matter of principle as an answer to this claim" because of the said admission of liability in said Article III of the protocol, and that there remained only an inquiry as to the facts, the umpire held in his interlocutory opinion therein (p. 421) — that the word "injury" was chosen because of its legal adaptation and significance, and not in its colloquial sense.

That (p. 421) —

the word "injury" was taken by the signatory parties to import a legal wrong, and in accordance with its fixed and determinate use in law as involving and importing *ipso facto* an intentional wrongdoing on the part of those responsible therefor.

By giving to this word its meaning in law and applying it to a document of peculiar legal importance drawn and carefully considered by minds of profound scholarship and erudition in law, skilled in words accurate and apt, in sentences short, clear, and trenchant, it is certain we can do no violence to the thought. By adopt-

ing any other interpretation of the language used, it becomes ambiguous, indiscriminative, and inapt. \* \* \*

The umpire regards the section quoted from Article III of the same import and value as though it had been written:

“ The Venezuelan Government admit their liability in cases where the claim is for a legal injury to property, and consequently the question which the Mixed Commission will have to decide will only be:

“ (a) Whether the legal injury took place. \* \* \*

“ (b) If so, what amount of compensation is due.”

The question in each case being whether by the law governing the facts in the case there has been such an injury. (See p. 422.)

In the case then before the umpire he held (p. 422) that there was open for discussion and decision (a) whether the acts complained of were wrongful or rightful governmental acts, (b) whether the injuries received were a necessary sequence of the existing conditions, or (c) resulted from some wrongful *act* or *neglect* of the Venezuelan Government.

In the claim of James Crossman,<sup>1</sup> which was for the seizure and appropriation by Government troops of certain personal property of the complainant, the learned agent for Venezuela in his answer contended that upon the admitted facts the property was not taken by virtue of the orders of an officer, or because of neglect by the military authorities, but was in fact a necessary calamity of civil war, and that the claimant must be remitted to his action at law against those who were responsible therefor.

To this answer the learned British agent raised a preliminary objection, insisting that by the terms of Article III of the protocol of February 13, the Venezuelan Government had denied to themselves the right to raise the questions of law named in their answer and that in virtue of those admissions “ the only questions open to the Commission are: (1) Did the seizure take place? (2) Was the seizure wrongful or not? (3) If wrongful, how much is due? ”

In the interlocutory opinion of the umpire in said case, he held<sup>2</sup> that the word “ seizure ” as used in said protocol did not include property “ taken by robbery, theft, pillage, plunder, sacking or trespass. ” That it was “ limited to a seizing under and by virtue of authority, civil or military. ” That “ there is required in every case a wrongdoer as well as that wrong has been done or suffered. A wrong intent or willful purpose must accompany the act. ” “ Not only must the act be willful or with wrong intent, *but it must be perpetrated by some one having a right whereby to declare and express a governmental will and intent.* ” The umpire now underscores these words to call especial attention to their force and inclusiveness concerning the question in hand.

In neither of these cases was the opinion of the umpire given in expectation that he would later meet before this Commission the question of responsibility by Venezuela for the acts of unsuccessful revolutionists, since the historic attitude of Great Britain concerning the principle in issue would negative such a proposition, save upon exceptional conditions carefully defined by international law, in the development of which law that Government had borne a very important and honorable part.

Held in their entirety and to their full rigor, the umpire would be compelled by the force of these two opinions to declare *stare decisis* upon the question of admitted responsibility for the acts of unsuccessful revolutionists, in which case such question would stand before this Commission upon the respective merits of

<sup>1</sup> *Supra*, p. 356.

<sup>2</sup> *Supra*, p. 358.

each claim having only an admitted liability if well founded in law and fact, in justice and equity.

Both of these opinions were given on mature deliberation after careful and painstaking study of the protocols in all of their parts and of such authorities upon the questions under consideration as were at his hand. He did not in the opinions there given cite these authorities or quote therefrom. As briefly as may be, he will now place them upon the record, that he may have them before him to aid in the present determination, and that his honored associates, the learned agents and their respective Governments, may know the authorities he accepted and upon which he relied in coming to his aforementioned decisions.

The intention of the *parties* is the pole star of construction; but their intention *must be found expressed in the contract* and be consistent with rules of law. The court will not make a new contract for the parties nor will words be *forced* from their *real signification*. (Bouvier, *Law Dict.*, vol. 1, p. 429.)

One leading principle of construction is to carry out the intention of the authors of or parties to the instrument or agreement so far as it can be done without infringing upon any law of superior binding force.

In regard to cases where this intention is clearly expressed, there is little room for variety of construction; and it is mainly in cases where the intention is indistinctly disclosed, though fairly presumed to exist in the minds of the parties, that any liberty of construction exists.

Words, if of common use, are to be taken in their *natural*, plain, *obvious*, and ordinary significations; but if technical words are used, they are to be taken in a technical sense, unless a contrary intention clearly appear in either case *from the context*. (Bouvier, *Law Dict.*, vol. 1, p. 416, citing 9 Wheat., 188; 32 Miss., 678; 49 N. Y., 281; 54 Cal., 111.)

Technical. Of or pertaining to the useful or mechanic arts, or to any *science, business*, or the like; specially appropriate to any art, *science*, or *business*; as the words of an indictment must be technical. Blackstone. (Webster.)

Technicality. That which is technical or peculiar to any trade, profession, sect, or the like. (Ib.)

In construing written laws, it is the intent of the lawgiver which is to be enforced; this intent is found in the law itself. The first resort is to the natural significance of the words employed, in their order of grammatical arrangement. (Bouvier, *Law Dict.*, vol. 1, p. 1106, citing Cooley Const. Lim., 70; 130 U. S., 670.)

Statutes should receive a sensible construction, such as will effectuate the legislative intention, and, if possible, so as to avoid an unjust or absurd conclusion. (Bouvier, *Law Dict.*, vol. 1, p. 1106, citing 144 U. S., 47.)

Where a law is expressed in plain and unambiguous terms, whether those terms are general or limited, the legislature should be intended to mean what they have plainly expressed, and *consequently no room is left for construction*. (Bouvier, *Law Dict.*, vol. 1, p. 1106, citing 130 U. S., 671; 99 id., 72; 2 Cranch, 399.)

Courts will not assume to make a contract for the parties which they did not choose to make themselves. (*Morgan County v. Allen*, 103 U. S., 498.)

When language is susceptible of two meanings, one of which would work a forfeiture which the other would not, the latter must prevail. (Bouvier, *Law Dict.*, vol. 1, p. 1106, citing 71 Wis., 177.)

When a court of law is construing an instrument, whether a public law or a private contract, it is legitimate, if two constructions are fairly possible, to adopt that one which equity would favor. (Bouvier, *Law Dict.*, vol. 1, p. 416, citing 160 U. S., 77.)

Neither will it be allowed to contravene established rules of law. (Bouvier, *Law Dict.*, vol. 1, p. 124.)

All statutes are to be construed with reference to the provisions of the common law, and provisions in derogation of the common law are held strictly. (Bouvier, *Law Dict.*, vol. 1, p. 416, citing 2 Black, 358; 117 Ind., 447; 4 Mich., 322; 5 W. Va., 1.)

Where words have two senses of which only one is agreeable to the law, that one must prevail. (Bouvier, *Law Dict.*, vol. 1, p. 1106, citing Cowp., 714.)

Construction is against claims or contracts which are in themselves against common right or common law. (Bouvier, *Law Dict.*, vol. 1, p. 429.)

Where the language of an instrument requires construction, it shall be taken most strongly against the party making the instrument. (*Orient Mut. Ins. Co. v. Wright*, 1 Wall., 456, U. S. Sup. Ct.)

A party who takes an agreement prepared by another, and upon its faith incurs obligations or parts with his property, should have it construed most favorably to him. (*Noonan v. Bradley*, 9 Wall., 394, U. S. Sup. Ct.)

What one party to a contract understands or believes is not to govern its construction unless such understanding or belief was induced by the conduct or declaration of the other party. (*National Bank of Metropolis v. Kennedy*, 17 Wall., 19, U. S. Sup. Ct.)

Agreements are construed most strongly against the party proposing. (Bouvier, *Law Dict.*, vol. 1, p. 124, citing 6 M. & W., 662; 2 Pars. Contr., 20; 3 B. & S., 929; 7 R. 1., 26.)

The more the text partakes of a solemn compact the stricter should be its construction. (Bouvier, *Law Dict.*, vol. 1, p. 1107.)

Every agreement should be so complete as to give either party his action upon it; both parties *must assent to all its terms*. (Bouvier, *Law Dict.*, vol. 1, p. 428, citing 3 Term, 653; 1 B. & Ald., 681; 1 Pick., 278.)

The parties must agree or assent. They must assent to the same thing in the same sense. (Bouvier, *Law Dict.*, vol. 1, p. 123, citing 4 Wheat., 225, U. S. Sup. Ct.)

There is no contract unless the parties assent thereto. (Bouvier, *Law Dict.*, vol. 1, p. 429.)

The whole contract is to be considered with relation to the meaning of any of its parts. (Bouvier, *Law Dict.*, vol. 1, p. 429.)

All parts will be construed, if possible, so as to have effect. (Bouvier, *Law Dict.*, vol. 1, p. 429.)

Words are to be taken, if possible, in their ordinary and common use. (Bouvier, *Law Dict.*, vol. 1, p. 429.)

The subject-matter of the contract and the situation of the parties are to be fully considered with regard to the sense in which language is used. (Bouvier, *Law Dict.*, vol. 1, p. 429.)

The law of the interpretation of treaties is substantially the same as in the case of other contracts. (Bouvier, *Law Dict.*, vol. 2, p. 1137, citing Woolsey's *Int. Law*, 185; 22 Ct. of Claims U. S., 1.)

That the contracting party, who might and ought to have expressed himself clearly and fully, must take the consequences of the carelessness. (Phillimore, *Int. Law*, ed. 1854, vol. 2, p. 93.)

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. (Woolsey, *Intro. Int. Law*, sec. 113.)

"To follow the ordinary and usual acceptation, the plain and *obvious* meaning of the language employed," which Phillimore says is the principal rule of interpretation. (Vol. I, sec. LXX.)

In all human affairs when absolute certainty is not at hand to point out the way we must take probability for our guide. In most cases it is extremely probable that the parties have expressed themselves conformably to the established usage, and such probability affords a strong presumption, which can not be overruled but by a still stronger presumption to the contrary. (Moore, 3621, quoting Vattel.)

When the language of a treaty, taken in the ordinary meaning of the words, yields a plain and reasonable sense, it must be taken as intended to be read in that sense, subject to the qualifications that any words which may have a *customary meaning in treaties* differing from their common signification *must be understood to have that meaning*, and that a sense *can not* be adopted which leads to an absurdity or to incompatibility of the contract with an *accepted fundamental principle of law*. (Hall, *Int. Law*, 350.)

International law names the source through which the claims of a British subject against Venezuela must come. (Wharton, *Dig. Int. Law*, sec. 215.)

The law of nations is the law of England. (IV Black. Com., 67; Phillimore, *Int.*



*Law*, vol. 1, ed. 1854, 62 (in brackets), citing Triquet and others *v.* Bath; Peach and others *v.* same; Burrows Rep., 1480, quoting Lord Talbot as there saying: "The law of nations in its full extent was part of the law of England." (Woolsey, *Intro. to Int. Law*, sec. 29.)

The Supreme Court of the United States refuse to construe an act of Congress to be in violation of "the law of nations if *any other possible construction remains.*" (*Betsy*, 2 Cranch, 118, U. S. Sup. Ct., Marshall, C. J.)

An act of Parliament will be so construed, *if possible*, as not to conflict with the rule of international law covering the same subject-matter. Lord Stowell and Doctor Lushington insist that in a prize court an act of Parliament can not control, and if the act of Parliament plainly does conflict it is nugatory. (Holland's *Studies in Int. Law*, 199.)

The law of nations should be respected by the Federal courts as a part of the law of the land. (*The Nereide*, 9 Cranch, 388, U. S. Sup. Ct.)

The laws of the United States ought not, if it be avoidable, so to be construed as to infract the common principles and usages of nations or the general doctrines of international law. (Wharton, *Int. Law Dig.*, vol. 1, sec. 8, p. 30, citing *Talbot v. Seaman*, 1 Cranch, 1.)

The law of nations is the great source from which we derive those rules respecting belligerent and neutral rights which are recognized by all civilized and commercial states throughout Europe and America. (Wharton, *Int. Law Dig.*, vol. 1, sec. 8, p. 30.)

In what has been stated I have referred exclusively to the international obligations imposed on the United States by the general principles of international law, which are the only standards measuring our duty to the Government of Honduras. (Mr. Bayard, Sec. of State, to Mr. Hall, 6 Feb. 1886.)

The law of nations is the *science* of the law subsisting between nations or states and of the obligations that flow from it. (*U. S. v. The Active*, 24 Fed. Cases, 755, quoting *Vattel*.)

#### CLAIMS

A claim "is, in a just juridical sense, a demand of some matter, as of right, made by one person upon another, to do or to forbear to do some act or thing as a matter of duty." (*Prigg v. Penna.*, 16 Pet., 539, U. S. Sup. Ct.)

In my judgment a claim upon the United States is something in the nature of a demand for damages arising out of some alleged act or omission of the *Government* not yet provided for or acknowledged. As the term imports, it is something asked for or demanded on the one hand and not admitted or allowed on the other. (*Moore's Int. Arb.*, 3623, citing *Dowell v. Cordwell*, 4 Saw., U. S. Cir. Ct., 228, and quoting from *Deady*, J.)

On a claim against a foreign government for spoliation the demand is founded upon the law of nations and the obligation of the offending government is perfect. (*Emerson v. Hall*, 13 Pet., 409, U. S. Sup. Ct.)

Claim: 1. A demand of a right or supposed right; a calling on another for something due or supposed to be due. "Doth he lay *claim* to thine inheritance?" — Shak. 2. A right to claim or demand; a title to any debt, privilege, or other thing in possession of another. "A bar to all *claims* upon land." — Hallam. 3. The thing claimed or demanded; that to which any one has a right, as a settler's claim (U. S. and Australia). (Webster.)

Claim: 1. A demand of anything as due. 2. A title to any privilege or possession in the hands of another. (Johnson.)

In the Spanish language the word of corresponding meaning is *reclamación*.

"The opposition or contradiction which is made to anything as unjust." This is *reclamatio, oppositio*. (Salvá.)

"The demand made for anything by him who has the *right of property* in it against him who possesses or *denies* it." This is *reclamatio*. (Salvá.)

*Reclamación* (claim): The opposition or contradiction that is made in words or in writing against anything as *unjust*, or by showing that it contradicts itself; and the claim or demand for anything by him who has the right of property in it against him who possesses it. (*Escrache, Dict. of Legis.*)

Claimant: 1. One who claims; one who demands anything as of *right*; a claimer.  
2. A person who has a *right*; to claim or demand. (Webster.)

Claimant: He that demands anything as unjustly detained by another. (Johnson.)

In discussing the scope of the word "claim" in the treaty of 1819 between the United States and Spain, Mr. John Q. Adams, Secretary of State, in his letter to Messrs. White and others, of March 9, 1822, observed that the treaty under the general term "claims" provided for the settlement of claims on contracts as well as claims on *torts*. (Am. St. Papers, For. Rel. VI, 796.)

The term "claims" in the convention must be construed so as to confine it to demands which must have been made the subject of international controversy, or which are of such a nature as, according to received international principles, would entitle them on presentation to the official support of the Government of the complainant. (Moore, Int. Arb., 3615, quoting Sir Frederick Bruce, umpire, U. S. and New Granada.)

We are led to the general rule of law, which has always prevailed and become consecrated almost as a maxim in the interpretation of statutes, that where the enacting clause is general in its language and objects, and a proviso is afterwards introduced, that proviso is construed strictly and takes no case out of the enacting clause which does not fall fairly within its terms. (Supreme Court of the United States in *U. S. v. Dickson*, 15 Peters, 165.)

The rule seems to be: — that qualifying words are, while the general terms of submission are not, to be taken in a restrictive sense, if there is to be any distinction. (Moore, Int. Arb., 3626, citing *Vorhees v. Bank*, 10 Peters, 449; *Wayman v. Southard*, 10 Wheat., 30; *Bond v. U. S.*, 19 Wall., 227.)

Fundamentally, however, there is no difference in principle between wrongs inflicted by breach of a monetary agreement and *other wrongs* for which the state, as itself the wrongdoer, is immediately responsible. (Hall, 4th ed., p. 294.)

The mixed commission under the convention with that Republic (Mexico) has always been considered by this Government essentially a judicial tribunal with independent attributes and powers in regard to its peculiar functions. (Daniel Webster, Sec. of State, concerning Mexican - U. S. convention of April 11, 1839.) (Moore, Int. Arb., 1242.)

#### INJURY

Injury (Lat. *in*, negative, *jus*, a right.) A wrong or tort.

Injuries arise in three ways: First, by nonfeasance, or the not doing what was a legal obligation or duty, or contract to perform; second, misfeasance, or the performance in an improper manner of an act which it was either the party's duty or his contract to perform; third, malfeasance, or the unjust performance of some act which the party had no right, or which he had contracted not, to do.

When the injuries affect a private right and a private individual, although often also affecting the public, there are three descriptions of remedies: \* \* \* second, remedies for compensation, which may be by arbitration, suit, action. \* \* \* (Bouvier, Law Dict., Vol. I, 1044.)

There is a material distinction between damages and injury. Injury is the *wrongful act* or *tort* which causes loss or harm to another. Damages are allowed as an indemnity to the person who suffers loss or harm from the injury. *The word injury denotes the illegal act, the term damages means the sum recoverable as amends for the wrong.* (Bouvier, *Law Dict.*, vol. 1, p. 1045, citing 103 Ind., 319.)

Injury *n.*; pl. injuries. \* \* \* L. *injuria*, fr. *injurious*, wrongful, unjust: pret. *in* — not + *jus*, right, law, justice; cf. F. *injurer*. See *Just*, a.

Injury in morals and jurisprudence is the intentional doing of wrong. (Webster's Int. Dict.)

Damages in law is the estimated reparation in money for detriment or *injury* sustained; a compensating recompense or satisfaction to one party for a *wrong* or *injury* actually done to him by another. (Webster's Int. Dict.)

Damages. The indemnity recoverable by a person who has sustained an injury, either in his person, property, or relative rights through the *act* or *default* of another. (Bouvier, *Law Dict.*, vol. 1, p. 491.)

“ There is no right to damages where there is no *wrong*. It is not necessary that there should be a tort, strictly so called — a willful *wrong*, an act involving moral guilt. The wrong may be either a willful, malicious *injury*, as in the case of assault and battery, libel, and the like, or one committed through mere motives of interest, as in many cases of conversion of goods, trespasses on lands, etc.; or it may consist in a mere neglect to discharge a duty,” etc.; “ or a simple breach of contract,” etc.; “ or it may be a wrong of another person for whose act or default a legal liability exists,” etc. “ But there must be something which the law recognizes as a *wrong*, some *breach of a legal duty*, some *violation of a legal right*, some *default or neglect*, some failure in responsibility sustained by the party claiming damages. *For the sufferer by accident or by the innocent or rightful acts of another can not claim indemnity for his misfortune.*” It is called *damnum absque injuria* — a loss without a wrong for which the law gives no remedy. (Bouvier, *Law Dict.*, vol. 1, p. 492, citing many cases and law writers.)

The umpire is not of opinion that he would be justified in making an award against the Mexican Government.

The damages and losses alleged by the claimants seem rather to be the result of the inevitable accidents of a state of war than to have arisen from a wanton destruction of property by Mexican authorities. (Moore Int. Arb., 3668, Shattuck's case, Thornton, umpire, Mex. Com., 1868.)

The umpire is further of opinion that the damage done to cotton crops by cavalry passing over them in the neighborhood of the scene of hostilities must be attributed to the hazards of war, and for which the government of the belligerent can not be held responsible. (Moore Int. Arb., 3670, Cole's case, Thornton, umpire, Mex. Com., 1868.)

The umpire is of opinion that when during time of war and in the enemy's country straggling soldiers and marauders go about robbing and destroying property it can not be considered that it is an injury done by the authorities of the country whose troops are invading an enemy's country \* \* \*. The umpire therefore awards that the above mentioned claim be dismissed. (Moore Int. Arb., 3670, Buentello's case, Thornton, umpire, Mex. Com., 1868.)

Damages done to property in consequence of battles being fought upon it between the belligerents is to be ascribed to the hazards of war and can not be made the foundation of a claim against the government of the country in which the engagement took place. (Moore Int. Arb., 3668, Riggs's case, Thornton, umpire, Mex. Com., 1868.)

The umpire is therefore of opinion that the claimant was committing no illegal act in transporting his cotton through Coahuila and Tamaulipas with destination to Matamoras on the 20th of September, 1864, and that as it was seized by Mexican authorities the Mexican Government is bound to indemnify the claimant. (Moore Int. Arb., 1327, Weil case, Mex. Com., 1868.)

The umpire can not doubt that robbery of cattle on the borders of Texas adjacent to Mexico and their transportation across the Rio Grande has been carried on for several years past; but he thinks that the proofs are entirely insufficient and he is not at all satisfied that the robbers were always Mexican citizens and soldiers; that bands of robbers were organized on the Mexican side of the river under the eyes and countenance of the Mexican authorities, or that the sufferers by these plunderers were refused redress by those authorities when they were appealed to in particular instances with regard to specific cattle proved by the owners to have been stolen. \* \* \* The umpire can not see that in the above-mentioned case there are sufficient grounds for holding the Mexican Government responsible for the losses suffered by the claimant, and he therefore awards that the claim be dismissed. (Moore Int. Arb., 3037, Dicken's case, Thornton, umpire, Mex. Com., 1868.)

\* \* \* At this period Halstead entered Mexico without a passport, committing not “ a criminal violation of the laws of Mexico ” — passports are a matter of police — but an offense for which he was arrested according to the laws of Mexico. He was legally arrested and kept legally in prison for a couple of weeks, but he was held a prisoner for something like four months, plainly not according to right and justice. (Moore Int. Arb., 3244, Halstead's case, Lieber, umpire, Mex. Com., 1868.)

See also Mexican Claims Commission, convention of 1868, the following cases: Moore Int. Arb., 3669, Blumenkron; 3674, Wilson; 3672, Antrey; 3671, Schlinger; 3012, Donougho; 3021, Wilson; 3027, Lagueruene; 3032, Bowley; 3033, Moliere; 3721, Cole; 3722, Mark; 3726, Brach; 3673, Johnson; 3668, Baker.

## SEIZURE

Seize. (Law.) To take possession of by virtue of a warrant or other legal authority; as, the sheriff seized the debtor's goods. (Webster's *Int. Dict.*)

Seizure. The act of seizing, or the state of being seized; sudden and violent grasp or gripe; a taking into possession, as the seizure of a thief, a property, a throne, etc. Retention within one's grasp or power: hold; possession; ownership. (Webster's *Int. Dict.*)

Seizure. In practice, the act of taking possession of the property of a person condemned by the judgment of a competent tribunal to pay a certain sum of money, by a sheriff, constable, or other officer lawfully authorized thereto, by virtue of an execution, for the purpose of having such property sold according to law to satisfy the judgment. (54 N. W. Rep. (Wis.), 30.) The taking possession of goods for a violation of public law; as, the taking possession of a ship for attempting an illicit trade. (2 Cra., 187; 4 Wheat., 100; 1 Gall., 75; 2 Wash. C. C., 127, 567; 6 Cowp., 404; Bouvier, *Law Dict.*, vol. 2, p. 976.)

The Constitution of the United States, amendment, article 4, declares that "the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated; and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized." (Bouvier, *Law Dict.*, vol. 2, p. 969, citing 11 Johns, 500; 3 Cra., 447; Story, Const., 1900; 116 U. S., 616.)

In the conventional agreement between the United States of America and Peru, March 17, 1841, these words are used: "Seizures, captures, detention, sequestrations, and confiscations of their vessels." And the limits placed are to "claims on account of the seizure, damage," etc. (Moore Int. Arb., 4590-4607.)

## JUSTICE

Justice. The quality of being just; conformity to the principles of righteousness and rectitude in all things; strict performance of moral obligations; *practical conformity to human or divine law*; integrity in the dealings of men with each other; rectitude; equity; uprightness.

The rendering to everyone of his due or right; just treatment; requital of desert; merited reward or punishment; that which is due to one's conduct or motives.

Examples of justice must be made for terror to some. Bacon. (Webster's *Int. Dict.*)

Justice refers more especially to the *carrying out of law*, and has been considered by moralists of three kinds: (1) Commutative justice, which *gives every man his own property*, including things pledged by promise; (2) distributive justice, which gives every man *his exact desert*; (3) general justice, which carries out all the ends of law, though not in every case through the precise channels of commutative or distributive justice. (Webster's *Int. Dict.*)

The constant and perpetual disposition to render every man his due. The conformity of our *actions* and our *will* to the *law*.

There is properly but one single general rule of right, namely: Give every one his own.

The foregoing are the authorities upon which the umpire rested his opinions in the two aforementioned cases, and the force and effect of which opinions were that the expressions in question were to be given their usual, ordinary, and obvious meaning when employed in claims treaties under accepted and recognized principles of international law, and that the effect and purpose of admitted liability on the part of Venezuela was not to extend the meaning and appli-

cation of "injuries" and "wrongful seizures" beyond their well-established bounds.

The learned agent of Great Britain in the case before us contends that this holding practically emasculates the admission of liability and deprives it of all meaning and bearing in connection with the treaty, and that it can not be presumed that this expression, carefully selected and deliberately inserted in an important section of such treaty, was to be treated as without meaning and effect. The learned agent urges that the treaty under consideration was made while a blockade of the Venezuelan ports was in progress and that his Government made the acceptance of liability, in the sense and in the words finally used in the perfected treaty, a condition precedent to the lifting of the blockade; and that this fact is, in his judgment, conclusive in favor of his proposition that Venezuela thereby admitted her liability for all claims arising out of the recent insurrection, whether due to their own acts or to those of the insurgents.

Since there is no mention of civil wars or war of any kind in that part of the protocol, the umpire understands the learned agent's contention to rest upon the position that all injuries to property and all wrongfull seizures thereof are included in Venezuela's admitted liability. That it is, in his present contention, applied to all claims arising out of the insurrection is simply because such claims are the only claims under consideration in this particular case.

The umpire is of opinion that the expression of admitted liability was not used carelessly or without purpose, but was intended to have grave and important effect upon the Commission assembled under the provisions of said treaty. The question is simply this: Is it the effect claimed by the learned agent or some other?

As held by the umpire, there was no ambiguity in the language used, and, as considered by the umpire, there was nothing ineffective in any of the provisions of the treaty. There seemed to him, on the face of its provisions, nothing to interpret, nothing to construe.

But the learned agent contends that, when viewed historically with a wise regard for all the conditions antecedent, proximate, and immediate, construction becomes necessary, and that when properly construed his contention will prevail; that there is, in fact, a latent ambiguity which first arises in the application of the treaty to the facts in hand.

It is held in *Bouvier* (vol. I, p. 1107, citing 1 Dall., 426; 3 S. and R., 609), that "when there is a latent ambiguity which arises only in the application and does not appear upon the face of the instrument it may be supplied by other proof." That "the journals of a legislature may be referred to if the meaning of a statute is doubtful or badly expressed." (*Bouvier*, vol. I, p. 417) That in contracts in case of doubt "there must always be reference to the surrounding circumstances and the object the parties intended to accomplish." (*Bouvier*, vol. I, p. 1107.)

The umpire has therefore carefully reviewed the historical status and the circumstances surrounding the parties at the time the treaty was made.

By the courtesy of the two Governments he is in possession of the Blue Book containing correspondence respecting the affairs of Venezuela, and the Yellow Book of Venezuela, together covering all the time which it is important to include in this inquiry, and it is from these two sources that the umpire has obtained his knowledge of the circumstances preceding and leading up to the blockade and the adjustment of matters between the war powers and Venezuela, finally crystallizing in the respective protocols.

(1) The scene opens with a dispatch from the governor of Trinidad to the British colonial office, of date March 16, 1901, concerning an outrage on British subjects by the *Venezuelan* gunboat *Augusto*, the event having relation also to

Patos Island. Representations concerning the same were made by the British minister resident at Caracas to the Venezuelan minister of foreign affairs prior to March 22, 1901, (No. 3); and, later, a report from the minister of the contemplated steps of the Venezuelan Government in reference thereto.

(2) Outrage on J. N. Kelly, of Trinidad, by *Venezuelan* soldiers, reported to the Marquis of Lansdowne by the British minister resident at Caracas by communication of date March 22, 1901, which outrage occurred during the then recent insurrection in the eastern part of Venezuela. On March 12 the British minister had communicated in writing (No. 6) to the Venezuelan minister of foreign affairs a description of this outrage, the last paragraph of which contains in part the following:

I will not dwell on the prejudicial effect on the interests of Venezuela herself caused by occurrences of this nature, as I feel sure that your excellency will agree with me in thinking that the injury done — *not by insurgents*, but by *soldiers* of the Government — to an inoffensive and law-abiding immigrant — \* \* \*

In connection with the *Augusto* incident, there were claims and counter-claims as to the respective rights of the British Government and of Venezuela in the island of Patos, both asserting sovereignty therein. (See No. 8 and inclosures 1 and 2 in No. 8.)

(3) Communication from the British minister resident at Caracas to the Marquis of Lansdowne, of date April 17, 1901, relating to the alleged burning and plundering of the sloop *Maria Teresa*, the property of a British subject, by a *Venezuelan* gunboat off Guiria during the then late disturbances on the Gulf of Paria and the maltreatment of British subjects in connection therewith, inclosure 9 in No. 11 being a copy of the communication addressed by the British minister at Caracas to the Venezuelan secretary of foreign affairs. It appears from this communication that the sloop was first taken by the insurrectionary troops at Yrapa and ordered to proceed to Yaguarapaso with revolutionary soldiers, who were landed there. It is also claimed that this service to the revolutionary forces was compulsory, that the master received no compensation therefor, and that the sloop was engaged in lawful traffic. But there was no demand upon the Government of Venezuela because of the compulsory service under revolutionary orders, and these facts were referred to in an exculpatory and explanatory way.

(4) Communication No. 12, from the British minister resident at Caracas to the Marquis of Lansdowne, of date April 17, 1901, referring to the case of John Craig and his vessel, the *sea Horse*, a British subject of Trinidad, for indignities and losses received at the hands of an unnamed *Venezuelan* guardacosta carrying a crew of eight men, whose commander it is alleged landed on the island of Patos, assaulted the subjects of Great Britain, and seized their property while they were peacefully engaged in their lawful avocations. Inclosure 8 in No. 12 is a copy of the communication made by the British minister to the Venezuelan secretary for foreign affairs calling his official attention to the facts and the importance of the Craig case.

In the reply of the Venezuelan secretary for foreign affairs of the same date (p. 27) he reviews the claim of Venezuela to the island of Patos as a part of her territory.

In the statement of Raphael José Ortega (p. 33), referring to the case of the *Maria Teresa*, it is alleged that this sloop was engaged in clandestine trade and in carrying implements of war to the revolutionists, and also that her captain was in league with them.

In the inclosure No. 20 (p. 35) there is a copy of the communication of the minister for foreign affairs to the British minister resident at Caracas, having

reference to the case of John Craig, in which there is brought forward the charge of complicity in revolutionary matters as a justification for the Venezuelan acts.

(5) Inclosure 1 in No. 24 is a communication from the governor of Trinidad to Mr. Chamberlain, of date October 3, 1901, calling attention to the seizure of the sloop *Pastor* by the Venezuelan gunboat *Tulono* off the island of Patos. And as is shown in the communication from the British foreign office to the colonial office, No. 37, of date November 30, 1901, the incidents connected with the seizure, when taken with other like acts in reference to this islands, make them a repeated violation of territory and as indicating a purpose on the part of Venezuela to consider and treat Patos as belonging to it, and therefore calling for a "strong remonstrance against any infraction of the sovereign rights of Great Britain." This was done by the British minister resident at Caracas by his communication to the Venezuelan minister for foreign affairs December 17, 1901, (inclosure 1 in No. 46), and on December 20, 1901, the Venezuelan minister for foreign affairs (inclosure 2 in No. 46, to the British minister resident at Caracas) replies to this communication, asserting that the matters there referred to —

must be considered in connection with the notorious circumstance that Venezuela considers the island in question as its legitimate possession.

(a) No. 25 is a communication from the customs to the British foreign office, of date November 8, 1901, concerning the fitting out of the *Ban Righ*, a matter which later assumed great importance in the minds of the Venezuelan Government, and was a cause of much feeling on their part against the British Government. This boat was nominally for the Colombian Government, and was fitted out as a vessel for offense and defense, and was loaded with a considerable quantity of arms and ammunition. At Antwerp it is alleged to have taken on a large quantity of arms and ammunition of French manufacture, and was expected to take on a consignment of shell at Pipe de Tabac, about 20 miles below Antwerp. (See Nos. 37 and 17 of date November 30, 1901.) Later the vessel was taken to Martinique and there turned over to General Matos. (No. 55.) On February 28, 1902, the Venezuelan Government took the position toward the British Government that until the latter would recede from its position of indifference and irresponsibility for the *Ban Righ* the Venezuelan Government could not consider "on bases of mutual cordiality the other matters which reciprocally concern" their respective Governments. On June 9, 1902 (No. 87), the Marquis of Lansdowne wrote the British minister that His Majesty's Government could not admit that there is any connection between the question of the Bolivar Railway and that of the *Ban Righ*, and could not acquiesce in the attempt of the Venezuelan Government to postpone dealing with other pending questions until that of the *Ban Righ* was disposed of.

(b) Communication of date November 18, 1901, from General Pachano to the British minister resident at Caracas (inclosure 1 in No. 40), calling attention to the landing of a great quantity of rifles and of cartridges on the island of Tobago and asking for the mediation of the minister in obtaining from the colonial authorities measures to prevent these arms leaving Tobago to the harm of Venezuela.

The governor of Trinidad declined to interfere. (Inclosure 2 in No. 42.)

(6) No. 49, British colonial office to the British foreign office, of date January 25, 1902, calls attention to "the seizure and detention by the Venezuelan authorities of a colonial British-owned and British-registered sloop, the *Indiana*, in the waters of the Barima River, in Venezuelan territory."

(7) The governor of Trinidad to Mr. Chamberlain, of date April 17, 1902, calls attention to the conduct of Señor Figuredo, Venezuelan consul at Port of

Spain, in connection with the dispatch of vessels from that port to Venezuela. This matter became one of serious importance and disturbance between the two Governments, and resulted in much correspondence between them, but no understanding.

(8) In the communication of the governor of Trinidad to Mr. Chamberlain of date May 12, 1902 (inclosure 1 in No. 88), attention is called to the destruction at Pedernales by the *Venezuelan* gunboat *General Crespo* of the British vessel *In Time*.

(9) Communication of the British minister resident at Caracas to the Marquis of Lansdowne, of date June 30, 1902 (No. 106), calling attention "to the seizure by a Venezuelan man-of-war on the high seas of the British vessel *Queen*," and stating that the attention of the Venezuelan Government had been called to the matter, with a request for information as to the steps proposed by them.

(10) Memorandum on existing causes of complaint against Venezuela by the British foreign office, of date July 20, 1902, No. 108, in which there appear case of seizures by the Venezuelan gunboat *Augusto*, case of the *Sea Horse*, case of the *Maria Teresa*, case of the *Pastor*, case of the *Indiana*, case of the *In Time*, case of the *Queen*. Under each case is a condensed statement of the facts accompanying each alleged outrage, the action of the British Government in connection therewith, and the position of the Venezuelan Government in reference thereto.

There follows, also, in said memorandum of causes for complaint a statement of the action of the Venezuelan consul at Trinidad, in which his offenses are summed up, and the fact also appears that the Venezuelan Government had been notified thereof and that notice had been taken of their communication.

In the same memorandum there occurs this:

Besides these specific outrages and grounds of complaint there are cases in which British subjects and companies have large claims against the Venezuelan Government. The Venezuelan Government decline to accept the explanations and assurances of His Majesty's Government with regard to the *Ban Righ* as in any way modifying the situation. As a result, the position of His Majesty's legation at Caracas has been rendered for diplomatic purposes quite impracticable, as all representations, protests, and remonstrances now remain disregarded and unacknowledged.

Returning to an earlier date in the correspondence between the British Government and the Venezuelan Government, under date of December 31, 1901 (No. 41), in the communication from the British minister resident at Caracas and the Marquis of Lansdowne, and referring to the fact that Venezuela had proclaimed the vessel *Ban Righ* a pirate, there is found this statement:

I have warned the Venezuelan Government unofficially that any infraction of *international law* with regard to the life and property of British subjects should be avoided. It is contended by the minister for foreign affairs that *international law* is overruled by the Venezuelan law of piracy.

In the index to the Blue Book there is this summary:

*Ban Righ*. — The Venezuelan Government offer reward for capture. They declare municipal law overrules international law.

The instructions of the Marquis of Lansdowne to the British minister resident at Caracas, of date July 29, 1902 (No. 110), directing him to make final protest and demand for reparation with a sharp alternative, cover the points named in the foregoing memorandum and no other.

In the statement of the British foreign office to the Admiralty, of date August 8, 1902 (No. 115), there appears this:



For the past two years His Majesty's Government have had grave cause to complain on various occasions of unjustifiable interference on the part of the Venezuelan Government with the life and property of British subjects. The successive instances which have occurred since the beginning of last year are set forth in the accompanying memorandum. \* \* \*

Lord Lansdowne is of opinion that the time has arrived when stronger measures must be resorted to for the purpose of bringing the Venezuelan Government to a sense of their *international obligations*. \* \* \*

I am to add that, in conversation with Lord Lansdowne, Count Metternich, the German ambassador, has suggested that the powers concerned should take part in a joint naval demonstration.

In an extract from the dispatch of Minister Haggard to the Marquis of Lansdowne, of date August 1, 1902, he incloses a copy of the note which he addressed to the Venezuelan Government embodying the instructions conveyed to him by his lordship's telegram of 29th ultimo (No. 110), which note Minister Haggard says he took personally to the acting minister for foreign affairs and carefully translated it to him word for word. This note is of date July 30, 1902 (p. 138), and begins by saying that he has been informed —

by His Majesty's Government that they have had under their serious consideration a succession of cases in which the Venezuelan Government have interfered with the property and liberty of British subjects in a wholly unwarrantable manner.

Then follows an enumeration of the incidents and complaints named in No. 108. The communication closes with the following paragraph:

It is not possible, His Majesty's Government consider, to tolerate a continuance of conduct which, in this last incident, reached a climax; and they have consequently instructed me to record a formal protest with reference thereto and to convey to His Excellency the President and to the minister for foreign affairs, in terms about which there can be no mistake, that, unless explicit assurances are received by His Majesty's Government that such incidents shall not occur again, and that full compensation be paid promptly to the injured parties wherever it be shown to the satisfaction of His Majesty's Government that such compensation be justly due, they will take such steps as they may consider to be necessary to exact the reparation which they have the right to demand in these cases, as well as on account of the claims of the British railway companies in Venezuela as also for any loss caused by the conduct of the Venezuelan consul at Trinidad, for which there is no possible justification.

The reply of the Venezuelan Government (No. 123) was, in brief, that they declined discussing these matters unless at the same time the matter of the *Ban Righ* and their claims against Great Britain on account thereof were taken up for consideration.<sup>1</sup>

The memorandum of the British foreign office communicated to the German ambassador October 22, 1902 (No. 127), opens with the statement that —

His Majesty's Government have, within the last two years, had grave cause to complain of *unjustifiable interference* on the part of the *Venezuelan Government* with the liberty and property of British subjects.

Among other instances alluded to as supporting this statement is found this —

It may be mentioned that there are several British railway companies in Venezuela which have large claims against the Government in respect of services rendered, damage done to property by *Government troops*,

but no allusion to losses from revolutionists.

<sup>1</sup> British Blue Book (Venezuela, No. 1, 1903), p. 139.

September 1, 1902 (No. 129), the Marquis of Lansdowne is advised by the British minister resident at Caracas of the imprisonment of a British subject, A. Martin Gransaul, at Puerto Cabello by the Venezuelan authorities, and also, on October 22 (No. 130), another dispatch concerning the cutting and maiming of a British subject, John Jones, by the Caracas police.

November 11, 1902 (No. 134), the Marquis of Lansdowne telegraphed Sir M. Herbert, British ambassador to the United States of America, directing him to see Mr. Hay, Secretary of State for that country, and to make him a communication in the following terms:

His Majesty's Government have, within the last two years, had grave cause to complain of *unjustifiable interference* on the part of the *Venezuelan Government* with the liberty and property of British subjects;

stating, also, that they had sought without result amicable settlement, and that it was felt that a continuance of such conduct could not be tolerated; that they had asked assurances as to the future and reparation for the past, but to no result.

It was on November 13, 1902 (No. 137), that through Count Metternich there was submitted to Great Britain a statement of Germany's claims, and in the first class were placed her claims arising out of the Venezuelan civil war of 1898-1900, amounting to 1,700,000 bolivars approximately. England's first-class claims were the illegal removal and destruction of her merchant ships. In the event of coercive measures becoming necessary the two powers were to make further claims, but there is no reference to acts of revolutionists.

In a communication (No. 140) from the Marquis of Lansdowne to Mr. Buchanan, of date November 17, 1902, concerning a conference had with representatives of the German Government, there is a further statement concerning an agreement with Germany, a recapitulation of the British claims, a reference to coercion if necessary, and then a statement as to the subsequent action of the British Government on receiving the submission of the Venezuelan Government "and on learning that they were prepared to admit their liability on every count." After providing for the immediate payment of the claims in the first class, they —

would then consent to the heavier claims being referred to a small mixed commission of three members in case the Venezuelan Government should have any considerations to urge in mitigation of the damages claimed. An arrangement of this nature would be equitable as regards the Venezuelan Government, and would, moreover, prevent pressure being exercised in cases, such as might possibly occur, where the Venezuelan member of the commission could prove a claim to be *unfounded* or *excessive*.

Another note (No. 141) of same date, from the Marquis of Lansdowne to Mr. Buchanan, speaks of the action of the foreign bondholders of Venezuela and their request for the support of their governments; that this request did not come until September; that in consequence their claim was not included in the demand of July, and therefore suggesting that they act with the German Government in representations to Venezuela and in urging her to accept the arrangement proposed.

November 26, 1902 (No. 153), in the communication from the Marquis of Lansdowne to Mr. Buchanan there is a statement of the substance of the German ambassador's communication to him which contained a rehearsal of the claims of the Imperial Government, the first two of which are —

(a) payment of the German claims arising out of the civil wars of the years 1898-1900, amounting to about 1,700,000 bolivars; (b) settlement of claims arising out of the present civil war in Venezuela. \* \* \*

The Imperial Government also concur in the further proposal of His Majesty's Government to demand at once from the Venezuelan Government the acceptance *in principle* of all the German and English claims, and to reserve the separate settlement of claims for a mixed commission to be appointed later;

but declining to submit those under paragraph (a) to such commission, suggesting also that both Governments present simultaneously an ultimatum —

*in which each power should embody its own collective demands*, referring at the same time to the demands of the other power.

The communication of the Marquis of Lansdowne to Mr. Buchanan (No. 154) of even date with the last, but referring to a conversation with the German ambassador of date even with the communication, states the points in which the two Governments had not fully agreed.

On December 2, 1902 (No. 161), the Marquis of Lansdowne communicated to the British minister resident at Caracas the contents of the ultimatum to be presented by him to the Venezuelan Government. Among others there are these: He should state that His Majesty's Government —

can not accept the note as in any degree a sufficient answer to your communications, or as indicating an intention on the part of the Venezuelan Government to meet the claims which His Majesty's Government have put forward, and which must be understood to include all *well-founded claims* which have arisen in consequence of the late civil war and previous civil wars and of the maltreatment or false imprisonment of British subjects, and also a settlement of the external debt.

You will request the Venezuelan Government to make a declaration that they recognize *in principle* the *justice of these claims*. [And that] \* \* \* as to the other claims they will be prepared to accept the decisions of a mixed commission with regard to the amount and the security for payment to be given.

It was on December 7, 1902, two days before the memorandum hereinafter referred to was submitted to the German Reichstag, that the ultimatum of the British Government and of the German Government were presented, in writing, by their representatives at Caracas to the Venezuelan Government through its secretary for foreign affairs. (See Inclosure 1 in No. 217.) The umpire quotes from the ultimatum of the British Government as follows:

I have the honor to state further that His Majesty's Government also regret the situation which has arisen, but that they can not accept your excellency's note as in any degree a sufficient answer to my communications or as indicating an intention on the part of the Venezuelan Government to meet the claims which His Majesty's Government have put forward and which *must be understood to include all well-founded claims* which have arisen in consequence of the late civil war and previous civil wars and of the maltreatment or false imprisonment of British subjects, and also a settlement of the external debt.

I am to request the Venezuelan Government to make a declaration that they recognize *in principle* the *justice of these claims*, that they will at once pay compensation in the shipping cases and in the above-mentioned cases and in those where British subjects have been falsely imprisoned or maltreated, and that in respect of other claims they will be prepared to accept the decisions of a mixed commission with regard to the amount and the security for payment to be given.

The umpire quotes from the ultimatum of the German Government (Yellow Book, pp. 37-41),<sup>1</sup> as follows:

The Imperial Government has, in good time, taken knowledge of the note of the ministry of foreign relations of the Republic of Venezuela of the 9th of May last. By that note the Venezuelan Government rejected the demands of the Imperial Government in respect to the payment of the German claims growing out of the

<sup>1</sup> See Appendix to original report, p. 969. Not reproduced in this series.

civil wars from 1898 to 1900, and, in support of its negative attitude, referred to arguments previously advanced. The Imperial Government, even after considering those arguments anew, does not think it can recognize them as probatory.

The Government of the Republic argues, in the first place, that by reason of the domestic legislation of the country, the settlement by diplomatic action of the claims of foreigners growing out of the wars is not admissible. It thus sets up the theory that diplomatic intervention may be barred by domestic legislation. This theory is not in conformity with international law, since the question of deciding whether such intervention is admissible is to be determined not according to provisions of domestic legislation, but in accordance with the principles of international law.

The Venezuelan Government, aiming to demonstrate that the diplomatic prosecution of claims is inadmissible, further cites article 20 of the treaty of amity, commerce, and navigation between the German Empire and the Republic of Colombia of the 23rd of July, 1892. But this argument does not seem to have weight, first, because the treaty is operative between the Empire and Colombia only and, besides, because section 3 of the said article in nowise opposes the diplomatic prosecution of German claims growing out of acts committed by the *Colombian Government or its agents*. \* \* \*

In the first place, the claims originating at an earlier period than the 23rd of May, 1899 — that is, prior to the accession of the present President of the Republic — are not, under the decree, to be taken into consideration, whereas Venezuela will be materially held responsible for the *acts of its preceding Governments*. Next, any diplomatic intervention in the decisions of the Commission is barred, no other resource than an appeal to the high federal court being admitted, notwithstanding the fact that has been proved in various instances that the judicial officers are depending on the Government and, when the occasion arose, have been dismissed from their offices without any formality whatever. \* \* \*

By order of the Imperial Government I have also to ask that the Venezuelan Government will forthwith make a statement in the sense that it recognizes, *in principle*, those claims as valid and that it is disposed to accept the decision of a mixed commission for the purpose of having them determined and guaranteed in every particular.

To these ultimata there was an answer by the Venezuelan secretary for foreign affairs, of date December 9, 1902 (inclosed in No. 217), and from the one addressed to the British minister resident at Caracas the umpire quotes as follows: <sup>1</sup>

Your excellency then enters into the question of the British claims and asks, in the name of your Government, that Venezuela should declare that they are just in principle, and you finally allude to the necessity of paying them and to the common action which the United Kingdom and the German Empire have agreed to exercise in order to compel the Republic to do so. \* \* \*

There is no reason why the Federal Government should not recognize the justice of obligations which are provided for in the national laws, and on this point you may be perfectly sure that the interests in question will be always protected and duly attended to.

With reference to the claims, your excellency would seem to refer definitely to those which you enumerated in a note of the 20th February, 1902, amounting, in your opinion, to 36,401 bolivars. The examining commission created with the agreement of the national legislative body will take them into consideration and will settle them in accordance with justice. The remaining cases which are not answered in the correspondence depend, as far as they can be considered as constituting claims, on facts which have to be proved or defined, and which the competent authorities will attend to or are attending to. And since your excellency speaks of well-founded claims, it does not appear possible that such cases, in their actual condition or legal position, can have the same character as those which are explained in documents which testify to their character and which give an oppor-

<sup>1</sup> See Appendix to original report, p. 985. Not reproduced in this series.

tunity of enlightening the judgment or guiding the decision of the body who will consider them. (As translated in Blue Book, p. 188.)

From the one addressed to the chargé d'affaires of the German Empire resident at Caracas (Yellow Book, p. 41) <sup>1</sup> the umpire quotes:

It takes up, as being the only argument of Venezuela against diplomatic intervention in matters of a certain nature, that which was concretely stated in the reply of May 9, in which the whole doctrine set forth in the previous correspondence was passed by, because a repetition of it was deemed unnecessary. And inasmuch as the very highest principles of international law have precisely been taken for a foundation of the defence of the position of Venezuela presented in the memorandum of March 19, 1901, it was found with extreme surprise that you ascribed to the Government a purpose to consider the question in no other light than that of domestic legislation. When article 20 of the treaty between the Empire and Colombia was cited in the note of May 9, last, it was with no other intention than that of adding supplementary proof to that already adduced in regard to the assent given by Germany to the doctrines upheld by Venezuela.

The three cases now cited as precedents for agreements reached through the diplomatic channel are self-explaining. In 1885 an arrangement was made with France for the payment of allowed claims and the examination of cases dating from much earlier periods; and proof of the fact that the doctrine maintained by Venezuela is therein duly recognized is found in Article V of that convention, whose force has just been fully confirmed. That article inhibits the diplomatic agents of the two contracting parties from intervening in private claims or complaints relating to matters appertaining to civil or criminal justice, unless there should be some denial of justice. \* \* \* If the claims under discussion are just claims, the Federal Executive, as an honored and civilized power, hastens here and now to give the assurance that those claims will be examined and passed upon as such; and inasmuch as the proper board is already organized, there is no occasion for dilatoriness or the slightest departure from the rules laid down by the law in the conduct of the proceedings. In regard to the other particulars, every one of which comes under its regulating law, I need only call attention to the abnormal circumstances created by the war, which are paralyzing any action on the obligations connected therewith. The Government is considering the appointment of a fiscal agent, who, by entering into direct communication with the interested parties, will help in making the satisfaction of those obligations easier and less protracted. It is only hoped that the work of pacification in which the Government is now deeply and earnestly engaged will enable it to reestablish the service of public credit.

The claims growing out of the war, that is still desolating and devastating a part of the Republic, will share fully in all the rights that are established by the law regulating the matter.

To prevent obscurity and to place before his honored associates and the learned agents of their respective Governments the facts which are within the knowledge of the umpire and which are referred to more or less directly in these ultimata and in the replies thereto, he makes a quick detour to a time antecedent to the correspondence hitherto quoted herein; and, beginning with the matters affecting Germany as indissolubly related to the affairs of the British Government in connection with the question before him, refers first to the written statement of the Venezuelan secretary for foreign affairs, of date August 12, 1902, and found in the "Yellow Book," pages 5-11,<sup>2</sup> in which it appears that the United States of America were officially advised that Germany was contemplating "coercive or comminatory action against the Republic of Venezuela" as early as December 11, 1901, and that their reasons therefor were given at that time and were, as then understood by Venezuela —

<sup>1</sup> See Appendix to original report, p. 971. Not reproduced in this series.

<sup>2</sup> *Idem*, p. 955. Ditto.

based on the refusal of the Venezuelan Government to permit that powers, foreign to the nationals, take part in the examination, classification, or mode of payment of the claims that various German subjects have presented or reserve the right to present for alleged losses or damages sustained during the last wars since 1898. While the text of the memorandum makes unfavorable remarks about the Venezuelan magistrates of the judiciary, whose office it is to pass upon the nature of these claims, it sets forth the resolution of the Imperial Government to present the claims itself, as finally examined, in order that they may be accepted in that form by Venezuela whether willing or not.

In consequence of the above-mentioned publication, the Government of the Republic is now confronted by a document by which it is seriously affected and of whose spirit and tendency it was entirely unaware. \* \* \*

The paper of the German ambassador, once known to Venezuela, can not be allowed to pass without the protest resulting from its contravening maxims of strict equality that international law advocates as a principle of harmony among the states of the civilized world. \* \* \*

The views and arguments advanced by the Republic since the beginning in support of its refusal to accept diplomatic action in the settlement of claims of the Empire have never been refuted, not even incidentally. \* \* \*

In that series of diplomatic notes the Empire rested its case not only on the law of the country, which, as such, gave sufficient force to the argument, but on the best recognized rules of modern international law, on the opinion of eminent European and American writers, on the legislation of other countries, Germany herself, among others, and on the ideas and circumstances which no fair government can ignore when it has to examine claims with due regard to all those concerned. It never was the intent of the Republic, in that correspondence, to impose its will arbitrarily and capriciously, nor did it intend, as the ambassador seems to suppose, to evade sacred obligations in a frivolous manner, but to hold the ground it has stood on since its advent to political life, for natural and judicious reasons. \* \* \*

The Imperial Government, according to the language of the ambassador, wishes to examine and decide for itself and by itself the character, amount, and mode of payment of claims connected with property or interests established in the Republic of Venezuela. The Venezuelan Government, supported by its constitution and the regulations, maintains that such procedure can not be granted to any but the respective national powers. \* \* \*

If by exceptionally waiving the local laws, the matter of claims was allowed to be made one of mere diplomatic action, the simultaneous effect might be a constant injury to the internal sovereignty and a ceaseless threat to the national treasury. \* \* \*

If the class of claims relating to property owned within the territory does not come exclusively under the law of the country, it would behoove the other party to prove it by representing such a statement as would upset all maxims, arguments, and opinions advanced by Venezuela.

This document distributed among the powers closes with a reference to "the organization of the two International Congresses convened on the powerful initiative of the Great Republic of the North," to which attention is here called by the umpire that it may be remembered in connection with what he has to say on the same matter further on in his opinion. Concerning the remaining part of the Yellow Book having reference to the correspondence with Germany beginning in April, 1900, and running on to the close of 1902, the umpire for the sake of brevity calls attention without quoting to the fact that it consists of claims upon the part of Germany covering the losses sustained by the great railroad of Venezuela in connection with the civil war up to the close of 1899; of general-indemnity claims growing out of the same war; of the claim of Venezuela that the decree of January 24, 1900, provided for their ascertainment and liquidation; of the refusal of Germany to allow the said decree to influence in any way its attitude "in regard to claims of German protégés," of its objection in detail to the provisions of such decree; of a reasser-

tion on the part of Venezuela of the propriety of the decree, and of the judicial validity of the law of February 14, 1873, regarding the manner of preferring claims against the nation; the arguments of Venezuela in favor of its positions on these questions; of a reference to "the celebrated International American Conference of 1889-90 and approval of the principles then enunciated by fifteen delegates there present;" of lengthy quotations from international law writers in supporting Venezuela's contention, and other matters considered relevant and important to the provision of her constitution making equal civil rights for natives and aliens; which positions are proclaimed and adhered to on the one part and denied on the other through a correspondence covering many pages of the Yellow Book. The right of intervention on the part of Germany in behalf of her subjects is distinctly repudiated by Venezuela as being in "judicial impossibility;" "that such intervention is contrary to the *law of the country and therefore* inadmissible under the international law;" to which the German Government replies that it holds "that national laws which exclude diplomatic intervention are not in harmony with international law, because, according to the view of the powers of the Republic, all intervention of this character could be barred by means of municipal legislation." (See pp. 28, 29, 30, 31 of Yellow Book, May 9, 1902).<sup>1</sup> This is a communication from the Venezuelan minister of foreign affairs to the chargé d'affaires of the German Empire, closing the correspondence between Germany and Venezuela until the presentation of their ultimatum December 7, 1902, to which reference has already been had.

The British Government, through its minister resident at Caracas, in his communication of April 25, 1901, to the Venezuelan minister for foreign affairs, informs that Government <sup>2</sup>—

that the declaration communicated to the Government of Venezuela by Mr. Middleton, His Majesty's resident minister, in his communication of May 21, 1873, to the effect that His Majesty's Government reserves the right to object to any claim on the part of Venezuela at any future time to having released itself, by its own decree, from responsibility to Great Britain as to the injustice or damages caused to British subjects, for which Venezuela would be bound to give indemnization either by reason of the law of nations in general or by virtue of the provisions of treaties.

To this there is a reply by the Venezuelan minister for foreign affairs, of date May 11, 1901, in which he states in part as follows <sup>3</sup>:

On the other hand, the chief justice believes that no reservation of rights whatever concerning decrees issued in the name of the national sovereignty, and the effects of which include both natives and foreigners, is possible or acceptable. There is no principle of the law of nations, nor any assumption whatever in the stipulation which Venezuela should bear in mind concerning Great Britain, which binds the Government to establish discriminations in the protection of the interests which should be governed by internal legislation.

To the positions here taken the British minister resident at Caracas takes serious exception in his communication of May 13, 1901, asserting that it is in contradiction of the terms of the treaty of 1825, a part of which he quotes, and further on he says <sup>4</sup>:

This constitutes a marked difference which it would have been deemed impossible to deny and which it is impossible to avoid. His Majesty's Government has never admitted, therefore, the contention of the Venezuelan Government, which is of long

<sup>1</sup> See Appendix to original report, p. 970. Not reproduced in this series.

<sup>2</sup> *Idem*, p. 975. Ditto.

<sup>3</sup> *Idem*, p. 975. Ditto.

<sup>4</sup> *Idem*, p. 976. Ditto.

standing, that the claims of British subjects should be placed on the same footing as those of natives, submitting them to judicial intervention and decision to the exclusion of diplomatic intervention.

On May 25, 1901,<sup>1</sup> the Venezuelan minister for foreign affairs answered the communication last above referred to in a long letter reproducing the arguments of Venezuela in favor of her law of 1873, citing authorities in support thereof, citing the statutes and constitutions of Mexico, Guatemala, Salvador, Nicaragua, Honduras, Colombia, Brazil, Ecuador, Peru, the Argentine Republic, and Paraguay upon the same points; and asserts that the thirty years during which the law of 1873 has been upon the statutes adds much to its dignity and force among nations.

December 25, 1901, the British minister resident at Caracas communicates to the Venezuelan minister for foreign affairs the regrets of His Majesty's Government<sup>2</sup> —

that the Government of Venezuela refuses to recognize the reservations of rights made by His Majesty's Government in the question of British claims in the last and previous communications, concerning the right to object to any claim on the part of the Venezuelan Government at any time, of releasing itself, by its own decree, of responsibility with Great Britain with respect to damages or injuries caused to British subjects by which Venezuela would be bound to make indemnization, either in accordance with international law in general or in conformity with treaty obligations. These reservations include also the refusal of His Majesty's Government to recognize any limitation whatever by the national law of its right in accordance with the general principles of international law.

December 16, 1902 (No. 193), there was a communication from the Marquis of Lansdowne to Mr. Buchanan, referring to a conversation had with the German ambassador concerning the Venezuelan proposal for arbitration, in which he informed the German ambassador —

We were, however, inclined to admit that, whilst it was impossible for us to accept arbitration in regard to our claims for compensation in cases where injury had been done to the person and property of British subjects by the *misconduct* of the Venezuelan Government, it was not necessary to exclude the idea of arbitration in reference to claims of a different kind. We had already provided for the reference to a mixed commission.

On December 17, 1902 (No. 194), Count Metternich communicated to the British Government a memorandum which was communicated to the German Reichstag by Count Bülow on December 9, 1902:

By the civil wars which have taken place in Venezuela during the years 1898 to 1900 and again since the end of last year, numerous German merchants and land owners have suffered serious injury, partly through the exaction of forced loans, partly by the appropriation without payment of supplies found in their possession, especially cattle for feeding the troops, and, lastly, by the plundering of their houses and the devastation of their lands. The total of these damages, as regards the civil wars during the years 1898 to 1900, amounts to, roughly, 1,700,000 bolivars (francs), while for the last civil war damages to the extent of, roughly, 3,000,000 bolivars have already been reported. Some of the injured parties have lost almost the whole of their property, and have thereby inflicted loss on their creditors living in Germany.

\* \* \* \* \*

It may be added that the Germans in the latest civil war have been treated in a particularly inimical manner. The acts of violence, for instance which were committed by the Government troops when they plundered Barquisimeto, were princi-

<sup>1</sup> See Appendix to original report, p. 976. Not reproduced in this series.

<sup>2</sup> *Idem*, p. 979. Ditto.



pally committed at the expense of German houses. This attitude of the Venezuelan authorities would, if not punished, create the impression that Germans in Venezuela were abandoned without protection to the arbitrary will of foreigners, and would be calculated seriously to detract from the prestige of the Empire in Central and South America, and be detrimental to the large German interests which have to be protected in those regions.

It is also here stated that the claim on behalf of the Great Venezuelan Railway, a German enterprise, equals about £ 300,000.

Count Metternich, in forwarding this memorandum to the British Government "points out that the German claims are not only pecuniary, but also based on the *ill treatment* of Germans by the *Venezuelan authorities*."

This defines and limits the meaning of the claim arising from the civil wars spoken of by the Germans in this connection and elsewhere, and is conclusive in its exclusion of all acts of revolutionaries from the claim and demands contained in its ultimatum submitted to the Venezuelan Government December 7, 1902.

It was on December 17 that the Marquis of Lansdowne informed Sir Michael Herbert, at Washington, that —

the American chargé d'affaires told me to-day that he had received instructions to inform me that the Venezuelan Government now earnestly wished for arbitration, which, in the opinion of the United States Government, seemed to afford a most desirable solution of the *questions in dispute*.

On December 18, 1902, the Marquis of Lansdowne informed Sir M. Herbert at Washington that he had that afternoon informed the United States chargé d'affaires that the cabinet had decided to accept *in principle* the idea of settling the Venezuelan dispute by arbitration and that the German Government was in accord.

It was on December 18, 1902 (No. 199), that the Marquis of Lansdowne communicated to Sir F. Lascelles that the German ambassador had that day informed him of his Government's agreement with Great Britain as to its treatment of the Venezuelan proposal for arbitration, but that his Government desired to make certain reservations similar to what had been previously suggested, and these reservations were submitted in a written memorandum. Paragraph 2 contains the following:

All further demands *contained in the two ultimatums* shall be submitted to the proposed court of arbitration. The latter will therefore have to consider not only the claims in connection with the present Venezuelan civil war, but also, as far as Germany is concerned, the demands mentioned in the memorandum laid before the Reichstag of German subjects arising from the nonfulfillment of liabilities incurred by contract by the Venezuelan Government. The court of arbitration will have to decide both on the *material* justification of the demands and on the ways and means of their settlement and security.

There is added:

The Government of the United States of America would be conferring an obligation on us if, by exerting their influence over the Venezuelan Government, they could succeed in persuading the latter to accept these proposals.

\* \* \* \* \*

I told his excellency that I would communicate his statement to the cabinet, which was to meet in the afternoon, and that I had little doubt that, in principle, the two Governments would be found to entertain similar views.

I was able, later in the afternoon, to inform his excellency that the cabinet agreed to arbitration as a means of settling the dispute, subject to the following reservations, which he undertook to communicate to the German Government:

1. The shipping claims are not to be referred to arbitration.
2. In cases where the claim is 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 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.

On December 22, 1902, the Marquis of Lansdowne sent to Sir F. Lascelles a copy (inclosure in No. 207), received from Count Metternich, of the reply which the German Government returned to the proposals made by Venezuela through the United States Government, from which reply certain extracts are here made. There were reserved from arbitration claims —

which originated in the Venezuelan civil wars from 1898 to 1900, and of which details are given in the inclosed memorandum of the *8th December, which was communicated to the Reichstag*. It will be seen that they consist of claims on account of *acts of violence on the part of the Venezuelan Government or their agents*. \* \* \*

All other claims which have been put forward in the *two ultimat*a could be submitted to the arbitrator.

The arbitrator will have to decide both about the *intrinsic justification* of each *separate claim*, etc.

In the case of claims in connection with damage done to, or unjustifiable seizure of property, the Venezuelan Government will have to recognize their liability in principle, so that the question of liability will not form the subject of arbitration, but the arbitrator will be concerned solely in the questions of the *illegality* of the *damage* or *seizure*. \* \* \*

The Government of the United States of America would be conferring an obligation on the *Imperial* and *British* Governments if, by exerting their influence over the Venezuelan Government, they could succeed in persuading the latter to accept *these* proposals.

Memorandum communicated to Ambassador White December 23, 1902 (No. 209), stated among other matters that —

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. \* \* \*

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, etc.

January 1, 1903, Ambassador White inclosed to the Marquis of Lansdowne a copy of a telegram, via Secretary Hay, from Minister Bowen, in which there is a signed communication from President Castro, and in which appears —

I recognize, in principle, *the claims which the allied powers have presented to Venezuela*.

Neither the British nor the German Governments were satisfied with this telegram of President Castro, and both insisted on an unreserved acceptance of conditions 1, 2, and 3, which were communicated to Ambassador White December 23, 1902, and on January 5, 1903 (No. 222), the Marquis of Lansdowne communicated to Ambassador White what President Castro's recognition "in principle" meant as understood by His Majesty's Government, and in that connection made a restatement of those conditions and required of President Castro a definite acceptance thereof, which was given of date January 9, 1903, through Mr. Bowen (No. 226), in the language following:

The Venezuelan Government accepts the conditions of Great Britain and Germany.

And the conditions which were thus presented so far as they affect the question now before the umpire, as he understands, were that Venezuela "will recognize *the principle of the justice* of the British claims."

Mr. Bowen telegraphs from Caracas to Mr. Hay, January 6, 1903 (Bowen's Pamphlet, p. 9),<sup>1</sup> among other things, that President Castro asserts —

that the claims against him are purely commercial in character; that he acknowledges that he must pay *such of them as are just*.

In the agreement which Mr. Bowen, representing Venezuela, signed January 27, 1903 (Bowen's Pamphlet, p. 15),<sup>2</sup> in regard to the 30 per cent of the total income of the ports of La Guaira and Puerto Cabello, communicated by telegram from Ambassador Herbert to the Marquis of Lansdowne, there appears a statement very significant as to his understanding of the claims to which Venezuela was obliged to respond, viz:

I hereby agree that Venezuela will pay 30 per cent of the total income of the ports of La Guaira and Puerto Cabello to the nations that have claims against her, and it is distinctly understood that the said 30 per cent will be given exclusively *to meet the claims mentioned in the recent ultimatums of the allied powers and the unsettled claims of other nations that existed when said ultimatums were presented.*

On January 23, 1903 (Bowen's Pamphlet, p. 12),<sup>3</sup> Sir Michael Herbert, at Washington, communicated to Mr. Bowen the demands of the British Government, so far as they referred to the claims included in Article III of the protocol, in the following language:

2. Other claims for compensation, including railway claims and those for injury or wrongful seizure of property, must be met by an immediate payment to His Majesty's Government or by a guaranty adequate to secure them. These claims can be, if desired, examined by a mixed commission.

These conditions were accepted by Mr. Bowen by a note of the same date, January 24, 1903 (Bowen's Pamphlet, p. 14),<sup>4</sup> the imperial chargé d'affaires at Washington submitted a document to Mr. Bowen concerning the claims of Germany against Venezuela, and in Article II thereof says:

*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.

February 5, 1903, the Marquis of Lansdowne cabled Sir Michael Herbert, ambassador, in part as follows:

A separate telegram is being sent to you which contains the draft of a protocol *embodying the conditions which have already been accepted by Mr. Bowen.*

<sup>1</sup> See Appendix to original report, p. 1035. Not reproduced in this series.

<sup>2</sup> *Idem*, p. 1039. Ditto.

<sup>3</sup> See Appendix to original report, p. 1037. Not reproduced in this series.

<sup>4</sup> *Idem*, p. 1037. Ditto.

Article III of the protocol thus submitted and Article III of the protocol of February 13, are identical. The language is every word the language of the claimant Government, and it was asserted by that Government (No. 263) to contain nothing not accepted by Mr. Bowen prior to February 5, 1903. What these agreements were has been set out here in substance.

From a careful reading of all the correspondence and conferences between the two allied powers and Venezuela, beginning in April, 1900, and continuing up to and including February 13, 1903, and which appear in the Yellow Book and the Blue Book, and in all the correspondence or conferences appearing in those two books and Mr. Bowen's pamphlet relating to the correspondence and conferences between him as the representative of Venezuela and the three war powers, Great Britain, Germany, and Italy, and in all the correspondence and conferences appearing in either of these documents in which the United States of America had a part, the umpire fails to find a sentence, a word, or a syllable suggestive of a claim by either of these three powers that Venezuela should respond in damages or be held to indemnities because of the acts of insurgents. On the contrary, Germany had stated their claims to be based on "acts of violence on the part of the Venezuelan Government or their agents," and the statements of Great Britain were not opposed, but wholly consistent therewith.

The high contracting parties knew during the negotiation, and at the conclusion thereof when the protocols of February 13 were signed, that Germany had declared in the most formal and explicit manner, on an occasion not remote and in circumstances of the State not dissimilar, her view of equity and justice concerning the liability of governments for the acts of revolutionaries. This appears in her treaty with Colombia in 1892, where is laid down her view of law, justice, and equity in these words:

It is also stipulated between the contracting parties that the German Government will not attempt to hold the Colombian Government responsible, unless there be 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. (Art. 20, sec. 3.)

Italy, the other war power, up to the time of signing the protocol of February 7, 1903, by her treaty with Venezuela in 1861 was bound to treat such matters reciprocally, as appears in the language following:

In cases of revolution or of interior war the citizens and subjects of the contracting parties will, in the territory of the other, have the right of being indemnified for damages and losses which may be caused to their persons or property by the constituted authorities of the country on the same terms as the nationals would have a right to indemnification according to the laws which prevail in such country. (Art. 4.)

And she had deliberately restated her position on such questions under conditions not dissimilar to those of Venezuela in her treaty with Colombia in 1892, 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* want of due diligence 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 the territory of Colombia, through the acts of rebels, or caused by savage tribes beyond the control of the Government. (Art. 21, sec. 3.)

Great Britain had a historical attitude of a similar character on this question, which she had applied in the case of the United States of America in 1861-1865 (see Hall, p. 232). and again not many years since to a country no more well

ordered than Venezuela, namely, to Colombia, in 1885, when a British subject was injured by the burning of Colon, Colombia, and sought the aid of his Government for reparation from Colombia. Under instructions from the British foreign office, the English minister resident stated that the destruction of Colon was due solely to the revolutionists, and that when these events took place "the Government of Colombia was entirely unable to prevent them, even though it afterwards accidentally succeeded in putting down the rebellion." And from these facts it was thought it could not be asserted that his injury "was directly due to the fault of the Colombian Government to the extent of justifying a demand for redress in behalf of those English subjects who, like yourself, have unfortunately suffered losses by reason of the fire." And the conclusion of the matter was that, under instructions of the prime minister, he was informed by the English minister: "I am unable to support your claims against the Government of Colombia." (U.S.-Vene. Claims Commission, convention of 1892, p. 585.)

The umpire desires to call attention specifically to the general attitude of the South American and Central American republics relating to the right of the state by constitutional provision and municipal legislation to cut off the right of the government of the injured citizen to intervene to demand attention to injuries received by their subjects in property and person, who maintain, some of them, that in virtue of such legislation no diplomatic claim can exist, and if one is submitted to an arbitral tribunal a judgment of dismissal must be entered. He assumes, rightfully he believes, that all governments concerned in the matter of which we are now inquiring were fully informed and thoroughly advised concerning the legislation and the attitude to which the umpire refers. That they knew that at the time these protocols were drawn opinions irreconcilable with theirs were held by a very large part of the South American and Central American republics; that these opinions were strengthening rather than abating; that they had taken form in national constitutions and statutes, and in proposed treaties and international agreements.

They knew that at the Pan-American Conference of 1889-90, in a majority report of its committee on international law, among other things it was declared "that foreigners are entitled to enjoy all the civil rights enjoyed by natives, and to all substantive and remedial rights in the same manner as natives," and "that a nation has not, nor recognizes in favor of foreigners, any other obligation or responsibilities than those which are established in like cases in favor of the natives by the constitution and laws." That it was there recommended that these resolutions be adopted as "principles of American international law." They knew these principles there propounded were in sharp and rugged conflict with the law of nations as understood and accepted by Europe and the United States of America. They knew that at the Pan-American Conference held in the City of Mexico in 1901 the delegates representing fifteen of the twenty states which were there assembled reaffirmed the propositions of 1889 and declared again and emphatically that the states do not recognize in favor of foreigners any obligations or responsibilities other than those established by their constitutions and laws in favor of their own citizens, and that the states are not responsible for damages sustained by aliens originating from acts of war, whether civil or national, "except in case of failure on the part of the constituted authorities." From this deliverance both knew that if the constitution and laws of the given state gave no remedies, or illusive ones, to natives for the wrongful seizure of or injury to property, it would be claimed and urged that foreigners must accept the consequences; and that also where the property of aliens had been seized and confiscated for military use by the military powers of the government there was no compensation therefor, regardless of the constitution

or laws of the particular state, and in direct contravention to the generally accepted law of nations applicable thereto.

They knew that there were several treaties projected at this conference all more or less at war with international law as held by Europe; that one country urged a treaty declaring as one of its provisions that "in all cases where a foreigner has claims or complaints of a civil order, criminal or administrative, against a state, no matter what the ground of his allegations may be, he must address his complaint to the proper judicial authority of the state, without being entitled to claim the diplomatic support of the government of the country to which he belongs to enforce his pretensions, but only when justice shall have failed, or when the principles of international law shall have been violated by the court which took cognizance of the claim;" that "in every case where a foreigner has claims or complaints of a civil, criminal, or administrative order he shall file his claim with the ordinary courts of such state;" that no government should "officially support any of those claims which must be brought before a court of the country against which the claim is made, except cases in which the court has shown a denial of justice or extraordinary delay or evident violation of the principles of international law." They knew that to establish such a principle of action would prevent any government from intervention in any case until there had been an exhaustion of all legal remedies and a palpable denial of justice; and that concerning this it was provided that "a denial of justice exists only in case the court rejects the claim on the ground of the nationality of the claimant." A second country would establish an "international court of equity;" but provided that the claimant must first exhaust all legal remedies before the courts of the defendant state where the nature of the claim permitted it to be adjusted by such courts.

They knew that at this conference it was proposed by three of the States in conference that a treaty should be made declaring that the responsibility of the state to foreigners is not greater than that assured to natives; that the government should not entertain diplomatically any demand of a citizen in a foreign country where the claim arises out of a contract entered into between the authorities and the foreigner, or where it has been expressly stipulated in the contract that the government of the foreigner shall not interfere; that the government of a foreigner shall not interfere to support his complaint or claim originating in any civil, penal, or administrative affairs, except for denial or undue delay of justice, or for nonexecution of a final judgment of the courts, or when it is shown that all legal remedies have been exhausted, resulting in a violation of express treaty right, or of the precepts of public or private international law "*universally recognized by civilized nations*." They knew that the words in quote, if agreed to, prevented any intervention, because of the fact that one of the South American states had by statute declared that no judgment rendered against a foreigner could be held as unjust or a denial of justice, even though the decision was iniquitous and against express law. They knew that the South American and Central American republics, with few, if any, exceptions, were permeated through and through with the seductive doctrines of Calvo, the distinguished Argentine publicist, the fundamental idea of which is that no government may rightfully intervene in aid of its citizens in another country, and that this fundamental doctrine to a greater or less extent had been brought into constitutions and statutes of the different states. They knew that in the constitution of Venezuela, Title III, Section I, article 14, there was to be found this provision, namely:

Foreigners will enjoy all civil rights which are enjoyed by nationals, but the nation does not hold or recognize in favor of foreigners any other obligations or responsibilities than those which have been established in a similar case in the constitution and in the laws in favor of nationals.

And that in paragraph 2, article 14, there is to be found this:

In no case may either nationals or foreigners pretend that either nation or states shall indemnify them for damages, prejudices, or expropriations which have not been executed by legitimate authority operating in its public character.

They knew of the Venezuelan law of March 6, 1854, concerning indemnity to foreigners, and the decree of Guzmán Blanco of date February 14, 1873, and that it was protested against by many, if not all, of the leading nations of Europe and by the United States of America; that notwithstanding these protests it was republished by order of President Castro January 24, 1901, and that, as republished, it required "all who bring claims against the nation, whether nationals or foreigners, by reason of *damages* and *injuries* and *seizures* by acts of national employees or of the states, whether in civil or international war, or in time of peace, will bring them" before the high federal court under the rules of procedure laid down in articles 3, 4, 5, and 6 of the decree; that article 8 of the decree provided "that whoever appears in a manifest manner to have exaggerated the amount of the injuries he may have suffered will lose his right to recover and be subject to fine or imprisonment, and if it be altogether false will be mulcted in a fine or sent to prison;" that article 9 of the decree provided "that in no case shall the nation or the state indemnify for losses, *damages*, or *injuries*, or *seizures* which have not been executed by legitimate authorities working in their public character;" that article 10 set a limitation of two years on all actions permissible under the law; that article 11 declared "that all who without public character decree contributions or forced loans or spoliations of any nature, as well as those who execute them, will be directly and personally responsible with their goods for whomever may be prejudiced;" that article 13 repealed the law of March 8, 1854, relating to indemnities above referred to. They knew that President Castro issued an order January 24, 1901, creating a junta to examine and determine the damages claimed by nationals and foreigners against the nation on account of the war initiated May 23, 1899, and limiting the time within which claimants must appear to *three months* from the date of the order, and otherwise their demands were to receive no attention "unless the delay be shown to be occasioned by a superior force." They knew that there was a law of the same date bearing the approval of President Castro, one article of which defined the losses which might be sustained before said junta, namely:

Losses during the war to private property *not* proceeding from hostile acts for which no one is responsible, nor for the licentious conduct of soldiers who have taken advantage of moments of contention, unless they have been made voluntarily, intentionally, and deliberately by order of superior power in charge of belligerent operation.

They knew that article 140 of the Venezuelan constitution contained this important declaration:

International law is *supplementary* to national legislation; but it can never be invoked against the provisions of this constitution and the individual rights which it guarantees.

They knew that such laws and constitution were based on the principle of the duty of nationals and aliens to obey the laws of the land wherein they dwell; that there was no injury to person or property unless incurred in violation of the national law; that there was no remedy save in manner and means as provided by that national law; that the alien had no recourse to the country of which he was a subject except for the causes recognized by such national law; that the nation whose subject he is has no right of intervention, except for causes prescribed by the law of the nation where he is commorant or domiciled; that all this is a

right of each nation to prescribe, and of each alien within its domains scrupulously to obey, and of each mother country to respect, regard, and by it to be controlled; that international law may aid, but can never control, dictate, or determine any matter which is in conflict with its own statute law and the national interpretation thereof; that whereas the generally accepted idea of Europe and the United States of America is the supremacy of international law in international matters, Venezuela and many of the other states of South and Central America of kindred thought maintain the supremacy of their own laws in international matters. They knew that before mixed commissions jurisdictional questions were always possible and might be frequent, and that unrestricted by express agreement Venezuela was bound by her laws, organic and other, to interpose objections jurisdictional to every claim not of the class recognized as proper subject-matter of international intervention by her constitution and her laws; that with unrestricted submission, among others, these questions could always be raised, namely:

I. That every claim by an alien for damages and injuries to property and of seizures thereof by national or state employees in time of peace or during the civil wars would be objected to as not within the jurisdiction of the mixed commissions until it had been heard before the junta provided and there had been a clear denial of justice.

II. That in all cases of losses, damages, or injuries to persons or property or seizure of the latter, not executed or caused by the legitimate authorities working in their public character, there would have been a denial of all liability in any manner at any time.

III. That in all cases otherwise admissible under the laws if the claim had run two years before presentation it was barred by their statutes.

IV. That if contributions or forced loans or spoliation had been decreed or caused by any one or more who were not of the public character required, the party injured had only his remedy against him or them who had caused the loss or injury.

V. That in cases arising on account of the war of 1899 there would be, also, the claim that no case was within the jurisdiction, because of the time limit of three months, except on proof that there had been the exception provided in connection therewith.

VI. That losses to property during that war which might escape the other objections would be met with the contention that such losses must not proceed from hostile acts for which no one is responsible, nor from the licentious conduct of soldiers who have taken advantage of moments of contention, nor are they recoverable unless they have been made voluntarily, intentionally, and deliberately by order of superior power in charge of belligerent operations.

For an agreement to arbitrate among nations, as among individuals, is simply a submission of all matters in dispute within the limits named, and there would be jurisdiction, law, equity, and fact as applied to each case. The admission of liability in the protocols prevented the raising of these objections. They knew that these objections, which the umpire has stated as not only possible but probable, had been, in fact, as a whole or in part during the correspondence interposed by Venezuela against the claims of Great Britain and Germany, who together agreed upon the formula in question. (See Yellow Book, pp. 16, 50, 59, and 65.)<sup>1</sup>

<sup>1</sup> See Appendix to original report, pp. 959, 975, 979, 982. Not reproduced in this series.



The umpire assumes that these important treaties were not made without great care and deliberation commensurate to their importance and by officials who were thoroughly and conscientiously able and apt to perform their high functions. In the Supreme Court of the United States of America, in the matter of the *Nereide* (9 Cranch, 419), Chief Justice Marshall says:

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.

The umpire feels confident that the careful review and partial rehearsal of the conditions existing at the time of making these two protocols will convince the most skeptical that the inclusion of the clause in question is not meaningless if its interpretation is established in accordance with the previously expressed opinion in the *de Lemos*<sup>1</sup> and *Crossman*<sup>2</sup> cases, and that to so hold leads to an absurd conclusion.

But there are parallel or corollary provisions in the second protocol which in the judgment of the umpire rest upon the same and no other grounds.

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 provisions of local legislation*.

By a proper application of the usually accepted international law governing such commissions, controlling courts, and defining the diplomatic conduct of nations there could be no question that national laws must yield to the law of nations if there was a conflict.

As a general rule municipal statutes expanding or contracting the law of nations have no extraterritorial effect. (Wharton, vol. 3, sec. 403, p. 652, Digest.)

We hold that the international duty of the Queen's Government in this respect was above and independent of the municipal laws of England. It was a sovereign duty attaching to Great Britain as a sovereign power. The municipal law was but a means of repressing or punishing individual wrongdoers; the law of nations was the true and proper rule of duty for the Government. If the municipal laws were defective, that was a domestic inconvenience, of concern only to the local government, and for it to remedy or not by suitable legislation as it pleased. But no sovereign power can rightfully plead the defects of its own domestic penal statutes as justification or extenuation of an international wrong to another sovereign power. (Mr. Fish, Sec. of State, to Mr. Motley, Sept. 25, 1869; Wharton's Digest, vol. 3, sec. 403, p. 653.)

This position was sustained by the eminent jurists forming the Geneva arbitral tribunal. (See Wharton, vol. 3, sec. 402*a*, p. 645, Digest.)

The effect of the Salvadorean statute in question is to invest the officials of that Government with sole discretion and exclusive authority to determine conclusively all questions of American citizenship within their territory. This is in contravention of treaty right and the rules of international law and usage and would be an abnegation of its sovereign duty toward its citizens in foreign lands, to which this Government has never given consent.

Articles 39, 40, and 41, Chapter IV, of the law in question, purport to define the conditions under which diplomatic intervention is permitted on behalf of foreigners in Salvador whose national character is admitted. I regret that the Department is unable to accept the *principle* of any of these articles without important qualifications. (Mr. Bayard, Sec. of State, to Mr. Hall, Nov. 29, 1886. Wharton, vol. 3, Appendix, sec. 172*a*, p. 960.)

<sup>1</sup> *Supra*, p. 368.

<sup>2</sup> *Supra*, pp. 356, 365.

It is a settled principle of international law that a sovereign can not be permitted to set up one of his own municipal laws as a bar to a claim by a foreign sovereign for a wrong done to the latter's subjects. (Wharton, vol. 3, Appendix, sec. 238, p. 969.)

Similarly in Wharton, volume 3, Appendix, section 403, page 991.

In Phillimore, volume 1, Chapter II, Section CXVII, it is said:

Under the rights incident to the equity of states as a member of an universal community is placed "the right of a state to afford protection to her lawful subjects wheresoever commorant," and under this head may be considered the question of debts due from the government of a state to the subjects of another state.

The definition of international law, making it under one form of expression and another the rules which determine the general body of civilized states in their dealings with one another, necessarily excludes state statutes from doing the same thing.

They [aliens] are again, as we have seen, entitled to protection, and failure to secure this, or any act of oppression may be a ground of complaint, or retorsion, or even of war, on the part of their native country. (Woolsey's *Intro. to Int. Law*, p. 90, sec. 66.)

(See Hall, *Int. Law*, Chap. II; also Chap. VII, sec. 87.)

The right of states to give protection to their subjects abroad, to obtain redress for them, to intervene in their behalf in a proper case, which generally accepted public law always maintains, makes these municipal statutes under discussion in direct contravention thereto and therefore inadmissible principles by those states who hold to these general rules of international law.

A government has a right not only to exercise jurisdiction over all persons within its territory, but also to see to the good treatment of its subjects when in the territory of a foreign power, and generally that they sustain no injury. (Holland's *Studies on Int. Law*, p. 160.)

It is not, I think, to be presumed that the British Parliament could intend to legislate as to the rights and liabilities of foreigners. (4 K. & J., p. 367.)

In *Healthfield v. Chilton* (4 Burr, 2016) Lord Mansfield held that the act of 7 Anne, c. 12, "did not intend to alter, nor can alter, the law of nations."

As "the law of nations" it is, of course, insusceptible of modification by an act of the British Parliament. The act "can neither bestow upon this country any international right to which it would not otherwise be entitled, nor relieve our Government from any of its diplomatic responsibilities." (Holland's *Studies in Int. Law*, p. 195; 3 Phillimore's *Int. Law*, p. 387.)

It is, on the other hand, quite certain that no act of Parliament, or decision given in accordance with its provisions, will relieve this country from liability for any results of the act, or decision, which may be injurious to the rights of other countries. (Holland's *Studies in Int. Law*, p. 199.)

Referring to Venezuelan municipal laws by which they then sought to obviate their international responsibility for the acts of turbulent factions or armed insurgents, Secretary of State Fish says: "To assume, therefore, to dictate that no claim for such losses shall ever be made may be said to be arrogant to a degree likely to be offensive to most governments having relations with a republic so subject to sudden and violent changes in its authorities.

"Upon the whole, the enactments adverted to may be regarded as superfluous in their substance, and in their form by no means adapted to foster confidence in the good will of that government towards foreigners who may resort to Venezuela." (See U. S. - Vene. Claims Com., Convention of 1892, p. 520.)

Municipal variations of the law of nations have no extraterritorial effect. (The *Resolution*, 2 Dall., 1; the *Nereide*, 9 Cranch, p. 389.)

The municipal laws of one nation do not extend, in their operation, beyond its own territory, except as regards its own citizens or subjects. (The *Apollon*, 9 Wheaton, p. 362.)

Recurring then to the proposition made when the umpire referred to this part of the second protocol, there seems to be adequate reason for this unusual provision only in the fact that the respondent government held that its laws were paramount in such matters and would be expected to contend in behalf of its carefully conceived and tenaciously supported theory before the Mixed Commission, and to prevent such contention and to prevent the possibility of a successful contention this clause was inserted. A commission not in terms bound to follow the law of nations might go astray over such a question if unrestricted, and hence the restriction. But it is, equally with the other proposition, open to the objection that, being in accord with public law, it had no place if there were not some reason for its existence — if it did not contain some rule to govern this Commission either not to be found in the precepts of international law or directly opposed to it.

Again, there is the reservation concerning technical objections. The course of commissions has rarely strayed from equity and justice by a too close adherence to technical objections, but there have been frequent interruptions and costly delays because of such objections, and the astute and able lawyers of Venezuela had on several occasions shown their capacity to raise fine distinctions in fact and law, resulting in long and eventually valueless discussion. The claimant Government had known from experience how forcefully such objections could be raised. It proposed to end that trouble at the beginning. Hence the provision:

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 Governments, respectively, in support of or in answer to any claim.

And yet it had not been the practice of commissions in times past — and it is not required by law writers — that there be a strict compliance with the general requirements concerning evidence. But there had been much annoyance and many serious interruptions of the business of commissions and occasional refusal to consider a case because of assumed lack of evidential quality in the proof offered, and hence the provision. Yet neither of these last two provisions were new or novel or opposed to the ordinary practice of commissions or the generally varied rules of public law, but they did represent the views of the claimant Government on those matters, and if inwritten were safe and wise precautions against probable delays, and possible friction, misconception, and misdirection of the tribunal. The law on these points was well laid down by the eminent scholar, diplomat, and jurist, Judge J. C. Bancroft Davis, in the Caldera case, 15 Court of Claims Reports (U. S. A.), 546:

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*.

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 Greenleaf Ev., sec. 1.)

International tribunals are not bound by local restraints. They always exercise great latitude in such matters (Meade's case, 2 Court of Claims, U. S. A., 271), and give to affidavits, and sometimes even to unverified statements, the force of depositions.

The umpire desires it to be distinctly understood once for all that he accepts the statement of the learned British agent that his Government thought the terms of the protocol broad enough to include all injuries and all wrongful seizures, whether caused by Venezuelan authorities or by insurgents. This statement of his is not questioned directly or indirectly; but he does not say, and

it has not been said, that there were not also in the mind of his Government in all of these provisions the protective and restrictive features here suggested. As a matter of fact, these are the plain, obvious, and reasonable grounds for their insertion, and there is not the slightest evidence which the umpire has been able to find that Venezuela knew of any other, thought of any other, or consented to any other grounds or reasons. This is the important question, for when there is found that which Venezuela or her representatives understood and consented to and understood that they consented to then there is found all there is of the treaty.

The position of all international law writers was in substantial accord touching this matter of nonresponsibility of nations for the acts of unsuccessful revolutionists at the time this protocol was signed, as was well known to the parties to the protocols in question.

The sovereign is responsible to alien residents for injuries they receive in his territories from belligerent action, or from insurgents whom he could control or whom the claimant government has not recognized as belligerents.

The umpire will rest his quotations from text writers upon Hall on International Law, pages 231-232, where the law is laid down in the language which 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.

In the opinion of Umpire Ralston, in the matter of *Salvatore Sambiaggio v. Venezuela*,<sup>1</sup> before the Italian-Venezuelan Mixed Claims Commission, now sitting in Caracas, there is a valuable collocation of authorities upon this point, to which opinion and the authorities there cited the umpire is pleased to make reference, and, to quote the conclusions of Ralston, umpire, found on pages 2 and 3 of his typewritten opinion:<sup>2</sup>

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.

<sup>1</sup> Volume X of these *Reports*.

<sup>2</sup> Italian - Venezuelan Commission (*Sambiaggio Case*) in Volume X of these *Reports*.

Held by Duffield, umpire in the German-Venezuelan Mixed Claims Commission, late sitting at Caracas:

That the late civil war in Venezuela from its onset "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." (Claim of Otto Kummerow *v.* Venezuela.<sup>1</sup>)

The precedents form an unbroken line, so far as the umpire has been favored with a chance to study them, supporting the usual nonresponsibility of governments for the acts of unsuccessful rebels. It was so held by the eminent Sir Edward Thornton in all cases which he decided as umpire in the United States-Mexican Commission. (Moore, vol. 3, pp. 2977-2980.) So held by the United States-Spanish Commission of 1871. (Moore, vol. 3, pp. 2981-2982.) So held by the United States and British Claims Commission of 1871. (Moore, vol. 3, pp. 2982-2987, 2989.) So held by the United States and Mexican Claims Commission of 1859. (Moore, vol. 3, pp. 2972.) So held in principle by the United States and Mexican Claims Commission of 1868. (Moore, vol. 3, pp. 2900, 2902, 2973.) So held concerning the nonresponsibility of the United States in the civil war of 1861. (Moore, vol. 3, 2900-2901.) So held in substance and effect by the United States-Venezuelan Mixed Commission now sitting at Caracas.<sup>2</sup> Even the cases which were claimed to qualify or oppose this rule and were not specifically attacked by the umpire in the Sambaggio case above referred to are not opposed to the rule laid down when all of the facts appear.

In the Easton case, before the Peruvian Claims Commission,<sup>3</sup> careful investigation discloses that the Government of Peru had acknowledged that it was liable, in fact and law, to pay the actual loss, and had tendered \$5,000 in satisfaction thereof; so that the Commission had before it only the question of amount.

In the case of the Venezuelan Steam Transportation Company against Venezuela there were presented peculiar conditions, in that a part of the damage was inflicted by the "Blues" and part by the "Yellows." The "Blues" was the *de jure* government which had been driven from Caracas by the "Yellows," but retained authority and control over certain States, among them the State lying on the west of the Orinoco near Ciudad Bolivar, and, during the happening of a great part of the injuries complained of, were in control of the State of which Ciudad Bolivar is the capital. The "Yellows," being in possession of the national capital, were recognized as the *de facto* government. Mr. Evarts, Secretary of State for the United States of America, a very eminent lawyer, held that —

there seems to be just as good ground for taking the organization of the party of the "Blues," so called, as the legitimate government at that time as the forces and managers of the party of the "Yellows." (U. S. - Vene. Claims Commission, 1892, pp. 516-517.)

For injuries inflicted by the "Yellows" the agent of the claimant government asked for damages several times in excess of the entire amount of the award given. Much of the damage claimed as inflicted by the "Blues" was placed upon the *de facto* Government, the "Yellows," by said agent on the ground of lack of diligence in permitting the "Blues" to remain so long at Ciudad Bolivar and in control of the vessels in question, when they could have been so

<sup>1</sup> Volume X of these *Reports*.

<sup>2</sup> *Supra*, p. 145.

<sup>3</sup> Moore, p. 1629.

easily dislodged, as was proven when the effort was in fact made. The case can not be held as authority for or against the general rule of international law on this subject.

The umpire holds that this historical review emphasizes and strengthens at every point the position taken by him in the cases of de Lemos <sup>1</sup> and Crossman <sup>2</sup> as to the meaning of the charging words used, interpreting the same from the general purpose, plan, and purview of the protocol itself. It did not seem to him, then, that there could possibly be any uncertainty concerning language apparently so plain and unambiguous to which he gave the only meaning of which it is susceptible *in law*.

From this review of the differences which arose between the claimant government it is found that the ultimatum contained no claim for injuries or damages other than those *well founded in law and fact*. That Germany, its ally, speaking for both, explained that under the language in question there was always the necessity resting upon the claimant government of "intrinsic justification" in each particular case; and that there was always to be decided the question of the legality or illegality of the injuries or seizures complained of. And in silence and tacit acquiescence passed on the statement of Germany, made in careful comparison of views, that its civil-war claims were for acts of violence committed by Venezuelan authorities and her agents. That during the time covered by this review in none of the correspondence or conferences of the allies with Venezuela, or between the allies themselves, or of the allies or Venezuela with the United States Government, or with Mr. Bowen, has the umpire been able to find a sentence, a phrase, or a word directly or indirectly making claim to indemnity for losses suffered through acts of insurgents or directly or indirectly making allusion thereto.

The umpire finds that President Castro understood he was admitting the liability of his Government only for such claims as were "just;" that Mr. Bowen understood he was submitting to arbitration only the matters contained in the ultimatum of each of the allied powers; that the claimant government thought the terms of submission broad enough to include such claims or other claims is not important when considered alone. It becomes important only when it is established that the respondent government knew of and assented to the submission of such claims. The review which has been made does not disclose to the umpire any such knowledge or assent. Rather, he finds not the slightest hint that such a proposition could or would be made or was made to the respondent government by the claimant government or by either of the allied powers. Neither was there anything in the anterior diplomatic action or attitude of the claimant government, or of Germany or of Italy, toward other nations similarly constituted and conditioned, to suggest the possibility, even, of such a claim upon the respondent government, but quite the contrary conclusion was to be drawn therefrom. Hence the umpire holds that the Government of Venezuela did not specifically agree in the protocols to be subject to indemnities for the acts of insurgents.

This leaves the question of liability for the acts of insurgents to rest upon the general principles governing such case.

In the opinion of the umpire it is stated with precision in the treaty of Germany with Colombia in 1892:

It is also stipulated between the contracting parties that the German Government will not attempt to hold the Colombian Government responsible, unless there be due want of diligence on the part of the Colombian authorities or their agents, for

<sup>1</sup> *Supra*, p. 360.

<sup>2</sup> *Supra*, p. 356.

the injuries, oppressions, or extortions 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.<sup>1</sup>

It is also held that the want of due diligence must be made a part of the claimant's case and be established by competent evidence. This is brought out in the treaty of Italy with Colombia in 1892, where the language is "save in the case of *proven* want of due diligence on the part of the Colombian authorities or their agents," and such a requirement is strictly in accord with the ordinary rules of evidence.

If less inequity would result to *all* parties concerned were the British claims allowed than if they were denied it might be necessary to allow them. Reference to the treaties existing between many of the claimant countries and other South American or Central American republics, and of Italy with Venezuela, will settle the question of general equity and will demonstrate that it is only by minimizing the use of the rule of responsibility that we can cause the least inequity. It is, also, easily apparent that if wrong has been done in the cases of Germany and of France it will not be righted by repeating it. The British Government is not in fault because some government has asked and obtained awards for such acts. Its foreign office carefully excluded all claims for acts of revolutionists from the memorials to be presented to the Mixed Commission, and thus prepared they were presented.

The learned British agent is frank and free to assert that his Government preferred that there should be no award in any commission based on such a claim. It is also as apparent as though stated that the British Government expected there would be no such claim made or allowed in any commission. Otherwise they would have admitted the revolutionary feature into their reclamations in the first instance as, according to the learned British agent, they considered such demands rightful to them if granted to any. Certainly, it is not the fault of the umpire of the British-Venezuelan Mixed Commission who held in the de Lemos case that there was responsibility only for illegal acts by the Government or some one acting in its behalf or under its order. It is not the fault of the Italian-Venezuelan Mixed Commission, whose umpire settled the question adversely to such claims before any opinion had been given favoring such claims. The questions of equity by equality and equity by relation of Venezuela to other governments were very strongly before the representatives of the governments, who asked and obtained favorable rulings thereon after the opinions opposed thereto had been declared and filed and after these very governments had established the law and the equities to be in accordance with such denial by their own solemn engagements with similarly ordered republics.

A broader view than is obtained within these ten mixed commissions may well be taken before passing upon this question of equity by equality and by relation. How stands the record? The countries hereinafter named have treaties identical in principle with those of Germany and Colombia and Italy and Colombia:

Italy-Venezuela, 1861;<sup>2</sup> Italy-Colombia, 1892; Spain-Venezuela, 1861;<sup>3</sup> Spain-Ecuador, 1888;<sup>4</sup> Spain-Honduras, 1895; Belgium-Venezuela, 1884;<sup>5</sup>

<sup>1</sup> Art. XX. (See British and Foreign State Papers, Vol. 84, p. 144.)

<sup>2</sup> British and Foreign St. Papers, vol. 54, p. 1330.

<sup>3</sup> *Id.*, vol. 53, p. 1050.

<sup>4</sup> *Id.*, vol. 79, p. 632.

<sup>5</sup> *Id.*, vol. 75, p. 39.

France-Mexico, 1886;<sup>1</sup> France-Colombia, 1892;<sup>2</sup> Germany Mexico; San Salvador-Venezuela, 1883.<sup>3</sup>

The learned British agent also raises the point that an international rule applicable to "well-ordered States" in regard to the irresponsibility of governments for the acts of unsuccessful revolutionists may not be easily applied to States possessing the history of the respondent Government.

Concerning this point the umpire is content to accept the concrete judgment, practically uniform, of States whose skilled and trained diplomatists have given this question long years of patient consideration. This concrete judgment he has in the treaties made between Germany and Colombia and Italy and Colombia heretofore quoted and between the other countries above cited, as well as by the historic attitude of the British Government and the Government of the United States of America in their diplomatic treatment of these question in relation to countries having the same general characteristics, in this regard, as Venezuela.

There now remains to consider only the "most favored-nation" proposition. Regarding this it is sufficient in the judgment of the umpire to say that Venezuela has granted to no other country any favors in these protocols not granted to the Government of His Britannic Majesty. He says this modestly, but conscientiously, after careful study. He would avoid, if he could, the clash in judgment this statement involves, but he can not do so and be true to his solemn convictions. That there have been interpretations of several protocols with which the present umpire can not agree and with which this opinion will not accord, he admits to be true. But these interpretations were had and the consequent results followed against the earnest protest and vigorous opposition of the Government of Venezuela, and were therefore clearly not favors granted by her.

In considering, determining, and applying the protocols to this case and to all others; in weighing and settling the facts and the law in each case; in meeting and answering every proposition connected with the proceedings of this Mixed Commission the umpire must never lose sight of the most essential part of the protocols which is none other than the solemn oath or declaration which it prescribes. Before we were allowed to assume the functions of our high office we were required by its provisions to make solemn agreement and declaration — carefully to examine and impartially decide, according to justice and the provisions of the protocol of the 13th February, 1903, and of the present agreement, all claims submitted to them (us).

While the oath adds to the requirements of administering our trust according to justice the provisions of the protocol, it is not to be presumed or admitted that there is aught in either of those protocols which is contrary to or subversive of its high and principal behest — justice. This, then, is the ultimate purpose and required result of all our inquiries, examinations, and decisions. It is made, as it should be made, the chief cornerstone of this arbitral structure. There is one other and very important rule of action prescribed to govern us in our deliberations: it is that we "shall decide all claims upon a basis of absolute equity." The way is equity, the end is justice. There is no other way and no other end within the purview of the protocol. Not only must each particular case be determined on these two bases, but each part of the protocols relating to this Commission must be interpreted and construed in accordance therewith. If there be two views of some provisions which, although differing, strike the mind

<sup>1</sup> British and Foreign St. Papers, vol. 77, p. 1090.

<sup>2</sup> *Id.*, vol. 84, p. 137.

<sup>3</sup> *Id.*, vol. 74, p. 298.



with equal force and there is a hesitancy which to adopt, the one must be taken which best withstands the application of this supreme test. The protocols will permit no construction of any part which in its adaptation may deviate from the chosen path or lead to a conclusion at war with the required end. All and every part thereof must be read and interpreted with this fact always predominant. If a question arises, not readily to be apprehended, wherein equity and justice differentiate, then the former must yield, because the obligation of the prescribed oath is the superior rule of action.

International law is not in terms invoked in these protocols, neither is it renounced. But in the judgment of the umpire, since it is a part of the law of the land of both Governments, and since it is the only definitive rule between nations, it is the law of this tribunal interwoven in every line, word, and syllable of the protocols, defining their meaning and illuminating the text; restraining, impelling, and directing every act thereunder.

Webster thus defines equity:

Equality of rights; natural justice or right; \* \* \* fairness in determination of conflicting claims; impartiality.

Bouvier says in part:

In a more limited application, it denotes equal justice between contending parties. This is its moral signification, in reference to the rights of parties having conflicting claims; but applied to courts and their jurisdiction and proceedings it has a more restrained and limited signification. (Vol. 1, p. 680.)

The phrase, "absolute equity," used in the protocols the umpire understands and interprets to mean equity unrestrained by any artificial rules in its application to the given case.

Since this is an international tribunal established by the agreement of nations there can be no other law, in the opinion of the umpire, for its government than the law of nations; and it is, indeed, scarcely necessary to say that the protocols are to be interpreted and this tribunal governed by that law, for there is no other; and that justice and equity are invoked and are to be paramount is not in conflict with this position, for international law is assumed to conform to justice and to be inspired by the principles of equity.

International law is founded upon natural reason and justice. \* \* \* (Wharton, vol. 1, sec. 8, p. 32.)

The law of nations is the law of nature realized in the relations of separate political communities. (Holland's *Studies in Int. Law*, 169.)

It is the necessary law of nations, because nations are bound by the law of nature to observe it. It is termed by others the natural law of nations because it is obligatory upon them in point of conscience. (Kent's *Com.*, vol. 1, 2.)

The end of the law of nations is the happiness and perfection of the general society of mankind, etc. (*Ib.*)

International law \* \* \* is a system of rules \* \* \* not inconsistent with the principles of natural justice. (Woolsey, *Introd. to Int. Law*, secs. 2 and 3.)

The rules of conduct regulating the intercourse of States. (Halleck, chap. 2, sec. 1.)

The intercourse of nations, therefore, gives rise to international rights and duties, and these require an international law for their regulation and enforcement. That law is not enacted by the will of any common superior upon earth, but it is enacted by the will of God; and is expressed in the consent, tacit or declared, of independent nations. \* \* \* Custom and usage, moreover, outwardly express the consent of nations to things which are naturally — that is, by the law of God — binding upon them. (*Ib.*, sec. 6, quoting Phillimore, vol. 1, preface.)

That when international law has arisen by the free assent of those who enter into certain arrangements, obedience to its provisions is as truly in accordance with

natural law — which requires the observance of contracts — as if natural law had been intuitively discerned or revealed from Heaven, and no consent had been necessary at the outset. (Bouvier's *Law Dict.*, vol. 1, p. 1102.)

The rules which determine the conduct of the general body of civilized States in their dealings with one another. (Lawrence, *Int. Law*, sec. 1.)

International law consists in certain rules of conduct which modern civilized states regard as being binding on them in their relations with one another with a force comparable in nature and degree to that binding the conscientious person to obey the laws of his country. (Hall, *Int. Law*, 1.)

In what has been stated I have referred exclusively to the international obligations imposed on the United States by the general principles of international law, which are the only standards measuring our duty to the Government of Honduras. (Mr. Bayard, Sec. of State, to Mr. Hall, Feb. 6, 1886.)

International law in its practical result guides, restricts, and restrains the strong states, guards and protects the weak.

The guide, commonly safe and constant and usually to be followed, is international law. But if in the given case, not easily to be assumed, it should occur that its precepts are opposed to justice, or lead away from it, or are in disregard of it, or are inadequate or inapplicable, then the determination must be made by recourse to the underlying principles of justice and equity applied as best may be to the cause in hand. The umpire will apply the precepts of international law in all cases where such use will insure justice and equity for this reason, if for no other — that well-defined principles and precepts which have successfully endured the test of time and the crucible of experience and criticism are safe in use, and should never carelessly be departed from in order that one may step out into a way unknown to walk by a course unmarked. But these precepts are to be used as a means to the end, which end is justice.

The rule of justice, equity, and law deduced by the umpire and to be applied here is well expressed in the treaties of Germany and Italy with Colombia hereinbefore quoted. Adapted for our use, the rule will read as follows:

The Government of Venezuela will not be held liable to the British Government for injuries to property or wrongful seizures thereof, or for damages, vexations, or exactions committed upon or suffered by British subjects in Venezuela during any unsuccessful insurrection or civil war which has occurred in that country unless there be proven fault or want of due diligence on the part of the Venezuelan authorities or their agents.

The Aroa mines supplementary claim is based wholly on the seizure of their property by revolutionary troops without proof of any fault or lack of due diligence on the part of the titular and respondent Government.

Under the rule adopted this claim must be, and is hereby, disallowed, and judgment will be entered to that effect.

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#### BOLÍVAR RAILWAY COMPANY CASE

A nation is responsible for the acts of a successful revolution from the time such revolution began.<sup>1</sup>

PLUMLEY, *Umpire*:

When this claim came to the umpire on the disagreement of the honorable commissioners, as to parts thereof there had been agreed to and allowed by the commissioners the following amounts:

<sup>1</sup> See also *Supra*, p. 119.

The whole of the claim particularized in —		<i>Bolivars</i>
Appendix A . . . . .		105,738.59
Appendix B . . . . .		28,600.24
Appendix C . . . . .		40,132.59
Appendix D . . . . .		126,081.27
Appendix E . . . . .		39,038.81
Appendix F . . . . .		2,272.50
Appendix G . . . . .		38,260.75
In the claim particularized in —		
Appendix H: Nos. 30, 31, 33, 35, 36, 44, 46, 48, 51, and 57 . .		20,036.93
Appendix K: Nos. 8, 10, 12, 13, 14, and 15 . . . . .		57,148.86
Appendix N:		
Nos. 1, 3, 4, 5, 7, 9, 12-33, inclusive, 36, 37, 39, 40, 41, 45, 46, 48, 49, 52, 54, 56, 65, 66, 69, 74, 76, 77, 78 . . . . .	<i>Bolivars</i>	277,356.58
Nos. 71, 81, 82 . . . . .	37,500.00	314,356.58
Total amount agreed upon by Commissioners . . . . .		771,667.12

The Commissioners agreed to a disallowance of the following amounts:

In the claim particularized in —		<i>Bolivars</i>
Appendix J . . . . .		577.50
Appendix L . . . . .		8,837.07
Appendix N: Nos. 71, 81, and 82 . . . . .		16,976.88
Total amount of disallowance agreed to by Commissioners . .		26,391.45
The whole amount of claims agreed to by the Commissioners, both allowed and disallowed . . . . .		798,058.57

The Commissioners disagreed as to the following amounts:

In the claim particularized in —		<i>Bolivars</i>
Appendix H . . . . .		313,576.27
Appendix K . . . . .		88,349.96
Appendix M (disagreement to whole of this claim) . .		2,215.87
Appendix N . . . . .		786,876.44
The whole amount of claims disagreed to by the Commissioners		1,173,018.54
		1,971,077.11

The Bolívar Railway Company has credited the Government of Venezuela with the following amounts:

		<i>Bolivars</i>
Weekly payments made by the Government in 1897 and 1898 . . . . .		46,000.00
Further amounts paid by the Government in 1899 . . .		6,360.00
Payment for patent fuel in 1899 . . . . .		2,272.50
Allowance for damaged sleepers recovered from the Gov- ernment troops in Tucacas . . . . .		58,659.40
Total amount of credits . . . . .		113,291.90
Claim as presented to this Commission . . . . .		1,857,785.21

Under Appendix H, and referring to the disputed items thereunder there are allowed by the umpire the following:

	<i>Bolivars</i>
Nos. 1, 2, and 3, referring to services performed by the railway company in the month of September, 1899, and vouched for by Gen. Ismael Manzanares . . . . .	20,274.94
No. 4, covering items September 3-30, performed for the Government, and vouched for by Gen. Lopez García, who was a supporter of the titular government of Andrade . . . . .	39,319.30
No. 5, use of the steamer <i>Barquisimeto</i> eighteen days . . . . .	9,090.00
No. 6, for the use of cars between October 10 and 24, and vouched for by Gen. Lopez García . . . . .	300.00
No. 7, for the use of the steamer <i>Barquisimeto</i> for thirty-one days . . . . .	15,655.00
No. 8, account accrued under the order of Gen. Carlos Liscano, and vouched for by him between October 20 and 31 . . . . .	5,722.25
No. 9, an account accrued between October 16 and 31 through the order of Gen. Ismael Manzanares, and vouched for by Valentin Torres . . . . .	26,586.24
No. 10, an account accrued between October 8 and 15, and vouched for by Gen. Lopez García . . . . .	7,425.00
No. 11, an account accrued between October 1 and 15, under the order of Col. Manuel Vargas . . . . .	2,454.66
No. 12, an account accrued between October 1 and 15, through the order of Gen. Valentin Torres, and vouched for by E. Medina . . . . .	12,769.00
No. 13, an account accrued through Gen. Ismael Manzanares . . . . .	22,313.16
No. 14, an account contracted by the Government through its representative in Tucacas, Lopez García, October 1-17 . . . . .	4,793.67

These accounts accrued during the successful revolution under General Castro, and represent services performed either on his behalf or on behalf of the titular government, and are, therefore, properly chargeable to the present Government. It is not necessary to define each, although the umpire has carefully inspected each account and vouchers covering the same periods and is satisfied that the above statement is correct. He also has the assistance of the telegram of November 4, 1903, sent by R. Gonzalez, P., to Gen. J. M. García Gomez explaining the relation of some of the generals whose names appear and concerning the items above allowed.

	<i>Bolivars</i>
No. 15 is an account contracted by General Guerra on November 3 and 4. He is known to have been in command of the army that attacked the revolting general at Puerto Cabello on November 11, and the umpire will assume that this is a proper charge against the Government . . . . .	5,302.50
No. 16, for the use of the steamer <i>Barquisimeto</i> between November 1-16 inclusive . . . . .	8,449.56
<p>It is a matter of history that Gen. Antonio Paredes was military governor of Puerto Cabello and its fortifications under Andrade, and continued in such office after the departure of Andrade and the dissolution of his Government. It is understood that he accepted for a brief time General Castro's authority, but that on the 7th of November he repudiated such relations and revolted, fortifying Puerto Cabello, and that an attack was made upon him on November 11-12 by sea and land. Since Paredes had no fleet and no occasion for the use of the sea, while the Government had its fleet before Puerto Cabello and was in control of the sea in front of Puerto Cabello, the assumption is very clear that the use of the steamer between points and Puerto Cabello could only be under the employment of the National Government.</p>	
No. 19, accounts contracted between November 18 and 28 by Gen. Valentin Torres, and vouched by Medina . . . . .	7,183.78

	<i>Bolivars</i>
No. 20, for the use of a steam launch under the order of Ramón Fraga- chen . . . . .	600.00
This allowance is animated with the same reason as was the allow- ance in No. 16. This use occurred the 14th day of November, which is included in the time covered by the use of the steamer <i>Barquisimelo</i> , and when it is not consistent with the other circumstances to assume that steam launches were being used by the nationalist revolutionaries.	
No. 22 is an account contracted by Gen. Valentín Torres, and vouched for by him, between November 1 and 15 . . . . .	18,346.27
No. 23, an account contracted by Gen. Juan Isava, and vouched for in another place by Fragachen . . . . .	11,855.18
This allowance is under the presumption and belief that at this time he was not in the service of the nationalist revolutionaries, although he was later.	
No. 29, an account contracted by Gen. Lopez García between Decem- ber 28 and 30 . . . . .	4,509.16
No. 34, an account contracted by Gen. Lopez García January 19, 1900 . . . . .	18.80
No. 35½ (this number is the umpire's) is of date January 29 and repre- sents an account presented on that day for 20,546.25 bolivars, less amount received on account of coal, 2,272.50 bolivars . . . . .	18,273.75
It is assumed that the account, both debit and credit, was satisfac- tory to the Government or it would have raised a question direct to the Commission concerning that particular item, and if the credit is correct it is right to assume that the debit is to the right party.	
No. 37, an account contracted by Gen. Lopez García and vouched for him, covering dates from February 1 to 26 . . . . .	1,358.80
No. 38, for damages caused the company by Gen. Lopez García on a day between February 1 and 28 . . . . .	363.00
No. 39, an account contracted between February 15 and 23 by General Solagnie . . . . .	2,746.02
The position of General Solagnie to the Government is ascertained by reference to voucher No. 12 in Appendix K, which voucher is countersigned by Gen. P. Gonzalez, and in that voucher there are entries for the month of March, 1900, stating accounts against the Gov- ernment for the transportation in special trains of General Solagnie, his staff, and troops. The umpire therefore feels safe in placing this account, made at Solagnie's order the month preceding, among the items of Government indebtedness.	
No. 40 is another of the same character as No. 39, under the same per- son's order, covering the date from March 1 to 15 . . . . .	3,081.39
No. 41, an account contracted by the order of General García, covering the same time as No. 40 . . . . .	166.40
No. 42 covers account contracted between March 6 and 31, inclusive, through the order of F. Solorzano . . . . .	290.43
No. 43 covers accounts between March 7 and 24, inclusive, through the order of F. Solorzano . . . . .	180.76
The last two allowances are made on the statement before the Com- mission by the British agent that Solorzano was at this time com- mander of the garrison at Tucacas, appointed by General Castro him- self. This statement was made about a month since, has not been questioned, and the umpire feels safe in accepting it, knowing that it was made in good faith and on what was believed to be correct in- formation.	
No. 45, an account contracted between March 1 and 28 by Gen. J. M. Quesada, and vouched for by B. Lopez Fonseca . . . . .	332.79
This account is thus placed because of the next account accepted by the honorable Commissioner for Venezuela wherein the charge is for an account contracted by Gen. Gonzalez Pacheco and vouched for by Lopez Fonseca. No. 46 being for a single item of April 2, so	

*Bolwars*

immediate to the other, there can be no mistake in regarding No. 45 as well sustained when vouched for by Fonseca.	
No. 47, an account contracted by Gen. F. Solorzano and vouched by Juan Felix Castillo . . . . .	3,424.33
There is no question about the position of Castillo, and the umpire had already settled the relation of Solorzano, which is further sustained in this item by finding him associated with Castillo.	
No. 49, of date of April 30, for repairs and materials on account of injuries to the railway and the rolling stock resulting from the use by the Government troops during the war, and vouched for by Lopez Fonseca . . . . .	12,498.75
No. 50 is an account contracted by Gen. J. Felix Castillo from May 2 to 31, inclusive, and vouched by him . . . . .	847.21
No. 52 is an account contracted by General Castillo from May 22 to 26, inclusive . . . . .	17.46
No. 53 is for materials taken from the station of El Hacha by General Aranguren . . . . .	167.00
The reason for this allowance is the presumption that at this time there was no general revolutionary movement, and in fact it was practically at an end all through that portion of Venezuela. Taking this with the further fact that the Government being well advised of this charge has introduced neither evidence nor denial, the umpire is convinced that it is probably correct.	
No. 54 is for transportation in accordance with orders of the minister of war . . . . .	14.70
No. 55 is for carrying freight under the order of General Castillo . . . .	21.16
No. 56 is for transportation through the order of General Castillo between June 1 and 28 . . . . .	167.80

The whole amount allowed by the umpire in Appendix H is . . 266,920.22

Under Appendix K, and referring to the disputed items thereunder, there are allowed by the umpire the following:

*Bolwars*

Nos. 1 and 2 are for trains, trolleys, and other services of the railway to the Government under the order of General Manzanares, covering the month of September 1899 . . . . .	12,311.81
No. 3 is an account for the use of trolleys, etc., order by Gen. Ismael Manzanares, and vouched by him, covering dates from September 5 to 30 . . . . .	593.50
No. 4 is an account of special trains ordered by Gen. Carlos Liscano, covering dates from October 7 to 28 . . . . .	6,055.82
No. 5 is an account of special trains by the order of General Manzanares, vouched by him, covering dates October 21-25 . . . . .	29,646.29
The accounts up to and including No. 5 cover dates on which the services were performed either for the titular government then existing or for the successful revolution, and in either case are properly chargeable to the present Government.	
No. 6 is a detailed account of trains employed under the order of General Manzanares, covering dates November 3 to 14 . . . . .	3,392.12
No. 11. This account was contracted for and on behalf of the troops of Gen. Jacinto Lara and is vouched by General Solagnie . . . . .	16,567.76

The whole amount allowed by the umpire in Appendix K is . . 68,567.30

Under Appendix M: This is a small claim for freight, etc., carried for the Government in the State of Lara in the years 1899 and 1900, and the allowance is objected to because it does not bear evidence of having been first charged to

the Government, and there is a denial of authority on the part of the officials of a State making accounts chargeable to the National Government without especial order to that effect.

The relation of the several States to the National Government is of such intricate character, apparently so intimate that it becomes difficult to discriminate rightfully between the two, if discrimination is possible in such matters. No question is made but that the service was performed in the interest of the State of Lara, and that it was proper service. The umpire knows that the several States are constituted by the National Government and the governors are appointed by the National Government and hold their offices during its pleasure; that a certain income is set aside for the support of these State governments; and from such knowledge as a basis in this regard he is satisfied that, if this account is allowed against the National Government and on behalf of the railway company, the National Government has such a relation to the State of Lara that it may easily recoup the sum if it is not properly chargeable to it, while if disallowed as against the railway company it is wholly remediless. It appears to the umpire, therefore, that it is safe for the National Government and just and equitable to the company that the question should be resolved in favor of the railway company, and the claim is allowed at 2,215.87 bolivars.

Under Appendix N, and referring to the disputed items thereunder there are allowed by the umpire the following;

	<i>Bolivars</i>
Nos. 2, 6, 8, and 10 are for services performed on behalf of the National Government for the transportation of troops, officers, prisoners, munitions and materials of war, all apparently of a character necessary for the use of the Government, and under the order and voucher of Gen. Juan F. Castillo, civil and military chief at Tucacas . . . . .	362.87
No. 11, service in October, 1900, for transportation of one official by the order of Governor Urbina at Tucacas. It bears the appearance of correctness, carries with it the character of service for which a government may properly be charged, and is vouched by one assuming authority, which is not questioned before this Commission . . . . .	2.31
The whole amount allowed by the umpire in Appendix N is . . .	365.17

The umpire is next to consider, under Appendix H, those accounts which represent services performed on behalf of troops and officers engaged in the second Hernandez revolution. Those accounts are —

	<i>Bolivars</i>
No. 17. Under order of Gen. Avelino Jiménez, November 30 . . . . .	1,839.03
No. 18. Under order of Col. M. Vargas, November 18-29 . . . . .	1,483.25
No. 21. Under order of Col. M. Vargas, November 1-15 . . . . .	10,212.07
No. 24. Under order of Gen. Avelino Jiménez, December 1-15 . . . . .	17,546.02
No. 25. Under order of Gen. E. Garmendía and vouched by A. Jiménez, December 9 . . . . .	38.00
No. 26. Under order of General Jiménez, December 16-28 . . . . .	12,936.03
No. 27. Under order of General Jiménez, December 29-31 . . . . .	1,455.57
No. 28. Under order of General Jiménez, December 29-31 . . . . .	1,083.58
No. 38. Under order of General Jiménez, January 3, 1900 . . . . .	32.50
The whole amount of these is . . . . .	46,626.05

There are to be considered also claims of a similar character under Appendix K. These are —

	<i>Bolwars</i>
No. 7. December 2, 1899, which are asserted to be contracts through the civil and military chief of the State of Lara, vouched by E. Garmendía, amounting to . . . . .	8,234.60
No. 9. A similar account of December 14, amounting to . . . . .	11,548.06
The whole amount of these is . . . . .	19,782.66

The umpire is convinced by the charges themselves that they are for services of the nacionalista revolution. For this he relies upon the telegram heretofore referred to and upon the internal evidences found in the vouchers themselves. The charge in No. 7 states that it is on account of the “revolution,” and that it was contracted through the orders of the civil and military chief of the State of Lara. In voucher No. 9 it is found that this is an account of the liberal nacionalista revolution and through the orders of the civil and military chief of the State of Lara in Barquisimeto. The first item of this account is December 4, 1899, and is for a special train to conduct Gen. E. Garmendía and his forces to El Hacha and return to Barquisimeto with comisionados. It will be observed that this is the same day that the same General Garmendía has vouched for the correctness of No. 7. This service in No. 9 first mentioned therein was performed by virtue of a written order attached to the voucher of date December 4, and signed by E. Garmendía, and he follows this with another order of the 10th of December, which is charged of date December 12 or 14, and in either case is for the conduct by train of troops and guns. His are the principal orders supporting this voucher, but there are orders by General Jiménez in this same month supporting this same voucher, showing that it was correctly charged to the revolution liberal nacionalista. The umpire therefore entertains no doubt that these two accounts, Nos. 7 and 9, are of the same character, both assisting to oppose the Government of which General Castro was the head.

Concerning these accounts, both in H and K, which were for services rendered by the railway company to the liberal nacionalista (or Hernandez) revolution, it is urged with ingenuity and ability by both the learned agent and the honorable Commissioner for the claimant Government that the present Government is responsible for them because they say that while the State of Lara had been of a revolutionist tendency and activity at a time previous, still at the time that General Castro came to that State with his revolutionary forces there was a condition of quiet which was disturbed by his presence and effort, and a large revolutionary force gathered to join with General Castro and fought their way to the capital, resulting in General Castro’s headship of the Government, and that the months of disturbance and war which followed in that State and section were the result of this fomentation by General Castro, and that until there was secured peace and quiet under his Government it is a part of his inheritance that he should assume responsibility for those results. They also ably contend for the importance of this and other railways in Venezuela to the nation in the development of its resources, the reliance of the nation upon these railways and the propriety and necessity of assuming a different position to this railway, especially from what might be taken toward other institutions or other classes of property. The umpire is in perfect harmony in regard to the great importance of such national highways to the internal development of the country as well as for its valued uses in case the Government needs to transport rapidly troops toward the scene of disturbance or conflict; but it is his opinion that his discretion goes no further than sound judicial discretion, and that all such arguments



are properly addressed only to the political department of government and not to its judicial department or to those who may act in the limited sphere allowed them who are occupying and fulfilling judicial functions.

It is also the opinion of the umpire that history is not in perfect accord with their position on this question. From the best sources open to the umpire he believes the truth to be that the troops which came from Lara and vicinity, equally with others, came with the supreme purpose of overthrowing the Andrade government, and necessarily expecting if success crowned their efforts that their leader, General Castro, would be the natural head of the government. There are no historic evidences of any dissatisfaction amounting to a revolutionary spirit on their part against his assumption of the headship of the government.

History discloses that Andrade abandoned Caracas on the morning of October 20, starting for La Guaira, at which place he disbanded the men who, remaining faithfully with him, had gone thus far, and he himself took ship for the Antilles; that on the day of his departure General Rodriguez, president of the government council, assumed executive power and named a ministry; then he and General Mendoza and General Castro came to terms, and General Castro entered Caracas in the evening of October 22, 1899, and assumed power on the next day as the supreme chief of the Republic and appointed his cabinet. On that day, as supreme chief, he set at liberty the political prisoners who had been placed in prison by Andrade, and among them Gen. José Manuel Hernandez, who had been leader in the nationalist revolution and was in prison on account of such leadership. It was in making up his cabinet that General Castro made General Hernandez minister of public works, which at the time he did not accept or decline. In the early morning of October 27 General Hernandez stealthily left Caracas, accompanied by Gen. Samuel Acosta with a division of soldiers, and went out through El Valle, on the La Victoria road. October 28 there was circulated in Caracas and elsewhere through the country his proclamation dated the 26th instant, calling upon the country to overthrow the government of General Castro, at the same time declining the office of minister of public works. The watchword of General Hernandez and his followers in his first revolution was the same as was assumed immediately by his followers in this second revolution, and this fact is found so well expressed and so generally understood by intelligent men that the December accounts of the Bolívar Railway Company state that they were made in the service of the liberal nationalist revolution. It is not their claim that it was the liberal restauradora revolution, which was the watchword of General Castro and his followers, referring to the alleged subversion of the constitution by President Andrade, which had given the cause and the occasion for the successful revolution led by General Castro. In the judgment of the umpire that revolution ended with the triumph of its leader and his installation as supreme chief of the Republic. It may be thought that to be a successful revolution it must defend itself against those who dispute the government it had formed, but it did successfully defend and hence establish its right of success as claimed by it when it made its triumphal march into Caracas and proclaimed its chief the head of the Republic.

If the personal responsibility of General Castro in this matter were the question for decision, it might be possible to hold him responsible for the second revolution as growing out of the revolution he had led. Such, however, is not the ground on which successful revolutions are charged, through the government, with responsibility. Responsibility comes because it is the same nation. Nations do not die when there is a change of their rulers or in their forms of government. These are but expressions of a change of national will. "The

king is dead; long live the king!" has typified this thought for ages. The nation is responsible for the debts contracted by its titular government, and that responsibility continues through all changing forms of government until the obligation is discharged. The nation is responsible for the obligations of a successful revolution from its beginning, because in theory, it represented ab initio a changing national will, crystallizing in the finally successful result. The nation did not disturb or foment a revolution in Lara for which it was responsible beyond the point where its will had been expressed and settled in the Government established through General Castro. Success demonstrates that from the beginning it was registering the national will.

This rule was laid down in *Williams v. Bruffy* (96 U.S. Sup. Ct., 176), wherein the court say, speaking of a similar condition—

such as exists where a portion of the inhabitants of a country have separated themselves from the parent state and established an independent government. The validity of its acts, both against the parent state and its citizens or subjects, depends entirely upon its ultimate success. If it fails to establish itself permanently, all such acts perish with it. If it succeed and become recognized, its acts from the commencement of its existence are upheld as those of an independent nation.

Neither was the nation responsible because General Castro, acting in his public capacity, set free from prison General Hernandez, for it was not done with a purpose to incite a revolution, but to complete and make permanent pacification between factions and to show his loyalty, present and prospective, to the friends of General Hernandez, who as opponents of the Andrade administration had joined their forces with his for its overthrow. The umpire does not find warrant in international law or in the proper application of the principles of justice and equity to the case at hand for holding the present Government of Venezuela responsible for the efforts of General Hernandez, his associates and compatriots, in their labors to destroy it. He holds that as a matter of fact and law it was a distinct and specific revolution based upon distinct and specific ideas of national government and with the avowed purpose of deposing President Castro and installing General Hernandez. It was no longer a battle for the restoration of the constitution, but was along the same lines that were established by General Hernandez and supported by his followers from the first revolution down to and inclusive of the second.

It follows, therefore, that so many of the items of Appendix H and Appendix K as were for services in behalf of this nationalist revolution are disallowed.

The umpire considers next, under Appendix N, the accounts which represent services performed on behalf of the revolution, generally known as the Matos revolution, commencing in the early winter of 1901-2 and closing in the spring or summer of 1903. These accounts are —

	<i>Bolivars</i>
No. 34. Order of E. J. Aular, December, 1901. . . . .	7,585.12
No. 35. Order of E. J. Aular, January, 1902. . . . .	9,717.86
No. 42. Order of E. J. Aular, February, 1902 . . . . .	15,569.77
No. 43. Order of E. J. Aular, February, 1902 . . . . .	65.45
No. 44. Order of E. J. Aular, February, 1902 . . . . .	5,033.08
No. 47. Order of General Fonseca, March, 1902 . . . . .	5,754.69
No. 50. Order of General Solagnie, April, 1902 . . . . .	30.29
No. 51. Order of General Solagnie, April, 1902 . . . . .	40,998.62
No. 53. Order of General Solagnie, May, 1902 . . . . .	79,661.78
No. 55. Order of General Solagnie, June, 1902 . . . . .	71,828.86
No. 57. Order of General Solagnie, July, 1902 . . . . .	108,259.10
No. 58. Order of Gen. F. Batalla, August, 1902 . . . . .	58,138.42

	<i>Bolivars</i>
No. 59. Order of Gen. F. Batalla, August, 1902 . . . . .	4,453.57
No. 60. Order of M. F. Bernal, August, 1902 . . . . .	3,831.11
No. 61. Order of M. F. Bernal, August, 1902 . . . . .	362.59
No. 62. Order of M. F. Bernal, October, 1902 . . . . .	561.16
No. 63. Order of General Solagnie, November, 1902 . . . . .	44,160.54
No. 64. Order of M. F. Bernal, November, 1902 . . . . .	1,464.39
No. 67. Order of General Solagnie, December, 1902 . . . . .	59,119.91
No. 68. Order of General Solagnie, January, 1903 . . . . .	57,514.56
No. 70. Order of General Solagnie, February, 1903. . . . .	39,177.32
No. 72. Order of General Solagnie, February, 1903. . . . .	10,981.87
No. 73. Order of General Solagnie, February, 1903. . . . .	34,273.36
No. 75. Order of General Solagnie, April, 1903 . . . . .	71,329.00
No. 80. For use of revolutionary army, May, 1903 . . . . .	37,267.69
The whole amount of these is . . . . .	<u>767,140.11</u>

It is urged with ability and force by the learned agent and the honorable Commissioner for the British Government that the respondent Government should be held responsible for these accounts because during this time the railway company was denied all protection and compelled to render this service against its will for want of proper protection which diligence and good government would have provided. They claim that the character of the company's business and its property rights are such as to especially demand the utmost of protection and extreme care and attention on the part of the National Government. They further urge that its importance to the National Government should incite the furnishing of such protection, and, if not furnished, a willingness to reimburse it for its losses. The umpire is of opinion that while there is opportunity for the recognition of these cogent facts and arguments by the Government itself in its public capacity and animated by a broad national spirit, there is no power vested in this tribunal to make orders or establish awards not properly juridical in their character; that this tribunal can not take into consideration questions of national policy, but must confine itself to the determination of whether there has been an international wrong for which the respondent Government is responsible in damage, and that it performs its functions best and safest when it adheres most closely to the principles established by the law of nations. It has then only to determine whether there has been negligence in fact on the part of the respondent Government in such a way and to such an extent as to make it chargeable with the losses which this claimant company has suffered through the demands of the revolutionists.

The umpire has already passed upon this in his historical review of the events which led up to the Matos revolution and the struggle of the National Government for supremacy which followed. This historical review was part of an opinion in the supplementary claim of the Aroa mines, and he there found the fact to be adverse to the contention of the claimant Government, and he now says that in his judgment it can not be charged upon the respondent Government in its supreme struggle for existence it was negligent in its conduct toward this part of its territory. The war upon the National Government was started in the east and in the west substantially at the same time, and with a common purpose and evidently looking towards a common end. The revolutionists pushed their victorious forces toward the capital. The armies of the Government were driven back from the east and from the west as the forces of the revolution pushed their way on. Unfortunately this left in the west the State of Lara and the Bolivar Railway Company bereft of Government forces, and for quite a time the revolutionist troops were strongly entrenched in the sections

in which this railway lies. Along with the presumption which stands by the side of the respondent Government that it will care to do its duty and will do its duty in this regard stand the historic facts that it fought in these sections until defeated and remained until driven out, and it went out not because it was weak and powerless, but because it was overcome by the superior strength of the revolutionary forces. In the judgment of the umpire it did not protect because it could not protect. After the blockade and the brief time necessary for recuperation of national strength, made necessary by the conditions attending and following the blockade, that section of the country had the first attention of the respondent Government, and it threw into that territory sufficient force under capable generals to defeat and drive out the revolutionist army. Hence so much of the claim as is found in the numbers above named in Appendix N is disallowed.

SUMMARY

	<i>Bolivars</i>
Total allowance by Commissioners . . . . .	771,667.12
Total allowance by umpire . . . . .	335,842.69
Interest to date of award . . . . .	119,896.93
Expenses (translations, official authentications, copies for Commission)	1,796.25
Total . . . . .	1,229,202.99

Judgment may be entered for the sum of £ 48,681.33.

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SANTA CLARA ESTATES COMPANY CASE (SUPPLEMENTARY CLAIM)

The titular government has no right to collect taxes on property which have already been paid to a revolutionary government which had gained control over the portion of the national territory wherein the property is located, and taxes so collected must be returned.

PLUMLEY, *Umpire*:

In this case the Commissioners agreed that some indemnity was due to the claimant Government from the respondent Government on account of so much of the damage as occurred to the claimant through the acts of the Government or its authorities or agents; but they did not fix that amount, leaving the appraisal of damages to the umpire, and disagreed wholly as to that part of the claim representing damages and losses to the claimant through the acts of revolutionary forces and authorities.

The facts show that the Santa Clara Estates Company carried on business in the Orinoco district of Venezuela; that from the month of May, 1902, to May, 1903, the district where this property was situated was entirely in the hands of Matos revolutionaries or the so-called revolution of liberation. This body established itself as the government of that section of the country and to a certain extent entered upon the discharge of governmental functions. The business of the company was the raising of live stock on their several estates known as "Santa Clara," "Bombal," and "Guara," all situate in the State of Sucre, in the district of Sotillo. Their losses consists in the taking of their live stock for the uses of the revolution. There is no question that the property was taken in the manner alleged and that the company sustained large losses in consequence. The contention arises through the question whether under the particular circumstances detailed in the case there is ground for ignoring the ordinary rule concerning the responsibility of the titular government for

the acts of revolutionaries. The learned agent for the British Government claims that it was negligence of the titular government to so long allow its revolted subjects to maintain an independent government; that there is a limit which must be reached within which the Government must reduce the revolutionaries to subjection, declare the independence of the revolted territory, and thereby permit the foreign governments to take the protection of their subjects into their own hands, or accept the liability to pay compensation for the damages suffered at the hands of the revolutionary authorities because of apparant and actual negligence and inactivity. He submits that in this case the first step, that of reduction to subjection, was not taken within a reasonable time; that a whole year beyond that proper limit of time during which the Venezuelan Government were justified in tolerating an independent government, for, he alleges, one determined battle was enough to dispose of the whole trouble; and that since they had not reduced the revolting subjects to subjection, nor permitted their independence, they had incurred responsibility after a reasonable time for the injuries committed by the Government in fact which the titular government allowed to remain and to be in control within the territory in question.

In regard to this argument of the learned British agent it is the opinion of the umpire that more dependence should be placed upon the actual diligence applied by the titular government to regain its lost territory and to suppress the revolutionary efforts than upon the mere question of time taken to accomplish that end; and the umpire recalls that Great Britain contended for seven years against the revolt of the thirteen American colonies before it consented to separation; that the United States of America fought the secession of the Confederate States for more than four years before it regained its revolted territory and had subjected the rebellious citizens to its control. And neither Great Britain nor the United States, notwithstanding the length of time intervening between the revolt and the termination of the same, admitted or discharged any liability to foreign governments for the acts of the revolutionaries in question. Other pertinent illustrations might be drawn from history more remote and more recent wherein a similar rule of nonliability under circumstances where the length of time elapsing between revolt and subjection by the titular government or success on the part of the revolutionary forces was greater than in the present case.

The issue in this regard is to be determined in the answer to this question. Was the length of time during which this independent government existed the result of the inefficiency and negligence of the Government in its general efforts to put down the revolution and to regain its lost territory throughout the whole country of Venezuela, or was it due to the extent, strength, and force of the revolution itself?

A brief résumé of the history of Venezuela for a short time preceding this revolution of liberation, as well as the facts connected with that revolution, becomes necessary.

It is generally accepted that not far from June, 1900 the country had become generally pacified and had accepted the administration of General Castro. Tranquillity prevailed, however, for only a very limited period. It was first seriously disturbed in the latter part of October, 1900, by a revolt at Yrapa, under Gen. Pedro Acosta, which was not suppressed until the following February. In the meantime there occurred the insurrectionary attempt of Gen. Celestino Peraza at La Mercedes. Then in July, 1901, came Gen. Carlos Rángel Carboras from Colombia, where he had been in hiding, aided by Colombian soldiers, and soon gathered in the western part of Venezuela an army of 4,000 men; in the early part of the succeeding August another force

invaded Venezuela by way of Colombia, and in early October there was the revolution of Gen. Rafael Montillo in the State of Lara. About this time Gen. Juan Pietri made an effort to combine the disaffected citizens in and around Caracas. All of these revolts were immediately met and in due time defeated; but they called for military movements in different directions and of considerable magnitude. They occasioned much loss of blood and national treasure, so that when the revolution of liberation, under General Matos, was launched upon the country in the latter part of December, 1901, it is historic that the Government had to enter upon its defense with very limited resources of men and money at its command, while the revolutionary forces were greatly aided financially by General Matos.

Almost simultaneously with the uprising in the east following the proclamation of General Matos there were similar uprisings in the west; there were fierce battles between them and the Government troops, with a general trend of victory toward the revolutionists, and by the latter part of March, 1902, much of the west and the greater part of the east had passed under their control. There were also naval contests favorable to them, and by the middle of May the governor of Trinidad advised the British foreign office that all Venezuelan ports except La Guaira were in the hands of the revolutionists. It was then that General Matos entered the country by the way of Carúpano and began his victorious march toward Caracas; and it was at this time that a portion of the garrison at Ciudad Bolívar revolted under Col. Ramón Farreras, and that city and the State of Guayana soon passed into revolutionary hands. There were also the advancing troops of the revolutionaries from the west to meet the uprisings then occurring in La Guaira, in the valleys of the Tuy, and in Guaripo, and with them to join the Matos forces which were at this time coming from the east; and this union was effected in early October. During all this period there had been constant, able, and strenuous effort on the part of President Castro, his officers and troops, to stay this rapidly rising and forceful tide of rebellion and to beat it back; but it was not until the combined revolutionary forces met him at La Victoria and battled with him for twenty days that he was able to deal them a destructive and disastrous blow. This signal defeat staggered the revolutionary forces and many of them disbanded, while the Government succeeded in regaining from them some of its interior and coast towns.

Close upon the heels of this signal triumph of the Government forces began the incident of the concerted action of the allies, and until the middle of February following all efforts of the Government were stayed and its powers paralyzed by the impending belligerent operations of the allied Governments and the actual state of blockade of all the ports of the country.

Certainly no charge of negligence can be placed against the National Government in this immediate crisis of its history. After the blockade was raised and peace between Venezuela and the allied Governments assured, the National Government assumed offensive operations against the revolutionary forces in the west, and the victory of General Gomez at El Guapo on the 13th, 14th, and 15th of April of the present year resulted in the practical overthrow of the revolution of that section of the country, and after the battle of El Guapo the troops of the Government were at once used in the restoration of the national power in the States of Varacua and Lara, and the defeat of the rebel armies in those sections resulted in their general surrender and the hurried escape of General Matos and his leading generals to Curaçao and the proclamation by Matos, on the 11th of June, at Curaçao, declaring the war at an end. Shortly after this declaration of peace on the part of Matos the Government repossessed itself of all parts of the national territory excepting that portion adjacent to

and within the city of Bolívar, and the attention of the Government was immediately and successfully directed against this last stronghold of the rebellion, and the revolution of liberation was at an end.

A war in which there were in a little over one year twenty sanguinary battles, forty battles of considerable character, and more than one hundred lesser engagements between contending troops, with a resultant loss of 12,000 lives, can hardly suggest passivity or negligence on the part of the National Government toward the revolution; and the umpire is impressed with the fact that such control as the revolutionists obtained in certain portions of the country was owing rather to the financial aid which it received through its chief, Matos, who, with the great body of men under his standard, made a combination for a time irresistible and overwhelming, than to any weakness, inefficiency, or negligence on the part of the titular government. In other words, history compels a belief that the Government did in fact what it has a right to have assumed it would do — made the best resistance possible under all the existing circumstances to the revolutionary forces seeking its overthrow. As previously suggested, it will be noted that the titular government met the revolution of liberation under Matos after several successive lesser revolutions which seriously taxed its military powers in men and treasure and necessarily depleted both; and that for some three months during the revolution its ordinary sources of income through its ports were entirely lost to it, and, while something of a national spirit was aroused by the occasion of the concerted action of the allied governments, its treasury suffered seriously.

It is therefore the opinion of the umpire that there was no undue delay on the part of the Government in the restoration of its power in the district under consideration, and that it was not through the weakness, inefficiency, or passivity of the Government that the revolution of liberation remained in control for the time named, but rather through its inherent strength in men, materials, and money, and in certain assisting circumstances.

The learned British agent would meet the ordinary assumption of diligence on the part of a government to regain its lost control of territory and to secure its lost control of its inhabitants by the fact that its recent efforts to compel repayment of taxes after these taxes had been once paid to the revolutionary government may be taken as having been contemplated by the Government during its delay in regaining such control; but, as the umpire finds, historically and not by assumption, that there has been no negligence or undue delay on the part of the National Government, the able and ingenious argument of the British agent in that regard can not prevail.

There remains to consider the validity of his contention that since Venezuela is now collecting taxes for the period when the revolutionaries were in control the National Government have thereby incurred a necessary responsibility for not having adequately protected its inhabitants in consideration for the taxes paid.

It is incontestably true that with the duty to pay public taxes flows the right of protection and the conscientious and careful discharge of all imposed public duties by the Government to which this tribute is made; that with the right to demand and exact revenue for the support of government stands the correlative duty to be competent and willing to discharge its public functions and conserve the welfare of the taxpayer, and that the one can not rightfully or lawfully exist in the absence of the other; but we have found it to be historically true that the Government of Venezuela was neither competent nor present to perform in any part its governmental functions at the place and within the period in question. They had wholly lost their sovereignty over this district and it was wholly out of their control and independent of the titular government,

and the attempt to obtain or the obtaining of a second payment of public dues does not disturb the revolutionary status, while the original payment of taxes to the revolutionary government only makes more emphatic its complete control of the situation during the period in question.

While there is no question that the collection of taxes by the Government for the period during which it had lost its sovereignty over the territory in question is indefensible in law, logic, and ethics, the respondent Government is not a pioneer in this respect.

The United States of America may claim priority over them. In the war of 1812 between that country and Great Britain the latter country captured and held thereafter until the declaration of peace the town of Castine, in the State of Maine. After peace had been declared and evacuation had taken place the United States collector of customs for that port claimed a right to exact duties for goods which had been imported through the custom-house while it was in charge of the British Government, and to which latter Government the duties had been paid. The case went to the United States Supreme Court, and, under the title of *United States v. Rice*, is found in 4 Wheaton, 246, Justice Story giving the opinion, from which the umpire makes a brief quotation:

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 transactions. \* \* \* 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 all that has already been stated, and when, upon 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.

The umpire holds, therefore, that the effect of the respondent Government in claiming and receiving a payment of taxes for a period of time when it had lost its sovereignty over the district in question, and could neither render protection nor receive obedience, is simply to make the respondent Government liable for a return of those illegally exacted taxes, as was held in the Italian-Venezuelan Mixed Claims Commission, now sitting at Caracas, by Ralston, umpire, in the matter of the Kingdom of Italy on behalf of Luigi Guastini,<sup>1</sup> to which reference may be had for a more extended discussion of the principles involved and for important citations and quotations there found.

Such exaction of taxes is without right; but it does not follow that there is an assumption on the part of the Government for the acts of revolutionaries. While the payment of taxes to the revolutionists did import the correlative duty of

<sup>1</sup> See Volume X of these *Reports*.



protection from them, for they were in a position and were bound in right and honor to grant it, there is certain logic in the astute contention of the learned British agent and there is grave error on the part of the officers of the Government if they demand such payment; but these wrongful demands can not change history or reverse international law.

Hence it follows that upon neither of the grounds held by the learned British agent can the losses of the claimant be considered of such a character that the National Government is bound to render him compensation for losses or injuries caused by the action of revolutionary troops; and so much of the claim is disallowed.

For that portion of the claim resting upon the action of the Government forces and authorities the umpire allows the sum of £ 492, which includes such expenses in the preparation of the claim as, in his judgment, should be allowed.

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#### DAVIS CASE

Where goods imported into Venezuela are by mistake or misrepresentation delivered by the customs officials to others than the consignee, the consignor can not maintain a claim against the Government of Venezuela when it appears that the wrongful delivery was only possible through the negligence of the consignor.

#### PLUMLEY, *Umpire*:

This case came to the umpire through the disagreement of the honorable Commissioners.

The umpire finds the decisive facts to be that Lanzoni, Martini & Co., an Italian company doing business in Venezuela as railway contractors and miners, contracted with Messrs. John Davis & Son, a British firm doing business at Derby, England, on or about the 26th of February, 1901, for certain goods in the line of the claimant company, consisting of oil for miners' safety lamps, lubricating oil, miners' safety-lamp glasses, and the like, and that on the 26th of February, 1901, these goods were shipped by the claimant company to go forward to the port of Guanta, in Venezuela, for the use of the said Lanzoni, Martini & Co. These goods were to be given up to Messrs. Lanzoni, Martini & Co. by the shipping agents of the claimant company in exchange for cash against bills of lading, which later were forwarded with the accounts to Messrs. Ruys & Co., of Amsterdam, for their collection, and on the 11th of April, 1901, the Dutch steamer *Prins Willem III*, from Amsterdam, put in at the port of Guanta, bringing these goods. The certified manifest showed that these goods were sent by Messrs. Hoyman & Schurman, of Amsterdam, to Guanta, consigned to Messrs. John Davis & Son, to the order and account of said company. It further appears that Messrs. Ruys & Co., of Amsterdam, had not succeeded in obtaining the cash of Messrs. Lanzoni, Martini & Co., and it appears that this Amsterdam company, shipping agents of the claimant company, did not forward such bills of lading to any agent or representative of the claimant company in Guanta or Barcelona, or send any instructions, suggestions, or restrictive orders to the customs officer at Guanta concerning the delivery of said goods only on payment therefor or otherwise; but on the 12th of April Messrs. Lanzoni, Martini & Co. applied to the customs officer requesting a certified copy of the consular invoice received by the customs-house stating that they had received no consular invoice, but had received the commercial invoice, and declaring that the goods in question had come for them and their use.

Mr. Lanzoni corroborated his statement by reading to the customs officer, correspondence which his company had had concerning these goods. The

goods were initialed "L. M. & Co.," and Mr. Lanzoni insisted that these were the initials of their company and the mark used on all their imports, and urged upon the customs officer that if his company were not furnished with the certified copy requested it would be impossible to present the manifest within the time limited by law, and the goods would be subjected to its penalties. There was not known to the customs officer in Guanta or Barcelona any mercantile house of Messrs. John Davis & Son, nor was there known to such customs officer any representative of such a company in either Barcelona or Guanta. In fact, no one applied to the customs-house on behalf of the claimant company during the four workdays' period permitted by Venezuelan law for the claiming of the goods before fines would be imposed. The customs officer believing the representations of the Messrs. Lanzoni, Martini & Co., and understanding that company to be creditable and responsible, and having in no way been placd upon his guard against said company in regard to these goods, or requested in any way to protect the interests of the claimant company, the certified copy requested was furnished, and the manifest of Lanzoni, Martini & Co. was admitted and the goods delivered to them. It further appears that through the negligence of the claimant company, or of Ruys & Co., their shipping agents of Amsterdam, there was no one in Barcelona, or Guanta, or elsewhere in Venezuela, in receipt of the bills of lading, advised on behalf of the claimant company concerning said shipment, or in any way authorized to act for them or their shipping agents until after the 4th of July of that year, on which day, as also on the 11th of July, it appears that the claimant company wrote to Messrs. Dominici & Sons, a firm established in Barcelona — the date of the receipt of the letters not appearing — inclosing to them the bills of lading and requesting them to hand over to Messrs. Lanzoni, Martini & Co., after payment, the goods in question; and it was after this date that there first appeared before the customs officer at Guanta any one acting in behalf of the claimant company, when it was ascertained by such representative that the goods in question had a long time previously been delivered to the Messrs. Lanzoni, Martini & Co., as above stated. It also appears that this latter company on then being addressed by these Venezuelan agents of the claimant company admitted that they had the goods and had used part of them and expressed their inability there to make payment, but that the debt would be cancelled or application to the company's office in Rome, Italy. These facts were duly reported by the said Dominici & Sons to the claimant company.

It further appears that the claimant company has made application both to the Barcelona house and the house at Rome of the Messrs. Lanzoni, Martini & Co. to obtain payment, and, failing to obtain such, instructed their agent in Rome to take legal proceedings in order to procure the money due them. The claimant company assert that they and their agents have used all reasonable means to obtain payment and have failed.

The laws of Venezuela concerning imported goods by the authority of the honorable Commissioner for Venezuela are as follows:

The consignee is the importer of goods shipped abroad and bound for Venezuela. Within four workdays from the time the entrance visit has been paid each one of the importers of foreign goods must present the custom-house with the copy of the certified invoice, together with a manifest in duplicate drawn in the Spanish language, fulfilling all conditions required for invoices, and containing besides the total amount of bales and their value. \* \* \* (Law XVI (Régimen de Aduana para la importación) of the Financial Code of Venezuela, art. 91.)

It is further provided that on the expiration of the four workdays fines are to be imposed, to wit: "For the first day later 100 bolivars, and 10 more for each

following day," and if after sixty days the manifest is not presented the goods shall be treated as abandoned, and the public shall be informed fifteen days beforehand that the goods are to be sold to the highest bidder, if not claimed by the owners, and if at the end of such fifteen days the goods remain unclaimed they shall be sold at public auction with all due legal formalities, and from the moneys thus received the fiscal dues, fines, and other expenses shall be paid.

It follows, therefore, that when the Messrs. Dominici & Sons, agents of the claimant company at Barcelona, made their application to the customs officer, as hereinbefore stated, if the delivery to Messrs. Lanzoni, Martini & Co. had not been made and the law had taken its due and regular course these goods would have been sold at public auction, and there might not have been any sum remaining out of their sale. It is very improbable, in view of the nature of the goods and the lack of general local demand therefor, that there would have been any considerable sum paid for them at public auction, while the duties, the fines, and other charges would have reached a large sum.

So far as it appears to the umpire from the facts before him, the attention of the British foreign office was not called to the particulars of this claim until January 19, 1903, and it was not until the 11th day of April, that the Venezuelan Government was notified of these facts and their attention asked to the same.

From the testimony of Mr. Stephenson, the only sworn testimony in the case on the part of the claimant company, the umpire could have adduced but very few of these facts, and if his testimony had been taken literally by the umpire it would oppose some of the facts as found. But from all the testimony in the case, and largely from the testimony of the respondent Government, he has been able to obtain a connected history concerning the matters in question.

Upon the authority of the honorable Commissioner for Venezuela the umpire quotes another portion of Venezuelan law affecting the action of the customs officer:

When the importer should not receive the certified invoice, the custom-house will, on his written requisition, furnish him with a copy of the corresponding one received by it with the documents under cover and seal, so as to form the manifest.

In the judgment of the umpire the customs officer at Guanta was led into error, not unnatural, by Messrs. Lanzoni, Martini & Co., largely, if not wholly, through the fact that no one appeared acting on behalf of the claimant company, and therefore the statements of Messrs. Lanzoni, Martini & Co. that they were the importers in fact were easily given credence. The umpire is satisfied that the legal duty of the customs officer was to deliver the goods to the consignees or their lawful order only, and that in delivering the goods to anyone else except to the consignees, or their order, there was a clear mistake; but as this case turns in the judgment of the umpire upon other grounds it is not necessary to pass upon the responsibility of the Government of Venezuela for such mistake. The negligence of the claimant company and of their agents is in justice and in equity more important, and in the opinion of the umpire is in fact decisive. Upon the facts found in this case, had matters taken their ordinary and due course under the laws of Venezuela, there would have been none of these goods in the Guanta customs-house at the time of the first inquiry made thereat by the claimant company in the latter part of July, or early August, 1901. They would all have been disposed of lawfully at auction to the highest bidder, and out of the proceeds of such sale there would have been paid all of the legal charges of the Venezuelan Government connected with the importation, the warehousing, the advertising, the selling of the goods in question, and the legal penalties attaching to the delay. The most that could have been at that time in the hands

of the Government would have been the remainder, if any, after satisfying these legal charges. In the judgment of the umpire there would have been no remainder. It is, therefore, inequitable to now claim of the respondent Government full payment for these goods which were lost wholly through the negligence of the claimant company. For, as the umpire has just stated, if these goods had not been delivered to Lanzoni, Martini & Co. they would have been sold under operation of Venezuelan law before the claimant company appeared at the custom-house through their agents Dominici & Sons.

From these facts the umpire holds that it was negligence on the part of the claimant company under all the facts in this case to not forward the bill of lading with the goods to a responsible Venezuelan resident agent, and that this negligence was the real and primary cause of the conditions which followed, and the least that can be said is that this negligence was directly and proximately contributory to the injuries complained of.

It was still greater negligence to allow more than three months to elapse before forwarding such bills of lading and securing local representation in its behalf.

Again, to justly and equitably charge the respondent Government with the official misconduct of its customs officer there should have been prompt notice to the Venezuelan Government of the claim for indemnity and the facts concerning the claim, so that the respondent Government, if otherwise liable, could have availed itself of its remedy against Lanzoni, Martini & Co. (a) through subrogation, (b) through the bond of its custom officer, or (c) through the property of the customs officer himself; and to delay notice for two years after the happening of the event upon which the claim is based is in itself gross negligence on the part of the claimant company. Upon the theory of the liability of the respondent Government there was such remissness of duty toward it on the part of the claimant company as amounts to laches in justice and equity.

Negligence is:

The failure to observe, for the protection of the interests of another person, that degree of care, precaution, and vigilance which the circumstances justly demand, whereby such other person suffers injury. (Bouvier, vol. 2, p. 478, citing Cooley on Torts, 630.)

The absence of care according to circumstances. (*Ibid.*)

Such an omission by a reasonable person to use that degree of care, diligence, and skill which it was his legal duty to use for the protection of another person from injury as, in a natural and continuous sequence, causes unintended injury to the latter. (*Ibid.*)

The failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation, or the doing what such a person under the existing circumstances would not have done. (*Ibid.*, citing 95 U. S., 441.)

See Bouvier under the head "Negligence" for further quotations.

Laches is:

Unreasonable delay; neglect to do a thing or to seek to enforce a right at a proper time; the neglect to do that which by law a man is obliged or in duty bound to do. Unlike a limitation, it is not a mere matter of time, but principally a question of the inequity of permitting the claim to be enforced; *an inequity founded upon some change in the condition or relation of the property of the parties.* (Bouvier, vol. 2, p. 101, citing as to the last part of the quotation 10 U. S. Ap., 227; 145 U. S. (Sup. Ct.), 386.) (*Italics the umpire's.*)

It has been said to involve the idea of negligence: the neglect or failure to do what ought to have been done under the circumstances to protect the rights of the parties to whom it is imputed, or involving injury to the opposite party through such neglect to assert rights within a reasonable time. (Bouvier, vol. 2, p. 101.)

The case, therefore, in justice and equity, should be decided wholly without reference to the actions of the customs-house officer at Guanta, which action, under the circumstances disclosed in this case, could have done the claimant company no harm, and solely with reference to the relations which the claimant company bears to the situation in question.

It therefore becomes the duty of the umpire to disallow the claim, and judgment may be entered accordingly.

#### FEUILLETAN CASE

In the absence of positive proof of payment of wages by the Government, after admitting an employment by it, and in the face of positive testimony that wages were not paid, the Government was held liable.

Interest allowed on amount due, but expenses of claim disallowed.

#### PLUMLEY, *Umpire*:

The Commissioners failing to agree, this case comes to the umpire for decision, and was considered and determined in the United States under the agreement between the two Governments permitting the same.

The claimant alleges that he took service as fourth engineer on board the Venezuelan gunboat *Restaurador* on February 27, 1901; that on the 16th of May of the same year he was shipped by Venezuelan authorities on board the gunboat *General Crespo* to La Guaira, there to give evidence in the matter of an inquiry there being had concerning the second engineer of the first-named gunboat; that he arrived in due course at La Guaira on the 18th of May, and gave his statements concerning the matter named; that under instructions of Venezuelan authority he remained in La Guaira, and later he examined the gunboat *Rayo* and made report of her condition, and then acting under orders, repaired the gunboat, and on the 15th of October of that year was transferred to the *Rayo*, serving regularly as third engineer until December, 1901; that then expressing a desire to leave the service he was put under arrest and forced to remain, and did remain, until the 27th of February, 1902, when he was released; that his salary under his first engagement as fourth engineer was 65 pesos monthly; that some time subsequently, while still serving on the *Restaurador*, he was raised to third engineer, at the monthly wage of 75 pesos, but the time when this advancement of wage took place is not stated. He claims that he went to La Guaira under orders and wages, but whether his wages were at 75 pesos, 65 pesos, or some other rate, he does not state. He does not state at what wages he acted as inspector and repairer of the *Rayo*, but he claims that his engagement as engineer of the *Rayo* was at the monthly wage of 60 pesos. For all these services he claims the sum of 492 pesos, alleging that he has never been paid any salary.

Aside from his own statement he furnishes the evidence of one Manuel Flores, who states affirmatively and positively from his own knowledge that the claimant was sent to La Guaira and without having had his wages paid.

The respondent Government contends that the claimant held the position of fourth engineer only on board the *Restaurador*; that he served from the 27th of February, as alleged by the claimant; and that he remained on the *Restaurador* until the 31st of May following, when he deserted the service of the Venezuelan Government, and that nothing remained owing him for his wages.

It is further contended by the respondent Government that there was no action or inquiry had at La Guaira against or concerning the second engineer of the *Restaurador*, and that the allegation of the claimant that he was sent to

La Guaira to make testimony in such cause was "simply a fable." It is further contended by the respondent Government that he was shipped on the boat *Rayo* by the first engineer of that boat, who unofficially employed him as his assistant; that he was paid by this person personally his wages in full during the time of his service on such boat, but that the sum agreed upon was 50 pesos monthly instead of 60, as alleged by the claimant; and that finally, for incompetency and apparent revolutionary sympathy, he was dismissed from the service. The respondent Government alleges that the claimant has been fully paid for all services rendered.

It is impossible from the statement of the claimant to know how much his wages should amount to, as he states two different prices during his service on the *Restaurador* without naming the time when the advance took place, and while claiming to be sent to La Guaira on wages, he does not state at what rate, nor how long such rate of wage continued, nor whether there was a differing price for the inspection and a differing price while he served as repairer, nor does he state whether he was under wages at La Guaira before entering upon the duty of inspector and repairer on the *Rayo*. He does not positively assert that he was not paid the sum his due while waiting at La Guaira and while working upon the boat *Rayo* prior to his engagement as engineer thereon, although, as he makes no statement admitting a payment and makes a general assertion that he was not paid his salary, the fair interpretation of his several statements in this regard is that he was not paid any portion of his due and that he was under certain wages for the entire year.

The umpire finds it impossible to reconcile his statements concerning the time of his employment with the wages due as claimed by him. His wages on the *Restaurador* and up to the 18th of May, when he gave his testimony in La Guaira, as alleged by him, reckoned at 65 pesos a month, amounts to 170 pesos. His wages on the *Rayo* from October 15 to February 27, at 60 pesos monthly, as claimed by him, amounts to about 266 pesos, and the two sums united equal 436 pesos. If he be allowed 65 pesos until May 31, although there seems to be no reason for doing this unless all of his time while waiting is to be charged for, there would be an additional sum of about 26 pesos, making in all about 463 pesos. So much of this, however, is conjectural that it can only be used to show the impossibility of stating his claim in detail with any fair degree of certainty.

Taking the case upon the claim of the respondent Government that he served on the *Restaurador* from February 27 to May 31, at a monthly wage of 65 pesos, and we have substantially 197 pesos as the amount his due for such service. Since the service is admitted the burden rests upon the respondent Government to show by a fair balance of affirmative proof that recompense has been made. Unfortunately for the respondent Government, if their claim of payment is correct, they have not shown it by the statement of any person claiming to know it as a matter of his own personal knowledge nor by inspection of the vouchers or books which should show such payments, and those books and vouchers are asserted to be beyond the reach and without the control or possession of the respondent Government. There is proof that the Bank of Venezuela paid the salaries reported to be paid, but there is no proof that such report contained the name of the claimant for all or any part of his wages, but there is proof that the officers of the boat believed sincerely and so does the admiral of the navy, that such payment was made. However, against the positive assertion of the claimant and his witness, Flores, that no part of his wage was paid while on the *Restaurador*, the umpire fails to find the fact of such payment established, and therefore holds that the sum of 197 pesos and 13 centavos is due to the claimant for such services.

Without any positive claim as to his wage between the 31st of May and the

15th of October and with no supporting testimony of such service and with the impossibility of reconciling such a claim, if it is to be considered as made, with the amount claimed by him as the total sum due, the umpire does not find anything due the claimant for this intervening period.

From the 15th of October onward while engaged on the *Rayo* as engineer, the umpire feels better satisfied in his own judgment to accept the positive testimony of the engineer under whom he served, supported by the testimony of Comodoro Pedro Thodo, that the claim was fully recompensed by the engineer himself by whom the claimant was unofficially engaged, as the umpire finds the facts to be. Unlike the case of the *Restaurador*, here the testimony concerning payment is explicit, positive, and of personal knowledge, and when opposed to the somewhat vague and quite indefinite general statements of the claimant are of convincing force and evidential value.

All of the claim not included in the services on the *Restaurador* to May 31 is disallowed.

The claimant is found to be a British subject.

Interest is allowed but expenses are disallowed, and the umpire finds the claimant is entitled to receive from the Government of Venezuela in full discharge of his entire claim the sum of £ 33 13s., and award will be made accordingly.

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#### COBHAM CASE

Claim dismissed without prejudice for want of sufficient proof, it appearing that claimant did not have the aid of skilled counsel in the framing of his evidence. Award made later for £ 100 by consent of Commissioners.

#### PLUMLEY, *Umpire*:

The Commissioners having failed to agree in this case it has come to the umpire for his determination.

The evidence shows two distinct instances of losses to property and injury thereto and of gross indignities toward and injuries of the person of the claimant.

Concerning the instance of October 26, 1902, resting upon the acts of Col. Guillermo Aguilera, Capt. Pedro Diaz, and their fifteen soldiers, constituting a part of the army of the revolution libertadora, it is impossible to charge responsibility upon the National Government against which these men were at war and over whose conduct it had lost all control. This part of the claim must be disallowed, in accordance with the umpire's opinion of justice and equity and in accordance with his previously expressed judgment before this tribunal. Cruel and unjust as such conduct must appear to all right-minded men, proper reparation is not to be found in mistakenly and therefore wrongfully charging it upon the Government.

Concerning the acts occurring on October 14, 1902, and testified to by H. Fischbach and Ramón Guerra and five others, if these were perpetrated by soldiers and officers forming a part of the army of the Government, it is to be regretted that such fact is not clearly in proof. The charges involved are all of too grave and compromising a character to be accepted without clear, definite, and convincing evidence. As the testimony stands it may or may not mean Government troops. The Government must not be held responsible for such a serious outrage on property and personal liberty by evidence in which upon this essential fact the language is distinctly ambiguous and indefinite. The injuries to the claimant were incurred in and because of his resolute efforts on behalf of his employer's property; and his personal bravery and his loyalty to his trust

incite the umpire to give him all the protection within his power, and had he warrant therefor from the evidence he would be glad to award him ample indemnity. The ambiguity of the claimant's evidence in that part of it which names the troops who did the injury is such that it would not justify the umpire in making an award against the Government in his behalf. But it is undoubtedly true that this evidence was prepared without the aid of counsel skilled in such matters, and it may be that it was intended to establish the fact that Government troops did the injury, and with tender regard for the claimant's rights in this matter, the umpire will exercise his discretion in his behalf and will dismiss that portion of the claim without prejudice in any particular to the claimant, and judgment may be entered in accordance with this holding.

*Caracas, November 13, 1903.*

Upon further consideration of this case and upon the advice and consent of the Commissioners the umpire awards £ 100, and judgment may be entered accordingly.

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#### DAVY CASE

Venezuela is responsible for the acts of her civil officers, whether they in fact received their commissions direct from the National Government or indirectly and mediate through means and methods previously devised by the National Government for the care and control of the State, county, or municipality to which power had been delegated by that Government to make these appointments and issue commissions; and the National Government must respond in damages for the wrongful acts of such authorities, unless they be speedily and adequately punished for their offense.

The claimant is not bound to seek redress for his wrongs by a civil action in the local courts. He may have recourse to his own Government and that Government has a right to intervene diplomatically on his behalf.

#### PLUMLEY, *Umpire*:

In this case there was a disagreement on the part of the honorable Commissioners and it came to the umpire to be by him decided.

This matter arose in the spring of 1898 in the State of Bolívar.

In one of the municipalities of that State the jefe civil improvised a court, constituted a pseudo judge, and the two, under assumed authority, observing some of the forms of law, but with apparent malice, without just cause, and in disregard of law, subjected the claimant to most inhuman and barbarous treatment. After which through certain forms of law, but without lawful authority, he was taken into involuntary and laborious service, compelled to depart from his home, and to suffer great hardship for many weeks and to do and suffer all this without any compensation under an unfounded claim that he was working out his bail in the aforesaid unjust cause.

The claimant is a British subject and a skilled workman in the handicraft of a mason.

These unlawful and reprehensible acts performed under the color of authority and under a claim of representing the sovereignty of Venezuela were early reported by the claimant to the British minister resident at Caracas, and by said minister were very soon brought to the attention of the Venezuelan Government. It is to the honor of the respondent Government that from the first it has recognized the gravity of the offense and has not sought to palliate, belittle, or excuse it. President Andrade personally took up the matter and assured the British Government that criminal proceedings would be instituted and the guilty



parties punished. In the correspondence which was had with the British minister resident at Caracas the President felt compelled to acknowledge the indifference of the local authorities to the case and in that way to explain the delay which had ensued. When the history of Venezuela for the year of 1899 is considered it will not be deemed strange that the central Government was unable to give this particular matter the attention which unquestionably it otherwise would have received. It was in the spring of 1899 that President Andrade gave ample and ready expression of his settled purpose to bring the criminals to justice, but the history of 1899 reveals the reason of his inability to carry out his purpose in that behalf. When the national record of the past four years is read, it will not seem strange that this matter has not received attention. This lack of attention may well be placed to other causes than indifference to or disregard of the rights and wrongs of the claimant.

Before this Commission the honorable Commissioner for Venezuela urged the irresponsibility of the respondent Government for such acts as are here complained of, because of the Federal character of the Venezuelan Government and the limitations which thereby attach to national action. Such was not the position taken by the chief executive of the respondent Government when the question was being pressed diplomatically, and, in the judgment of the umpire, it is not well taken here. Internationally, the National Government is solely responsible for the proper safeguarding of the rights and interest of foreigners, resident or commorant, within its territory. No diplomatic relations exist except as between the respective nations as such. The responsibility in a given case being admitted the duties attaching must be performed, or satisfactory atonement made. Great Britain can not deal with the State of Bolívar. The national integrity of the respondent Government alone would prevent it. Hence the nation itself, in its representative character and as a part of its governmental functions, must meet the complaint and satisfy it. The Federal condition of Venezuela is freed from some of the embarrassing features concerning such matters which pertain to the United States of America as a nation. The United States of America was formed of States already organized, each independent, each sovereign. These States formally yielded to the nation certain of their sovereign rights, but reserved all those not especially delegated. One of the vexed questions in the home country of the umpire has been the line of demarcation existing between the two and in that regard the power of the nation to interfere with the internal policies of the several States. But in Venezuela the States are carved out of the national domain by the national will and formed in accordance with the national wishes. Certain rights and privileges are granted to these States by the central Government, while all not in terms granted, are necessarily reserved to and retained by the nation. It is not conceivable that it, in any part, abdicated its sovereignty over these several States in matters which affect its national honor and which concern its duties as a nation toward other governments. In the opinion of the umpire there can be but one answer to this proposition, which is that there is responsibility on the part of Venezuela for the acts of its civil officers whether they in fact received their respective commissions direct from the National Government or indirectly and mediately through means and methods previously devised by the National Government for the care and control of the State, county, or municipality to whom power had been delegated by the National Government to make these appointments and issue commissions. The creator of these methods and means of internal administration, viz, the nation, must always be responsible to the other government for the creatures of its creation.

It is also urged by the honorable Commissioner for Venezuela that the claimant should find his adequate remedy by civil action through the courts of

Venezuela, directed against the man or men who had done him this harm. He had this right, without question, but in the judgment of the umpire he was not compelled to resort to the courts for his remedy. He had recourse to the Government of which he was a subject, there to obtain his relief through diplomatic channels. The Government of which he is a subject has a right to represent his interests diplomatically and where, as in this case, there has been an agreed submission of the claims of British subjects to a mixed commission created to consider them the tribunal thus constituted has undoubtedly jurisdiction of the parties and of the subject-matter.

It was also the opinion of the honorable Commissioner for Venezuela that the crime was fully atoned when the guilty parties had been prosecuted and punished — a fact which he confidently believed had occurred and of which he felt sure he could give satisfactory evidence before the tribunal. It appeared that preliminary steps had been taken looking to that end, and the evidence adduced at each preliminary inquiry is a part of the testimony used in this case. These preliminary steps had given the President of Venezuela knowledge of the wrong committed, the necessity of punishment commensurate to the offense, and the names of the offenders. The umpire has no question that the honorable Commissioner for Venezuela has been diligent in his efforts to obtain record evidence that there had been both prosecution and punishment of the guilty ones, but it has been without avail, and there is left to the respondent Government only one way to signify its regard for individual freedom, its abhorrence of such proceedings as are detailed in this case, and its desire to remove the stain which rests upon its department of criminal jurisprudence through the untoward and wicked practices of those who engaged in this conspiracy against the person and liberty of the claimant and the honor of their country. Too great regard can not be paid to the inviolability of the one and the sacred qualities of the other. The measure of damages placed upon such a crime must not be small. It must be of a degree adequate to the injury inflicted upon the claimant and the reproach thus unkindly brought upon the respondent Government. These invaded rights were in truth priceless, and no pecuniary compensation can atone for the indignities practiced upon the claimant; but a rightful award received in ready acquiescence is all that can be done to compensate the injuries, atone for the wrong, and remove the national stain.

If justification is sought through precedent for the umpire's conclusions, ample warrant therefor is found in Moore's *International Arbitrations*, volume 4, pages 3235-3265.

The honorable Commissioner for Venezuela will quickly differentiate between the case before the umpire and a claim based upon mistakes of law or fact or the lawful adaptation to the given person of very arbitrary and even oppressive laws. The case before the tribunal was a purely lawless proceeding under a certain color of law and legal authority and under certain forms of process, but wholly against the law of the land, and was a gross malversation in office and malfeasance by a civil officer, constituted such by the laws of Venezuela, and it is as much an affront to the honor of Venezuela as it is a deliberate indignity placed upon the claimant and an affront to the claimant Government.

The umpire finds the sum claimed in the memorial reasonable, and he adjudges that the respondent Government pay to the claimant Governments as an indemnity on behalf of the claimant the sum of £ 1,000, and award will be made for that sum.

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MOTION FOR ALLOWANCE OF INTEREST ON AWARDS FROM THEIR DATE UNTIL  
THEIR PAYMENT

Under the terms of the protocol interest can not be allowed on the claims from the date thereof until they are paid.<sup>1</sup>

PLUMLEY, *Umpire*:

His Britannic Majesty's agent before the British-Venezuelan Mixed Commission moved that interest be allowed upon all awards at the rate of 5 per cent. per annum from the date of the award to the date of payment, and supported his motion with an able argument. To this motion the honorable Commissioner for Venezuela opposed an able opinion. After careful consideration of the question, the honorable Commissioners finding themselves unable to agree, joined in sending the question to the umpire for his decision.

Interest eo nomine is by contract expressed or implied.

Both the claimant and the respondent Government quote Article III of the protocol to sustain on the one hand the claim for interest and on the other hand to deny it.

It reads as follows:

The British and Venezuelan Government agree that the other British claims, including claims by British subjects other than those dealt with in Article VI hereof and including those preferred by the railway companies, shall, unless otherwise satisfied, be referred to a mixed commission constituted in the manner defined in Article IV of this protocol, and which shall examine the claims and decide upon the amount to be awarded in satisfaction of each claim.

The learned British agent finds in this paragraph not only a warrant that interest may be awarded, but that it should be awarded in each case at a specified rate until date of payment. This right and duty to award interest is found by the learned British agent in the fact that the award is to be "in satisfaction" of each claim; that the date of payment of the award is uncertain and may not take place for many years; that "when the date of payment of a sum due in satisfaction of a debt is uncertain, it is an universally recognized principle that interest should accrue;" that if interest is not allowed from the date of the award to the date of payment "the Commission will not have satisfied the claim as required by the protocol."

He grants and claims that "the decision of this question must necessarily turn on the exact terms of the protocol constituting the Commission."

From the part of said protocol above quoted the honorable Commissioner for Venezuela finds, on the contrary, that the "powers of this Commission are merely and exclusively confined to awarding each claimant a determined sum" when their claims are found to be just. He also relies upon the terms of the protocol, and not only fails to find therein the warrant for the allowance of interest on awards by the Commission, but holds further that "the clear and precise terms of the protocol bar all discussion on this point."

It will be observed that the Commission is not authorized or permitted to name the time when, the manner by which, or the means through which the award is to be satisfied or paid. Examination of the protocol will show that elsewhere therein the high contracting parties have themselves provided for all this and for security as well. As to a certain class of claims, there is an agreement as to the amount due in satisfaction. In Article III, however, it is agreed that there is a question to be submitted to arbitration, which question seems to be,

<sup>1</sup> To like effect see Italian - Venezuelan Commission (Cervetti Case) in Volume X of these *Reports*.

What, if anything, is the amount due to the claimant from the respondent Government on the account as presented? A mixed commission, to be provided for in the next succeeding article of the protocol, "shall examine the claims and decide upon the amount to be awarded in satisfaction of each claim." Have the commissioners, by the terms of the submission, anything to do with the satisfaction of the *award*. Are they asked to consider anything but the quality of each claim, and, if allowed at all, to decide upon the amount which will satisfy it? Is not the word "amount" sufficient in its use? What the claimant Government asks by this motion is that this Commission settle the amount which satisfies the justice of the claim, and also fix a rate of interest which shall attach to that amount and follow it until the award itself is satisfied by payment, and that an agreement to this effect may be found — nay, is found — in the language quoted when considered, as all parts of a treaty should be, in reference to all other parts thereof.

Amount. 1. The sum total of two or more sums or quantities. The aggregate, as the amount of 7 and 9 is 16; the amount of the day's sales.

2. A quantity or sum viewed as a whole. \* \* \*

3. The full effect, value, or import; the sum or total; as, the evicence, in amount, comes to this. (*Century Dictionary*, Vol. 1, p. 191.)

It would seem that amount, as it is used in the provision quoted in the protocol, means, and only means, a certain round sum to be awarded in satisfaction of the *claim*, which in itself may include the original sum and interest thereon to the time of the award. The whole question of satisfaction of the award is provided for elsewhere in the protocol. If interest is to be allowed on the basis of a contract, the intent of the high contracting parties to so contract is the thing sought, and it must be gathered, if found anywhere, primarily and principally in the foregoing quotation taken from the protocol. Both claimant and respondent Governments so agree. And the claimant Government makes no reference to any other part of the protocol, resting their claim for interest solely upon said quotation. But do not the provisions of the protocol, as found in the language quoted, limit the action of the Commission to an examination of the claim and a determination of the certain amount in pounds sterling to be awarded the claimant? Is there to be found in the other parts of the protocol, or in the facts leading up to it and surrounding it, or in some interpretation put upon it by both parties, that which will control the quoted provision and so enlarge its scope as to render it consistent with the position of the learned British agent? It seems to the umpire that the other parts of the protocol show a purpose and plan on the part of the two Governments to settle all details for themselves, excepting the claims submitted in Article III, and by and for themselves to settle the means of payment thereof and the security therefore. It would seem to the umpire, from a careful reading of the protocol, that the only question left open for the determination of the Commission was the question of the claims themselves, and that concerning these claims, they were to determine whether in justice and equity there was anything due and, if so, how much; and, if he were obliged to determine the question unaided by reference to collateral facts or by the use of other proper means, he would be obliged to hold such to be the rule. Will examination of the facts leading up to the protocol and collateral with it remove or more firmly establish this belief? This is to be seen.

In the British Blue Book for 1903, under date of December 18, 1902, page 178, in an extract from a communication of the Marquis of Lansdowne to Sir F. Lascelles, it is said by the marquis that the —

court of arbitration will have to decide both on the material justification of the demands and of the parties and means of their settlement and security.

The Hague Court of Arbitration, and not a mixed commission, was the proposition then under consideration, which distinction is uniformly observed throughout the correspondence between the British Government and the German Government and between the British Government and their officials.

On page 182 of said book there is a communication of the British Government to the United States embassy, where, in paragraph 3 of said communication, it is stated —

the arbitrator will have to decide both about the intrinsic justification of each separate claim and about the manner in which they are to be satisfied and guaranteed.

In this communication the President of the United States or The Hague tribunal was the arbitrator referred to.

On page 183 of said book is found a memorandum of a communication made to Mr. White, December 23, 1902, and paragraph 3 of the reservations contained in said memorandum has this:

It would, in the opinion of both Governments, be necessary that the arbitral tribunal should not only determine the amount of compensation payable by Venezuela, but should also define the security to be given by the Venezuelan Government and the means to be resorted to for the purpose of guaranteeing a sufficient and punctual discharge of the obligation.

In this communication it was understood that either the President of the United States or The Hague tribunal was to be the arbitrator, and it was expected and required of them that they should determine, settle, and provide for these additional propositions.

There is a draft of a letter to the American ambassador at Berlin, found on page 191 of said book, in which the position of the German Government is stated and previous communications are referred to. In the closing part of said letter there is found this language:

Besides which he (President Castro) must especially make clear in what manner he intends to pay the demands contained in that memorandum or to give security for that amount.

On page 208 of said book, number 233, the Marquis of Lansdowne, in a dispatch to Sir Michael Herbert, after referring to other conditions previously named to the ambassador at Washington, makes in the last paragraph this statement:

The question of guaranties for the satisfaction of the remaining claims would also have to be carefully examined, and we were engaged in preparing instructions to you upon these and other points.

From these extracts and, better still, from a careful reading of the entire correspondence contained in said book, it will be seen that the final adjustment between the allied powers, and more especially between Great Britain and Venezuela, was a matter of careful consideration, made especially apparent by the very systematic use of similar language in different communications, from which may be deduced the fact that the protocol itself is in structure and language a work of much care and thought. A careful reading of all the communications contained in said Blue Book will disclose no reference, direct or indirect, to the question of interest, or to compensation for delay in payment, while there is constantly presented a requirement as to the means of payment, and, if payment is not to be made at once, of adequate security therefor. A return to the protocol itself will show in the preamble, "Certain differences have arisen between Great Britain and the United States of Venezuela in connection with the claims of British subjects against the Venezuelan Government."

Article I of the protocol provides, among other things, that the Venezuelan Government recognizes "in principle the justice of the claim," etc. Article II of the protocol provides that "The Venezuelan Government will satisfy at once, by payment in cash or its equivalent," certain classes of claims, and then comes Article III, which provides for the submission to a mixed commission of the class of claims which have been brought before us for an examination and decision as to the amount to be awarded in satisfaction of each claim.

In the instructions from the Marquis of Lansdowne to Sir Michael Herbert, No. 234 of Blue Book, January 13, 1903, on page 212, there appears this statement:

Other claims for compensation, including the railway claims and those for injury to or wrongful seizure of property. \* \* \*

And, near the top of the page —

His Majesty's Government will be ready to accept in satisfaction of these claims either a sufficient cash payment or a guaranty based on security which must be adequate, and which the Venezuelan Government must be bound not to alienate for any other purpose.

Further proposing that —

Before the amount to be actually handed over to claimants of this class is finally decided, a commission, upon which Venezuela would be represented, should be appointed to examine and report upon the amount to be awarded in satisfaction of each claim. \* \* \* Should a cash payment have been accepted by His Majesty's Government, they will be prepared to refund any surplus which may be available after the examination.

It appears from this instruction that when a mixed commission was under consideration it was to follow a settlement on the part of Venezuela either by a gross sum paid to Great Britain, which was by that Government estimated at £ 600,000, or, if not paid at once, the other alternative was a satisfactory guaranty; and in either case it was agreed that an examination of the respective claims for the purpose of fixing the amount due in each claim should be made by a mixed commission; and it was not proposed that they should possess any other power and there was no other duty to rest upon them, except to settle the amount of each claim, which amount, naturally, would be the same whether it was to be paid in cash or was to be adequately secured. This is brought out again in the recapitulation made in this same set of instructions, beginning at the bottom of page 212 of said book:

(b) Other claims for compensation, including the railway claims and those for injury to, or wrongful seizure of, property, must be met either by an immediate payment to His Majesty's Government or by a guaranty adequate, in your opinion, to secure them. These claims can, if this be desired, be examined by a mixed commission before they are finally liquidated.

There is no suggestion here as to any power given to, or any potency in, the Commission, except that of examination of the respective claims, in which they were to determine whether the claims were just and equitable, and, if so, to settle the amount. To The Hague tribunal and to the President there were to be given other powers which were to be asserted by them in lieu of the agreement concerning such matters which was effectually made between the allied powers and Venezuela. The President declined to act, and an agreement was finally concluded in which there was an unalienable right given by Venezuela to the powers in and concerning the customs duties received at the two principal ports of Venezuela, so that the alternative proposed, if cash was not immediately paid, was in fact settled in the protocol.

There is another important factor to be considered in arriving at the question of whether interest was in the mind of either of the high contracting parties. Examination of the Blue Book shows that the Marquis of Lansdowne insisted, in association with the other allied powers, that there should be given them preferential treatment over the peace powers in the payment of their claims out of the 30 per cent of customs to be set aside for their liquidation.

Mr. Bowen insisted that Venezuela must give similar treatment to all creditor nations. In connection with the discussion that took place in reference to this question of preference see No. 241 of Blue Book, page 219, of date January 25, 1903, when the Marquis of Lansdowne was informed by Sir Michael Herbert of the anticipated annual income of the two ports of La Guaira and Puerto Cabello, which was set by him at 10,000,000 bolivars, while 29,000,000 bolivars was considered to represent approximately, the claims of the peace powers. In the Marquis's reply of January 26, 1903 (Blue Book, 219), he reduces this income to pounds sterling, and finds 30 per cent to be, approximately, £ 213,000. He estimates the claims of the blockading powers at £ 900,000, and puts the claims of the peace powers in pounds sterling at 1,148,574. He then proceeds to deduce from all these facts, that there could be an arrangement to extinguish the claims of the allied powers in five years, and that this could be done without injuriously affecting the interest of the other creditor powers. The thought of the Marquis of Lansdowne is expressed definitely in No. 254, page 222 of the Blue Book, in his interview with the German ambassador, January 29, 1903.

The German Government had stated that this 30 per cent, in their judgment, should be set apart for the sole purpose of liquidating the claims of the blockading powers; but they were informed by the Marquis of Lansdowne that it seemed worthy of consideration —

Whether, if the part of the customs revenues was appropriated, not for the satisfaction of the claims of all the creditor powers, but for that of the British, German, and Italian claims alone, we might not be content with rather less than the full 30 per cent referred to. It seemed to us that the allocation of an annual sum sufficient to extinguish our claims in, say, six years, might be enough for our purpose, and we had instructed Sir M. Herbert to discuss the question with his German and Italian colleagues.

Again in No. 256, February 1, 1903, Blue Book, p. 223, in his instructions to Sir Michael Herbert, the Marquis of Lansdowne says:

An arrangement by which the claims of the blockading powers should be extinguished in six or seven years would, we believe, leave it possible for a *similar settlement* to be made with the *other powers*.

It must be borne in mind that the 30 per cent of the customs revenues of these two ports was the one sole guaranty and means of payment proposed, and it was definitely understood that no better, or other, could be, or would be, offered; and the entire discussion relative to preferential treatment was concerning payment out of the fund thus to be obtained. This may be seen by reference to the Blue Book and the different communications found therein.

To extinguish £ 900,000 in six years would require £ 150,000 each year; this would leave £ 63,000 each year to apply on the claims of the peace powers, aggregating during the six years £ 576,000, and reducing the claims of the peace powers to £ 770,514 at the end of the six years. Then with the full £ 213,000 to be applied each year it would require three years and a half for their complete liquidation, or about nine and a half years in all. Add interest, however, at 5 per cent to the £ 900,000 and the first year's payment to the allied powers would be £ 195,000, leaving £ 18,000 to apply on the claim of the peace powers. Their interest would be £ 57,423, and hence there would be an

increase in their claims that year of £ 39,425. Carry this same plan throughout the six years, lessening each year the amount of interest on the claims of the blockading powers, and increasing each year, by so much, the amount to apply on the claims of the peace powers and the result would be, that, when the six years had ended, the debt to the allied powers would have been paid, and there would be an increase on the part of the claims of the peace powers of £ 59,125, so that their claims at that time would be brought up to £ 1,207,639. Can this situation be reconciled with an intelligent proposition by an intelligent statesman, that the allied powers could be paid off in six years, and substantially *similar* treatment be given the peace powers, and *all* out of the 30 per cent? A situation that actually increased the indebtedness of the peace powers during the entire time in which the allied powers were being paid. It would seem impossible to reconcile such a statement.

As another test, take the hazard that the customs receipts permanently fall off just one-half, and that the debts aggregate as estimated £ 2,048,510. The interest at 5 per cent would be sufficient to exhaust the entire income and the debts would *never* be paid. Is it possible that these able Governments regarded the proposition to set aside these customs receipts as any kind of security if the reduction of one-half thereof would take away all possibility of payment? Again, when the umpire reached Caracas in the spring of 1903, he found that intelligent residents of the city were fearing that the aggregate allowance by the Commissioners would be £ 5,000,000. Were that to prove true and the income remain at £ 213,000, and interest was to be allowed at 5 per cent, the indebtedness would increase at the rate of £ 37,000 each year. With the interest factor in, there is all this uncertainty and possible permanent unliquidation. With the interest factor out, there is a sum constant each year in some amount to reduce the indebtedness and a certainty of final liquidation.

Again, if the very high rate of interest named (high in connection with a secure government indebtedness) had been understood as pledged, would either party to the submission at The Hague have involved itself in the trouble and large expense, in the aggregate, to determine which should be obliged first to let go of so good an investment?

Again, when the Marquis of Lansdowne was suggesting that a part of the 30 per cent would answer the demands of the blockading powers and that a part thereof would be sufficient to wipe out their indebtedness in six years, what fraction of the 30 per cent did he have in mind? Without interest, in such case there would be reserved to the allied powers approximately 21 per cent, and there could be tendered to the peace powers 9 per cent during each of the six years. With interest, the allied powers would the first year absorb  $27\frac{1}{2}$  per cent, and there would then be  $2\frac{1}{2}$  per cent for the peace powers, with the actual final result suggested that the peace powers would have their indebtedness increased during the six years. While the proposition of 21 to 9 was not of such a character as to offend the other powers, allowing the standpoint of the allied powers to be taken or not, the other proposition could not have been offered or received with dignity, and it is impossible to conceive that it was in the mind of so eminent a gentleman as the Marquis of Lansdowne.

Although the time of payment is not in terms expressed, a certain method of payment, with security, is devised which begins liquidation at once and concludes in from six to ten years according as the claimant Government is or is not a preferred creditor, as it assumes to be. These awards are substantially in that class of debts where by the agreement an option is granted to the debtor to pay on or before a certain time. It is also a secured debt, which quite frequently appeals to a creditor as superior to an unsecured debt bearing interest. Preceding the protocol, the claimant Government insisted upon an immediate



cash payment or satisfactory guaranties. It was given the guaranty. The two Governments, on their own part, made every provision for payment and security and left only to the Commission the examination of the claims presented. To examine and, if allowed, to award upon the claims presented the amount due thereon is the apparent power given to the Commission. In the judgment of the umpire there is no power inherent in a mixed commission to affix interest to the awards beyond the life of the Commission. The recovery of interest on the judgments of a court is a matter of statute, as understood by the umpire. Interest only follows the judgment if so provided by statute. (*Thompson v. Monrow*, 2 Cal., 99; 56 Am. Dec., 318.) If such power is to exist it must be by grant from the parties who created it; and if the awards are otherwise to draw interest it is from other source and other cause than a naked order of the Commission.

In the Claims Commission between the United States of America and Venezuela, under convention of April 17, 1867, the treaty provided that —

semi-annual interest shall be paid on the several sums awarded at the rate of 5 per cent per annum from the date of the termination of the labors of the Commission. (*Moore's Int. Arb.*, vol. 5, 4810.)

Similarly for the Mixed Commission between the same countries, under convention of December 3, 1886, the same rule as to interest on awards was provided in the treaty. The said treaty also recognized the propriety of allowing interest on the claims, when they were of a proper character. In the American and British Claims Commission treaty of May 8, 1871 (*Moore's Int. Arb.*, vol. 5, 4327), there was, ordinarily, an allowance of interest at the rate of 6 per cent per annum from the date of the injury to the anticipated date of final award. Examination of that treaty will show a corresponding silence on the question of interest on awards, with the protocol under consideration. The United States and Mexican Claims Commission, under convention of February 1, 1869, had very able members as Commissioners, and as umpire during the latter part of the sittings Sir Edward Thornton, who, in the closing part of his labors, passed upon this question of interest, but allowed it only from a certain specific time up to a date usually described as the date of final award. (*Moore*, vol. 2, 1317-18.)

In the United States and Mexican Claims Commission, under convention of April 11, 1839, the question of interest was disposed of similarly. (*Moore*, vol. 4, 4325.) Between the same parties, under the act of 1849, interest in the particular case referred to on page 4326 of *Moore* is denied for the reason given, and in the Spanish Commission of 1871 (*Moore*, 4327) interest was denied.

It will be noted that in article 6 of the treaty of December 5, 1885, between the United States of America and Venezuela it was especially provided that —

In the event of interest being allowed for any cause and embraced in such award, the rate thereof and the period for which it is to be computed shall be fixed, which period shall not extend beyond the close of the Commission.

In the convention for the arbitration of the claims of the Venezuela Steam Transportation Company of January 12, 1892, article 5 of the treaty provided that —

If the award shall be in favor of the United States of America, the amount of the indemnity, which shall be expressed in American gold, shall be paid in cash at the city of Washington, in equal annual sums, without interest, within five years from the date of award.

In the case of the Peruvian indemnity fund left with the Attorney-General of the United States to distribute he held that —

The charge for interest is rejected, it being incompatible with the principles which appear to have been adopted by the two Governments in concluding the convention.<sup>1</sup>

In the preliminary provision made for the settlement of the civil war claims, so called, immediately between Great Britain and the United States of America, it was especially set out that each Government was required to pay the amount awarded against it within twelve months after the date of the final award, *without interest*. (Moore's Int. Arb., vol. 1, 690.)

In the Chinese indemnity cases found on page 4629 of Moore, 12 per cent interest was allowed to a certain date, covering in most cases the period of three years, and they were induced to give this liberal rate —

by consideration of the fact that some time must elapse before the complete collection of the indemnity through the Chinese custom-houses could be effected; and they intended to make their awards the final settlement of the question of interest.

In the matter of indemnity for slaves between Great Britain and the United States of America, there was a claim for damages of the nature of interest on the part of the United States against Great Britain. On page 375, volume 1, of Moore, begins the discussion of this claim on the part of Great Britain, and the opposition is divided into three parts:

(1) Principles of justice and equity; (2) the authority of precedents; and (3) a reasonable and necessary construction of the convention.

And it is urged under the last head, that if the convention intended the creditors to receive damages as well as the value of the slaves —

it was inconceivable that the power should not have been given to the Commissioners to ascertain by evidence the amount of such damages; and if it was intended that interest should be arbitrarily fixed upon as the standard of damages it was equally inconceivable that the convention should have been silent upon the subject.

It is argued that in the convention between the United States and France of September 30, 1800,<sup>2</sup> there was an express provision for interest, and a similar stipulation in a subsequent treaty between the same parties,<sup>3</sup> and, from these facts, that whenever, in a treaty, the United States meant to stipulate for interest, they took care to include an express provision to such effect. There are other references of a similar character which might be made to Moore, but the umpire forbears.

Where it has appeared that there were objections to interest in the cases quoted, the objection has been to interest on the claims then before the Commissioners. The question of interest on awards to time of payment was not the matter then under consideration.

The Geneva tribunal, from the magnitude of the questions at interest, the quality of the countries involved, and the high character of the agents of the respective governments and of the arbitrators as well, occupies a position of unique importance among even the great arbitrations of the past. That the Geneva tribunal allowed interest on the claims but did not allow any interest to attach to the award, the umpire considers very significant.

The umpire believes it to be safe to hold that this Commission has no power not directly conferred upon it by the protocol.

<sup>1</sup> Moore, Vol. 5, p. 4595.

<sup>2</sup> Treaties and Conventions between the United States and Other Powers, p. 322.

<sup>3</sup> *Ibid.*, p. 356.

Interest *eo nomine* is a matter of contract. The protocol, the contract in question, does not in terms provide for interest. Neither does the language used import interest; nor is it to be implied from the language used. (16 American and English Encyclopædia of Law, 999; III. Grounds of Allowance of Interest, and notes 2, 3, 4, and cases therein cited; *Ib.*, IV. Contracts to Pay Interest, and notes 8, 9, 10, and cases therein cited; *Ib.*, p. 1001, subhead 4, Construction, (a) in General, and notes 2 and 3, and cases there cited; *Ib.*, 1002, subhead 3, Implied Contracts, (a) in General, and note 1 on p. 1003, and cases there cited.)

Upon the question of an implied contract and as aiding in determining the question of interest, it may be well to remember that the general practice of nations in cases of submission to arbitration has not been to provide for interest on the awards until date of payment; that to so provide is quite the exception.

There is to be considered also the general rule that nations do not pay interest except when especially written in the contract. Lawrence says in *Law of Claims against Governments, etc.*, page 218:

Upon ordinary claims the Government is not liable for interest unless by contract so providing. (See note 78 on same page and following pages.)

The force of this general rule is to negative any implied contract between nations to pay interest where there is an agreement between them and nothing is said about interest. (16 American and English Encyclopædia of Law, 1005, subhead Implication Negated and note 3, and cases there cited; *Ib.*, 1005, subhead (b), Knowledge of Custom, and note 5 and cases there cited.)

Damages are sometimes assessed for delay of payment or detention of property at the rate and of the nature of interest, but there is here no default to be considered, and there will not be if the respondent Government in good faith carries out its terms of payment, even if it takes many years to liquidate the indebtedness. (16 American and English Encyclopædia of Law, 1007, subhead (b) Express Contracts to Pay Money, (1) In General, and note 4 and cases there cited; *Ib.*, 1013; *Ib.*, 1014, subheads (a) and (b), notes 5 and 6, and cases there cited; *Ib.*, 1015, note 2, and cases cited.)

As bearing upon the wisdom, propriety, or value of an award of interest to attach and to follow the award, where such an order is not sustained by the clear language of the convention constituting the Commission, and as bearing upon the question of jurisdiction in the Commission to make such an award under such circumstances, the consistent and practically concurrent action of the many commissions composed of distinguished bodies of men, there is great significance on the almost prevailing and constant practice of the rule not to allow interest. Indeed, the umpire has been unable to find a single instance where under substantially the same terms of submission as are contained in the protocol under consideration there has been any such allowance of interest.

The award of the Mixed Commission in respect of British mineral oils claims in France of 1874, produced by the claimant Government as an authority for its motion, does not disturb this proposition of the umpire. The terms of that submission were —

To settle, as hereinafter directed, questions concerning duties levied in France on British mineral oils, *as well as to consider and report on any other questions which the high contracting parties agree or shall agree to refer to it* — <sup>1</sup>

and, if the umpire reads correctly, interest was only allowed by this Commission in cases where judgments had been pronounced, and for the purpose of meeting the terms of those judgments.

<sup>1</sup> British and Foreign State Papers, Vol. LXIII, p. 211.

It must also be regarded as of importance that all of the other commissions sitting in Caracas at this time have failed to allow interest on awards — some, probably, because it was not asked for; in others, because it was directly denied as being beyond the power given by protocols. This not only adds the weight of the judgments of the many eminent men who have thus passed upon this question, but throws into the discussion of the question certain features of inequity in case it should be allowed to one only of the claimant Governments. Especially is there force to this thought in connection with Germany and Italy, who, with Great Britain, formed the blockading powers and claim preferential treatment out of the common source provided for the liquidation of all claims. They are to be paid in parts proportionate to the amount of their respective awards, and it is not equitable that Great Britain should have profit in a 5 per cent dividend on awards for six years' delay in payment while Germany and Italy are delayed equally, but without recompense, and the date of the final payment to them be deferred still further because of the increased burden placed upon the common fund by reason of such interest. If the protocol plainly required such an inequity to exist between these two parties the umpire would have no alternative but to make the allowance. These deductions bear largely upon the question of the probable intent when the result of a certain line of action is being considered, and it prevents a judgment, where in the discretion of the umpire it might be allowed if it would produce equity, when in fact it would produce inequity.

As the result of all this consideration the umpire is not satisfied that he has any warrant or authority under the protocol to favorably entertain the motion of the learned British agent in the matter of interest on awards until payment, and he therefore denies the motion.

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#### INTEREST ON DIPLOMATIC DEBT CASE

Venezuela held liable for interest at legal rate on ascertained liquidated amounts acknowledged by her to be due.

PLUMLEY, *Umpire*:

The honorable Commissioners having failed to agree upon either class of claims presented by the memorial in this case, it comes to the umpire for his determination.

The memorial calls for simple interest at the rate of 6 per cent on two classes of claims.

Class 1 is claims agreed to by the Venezuelan minister for foreign affairs and Her Majesty's representative at Caracas, Mr. Edwards, in 1865.

Class 2 is awards made by the Mixed Commission constituted by the Anglo-Venezuelan claims convention of the 21st September, 1868.

#### I

The British Government has always claimed of the Venezuelan Government interest at the rate of 6 per cent as an integral part of the claims under class 1; but the umpire fails to find that the respondent Government ever formally consented to the payment of any interest until the decree of May 23, 1876, when, as the umpire understands it from the information in hand, 3 per cent bonds were proposed by Venezuela in payment of these agreed claims and also in payment of the awards made by said Mixed Commission. This proposition the

British Government declined to accept, but always insisted that interest at 6 per cent was their due on both classes of claims.

In the opinion of the umpire the claim for interest can not stand upon a contract either expressed or implied, because he fails to find such a contract, and, if allowed, it must be as damages for undue and unreasonable delay in payment, and for default of payment, in the manner and by the means proposed for liquidation when the claims of this class were merged into a stated sum by agreement between the two nations.

The umpire finds that there was an agreement to appropriate for the payment of this stated sum "the proportional sum appertaining to the British claims of the 10 per cent of import duties assigned for that purpose by the law of estimates of public expenditure." The sum thus stated and agreed upon between the two nations was \$ 247,935.60. In the year 1869, \$ 12,229.85 was paid presumably in accordance with this arrangement as to the share of Great Britain in the percentage of customs duties set apart for debts of this character.

By a decree of the 23rd of May, 1876, this stated sum of \$ 247,935.60 was approved by the Venezuelan Congress; but nothing more was paid until 1885, when \$ 2,784.75 was paid, and thereafter each year, by successive installments, the debt was gradually reduced, and in 1897 it was wholly extinguished.

From the expressions used in the correspondence between the two Governments the umpire finds that it was understood by both of the high contracting parties that this debt was to be liquidated within five years from the date of said agreement; and he fails to find any agreement between the two Governments, or any consent on the part of the British Government, to any further extension of the time of payment. Whether the means proposed by which payment was to be made would have liquidated the entire sum in five years the umpire has no means of knowing, but that such was the expectation of the Venezuelan Government is clearly manifest from the language of its minister of foreign affairs when he urges for the consideration of the British minister at Caracas that interest ought not to be required on the sum then agreed upon because, among other reasons, France had accepted a settlement of her claims in which settlement there was an agreed delay of five years before final payment and no interest was exacted. There could be no significance to this argument on the part of the honorable minister for foreign affairs if it were not in the mind of both the representatives of their respective Governments that this particular debt was to be liquidated in less than five years. In the absence of any specific understanding a reasonable time for payment would be the implication of law; and whether default is found in failure to liquidate within the five years as the agreed time, or in the failure to pay any considerable part of said sum within twenty years from the settlement, it makes but little difference, for it is impossible not to find that this long delay has far exceeded the contemplation of either of the high contracting parties. Placing the ground for interest on the unreasonably long delay in payment, it becomes necessary to fix the time at which interest for that cause should begin. It is the belief of the umpire that the respondent Government will not regard it a harsh conclusion to set the time for payment on the same day when they first recognized their duty to pay and paid over their first installment on this account. This was in the year 1869.

As has already been said, allowance for interest on the claim must be for the default of the respondent Government and for the undue detention of the sum agreed to be paid to the claimant Government by the respondent Government. Under Venezuelan law, until 1873, contractual indebtedness bore interest at the rate of 6 per cent after default. Neither Government can complain if, until 1873, that rate is adopted here, the first charge for interest beginning at the close of 1869. The amount for the five years 1869 to 1873, both inclusive, is

\$ 70,711.70. Some time in the year 1873 the statutory rate under such circumstances became 3 per cent; and there is no hardship to the claimant Government that, in the matter of a pure money indebtedness, it should stand on a par with the claimants whom they then represented. If these claimants had recovered their indebtedness before Venezuelan tribunals they would have been limited to 3 per cent. Venezuelans are so limited.

(See 16 American and English Encyclopædia of Law, p. 1052, subhead 3. Rate as damages. *a.* General rule; legal rate: "When there is no contract for interest, and interest is given as damages strictly, the general rule is that the legal rate is recoverable." See note 3 and cases there assembled.)

The legal rate changing, the rate to be used must be changed to conform. (Ib. 1062. *c.* Interest recoverable as damages. See note 5 and cases there cited.)

The place where the contract is to be performed — i. e., the place where the money is to be paid — governs the interest to be allowed. (Ib. 1088, subdivision *b.* See note 5 and cases there cited.)

When interest is given as damages the law of the place of performance governs. (Ib. 1090, subhead 2. Interest as damages. See note 2 and cases there cited.)

Aliens should be content with the commercial laws of the country in which they are located by choice, for business or other reasons. If they should be content, so should the government of whom these aliens are subjects. Venezuela can not be asked to offer a prize or pay a premium for alien claimants through their governments.

It consorts with the umpire's idea of justice and equity to permit the legal rate in Venezuela to determine the rate recoverable before this tribunal in cases of this character. It follows, then, that beginning with 1874 and continuing until 1897, both inclusive, the allowance for interest is placed at the rate of 3 per cent, or one-half of the sum claimed. This amounts to \$ 120,850.77. Add to this the sum allowed from 1869 to 1873, inclusive, \$ 70,711.70, and the whole amount under this class is \$ 191,562.47.

Aside from the reasons which have thus far been stated there is the same or greater reason in justice and equity for allowing interest on this claim that there has been to allow it in the other cases before this tribunal. The allowance of interest for damages to property, or for contractual claims, considered by mixed commissions has been for a long time a well-settled practice with a large degree of uniformity. So far as the umpire is aware it has been the unquestioned action of all the mixed commissions sitting in Caracas in 1903. It has been the settled practice of this tribunal, where justice and equity seemed to require it. The claim now being considered is in effect an account stated between the two Governments and has a much stronger ground for allowance of interest after default than a claim not agreed to.

The one serious ground of weakness in this claim is that there has been an entire liquidation of the principal sum, or capital, and it is a rule of practically universal application in the courts that where interest is incidental only, as damages for a breach of the contract, payment of the principal *ipso facto* operates to defeat a demand for interest.

As this same question appears in the same way and must be given the same effect in the claim for interest on awards, discussion and determination thereof will be reserved until after consideration has been given to the other points in the second class of claims.

## II

It was especially provided in the protocol constituting the Mixed Commission of 1868-69 that the awards were made to receive "full effect without objection or delay." But there was also a stipulation in the protocol that the awards of

the said Commission, together with the convention itself, should be submitted for approval to the Venezuelan legislature. Because of the revolutionary condition of Venezuela for the next three years this provision could not be carried out until 1873, when a decree of date the 14th of June approved both the convention and the awards.

It is certainly a matter of serious doubt whether, until such decree, the awards made by the Mixed Commission could be regarded as settled and fixed beyond all question. As has been stated, this action was taken by the Venezuelan Congress as soon as it could be done, in consideration of the unfortunate condition of the country during the period intervening. It is the opinion of the umpire that in all these matters up to and including the ratification of the convention and its awards the Venezuelan Government acted in the utmost good faith, without purposed or willfull delay and without actual default. Had the Venezuelan Government then provided for an early payment of the principal sum, in the opinion of the umpire, there could be nothing claimed of Venezuela by the British Government under this part of the memorial; but this was not done.

The conditions here are decidedly different from those attending the protocol of February 13, 1903, and the awards made thereunder. In the latter case the signatory parties agreed in the protocol (*a*) to constitute a mixed commission and settle the several amounts due; (*b*) to provide a specific way for payment out of a certain definite class of Venezuelan income necessarily entailing by its terms a delay of some years before final liquidation. All this is a part of the protocol creating our Mixed Commission.

In the present case now under consideration the protocol creating the Mixed Commission required the ratification above referred to, but provided in effect that when the awards were made and the ratification had there should be given full effect to said awards "without objection or delay." No objections were made. In fact, in everything, the conduct of the Venezuelan Government was so scrupulously regardful of the terms of the convention that it is forced upon the umpire, and must be apparent to all who carefully consider the question, that failure to meet the award with ready payment was solely because of their straitened financial condition resulting from the drain upon their finances through the revolutions which had directly preceded. The umpire understands it to be an admitted fact that Great Britain never acceded to any delay and never consented to any installment method of payment except through allowance of interest to compensate therefor. On September 4, 1873, the Venezuelan Government was informed by the British representative at Caracas that the sums awarded the British claimants under the convention of 1868 had been apportioned among them with interest from the date of the awards at the rate of 6 per cent per annum. To this the Venezuelan Government demurred; but it has always been insisted upon on the part of Great Britain, and the Venezuelan Government is presented with no new claim in the memorial now before this tribunal. The whole amount awarded was \$ 312,586.95. The first payment was made in 1873 and there were annual installments thereafter, omitting the year 1879, until 1885, when the last installment was paid and the principal or capital sum was extinguished.

It is the belief of the umpire that this delay constituted a default on the part of the Venezuelan Government; that it was not in accordance with the spirit and purview of the protocol to thus defer the final liquidation of the awards.

This default was not from choice or purpose from necessity. Nevertheless among individuals similarly situated if one should from necessity withhold the money of another he is on all fours with the one who withholds from preference. In either case he is held to pay the creditor a reasonable sum for the damages done him through such detention.

As stated under Claim I, there is projected here, as there, the fact that the claimant Government has received in full the principal sum.

The law as laid down in England and the United States in the courts of both countries is well settled in cases of this character. Where interest is not a matter of contract it is not regarded as an integral part of the debt but as a mere incident thereof. In consequence, if the original debt is paid the incident thereof ceases. There is no authority of repute known to the umpire which sustains a contrary contention. The maxim, "Equity follows the law" is also in the mind of the umpire. This maxim would be controlling if in international matters it should apply under a protocol containing such provisions as are found in the one by which this tribunal exists. If it is to control, then the claims under this memorial must be disallowed.

That when the principal thing ceases to exist, things merely incidental thereto, or incidents thereof, cease also, is a logical deduction and may well control in the courts and yet not be controlling between Governments before an international tribunal.

It seems to the umpire that the claimant Government acted with wisdom and with proper regard for the dignity and quality of the respondent Government when it received the payments made as payments on the principal in accordance with the wishes of the respondent Government; and, while presently pressing the claim for interest upon Venezuela, awaited the action of that country in response to the demand instead of applying the payments, as made, first to interest and the remainder, if any, to the principal, as would have been the due course between individuals. The umpire is aware that it has been held by the courts that to accept the principal and yet claim the interest as still due does not affect the rule first stated because the act of receiving is not compulsory but voluntary on the part of the payee.

To the mind of the umpire, however, these rules of the courts concerning litigants and litigation before them are not necessarily correct or safe guides for international tribunals, or for the conduct of nations in their intercourse with one another. The rule which suggests that nations do not ordinarily pay interest to a claimant is based upon the ground that it can not be assumed that a nation is not ready to pay as soon as the debt is determined and the responsibility fixed. Here it is evident that Venezuela was financially unable to make immediate response to acknowledged obligations. It appears to the umpire that the conduct of the claimant Government in continuing to press its demands for interest, but at the same time consenting to receive payment of the principal sum, is to be approved as properly regardful of the dignity of the debtor nation; and that in relying upon presenting her claim for interest as an independent claim she was, in effect, placing both Governments on a level, which was wise and discreet. The umpire, looking to the protocol for guidance, finds ample warrant for an award which produces justice and equity, clearly and indisputably, although it may be at variance with the strict provisions and holdings of the courts. This tribunal is to decide "all claims upon a basis of absolute equity without regard to objections of a technical nature \* \* \* ." In the opinion of the umpire, which he rendered in the Aroa mines supplementary claims on page 67<sup>1</sup> of said opinion, he expresses his interpretation of absolute equity to be "equity unrestrained by any artificial rules in its application to the given case." On page 5<sup>2</sup> of this same opinion there are quoted his accepted definitions of "technical" as used in the protocol.

<sup>1</sup> *Supra*, p. 444.

<sup>2</sup> *Supra*, p. 410.



With this mandatory order from both Governments to do justice and equity regardless of objections of a technical nature, the duty of the umpire in this case is made plain. He must ascertain "that which is equally right or just to all concerned" — that which is "equal or impartial justice" (Century Dictionary; title, Equity.) — and make an award which is "fairness in the adjustment of conflicting interests — the application of the dictates of good conscience to the settlement of this controversy." (Ibid.)

There remains to consider the objection raised by the honorable Commissioner for Venezuela that the award must exclude from the benefit of interest allowance if made, all Venezuelans who have replaced the old claimants as their sole heirs. The reason urged to sustain this position is that this Mixed Commission was "constituted to decide the claims of *British subjects* against Venezuela and that Venezuelans can not legally apply thereto for maintaining their rights." This is a point the force of which, when properly applied, has been acknowledged by the umpire and has met his approval in the claim of Mathison<sup>1</sup> and in the claim of the heirs of Stevenson,<sup>2</sup> but in the case now being considered all rights passed upon by the umpire were vested, respectively, in 1865 and in 1869, when the stated account was agreed to and when the awards were made. This vested right may pass, like other vested rights, to those who in themselves would have no place before this tribunal, but who as the representatives of those having such vested rights may have such place. To hold otherwise would permit Venezuela by delaying payment of these vested rights to avoid payment at all which would not partake of justice or equity. In the Chopin case, quoted in the umpire's opinion in the heirs of Stevenson<sup>3</sup> and found in Moore, volume 3, 2506-2507, it was held that a claim duly presented before a commission became such a vested right that an award could be made for the benefit of unquestioned citizens of the respondent government to take as representatives of one deceased whose right had thus vested.

There are many other cases to be found in Moore where the claims were held within the terms of the convention if vested in a deceased claimant, although the immediate representative would not, on his own part, receive an award.

In the opinion of the umpire this case takes its true status back when the indebtedness was agreed upon between the Governments and the awards were made, and therefore these claims rest upon rights which have vested for more than thirty years.

Interest is but an incident of the original award and takes the right then established in the principal sum. This would have been the case had the interest been discharged from time to time, and it is not equity to give Venezuela any advantage to be derived from its own delay. Such appears to the umpire to be a just, equitable, wise, and salutary rule to apply in this case.

Interest is therefore allowed in this second branch of the memorial at 3 per cent, beginning with 1874 and ending with 1884, both inclusive, amounting in all to \$ 39,797.32. The umpire therefore holds that judgment should be entered in both classes of claims in the round sum of £ 46,279, and award will be made accordingly.

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<sup>1</sup> *Infra*, p. 489.

<sup>2</sup> *Infra*, p. 497.

<sup>3</sup> *Infra*, p. 503.

## MATHISON CASE

(By the Umpire):

In cases of dual nationality the law of the domicile is the law which governs as to citizenship.

The constitution of 1864 of Venezuela can not be retroactive in its effect so as to constitute one born before that date in Venezuela a citizen of Venezuela; but such was not the effect of said constitution.

## CONTENTION OF BRITISH AGENT

In this case the claimant was born in Venezuela on September 14, 1858. His father was the child of British parents and was born in Trinidad. The claimant is therefore by the law of England a British subject. If he is also a Venezuelan it is admitted that he will have no standing before this Commission, since the wrong alleged was done to himself.

The Venezuelan law on the subject is as follows:

Constitution of Venezuela of 1830, article 10 —

The following are Venezuelans by birth: Free men born in the territory of Venezuela.

Constitution of 1857 —

The following are natural-born Venezuelans: All persons born in the territory of Venezuela.

The latter was the constitution in force at the time of the claimant's birth.

It is submitted that this does not and was not intended to apply to persons born in Venezuela of foreign parents, if such persons should be by the law of their parent's country nationals of that country.

If the local law of the country where a man happens to be born is to have the effect of preventing him from enjoying the privileges of his parents' nationality, it must expressly and in clear terms state that intention, otherwise it will be taken not to have intended to produce that effect and to have excluded the case of a man so circumstanced. General words can not be held sufficient to produce such a result.

Upon consideration of the context of the provision above quoted it becomes plain that the constitution gave Venezuelan nationality as a privilege and in no way intended to insist upon it as a compulsory burden.

Constitution of 1830, article 10, section 3:

Venezuelans by birth are those born in foreign countries of Venezuelan fathers while absent on the service of or on account of the Republic, or with the express license of competent authority.

The purport of the constitution of 1857 is the same.

In other words, Venezuelans going abroad, save under special circumstances, lose the privilege of having their children born Venezuelan. That is to say, the Venezuelan legislature regarded nationality in the light of a privilege and had no intention of making the nationals of other countries Venezuelan against their will and did not intend to include the case in question.

It was not till 1864 that it occurred to the legislature to insist that the nationals of other countries should be Venezuelan whether they wished it or not. The contention of the Venezuelan minister, cited on page 3 of the opinion of the Venezuelan Commissioner, is untenable in view of the above section.

It is hardly necessary to explain that the attitude of Great Britain toward this matter has always been the same, viz, that where the law of a foreign country clearly states that the nationals of Great Britain born in that country are to be

nationals of that country while there resident, Great Britain acknowledges the right of those countries to claim them on their own territory. Here, however, the law of the country does not and was not intended to have that effect.

That the earlier constitution was not intended or believed to have the effect alleged by the Venezuelan Commissioner is shown, in spite of subsequent explanations and protestations, by the terms of the later law. (Constitution of 1864.)

ART. 6. The following are Venezuelans: All persons who have been born or who may be born in the territory of Venezuela, *whatsoever may be the nationality of their parents*.

It will be seen that this provision was really meant by its framers to be a *change* in the law, as is evidenced by the attempt to make it retroactive in its effects, a pretention which Great Britain through its minister at once stated that it could not in any way countenance.

Having in view, then, that the words of the earlier constitution are on the face of them insufficient to produce the result contended for, that they were not intended to do so, and that this must be taken to have been the opinion of the framers of the constitution of 1864, there is no conflict of law as regards the nationality. The claimant was born a British subject; the law at the time in force in Venezuela did not have the effect of giving him any other nationality; no subsequent law, therefore, could have the effect of depriving him of the privileges of British nationality, and the British Government are entitled to maintain this claim on his behalf.

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

Edward A. Mathison demands of the Government of Venezuela payment of £ 4,966 owing to damages and injuries which, according to his own statement, were caused him by the Government troops.

The undersigned rejects such a claim because said Mathison is of Venezuelan nationality, and therefore has no right to claim before this Mixed Commission. Mathison was in fact born in Ciudad Bolívar in the year 1858, his father being an Englishman, therefore long after Venezuela had assumed its position as an independent nation and declared and inscribed in its constitution the principle *jure soli* by virtue whereof every man born in Venezuelan territory is a Venezuelan by birth.

See the following pertinent extracts:

Constitution of 1830. Title III. On Venezuelans.

ART. 9. Venezuelans are such by birth and by naturalization.

ART. 10. Venezuelans by birth are: The freemen born in the territory of Venezuela.

Constitution of 1857. Title III. On Venezuelans.

ART. 7. The quality of a Venezuelan proceeds from nature or may be acquired by naturalization.

Venezuelans by nature are: All men born in the territory of Venezuela.

Constitution of 1858. Title II. On Venezuelans.

ART. 6. Venezuelans are: First by birth, all those born in the territory of Venezuela; the children of Venezuelan father or mother born in the territory of Colombia, and those of Venezuelan parents born in any foreign country.

Constitutions of 1864. Title I. Section II. On Venezuelans.

ART. 6. Venezuelans are: All those born or that may be born in the territory of Venezuela whatever may be the nationality of the parents.

In the constitutions enacted by the Republic in the years 1874, 1881, 1891, 1893, and in the one actually in force, which is that of 1891, the last extract is textually reproduced.

Under the rule of the constitutions of 1857, 1858, it was claimed by some foreign governments that children who were born in the territory of Venezuela of foreign parents were to follow their parents' nationality, but the Republic always maintained that they were Venezuelans; and in order to avoid such discussions, no matter how unfounded the pretensions of the aforesaid governments might be, the provision contained in article 6, No. 1, of the constitution of 1864, was enacted.

No sooner was the fundamental law published than the chargé d'affaires of France addressed himself to the minister of foreign affairs in Venezuela, stating that his Government had ordered him to ask precise explanations about the meaning of certain provisions contained in the new constitution of the Republic with regard to nationality.

Article 6 [says the chargé d'affaires] reads thus: "They are Venezuelans: First, *all those born or that may be born in the territory of Venezuela, whatever their parents' nationality may be.*"

This paragraph being susceptible of two meanings, the undersigned wishes to know whether the legislature has intended to establish for every person born, or that may be born, of foreign parents in the territory of the Republic, the obligation of embracing, even against his will, Venezuelan nationality, or has only been willing to grant him the right of claiming this nationality in preference to that of his parents.

In this last case, the undersigned can but pay homage to the liberality of the new laws of the Republic, quite in conformity on this point with the provisions of French law.

On the other hand, he should be very sorry to be obliged to seriously protest against nationality being imposed by force on individuals born of French parents, if such be the meaning of the first paragraph, article 6, of the fundamental law of the United States of Venezuela.

Doubtless the provision referred to is not susceptible of two senses, having but one, that which has been expressed in the first place by the honorable French minister. As for the protest, it is absolutely unlawful, in view of the fact that Venezuela, on sanctioning said law, made use of its sovereignty, an essential tribute of every independent nation.

The minister of foreign affairs of Venezuela answered the chargé d'affaires, as follows:

In the former constitutions of Venezuela, it recognized as its citizens all men born in its territory, this declaration standing alone. The Executive power realized and always understood that such an article regarded as citizens, even against their will, all who were born in this country. There was only one case in which the Executive power yielded — that is to say, the one concerning the young man d'Empaire. His resolution, however, as coming from an authority who had no right to interpret the constitution, had only a transitory character, and so it was then submitted to Congress. The affair not being decided at the time of the inauguration of the present Government, this Government consulted the cabinet council, and its opinion maintained the principle of imposed nationality. In conformity with this a pretension of the chargé d'affaires of Spain was then decided. It claimed the native citizenship on behalf of the sons of Spaniards, taking as a precedent the circumstance that the same had been bestowed on descendants of French and English people. Other cases of the same nature were likewise decided by this secretaryship. (Foreign Memorial, 1865.)

At the same time (1865) Mr. Edward, chargé d'affaires of Great Britain, acknowledged the right of Venezuela to dictate the above provision in 1864, alleging only that in that case it was not to be extended to those born prior to it.

The minister of foreign affairs of Venezuela hastened to show that said decision was not retroactive, but explanatory. In truth, the constitutions of 1830, 1857, and 1858 sanctioned the same principle as well as that of 1864, only in this last one the expression is clearer, if possible, so as to make any pretension impossible. however rash, against the Venezuelan nationality forcibly imposed upon persons born in Venezuela of foreign parents.

It is worth mentioning that in the epoch in which Mathison was born the principle *jure soli* was in force in England absolutely, somewhat modified afterwards by the law of 1870.

Jusqu'à une époque toute récente, l'Angleterre était un pays de perpétuelle allégeance. Quiconque était né sur le territoire britannique était sujet britannique, et ne pouvait cesser de l'être sans le consentement du prince. (Ernest Lehr, *Éléments de Droit civil anglais*, 1885, p. 21.)

La loi de 1870 (sec. 4) confirme implicitement le vieux principe du *common law* que tout individu né sur territoire britannique est par ce fait seul sujet britannique. (Idem., p. 23).

And it is to be borne in mind also that England has decided on several occasions some controversies identical with the one arisen on account of Mr. Mathison's nationality in the way I contend to be right.

The diplomatic correspondence of the English Government furnishes us with numerous proofs in this respect.

Sec. 547. En 1842 le gouvernement de Buenos Aires ayant voulu obliger au service militaire plusieurs sujets anglais nés dans la République Argentine, ceux-ci réclamèrent la protection du gouvernement britannique. L'avocat général du royaume uni décida que "l'effet de la loi anglaise ne pouvait aller jusqu'à priver le gouvernement du pays où ces personnes étaient nées du droit de les considérer comme ses sujets naturels, et qu'elles ne pouvaient être protégées contre la loi qui atteignait les sujets du pays, à moins que cette loi ne refusât la qualité de nationaux aux fils d'étrangers." C'était donc au gouvernement argentin que les individus qui se croyaient lésés devait s'adresser.

En 1857 la même question se présenta de nouveau à Buenos Aires, où des sujets anglais nés dans cette ville furent astreints au service de la milice. En réponse à leur demande de protection, Lord Palmerston écrivit à l'Envoyé anglais que le gouvernement de S. M. ne pouvait réclamer de telles personnes comme sujets anglais. (*Le Droit international*. Calvo, t. 2, p. 42.)

Paragraphe 549. L'année suivante nous voyons encore le gouvernement anglais affirmer la même doctrine. Dans une dépêche de Lord Malmesbury à Lord Cowley nous lisons: "Il est permis à tout pays de conférer par des lois générales ou spéciales les privilèges de la nationalité aux personnes qui naissent hors de son territoire, mais il ne peut les leur accorder au détriment du pays où elle sont nées après qu'elles y sont retournées volontairement et y ont fixé leur domicile. En règle générale ceux qui naissent sur le territoire d'une nation sont tant qu'ils y résident soumis aux obligations inhérentes au fait de leur naissance. La Grande-Bretagne ne saurait permettre que la nationalité des enfants nés sur son territoire de parents étrangers soit mise en question. (Calvo, *ibid.*, p. 48.)

In 1843 a question arose between Great Britain and Portugal identical with the one we are studying, and Lord Aberdeen sent the English representative the following instructions:

I have received your official letter, dated the 5th of May, by which you advise me that you have informed the minister of foreign affairs of Portugal that the Government of Her Majesty can not admit even for a moment the right vindicated by the Portuguese Government of considering as Portuguese subjects all persons born in Portugal, notwithstanding their descending from foreigners residing in said country.

I think it necessary for your best information to let you know the opinion of the advocate-general of the Queen on several cases arisen in foreign countries, in which the right you refer to in your official letter has been discussed.

Such opinion is, substantially: That if, according to the written law of this country, all children born out of the King's obedience, whose parents or paternal grandfathers were subjects by birth, are themselves entitled to enjoy British rights and privileges while remaining in British territory, the British statute, however, in its effect can not be extended so far as to deprive the Government of the country where those persons were born of the right of claiming them as subjects, at least as long as they remain in that country. (Seijas, *Derecho Internacional Hispano-Americano*, Tomo I, p. 340.)

Not by the strength of my reasoning, but by the authority of the texts above cited, I have fully proven that Mr. Edward A. Mathison is of Venezuelan nationality, and being such has no right to resort to this Mixed Commission, making a claim against his own native country. Therefore said claim ought to be disallowed.

PLUMLEY, *Umpire*:

The claimant was born in Venezuela on September 14, 1858. He now resides and has always resided in Venezuela. His father was of British parents and was born in Trinidad. No question is made that by the law of Great Britain one born in another country of a British father domiciled in such foreign country is a British subject. It is admitted that if he is also a Venezuelan by the laws of Venezuela, then the law of the domicile prevails and the claimant has no place before this Mixed Commission.

His claim is for £ 4,766 for damages and injuries received by him through troops of the Venezuelan Government. No question is made that his claim is a just one, providing he brings himself within the jurisdiction of the Commission.

The honorable Commissioners fail to agree, and therefore this case comes to the umpire to be determined by him.

The constitution of Venezuela of 1864, title 1, section 2, subject, Venezuelans, is as follows:

ART. 6. They are Venezuelans: First. All those born or that may be born in the territory of Venezuela, whatever may be the nationality of their parents.

No question is made that the constitution then established by the Republic is textually the same now, and has remained thus ever since 1864.

No question is made by the learned agent for the British Government that, under the constitution of 1864, one born thereafter in circumstances similar to those of the birth of the claimant Mathison would be a Venezuelan citizen, but it is asserted that the constitution existing at the time of the claimant Mathison's birth did not impose Venezuelan citizenship upon the claimant. The interpretation to be given to the constitution of 1857 is decisive of the question in issue, as it is agreed that this is the constitution in force at the time of the claimant Mathison's birth.

The learned British agent contends that the constitution of 1864 can not have retroactive effect so as to constitute one born before that date a citizen of Venezuela by force thereof, and the umpire sustains his contention. The umpire does not understand the honorable Commissioner for Venezuela to claim retroactive force for the constitution of 1864, and understands him to accept the claim of the learned British agent in that regard.

The umpire understands that the honorable Commissioner for Venezuela claims in regard to the constitution of 1864 simply this, that it is exigetical, not additional, and that beginning with 1830 the constitution of Venezuela has had in this regard the same meaning and purport as the constitution of 1864.

It is insisted by the learned agent for Great Britain that to have the effect to deprive him of the nationality of his parents the law of a country where a man

happens to be born must be stated in express and clear terms, and that general words can not be held sufficient to produce such result; and he claims further that the language of the constitution of Venezuela as it was prior to 1864 comes within the force and effect of his objection.

The strength and value of this contention will depend in a great measure upon what is deemed the natural relation of the state to those born within its domain, and conversely the natural relation to the state of one so born. If the state owes to such the protection due to its citizens, and in return has a right to demand from such due allegiance, if this is the natural relation between the two, changed only by artificial rules legislative enactment, or kingly decrees, the language used in any law having reference to such relations will be interpreted to favor the natural status, unless it clearly appears to express a different purpose. On the other hand, if such is not the rule of nature, then an effort by enactment to make it a rule of the state will require very clear and unambiguous language to express such intention, and if ambiguities exist or the expression is weak the interpretation will be against the law which seeks to establish a principle in derogation of a great natural law.

Phillimore, volume 1, chapter 18 (star page), section 328, says:

First. As to the right of territorial jurisdiction over persons: They are either (1) subjects or (2) foreigners commorant in the land. \* \* \* Under the term subjects may be included both native and naturalized citizens. \* \* \* The native citizens of a State are those born within its dominions, even including, according to the law of England, the children of alien friends.

In a note to Phillimore, Volume IV, page 17, it is said that in *Shedden v. Patrick*, 1 Macqueen's House of Lords' Cases 611, Lord Chancellor Cranworth observes that in England, *independently of statute law* and with certain exceptions, every one *born* abroad is an alien. England holds that the happening of birth within its dominions from parents who are not enemies affixes and imposes an indelible citizenship in that country. See the case of *Frost MacDonald* in State Trials, 887. Here the respondent left Great Britain in his infancy, but he was born there. He was taken in arms holding a French commission, the latter being the country of his domicile: he was held guilty of treason by the courts of Great Britain.

Natural allegiance is such as is due from all men *born* within the King's dominions immediately upon their birth. (Blackstone (Cooley's), vol. 1, 369, citing 7 Rep. 7.)

The children of aliens born here in England are, generally speaking, natural-born subjects and entitled to the privileges of such. (Blackstone (Cooley's), vol. 1, p. 373.)

The first and most obvious division of the people is into alien and natural-born subjects. *Natural-born* subjects are such as are born within the dominions of the crown of England \* \* \* and aliens such as are born out of it. The thing itself, or substantial part of it, is founded in reason and the nature of *government*. (Idem, p. 366.)

Such was the rule of the common law. All changes are the result of statutory legislation.

Blackstone contended, volume 1 (Cooley's), page 369:

That the natural-born subject of one prince can not by any act of his own \* \* \* put off or discharge his *natural* allegiance to the former.

And that this is the principle of *universal law*, citing to sustain this 1 Hale's P.C., 68.

The universality of this principle to the extent of holding the inability of expatriation is, of course, very much questioned, and is only quoted here to show the force which attaches to the incident of birth in establishing one's

citizenship. In all these there are certain well-defined exceptions which, not being necessary to this discussion, are assumed to be in the minds of everyone, and therefore that no especial reference to them is necessary.

Story's Conflict of Law, second edition, Chapter III, section 48, gives as the general rule:

Persons who are *born* in a country are generally deemed to be citizens and subjects of that country.

That —

A reasonable qualification of the rule would seem to be that it should not apply to the children of parents who were *in itinere* in the country, or who were abiding there for temporary purposes, as for health, or curiosity, or for occasional business.

When I say that an alien is one who is born out of the King's dominion or allegiance, this always must be understood with some restrictions. The common law, indeed, stood absolutely so, with only very few exceptions. \* \* \* And this maxim of the law proceeded upon a general principle that *every man owes natural allegiance where he is born*, and can not owe two such allegiances or serve two masters at once. (Blackstone (Cooley's), vol. 1, 373.)

The Century Dictionary says:

Natural-born citizen. One who is a member of a state or nation by virtue of birth.

Native. One born in a given country as a native of it. Of or pertaining to one by birth or the place or circumstances of one's birth.

Citizen. A native of a city or town. \* \* \* A freeman of a city or town as distinguished from a foreigner or one not entitled to its franchise.

"Surely no native-born woman loves her country better than I love America."

Naturalize. To confer the rights and privileges of a native-born subject or citizen upon.

In ancient Rome citizenship, though most usually acquired by birth, might be obtained by special grant of the state. (International Encyclopædia; title, Citizen.)

Then the chief captain came and said unto him, Tell me, art thou a Roman? He said, Yea. And the chief captain answered, With a great sum obtained I this freedom; and Paul said, But I was *free born*. (Acts xxii, 27-28.)

But Paul said, I am a man which am a Jew of Tarsus, a city in Cilicia, a citizen of no mean city. (Acts xxi, 29.)

"Breathes there the man with soul so dead  
Who never to himself hath said,  
This is my own, my native land —  
Whose heart hath ne'er within him burned  
As home his footsteps he hath turned  
From wandering on a foreign strand?"

(Scott's *Lay of the Last Minstrel*.)

Allegiance on the one hand and protection on the other ordinarily settle this without difficulty when applied to native-born or naturalized citizens, or mere commorant aliens. Serious questions arise only when the law must be applied to those who are domiciled from choice in a state of which they are not native and in which they have not sought or have not been permitted citizenship.

The necessities and blessings of commerce and the comity now existing between nations have enlarged these conditions and have permitted privileges to each quite beyond those pertaining to such relations in a not remote period. When the proportionate amount of these unattached persons to the great body of native citizens is relatively very small, the danger and the harm to the state is little, if any; but any considerable number, relatively, of persons who partake of the benefits of a country and yet deny to it allegiance and defense, while



claiming from it peculiar protection, become a serious menace and harm to the state of which they are a part. It is not egotism for a country to assume that a man who becomes de facto a citizen by his established domicile, who there erects his roof-tree, there selects and locates his wife, and there rears his children, has deliberately chosen that such country shall be for his children their native land, to whom they, if not he, shall owe allegiance. If citizenship is thereby imposed, it is not by the state, but by the parent.

This law of nature, of nativity, furnishes the most ready basis of citizenship, and a law which recognizes it and which denies continuous alienship to successive generations is as general as it is wise and as wise as it is general.

It follows, then, that in the judgment of the umpire a law defining citizenship to mean those who are born in its dominions is so far in accord with the universal trend of law upon such matters, so consistent with a due regard for the higher welfare of the inhabitants of the state, so sympathetic with natural law, that he would find nothing doubtful nor uncertain if it be expressed in general terms. Most certainly he finds no doubt or ambiguity in the expressions:

ART. 9. Venezuelans are such by birth and by naturalization.

ART. 10. Venezuelans by birth are: The free men born in the territory of Venezuela. (Venezuelan constitution, 1830.)

This is not generalization. Using the article "the" before "freemen" makes it specific and certain. It includes all that are born free. It excludes all others and none other. It gives one test only. It defines that one. There is no ambiguity here — nothing which suggests or permits interpretation. It comes within the rule quoted from Vattel in Phillimore (Vol. II, sec. 70):

If the meaning be evident and the conclusion not obscure, you have no right to look beyond or beneath it to alter or to add to it by conjecture.

Nor does the umpire find ambiguity in this:

ART. 7. The quality of a Venezuelan proceeds from nature or may be acquired by naturalization.

Venezuelans by nature are: All men born in the territory of Venezuela. (Venezuelan constitution, 1857.)

Here, also, there is no generalization. The most conclusive and comprehensive word known to the English language does duty here.

The Century Dictionary:

All. The whole quantity of, with reference to substance, extent, duration, amount, or degree, with a noun in the singular, as all Europe, all history, etc.

"All hell shall stir for this." (Shakespeare, *Henry V*, V, 1.)

"All heaven resounded, and had earth been then, all earth had to her center shook." (Milton, *Paradise Lost*.)

The Century Dictionary further says:

The *whole number of* with reference to *individuals* or particulars take collectively with a noun in the plural; as, all men, all natives, etc.

Nor is this less certain or significant:

ART. 6. Venezuelans are: First, by birth, all those born in the territory of Venezuela; the children of Venezuelan father or mother born in the territory of Colombia, and those of Venezuelan parents born in any foreign country. (Venezuelan constitution, 1830.)

These are identical in scope and largely in language with the fourteenth amendment of the Constitution of the United States, viz:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.

It is well understood and clearly expressed by the learned agent for Great Britain that the expressions used in the different constitutions in Venezuela hereinbefore quoted are to be accepted as they have been interpreted by that country through the proper channels. Being wholly a matter of its own domestic concern it is not questioned that the interpretation which it has placed upon this language is authoritative and must be accepted by all other nations. Upon such matters if the laws of other nations conflict with the laws of Venezuela the laws of such other nation must yield, as they have no extraterritorial effect beyond the amount which the comity of Venezuela may allow. It is the belief of the learned British agent that the provisions concerning citizenship, hereinbefore quoted, from the constitution of Venezuela, and the provisions of the constitution of 1864, hereinafter written, are progressive, not interpretative. It is asserted by the honorable Commissioner for Venezuela that these several provisions are not progressive, that the several constitutions are identical in meaning and purpose, but that the language used is of the nature exegetical to meet the resisting contentions of other nations concerning the meaning of the constitution then existing — to meet those objections and protestations with language which would effectually preclude any such interpretation and stay all such contentions.

As an aid in understanding the spirit, scope, and purpose of the constitution of Venezuela of 1830, 1857, 1858, and 1864, the opinion of its statesmen is also of value. In the case before the American-Venezuelan Claims Commission under the convention of 1866 Commissioner Andrade, whose opinions give evidence of superior mental strength and ability, says (Moore's *Int. Arb.*, vol. 3, 2457):

By virtue of that right Venezuela declared in her constitutions of 1830, 1857, 1858, and 1864 a Venezuelan citizen by birth every free person born in the territory of Venezuela, such, for instance, as Narcissa de Hammer and Amelia de Brissot,

referring here to the widows who appeared as claimants before the Commissioners in virtue of their derived citizenship through their husbands, who were United States citizens in their lifetime, while the claimants were Venezuelan born, reared, and domiciled.

The honorable Commissioner for Venezuela further asserts that his present contention is in accord with all past interpretation of this point by Venezuela. This last proposition is nowhere and in nowise challenged by the learned British agent, and hence is accepted by the umpire as an admitted fact. Such being the interpretation by Venezuela of its own constitution in this regard it must prevail.

The law enacted by the supreme power of the state is to be interpreted according to the intention of that one power. (Phillimore, *International Law*, Vol. II, sec. 66.)

Such intention is to be gained by what the country or state enacting the law has said was the meaning if it has made a deliverance through the proper channels upon that subject. If not, then there comes to our aid another principal rule of interpretation.

Inculcates as a cardinal basis (which) is to follow the plain and obvious meaning of the language employed. (Phillimore, *International Law*, Vol. II, sec. 70.)

To hold in conformity with the contention of the honorable Commissioner for Venezuela that one born in the country of alien friends is a citizen of the

country of his birth, is to hold in accord with the position of England and the position of the United States of America and is in accord with the wise policy for a state which is growing or anticipates growth by immigration. It can not wisely have a large, foreign, cancerous growth of unaffiliated and unattached population alien to the country, its institutions, and its flag, but in due regard to its own safety it must fix a time when the domicile of the parent's choice shall create a citizen out of the son of his loins born within that domicile. It is the test of nature; it is the test of Venezuela. If citizenship is thereby imposed it is through the father's voluntary, intelligent selection. There must be an end to the citizenship of the national of a country when he is resident and domiciled in some other country. If the father can retain his foreign nationality and impart that to his own son on the soil of the country of his domicile, then may not the son of the son, and so on ad infinitum?

The umpire holds that the constitution of 1864 is but explanatory of the meaning of the constitutions preceding upon these questions of nationality, and, that since 1830, a free man born in Venezuela is a citizen of Venezuela; and that therefore Edward A. Mathison is a Venezuelan and not a British subject, and this tribunal has no jurisdiction over his claim.

It is therefore dismissed without any prejudice to any right which the claimant may have in any other tribunal for the recovery of his claim.

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#### STEVENSON CASE

(By the Umpire):

A woman acquires the nationality of her husband by marriage, but if she continues to reside in the country of her birth after the death of her husband, and the law of such country provides that she is a citizen of the country of her husband during her marriage only, then the law of her domicile will control and she can not be considered as a subject or citizen of the country of her husband.

Where there appears to be a conflict of laws with respect to the nationality of a person, she is deemed to be a citizen of the country in which she has her domicile.

Under the protocol the Commission has no jurisdiction to decide claims of the British nation, as such, against Venezuela. Its jurisdiction is limited to hearing and deciding claims on behalf of British subjects.<sup>1</sup>

Two children resulting from the marriage, who were born on British soil, are, under the laws of England, British subjects, and have a right to claim before the Commission.

The fact that they were in the military service of Venezuela can in no way affect their status as British subjects, and can not amount to a declaration to become citizens of Venezuela, and in no case can it be equivalent to formal naturalization as citizens thereof.

The decease of one of these children after the presentation of the claim and before the award will not defeat the allowance of his claim, as it was British in origin and at the time of its presentation to the Commission. The claim with respect to these two heirs allowed; with respect to the widow and other children, dismissed without prejudice.

#### CONTENTION OF BRITISH AGENT

This claim is presented by the British Government on behalf of the estate of the late J. P. K. Stevenson.

The circumstances of the claim are already before the Commission. Since the claim was presented by the British Government in 1869 the claimant, a

<sup>1</sup> See Italian - Venezuelan Commission (Miliani Case) in Volume X of these Reports.

British subject born in Scotland, has died, and the claim is now presented on behalf of his estate.

The principle upon which the British Government ask compensation is that underlying the diplomatic presentation of all claims of foreign subjects by their governments. Compensation in such cases is demanded and granted in respect of an international wrong, committed to the property of the subject of the demanding state by the state on which the demand is made. The injury done to the subject is an injury to the state and remains unatoned until the claim is satisfied. It is on this theory that the diplomatic support of claims is recognized in international law, and it is the principle upon which the British Government has always acted in such matters. (Cf. Vattel, book 2, ch. 6, quoted in Moore Int. Arb., at p. 2378. The decision in the case of Cassidy (id. p. 2378) exemplifies this principle.)

The claim, then, being a claim on behalf of a British subject in its inception, has not been satisfied. The injury done to the State therefore remains and is not affected by the death of the person injured and the vesting of the estate in another.

As regards the amount recovered this will devolve precisely as the damaged portion of the estate would have done, had it not suffered damage at the hands of the respondent Government.

Such claims as the present come under the terms of the protocol of February 13, 1903. Preamble:

Whereas certain differences have arisen between Great Britain and the United States of Venezuela in connection with the claims of British subjects. \* \* \*

One of the "differences" mentioned was the injury inflicted on the British Government in connection with this claim, which has been in dispute since 1869. The object with which this tribunal is constituted is by the terms of the protocol, to settle such differences, and therefore in this case to cause the Venezuelan Government to make atonement to the claimant Government for the wrong inflicted upon it in the person of its subject Stevenson.

As the claim also satisfies the conditions of Articles I and III of the protocol, this Commission has jurisdiction to make an award in favor of the claimant Government.

In the view of the British Government the nationality of Mrs. Stevenson and of her children is irrelevant; as, however, the conclusions drawn by the Venezuelan Commissioner appear to be inaccurate, his opinion ought not to remain unanswered.

The facts, which are not in dispute, are as follows:

Stevenson was an Englishman, but Mrs. Stevenson was, before marriage, a Venezuelan. The names, ages, and places of birth of the children may also be taken to be as stated by the Venezuelan Commissioner.

It will not be seriously disputed that Mrs. Stevenson became, by the law of both countries, a British subject by her marriage and that there was at that time no provision in the law of either country to modify or qualify the completeness of that status.

When a person has completely acquired a particular nationality (British) no subsequent legislation of a foreign country (Venezuela) can divest him of that nationality or of any of its privileges unless he goes through the prescribed form of naturalization in that country. By the law of both countries Mrs. Stevenson became, in 1855, a British subject for the rest of her life (unless remarried, which is not the case here).

The Venezuelan law of 1873, though possibly effective in giving a double nationality to any widow whose marriage with a British subject should have

taken place after that date, could have no effect as regards those already married.

As regards the children, the first six are British subjects according to the argument in the case of Mathison, to which the tribunal is respectfully referred.<sup>1</sup>

The two last, Juan and Guillermo, are British subjects by the laws of both countries. It is not disputed that the remainder are Venezuelans on Venezuelan territory.

The fact that a person takes a civil or military appointment under a foreign government does not affect his nationality, and it has never been held to do so.

GRISANTI, *Commissioner*:

The claim of J. P. K. Stevenson was submitted to the Venezuelan-British Mixed Commission which sat at Caracas in 1869. The Commissioner on the part of Venezuela refused to consider it, believing it was not within the jurisdiction of the Commission to do so, and the British Commissioner undoubtedly acknowledged this objection as right, for he withdrew the claim with the reservation that such withdrawal was without prejudice to the right of the claimant.

Said claim is presented anew before this tribunal, and the undersigned proceeds to give his opinion in regard thereto.

J. P. K. Stevenson married in Port of Spain, in 1855, Mrs. Julia Arostegui, she having been born in Venezuela in 1838 of parents who also were natives of the Republic. Stevenson had twelve children from his marriage, as follows: María, Hilaria, Agustina, Julia, Elena, Juan, Norman, Cecilia, Alejandrina, Corina, another Juan, and Guillermo. They were all born in Venezuelan territory (Maturín), except the last two, who were born in Trinidad, but have held public posts in Venezuela — Juan civil posts and Guillermo military ones. J. P. K. Stevenson died in Maturín about the middle of April 1882.

The British Government now presents the claim on behalf of the heirs of Stevenson, who are his widow and surviving children. The Venezuelan Commissioner hereby rejects said claim on the ground that the said heirs, being Venezuelans, have no right to claim before this Commission, which is called upon to examine and decide claims of British subjects.

Mrs. Julia Arostegui, as before stated, was born of Venezuelan parents in Venezuela, and is therefore a Venezuelan. If by the English laws the lady acquired British nationality, she regained her Venezuelan nationality by virtue of her widowship, in conformity with article 19 of the Venezuelan Civil Code of 1881, in force when Stevenson died. Said article reads as follows:

The Venezuelan woman who marries a foreigner shall be considered as a foreigner with respect to the rights peculiar to Venezuelans, provided that by so marrying she acquires her husband's nationality whilst she remains married.

This provision is the same as that of the Civil Code of 1873 and that of 1896, at present in force.

If by the British law the woman who marries an Englishman acquires British nationality and retains it so long as she acquires no other, and it be considered that a conflict has arisen as to Mrs. Stevenson, between said law and the above-mentioned provision of the Venezuelan Civil Code, the conflict should in justice be resolved, giving the Venezuelan law the preference. And, indeed, the ties which bind Mrs. Arostegui de Stevenson to Venezuela are many and close; it was here she and her parents were born, as also ten of her children; it is here her husband is buried; her affections all are centered in Venezuela, and likely

<sup>1</sup> See *supra*, p. 485.

enough she knows no other land which is not Venezuelan territory, excepting Port of Spain. Her marriage was solemnized at Trinidad because, the bridegroom being a Protestant, the priest of Maturín declined to marry them.

I shall now consider the nationality of her children. With regard to María, born in 1856; Hilaria, in 1858; Agustina, in 1860; Julia and Elena, in 1863; and Juan, in 1864; I hold that they are Venezuelans, and refer to the arguments contained in my opinion in reference to the claim of Mr. Edward A. Mathison.<sup>1</sup>

I consider that no discussion whatever is possible as to the Venezuelan nationality of Norman, born in 1865, Alejandrina, in 1869, and Corina, in 1871. Juan and Guillermo, born in Trinidad in 1873 and 1881, have mixed in the political affairs of Venezuela, and have held public offices; the former a civil and the latter a military position; both having been, therefore, deprived of the right to claim British protection.

In the verbal discussions with His Britannic Majesty's honorable Commissioner he has held that, as the British Government presented this claim in the year 1869 and it was withdrawn, they have now the right to present it anew, whatever be the nationality of its present owners. I have rejected such argument as being antijudicial, as the British Government is acting on behalf of the claimants, and they, being Venezuelans, such representation is unacceptable.

On the strength of the reasons assigned the Venezuelan Commissioner rejects entirely this claim.

I herewith produce three telegrams<sup>2</sup> referring to this case, addressed to the assistant Venezuelan agent, Dr. J. I. Arnal, two of which are from Gen. José Victorio Guevara, president of the State of Maturín, and the other one from Gen. L. Varela, jefe civil y militar of the State of Guayana. I am expecting other proofs, which I shall present as soon as received.

PLUMLEY, *Umpire*:

This case first came to the umpire on the disagreement of the honorable Commissioners concerning the objection of the honorable Commissioner for Venezuela that the claim was barred by limitation, which objection was overruled by the umpire, as set forth in his opinion in the same case of date October 16, 1903,<sup>3</sup> and the cause was returned to the honorable Commissioners to be considered on its merits.

The honorable Commissioners in their consideration of the merits of the case find no important disagreements as to the facts, but they do differ widely in their application of the law to the facts.

The admitted facts are that in 1859 J. P. K. Stevenson, since deceased, suffered recoverable injuries at the hands of the Venezuelan Government —

	<i>Pesos</i>
On the Rio de Oro estate to the amount of . . . . .	13,277.60
On the La Corona Mapirito and San Jaime estate . . . . .	77,645.00
	90,922.60
In 1863 on the Bucaral estate . . . . .	43,660.80
In 1869 on the San Jacinto estate . . . . .	1,260.00
Total . . . . .	135,843.40

<sup>1</sup> *Supra*, p. 486.

<sup>2</sup> These telegrams refer to the place and time of birth of the claimants.

<sup>3</sup> *Supra*, p. 483.

J. P. K. Stevenson was at this time, had always been, and on the date of his death was a British subject domiciled in Venezuela. He died in Venezuela in 1882.

In 1855 the said J. P. K. Stevenson, then domiciled in Venezuela, married, at Port of Spain, Trinidad, Julia Arostegui, a Venezuelan by birth and domicile, who still survives him and is one of the parties in interest in this claim. This marriage was solemnized in Trinidad because the priest at their home in Venezuela declined to officiate, the groom being a Protestant. Of this marriage there were born to them, who still survive and are parties of interest in this claim, María, born in 1856; Hilaria, in 1858; Agustina, in 1860; Julia and Elena, in 1863; Juan, in 1864; Norman, in 1865; Cecilia, in 1867; Alejandrina, in 1869; Corina, in 1871; Juan, in 1873; and Guillermo, in 1881. Save the last two, all were born in Venezuela and have always had their domicile in Venezuela. The last two were born in Trinidad, but since 1881 they also have been domiciled in Venezuela and are said to have held offices, civil and military, in that country under the National Government. The domicile of the widow before and during her marriage and since has been in Venezuela.

Interest on this claim is asked as also expenses.

Upon these facts the honorable Commissioners disagree in judgment and the case has therefore come to the umpire for decision.

The umpire would first acknowledge to the learned agent for Great Britain and the honorable Commissioner therefor and to the honorable Commissioner for Venezuela his indebtedness for the very thorough, careful, and able manner in which the claims and counterclaims of the respective Governments have been laid before him. This presentation has in a great measure simplified the work of the umpire, and he is correspondingly grateful.

The claimant Government contends that it is not important to inquire into the citizenship of the widow and children of the deceased for the reason that it being acknowledged that the said J. P. K. Stevenson was a British subject and that this claim matured during his lifetime settle the question of jurisdiction in this tribunal. It is urged by the claimant Government that the injury having occurred to a British subject and an indignity having been committed through him against the British Government by the respondent Government it can not be atoned until full recompense has been made and that the true status of the case is found not in the citizenship of the representatives of the deceased at the time of the protocol, but in the unremoved indignity to the British Government. This position of the claimant Government is not assented to by the respondent Government, which insists that the jurisdiction of this tribunal turns upon the question whether the beneficiaries, the widow and heirs of Stevenson, are or are not in any part British, and they deny such nationality as to all and insist that the widow and children are all Venezuelans.

Venezuela was the domicile of J. P. K. Stevenson through long years of choice and settled purpose. It was the domicile of himself and his family at the time of his death. It was the domicile of origin in the case of Mrs. Stevenson. It was the domicile of origin in the case of all the children save two. This domicile of origin on the part of the children continued their domicile of choice, as well, after they became adults. As to the two born out of the country, it became with them a domicile of choice after they reached their majority. The domicile of the widow continued as it had always been — Venezuela. In Venezuela is found the home of her parents, her own birthplace, the old family roof-tree, the graves of her family, and of her kindred and all of the tender associations which cluster around the home of one's youth. Here she found her husband; here her children were born; here she erected her own family altar; here remained the friends of her childhood, and here were all her children when

her husband died; here were all the familiar scenes which had become woven into the warp and woof of her life, and were therefore a part of her life, and it is not strange that here she remained. There is not the slightest evidence that she ever had a thought of allegiance to Great Britain or ever suggested to her sons in their strength that their hearts should be fixed in loyalty to the British sovereign and their hands ready for his defense. Her relation as subject of Great Britain was wholly by affinity, so far as appears, and when the connecting link between her and Great Britain was broken in the death of her husband her citizenship came back to her domicile not only by the law of Venezuela but as her natural selection. There is nothing to suggest that Mr. Stevenson ever yielded personal service, had any personal loyalty, or did aught that was due in the way of allegiance to his native country. Apparently, in every respect but that of *de jure*, he had become a Venezuelan. To hold that under these circumstances the children were born British subjects and the wife constituted a British subject after the death of her husband against the law of Venezuela, organic and statutory, seems forced and unnatural. It seems to the umpire that the conditions of domicile of such great length and constancy as in this case have an important bearing on the ultimate rightful solution of this question. According to Boullenois, quoted in Story's Conflict of Laws, page 1697, it is safe to stand upon the proposition —

First. To follow the general principles which declare that the person will be affected by the state and condition which his domicile gives him. Secondly. Not to derogate from those principles, except where the spirit of justice requires it.

If the position assumed by the learned British agent is correct, that the act of 1873 was the beginning of a claim by Venezuela that her daughters when married to a foreign subject thereby partook of the husband's nationality only during the lifetime of the husband, it could hardly be taken as retroactive or null. The law existing at the time when her widowhood begins and her rights as widow vest will be effective, unless, indeed, as urged by the learned British agent, the country of the husband would not permit that her citizenship being once fully established, and exclusively, in that country, that the law of the land of her nationality could vest her of such vested citizenship. The force of this contention, if she were then domiciled or resident in the land of her husband's nationality, or in any land other than that of her nationality, it is not necessary to discuss. When applied as in this case, in the judgment of the umpire its force is largely weakened if not entirely spent. Her very marital relation in Venezuela the legitimacy of her children, her rights of property in the estate of her husband, are all determined by the laws of Venezuela, which, while recognizing the privilege of one of her daughters to become the wife of a foreign subject, consent or refuses to consent, at her pleasure, to the passing of the citizenship of such wife into the nationality of the husband; and when Venezuela consents thereto qualifiedly she has the sole and exclusive right to settle her own interior policy in that matter, and to decree the extent of such qualification. This position gains peculiar force in this case, where, for eight years after the law of 1873, the husband, with his wife and family, continued their domicile in Venezuela through his continuing choice and election.

In the cases of Lucien Lavigne and Felix Bister before the Spanish Commission of 1871 in its sitting of 1878, the act of the Congress of the United States of February 19, 1855, was under consideration.

This act 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. (10 Stats. at L., p. 604.)



Held in those cases that this law could not operate so as to interfere with the allegiance which such children may owe to the country of *their birth when they continue in its territory*. (Moore, *Int. Arb.*, vol. 3, p. 2454.)

Under substantially identical conditions with the case now under consideration the question before this tribunal was passed upon by the Commission sitting in virtue of the convention between the United States and Venezuela of December 5, 1885. The questions were very ably discussed, and it was unanimously held that the Commission had no jurisdiction of the claim. The claimants were women born in Venezuela, widows of United States citizens who had resided in Venezuela during their married life, had had children born to them in Venezuela, and had continued to reside with their children in that country after the death of their respective husbands. By the laws of the United States, in virtue of their marriage they and their children also were citizens of the United States, their fathers having been citizens of the United States. (Moore, *Int. Arb.*, vol. 3, p. 2456-2461.)

In *Shanks v. Dupont* (3 Peters, 243), the United States Supreme Court held that when the marriage is within the jurisdiction of the sovereign and the residence there, the sovereign is interested in the subject of allegiance, and it can not be dissolved without his consent so long as the wife remains within the jurisdiction.

Had Mr. Stevenson taken his wife within the dominions of Great Britain to reside, and had he there remained and died, leaving her domiciled there, and were she asserting a claim before this tribunal as one still domiciled in Great Britain or its dependencies, in the opinion of the umpire the law of Great Britain might well be taken as the controlling law and she be held to be a citizen of Great Britain as against Venezuela, notwithstanding the law of Venezuela reestablishing her citizenship in that country after the death of her husband. In the opinion of the umpire, where, as in this case, there appears to be a conflict of laws constituting Mrs. Stevenson a British subject under British law and a Venezuelan under Venezuelan law the prevailing rule of public law, to which appeal must then be taken, is that she is deemed to be a citizen of the country in which she has her domicile; that is, Venezuela.

Bluntschli, *International Law*, section 374, says:

Certain persons 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.

Twiss, *Law of Nations*, page 231-232, says:

According to the law of nations, when the national character of an individual has to be ascertained, the first question is, in what territory does he reside? \* \* \* If he resides in a given territory permanently he is regarded as adhering to the nation to which the territory belongs and to be a member of the political body settled there.

In the case of *Elise Lebret*, before the French and American Commission, Judge Aldis says:

In case of conflict of laws, as neither country can claim superiority over the other, the only reasonable way of settling the difficulty is to hold him subject to the laws of the country where he resides. The British act of 1870 and the Italian Code of 1866 recognize residence as the turning point in such cases. In *Alexander v. The United States*, No. 45, before the British and American Claims Commissioner (Hale's Report, pp. 15, 16), where the claimant was by British law a British subject and by American law an American citizen, it was held that his claim as a British subject could not be allowed, for that would be giving the laws of one country (Great Bri-

tain) superiority over the laws of the other (the United States). See the opinion of Judge Frazier, in which Count Corti concurred. (Moore's *Int. Arb.*, vol. 3, p. 2505.)

That the national character of a married woman is always that of her husband is modified by the holding that such is the case when the domicile of the wife had continued to be that of the husband's nationality. (Moore's *Int. Arb.*, vol. 3, p. 2505.)

The duty to regard as of superior force, in a case like the present, the law of domicile of the claimant is in accord with the expression of Lord Aberdeen in his communication to the British minister to Portugal, in 1845, in which he said: <sup>1</sup>

I think it necessary, for your best information, to let you know the opinion of the advocate-general of the Queen on several cases arisen in foreign countries in which the right you refer to in your official letter has been discussed. Such opinion is substantially that, if according to the written law of this country, all children born out of the King's obedience whose parents or paternal grandfathers were subjects by birth, are themselves entitled to enjoy British rights and privileges while remaining in British territory, the British statute, however, in its effect, can not be extended so far as to deprive the government of the country where those persons were born of the right of claiming them as subjects, at least, as long as *they remain in that country*.

See quotation from Commissioner Grisanti's opinion in Mathison case.<sup>2</sup>

The learned agent for Great Britain contends that in this case —

The principle upon which the British Government asks compensation is that underlying the diplomatic presentation of all claims of foreign subjects by their government. Compensation in such cases is demanded and granted in respect of an international wrong committed to the property of the subject of the demanding state by the state on which the demand is made. The injury done to the subject is an injury done to the state and remains unatoned until the claim is satisfied. It is on this theory that the diplomatic support of claims is recognized in international law. And it is the principle upon which the British Government has always acted in such matters. (Cf. Vattel, book 2, chap. 6, quoted in Moore's *Int. Arb.* at p. 2378.) The decision in the case of Cassidy (*id.*, p. 2380) exemplifies this principle.

The claim, then, being a claim on behalf of a British subject in its inception has not been satisfied. The injury done to the state thereby remains and is not affected by the death of the person injured and the vesting of the estate in another.<sup>3</sup>

This places the claim for an allowance before the Commissioners not on the status of the claimants before this Commission as determined by the protocol of February 13, 1903, but rather on the unatoned indignity to the claimant Government through the injuries wrought upon Mr. Stevenson by the respondent Government in his lifetime.

Had Mr. Stevenson been unmarried and without heirs ascending, descending, or collateral, the indignity would still be unatoned; but could there be a claim of a British subject before this tribunal under the protocol and there be no British subject living to be a beneficiary? Subsequent to the happening of those indignities to the British Government through J. P. K. Stevenson, if he had joined the revolutionists and fought the Republic of Venezuela the indignity to the British Government would have remained unatoned, but could the claim survive before this Commission?

Similarly, if, subsequent to the events complained of, Mr. Stevenson had renounced his British allegiance and had become a naturalized citizen of

<sup>1</sup> Seijas, *Derecho Internacional Hispano - Americano*, t. I, p. 340.

<sup>2</sup> *Supra*, p. 488.

<sup>3</sup> *Supra*, p. 495.

Venezuela; or if, subsequently to said events, he had removed from Venezuela to the United States of America, for instance, and there sought and obtained citizenship by naturalization, what would have been the status of this claim before this Commission? Had this claim been assigned by Mr. Stevenson in his lifetime, or by the widow and heirs subsequent to his death, to a Venezuelan citizen at any time prior to February 13, 1903, would it have had standing before this Commission? In these hypothetical cases the right to reclamation turns upon the act of forfeiture by the claimant or his representatives which deny the right of the parent country to intervene. May it not as well turn upon the death of all those for whom Great Britain has a right of intervention? Is it not essential to jurisdiction in this Commission that the right to intervention shall exist at the time of the happening of the events complained of and at the date of the protocol creating this Commission?

The umpire cites the claim of M. J. de Lizardi against Mexico before the United States and Mexican Commission under convention of July 4, 1868. Lizardi was dead. The claim was presented by his niece, Doña María de Lizardi del Valle, wife of Don Pedro del Valle. It was not shown to what nation her husband belonged, but he was not a citizen of the United States. She was the legatee of the deceased. There was before the Commission the question of jurisdiction arising through her acquired nationality by marriage. Sir Edward Thornton, the umpire, in giving his opinion, said in part:

As therefore, Mr. Lizardi's niece is not a citizen of the United States, and as she would be the beneficiary of what 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's *Int. Arb.*, vol. 3, 2483.)

In *Calderwood, Executrix, against The United States* (Moore's *Int. Arb.*, vol. 3, 2485-2486), before the American and British claims commission, treaty of May 6, 1871, there was the case of a claimant who was the widow of a British subject resident in Louisiana who had, in his lifetime, a rightful claim against the United States. The claimant, but for the acquired allegiance, through marriage, to the British Crown, was a citizen of the United States. Counsel for the United States demurred to the claim for want of jurisdiction in the commission, denying to the claimant British citizenship after the death of her husband. To this demurrer the counsel for Great Britain made reply that the United States had no law providing for readmission to American nationality of one who had become alien through her marriage. The case evidently turned upon this point. Certainly it turned upon the question of citizenship of the claimant, and a majority of the commission held her still a British subject, overruled the demurrer of the United States, and sustained jurisdiction in the commission. The point which the umpire would make from this case is that, by unanimous consensus of opinion on the part of this eminent board, consideration of the claim was to be had or refused solely upon the question of citizenship of the claimant; not at all upon the indignity suffered by the Government of Great Britain and which continued unatoned.

In the case of *Elise Lebet*, previously referred to in this opinion, counsel for the United States claimed the following to be the true rule of construction in such case:

5. \* \* \* 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 is intended to compensate persons whom it claims as its own citizens, and that through the agency of another government. (Moore, vol. 3, 2491.)

In the commission between the United States and France under convention of January 15, 1890, there was presented the claim of Oscar Chopin *v.* The United States. It was presented on behalf of himself and three other heirs of Jean Baptiste Chopin, who was a French citizen, a resident of Louisiana, and died in 1870, leaving as a part of his estate this rightful claim. The four heirs, including Oscar, were born in the United States, but they had resided in France more or less, and there were such facts as justified the commission in giving an unanimous award for a certain sum, which they did not undertake to distribute, notwithstanding that Oscar Chopin himself, deceased before the making of the award, leaving a widow and five children, all born in the United States. In Boutwell's report, page 83, the result is stated, and with this comment by this eminent gentleman and lawyer: <sup>1</sup>

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.

Another point to be observed is that the counsel for France withdrew so much of the claim as represented the interest of one of the four heirs of Jean Baptiste Chopin, she having married a citizen of the United States, thus clearly recognizing on his part the principle that the right of recovery was governed by the lawful interest of the beneficiaries and not in the original indignity to France, which still remains wholly unatoned. (Moore, vol. 3, 2507.)

Concerning the agreement between the United States and Spain of February 12, 1871, for the settlement of the claims of citizens of the United States or of their heirs against the Government of Spain, in an interchange of notes between General Sickles, representative of the United States at Madrid, and Mr. Sagasta, Secretary of State for Spain, the instructions of Mr. Fish, the Secretary of State for the United States, and an eminent lawyer, were communicated to the Spanish Government in the following language:

The President contemplates that every claimant will be required to make good before the commission his injury and his right to indemnity \* \* \* and it will be open to Spain to traverse this fact or to show that from any of the causes named in the circular of the Department of State of the United States of October 14, 1869, the applicant has forfeited his acquired rights. (See Moore, vol. 3, 2564.)

Attention is again called by the umpire to the claims of Narcissa de Hammer and Amelia de Brissot, heretofore, referred to in this opinion and found in Moore, volume 3, 2457. This commission was very ably constituted. The opinions of each of the commissioners are remarkable for erudition and wisdom and have genuine weight in the reasonableness of their conclusions and the reasons which they give therefor. The claims of these two women appealed with peculiar force to the tribunal. They were widows of American citizens who were shot dead by Venezuelans while in the strict performance of their duty and without fault or wrong on their part. The indignities to the United States had been in no

<sup>1</sup> House Ex. Doc. No. 235, Forty-eighth Congress, 2nd session.

part atoned for and they were clear, unquestioned, and of a most serious and aggravating character. But in the opinion of each member of the tribunal its jurisdiction turned not on the original indignity to the United States but on the status of the claimants before the commission. Commissioner Little said in part:

The question of citizenship here is not a Federal or municipal one. Inasmuch as the legislation of the two countries of these subjects does not conduce to the same result in this case, that of neither can be looked to as determinative of the issue. This must be resolved from the standpoint of the public law. Thus considered, I think Mrs. Hammer and Mrs. de Brissot are not citizens of the United States within the meaning of the treaty. (*Shanks v. Dupont*, 3 Peters, U. S., 243.) Their claims must, therefore, be dismissed for want of jurisdiction. 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. de 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.)

Commissioner Findlay said in part:

I quite agree with Commissioner Andrade that Mrs. Hammer and Mrs. de Brissot can not be considered citizens of the United States invested with the right of prosecuting a claim against the Government of Venezuela. (Moore, 2460.)

And, after making this statement, he proceeds with an argument valuable, to read, and concludes with the sentence following:

On the whole I think that we have no jurisdiction as to these particular claims.

In the memorial of Don José María Jarrero, under act of Congress March 3, 1849, to adjust claims of United States citizens against Mexico (Moore, 2324), it appeared that the original claim was in favor of a citizen of the United States, but that before the conclusion of the treaty between Mexico and the United States resulting in this commission it had been assigned to a Mexican citizen. The commission dismissed the claim, stating, among other things:

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.

In the case of *L. S. Hargous v. Mexico*, claims commission under convention of July 4, 1868, Thornton, umpire, gave the opinion dismissing the assigned claim, holding that the assignee must stand on the qualities of the claim. His opinion is worthy of careful study in connection with the principles involved by the case in this tribunal, and is found in Moore's *International Arbitration*, volume 3, page 2327. See also the *Importers' case*, Moore, volume 3, page 2331.

In Moore's *International Arbitrations*, volume 3, page 2388, there appear extracts from the published notes of the board of Commissioners, under the convention with France of July 4, 1831, where these rules were laid down as governing the board.

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 rights 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 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.

In the United States and Peruvian Claims Commission, which met at Lima, January 12, 1863, Mr. Benson, a United States citizen, had a claim against Peru, which he had previously assigned for value to one José F. Lasarte, a Peruvian citizen residing in the city of New York. Benson presented his claim to the Commissioners as a debt against Peru, saying nothing about the assignment; and Lasarte in the meanwhile presented the same claim, as assignee of Benson, as a claim of the United States. As a result the Commissioners dismissed the claim of Benson on the ground that he had parted with his interest to Lasarte, and had therefore no standing before the Commission. Concerning Lasarte it was held that he had no valid claim against the United States, because it was not a pending claim of a citizen of Peru against the Government of the United States. Mr. Lasarte's claim against the United States was Mr. Benson's claim against that country, and it was impossible to maintain that the interposition of the United States with Peru in favor of Mr. Benson can be made to answer the solicitation of interposition against itself. (Moore, 2390).

See the case of Julius Alvarez against Mexico, opinion rendered by Sir Edward Thornton, umpire, and delivered October 30, 1876 (Moore, 1353); by the same umpire (note on pp. 1353-1354), in the case of Hernian F. Wulff *v.* Mexico, No. 232, as follows:

\* \* \* The umpire is asked to amend his award of June 18, 1875, by making it absolute in favor of the administrator instead of conditional upon proof that the recipient shall be a citizen of the United States. 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. The heirs are certainly benefited by being able to pay the debts of their deceased relative, even though the whole of the award may be swallowed up by the creditors. If there be no heirs and only creditors, the umpire is of the opinion that even those creditors who are the immediate recipients of the award must prove that they are citizens of the United States. The umpire thinks that the Commission can make no award except to corporations, companies, or private individuals who are citizens either of the United States or of the Mexican Republic, respectively.

Moore, 1353, lays down the rule thus:

On the other hand, 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 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.

That in such a matter as is now under consideration by the umpire the claimant Government is not proceeding primarily to punish for the governmental indignity named, but is rather acting as an international representative on behalf of the private interests of its subjects, gains force when we consult the language of the proposed general treaty for arbitration between Great Britain

and the United States negotiated on behalf of their respective Governments by Hon. Richard Olney, Secretary of State, for the United States, and Hon. Julian Pauncefote, envoy extraordinary and minister plenipotentiary of Great Britain on January 11, A. D. 1897. Article VII of that treaty provides:

If before the close of the hearing upon the claims submitted to the arbitral tribunal, constituted under Article III or Article IV, either of the high contracting parties shall move such tribunal to decide, and thereupon it shall decide, that the determination of such claim necessarily involves the decision of a disputed question of principle of grave general importance affecting the national rights of such party, as distinguished from the private rights *whereof it is merely the international representative*, the jurisdiction of such arbitral tribunal over such claim shall cease, and the same shall be dealt with by arbitration under Article VI.

The attention of the umpire has not been brought to an instance where the arbitrators between nations have been asked or permitted to declare the money value of an indignity to a nation simply as such. 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. In all of the cases which have come under the notice of the umpire — and he has made diligent search for precedents — the tribunals have required a beneficiary of the nationality of the claimant nation lawfully entitled to be paid the ascertained charges or dues. They have required that this right should have vested in the beneficiary up to and at the time of the treaty authorizing and providing for the international tribunal before which the claim is to appear. That it was then vested has been held as sufficient, and subsequent events have been held as not divesting this vested right. This, however, is as far as any tribunal of repute has gone.

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 offending party and declared in its own sovereign voice, and are ordinarily wholly punitive in their character — not remedial, not compensatory.

It is one of the cherished attributes of sovereignty which it will not usually or readily yield to arbitrament or award. Herein is found a reason, if not the reason, why such matters are not usually, if ever, submitted to arbitration.

Inspection of the protocol of February 13, 1903, between Great Britain and Venezuela discloses in the preamble the occasion of arbitrating the existing differences and their scope, as follows:

Whereas certain differences have arisen between the United States of Venezuela and Great Britain in connection with the claims of British subjects against the Venezuelan Government.

Article III submits to arbitration certain of these claims of British subjects, reserving those dealt with in Article IV. Whence it follows that nothing being submitted to this tribunal except the claims of British subjects, nothing else can be heard. An arbitral tribunal between nations is one of great power within the terms of its creation, but absolutely powerless outside thereof. Nothing can be within its terms except such as is there by the clear and express agreement of the high contracting parties. The umpire fails to find in the solemn covenant creating this tribunal any authority given it to pass upon any other than claims of British subjects, or, in other words, and affirmatively, he fails to find that it has

authority to pass upon matters resting solely in unatoned indignities to the claimant Government. Hence he holds it necessary to consider the questions raised by the honorable Commissioner for Venezuela, denying that any of the claimants in this case are British subjects or were such February 13, 1903.

The British Government contends, as in the Mathison case,<sup>1</sup> (a) that all the children born before the adoption of the constitution of 1864 are British, (b) that the two born in Trinidad are British, and (c) they admit that the four born in Venezuela after 1864 are Venezuelans while in Venezuela. They also contend that under the laws of Venezuela existing in 1853 and continuing to 1861 the wife of J. P. K. Stevenson, by the laws of both countries, became a British subject by her marriage and retained such nationality after his death without regard to domicile, subject to being defeated only (d) by subsequent marriage to the subject of a different nationality, (e) by actual naturalization in some other country; and that the law of Venezuela establishing a different status for the domiciled widow of a foreigner, passed after her marriage, but before her husband's death, does not affect such relation. That the Venezuelan law of 1873 and the Venezuelan constitution of 1861, for a woman married thereafter to the subject of a foreign country, relegates her to her original nationality after the death of her husband, if then domiciled in Venezuela, is not seriously questioned so far as the obligations of Venezuela are concerned.

The respondent Government claims, as in the Mathison case, that the constitution of 1864 differs only exegetically from previous provisions in their constitution, beginning with 1830, and that always the respondent Government had claimed to be citizens all born under her flag, of whatever nationality their parents. There are well-recognized exceptions to this rule, but they need not be named here, as they are not relevant to this discussion.

The umpire sustains this claim of the respondent Government consistently with his holding, and for the reasons and upon the authorities given, in the Mathison case (q.v.). In the opinion of the umpire, if Mrs. Stevenson ever became a subject of Great Britain when in Venezuela it was not by the marriage in 1855, but by virtue of the marriage relation in 1873 under the Venezuelan law passed that year, heretofore referred to. Did she become a subject of Great Britain, while in Venezuela by virtue of the act of 1873; and if she did, did she retain that nationality after the death of her husband, under the facts and the law of this case? This is the first question of importance. That she was a Venezuelan, born in Venezuela and of Venezuelan parentage and always domiciled in Venezuela, both before and after marriage and since her husband's death, is not questioned. That the women of Venezuela, except as qualified by the law concerning marriage, take and retain citizenship under the same rule and conditions as men can not successfully be questioned. If Mrs. Stevenson became a subject of Great Britain at the time of her marriage with her husband — then and always a British subject during their married life — it was because of the force of the general international law and not because of any enactment of Venezuela up to that time. It can not be successfully contended, in the opinion of the umpire, that Venezuela was compelled to relinquish her claim to the citizenship of Mrs. Stevenson so long as they remained domiciled in Venezuela. What was the law of citizenship in Venezuela in 1855? Clearly, so far as it has appeared in this tribunal, and so far as the umpire has had opportunity to investigate, it was a law fixing citizenship upon *all those* born within her territory. If at this time the law of Great Britain gave to the wife of a British subject British nationality without reference to their domicile, it did not affect the status

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<sup>1</sup> *Supra*, p. 485.



of such a wife in Venezuela as affecting Venezuelan interest while domiciled there.

In the judgment of the umpire, the act of 1873, followed by the constitution of 1891, was a concession of privilege and of comity in accordance with the general trend of opinion throughout the civilized world. A study of the language used will show its general permissive quality, enlarging the privileges of a married woman under such circumstances by the removal of the restrictions theretofore existing rather than the establishment or the assertion of new rights in Venezuela. As a whole, it was a surrender of things theretofore claimed. Theretofore the law, organic and statutory, in Venezuela was, once a citizen always a citizen, so far as the effect of marriage upon the citizenship of a woman is concerned. As changed, it released the Venezuelan claim of citizenship upon such while they remained married, provided the country of which the husband was a subject extended to her the privileges of a subject or a citizen, because of such marriage. If the husband's country did not give that privilege, then she was not to become a citizen of that country. If not a subject to that country, to what country was she subject? Clearly, a Venezuelan subject or citizen. She was to remain subject to the country of her husband's citizenship while she remained married. After the dissolution of her marriage, of what country was she a subject? Clearly, the intention was that her citizenship reverted to Venezuela. If, prior to 1873, she was hopelessly without the control of Venezuela and no longer of that country, in virtue of her marriage in 1855, Venezuela, by her act of 1873, was writing an absurdity. If until then there had been no recognition of a right of citizenship in another country attained by marriage to a subject of that country, then the law is written with unusual force and cunning. It is expressive and apt. The umpire prefers the opinion that in 1855 Mrs. Stevenson did not have the consent of Venezuela to any change of citizenship in virtue of her marriage to a British subject, and that in 1873 the law was changed so as to give such consent, certainly to those thereafter married.

Hence it follows that when Venezuela gave her consent to a citizenship, limited and qualified by subsequent events, to a woman marrying a subject of a foreign country, which country granted her citizenship because of such marriage, Venezuela gave such citizenship subject to the limitations and qualifications expressed in such law, and if thereby Mrs. Stevenson became a British subject it was to continue to her, so far as Venezuela should recognize it, only during her married life, and on the death of her husband she became again a citizen of her native land, then and always the place of her domicile. Hence the contention of the learned agent of Great Britain, which is presented with great force and learning, is held not to apply to the case in hand, because there never had been unqualified British citizenship in Mrs. Stevenson. The law of 1873 did not take away rights which had already attached to Mrs. Stevenson in the way of British citizenship, but rather it for the first time recognized and permitted such citizenship in any degree on the part of Venezuela.

This holding as to the law of Venezuela previous to 1873 and since is not inharmonious with the established laws of other and very important countries. The tenacious grasp of a country upon her native-born citizens is not peculiar to Venezuela; she has able and powerful contemporaries. Indeed, if the umpire is not misinformed, the honorable claimant Government for a long time denied the right of any of her subjects to expatriate themselves, however anxious they might be to do this and however solemn might be the proceeding which invested them with their new nationality. This holding as to the effect of the law of 1873 prevents the necessity of entering upon the discussion of the claim put forward that once British citizenship has fully attached no succeeding law of Venezuela could be allowed to take it away. The effect of this holding is

to decide that British citizenship never attached to Mrs. Stevenson by consent of Venezuela and in a manner to affect her interior policy, only while Mrs. Stevenson remained the wife of Mr. Stevenson. In the opinion of the umpire, then, the widow of J. P. K. Stevenson, from the moment of his death and during her entire widowhood, is, and as to Venezuela has been, a Venezuelan. Logically he holds to the same effect concerning the children of the late J. P. K. Stevenson who were born in Venezuela.

The reasons which control the umpire in his decision as to the citizenship of the widow of Mr. Stevenson and of the children born in Venezuela do not apply to Juan and Guillermo, both of whom were born in Trinidad. They were born on British soil of a British father and of a mother who, by virtue of her marriage with a British subject acquired his citizenship, which remained until the death of her husband.

It is not claimed that they were born *in itinere* nor under other circumstances negating the general rule. Hence they are of British origin. It remains to determine whether in virtue of anything which has transpired since their birth they have lost their British nationality and their right of intervention by the British Government in their behalf.

Juan, in 1896, was an amanuensis in the office of the city secretary or city clerk in the city of Maturin at a small monthly wage. This was when he was 23 years of age. He is shown to hold no other civil position or to have participated otherwise in the affairs of Venezuela.

Guillermo, in 1898, when he was 17 years of age, was an aid-de-camp on the staff of one of the generals of the Venezuelan Government. It is not shown that he ever held any other position, civil or military, or in any other way mixed in the affairs of the National Government.

They were not Venezuelan citizens by birth. This is admitted. By the constitution of Venezuela they who are alien born can only obtain citizenship through naturalization. They have never been naturalized. Service in military and civil life is in no sense an equivalent for naturalization. It confers no citizen privileges or benefits. It confers no right upon them to claim of Venezuela the immunities and protection of a citizen. It permits no claim on the part of Venezuela for compulsory service by them. By the treaty of Great Britain with Venezuela, as British subjects they were especially exempt from all military demands and requisitions in property and person. Such service as is here shown might suggest on their part a leaning toward Venezuelan citizenship, but it would be no more than a suggestion. It certainly was not so forceful and suggestive as a formal declaration of intention to become a citizen as is provided in the United States naturalization laws. According to Van Dyne's *Citizenship of the United States*, page 77 —

International claims commissions to which the United States has been a party have universally decided, whenever the question has been presented, that mere declaration of intention gave the person no standing before a commission as a citizen of the United States.

See also Moore, *International Arbitration*, pages 2549, 2550, 2553. See again Van Dyne's *Citizenship*, pages 78-81, wherein observe the claim of George Adlam *v.* The United States, before the Claims Commission under the treaty of Washington, May 8, 1871, between the United States and Great Britain, which is a case very much in point. The same case is also found in Moore.<sup>1</sup> These two sons are not Venezuelans. They were born British subjects; they are still such. They have not broken their neutrality by acts opposed to the Government.

<sup>1</sup> Pp. 2552-2553.

They have been law-abiding and helpful, not harmful, to the land of their domicile. The claim in question had its origin in a British subject, J. P. K. Stevenson. At his decease it came by the widow and the legitimate children of Mr. Stevenson. As held by the umpire herein, it lost its original status in regard to the widow and children born in Venezuela. It retains its original status in the persons of the two sons, who were born British subjects.

From the testimony received from the respondent Government since the umpire returned to the United States of America, there appears, casually, a statement that Juan had deceased recently. Since no reference is made to this fact by the representative of the respondent Government, the umpire has a right to assume that such Government regards the incident of his death not to disturb the status fixed in him at the time of the presentation of this case to the Mixed Commission. The Chopin case, found in Moore, International Arbitration, page 2506, is full warrant for such a conclusion. Such would be the opinion of the umpire independent of the Chopin case. It meets the requirements, viz: (a) British citizenship at the time of the origin of the claim; (b) British citizenship at the time of the presentation of the claim before the Commission. When thus presented, a right to recovery vested in those then having a lawful claim.

The decision of the umpire is therefore unaffected if since then Juan has deceased.

The claim of the widow and of the children, who are held herein to be Venezuelans, is disallowed without any prejudice to their rights as Venezuelans before any proper tribunal. Under the Venezuelan law of distribution, as it was at the time of the death of J. P. K. Stevenson, the widow and the children each take an equal share of his estate. There are, then, thirteen equal shares into which this claim is divided. Two of these shares are allowed. For a portion of the time covered by this claim the legal rate of interest in Venezuela was 6 per cent; for the remainder of the time it was 3 per cent. Beginning at the time the claim was presented to the Claims Commission of 1868-69 interest has been calculated at the legal rate. There is no proof that the respondent Government had been informed previously of the claims of 1859 and 1865. Those of 1869 originated after the convention creating that Claims Commission. Certainly the respondent Government could make no compensation until a claim had been duly presented, and hence it could not be, until then, in default. Interest as damages begins only after default.

The award will be made for £8,940.

#### PUERTO CABELLO AND VALENCIA RAILWAY COMPANY CASE

A government is not liable for damages suffered by property which is situated in the track of war.

Where an agreement in a contract existed to refer all controversies to local courts, not more than the legal rate of interest can be allowed on amounts due the company when the Government insisted that such amounts were incorrect and the company had no resort to the local courts.

#### PLUMLEY, *Umpire*:

This is a claim presented by the British Government for and on behalf of the Puerto Cabello and Valencia Railway Company, asking an award of £319,381 4s. 9d. on account of arrears of guaranty and accrued interest thereon, together with a small sum due for freight.

This case came early before the Mixed Commission, but its consideration was deferred for some time that a settlement might be secured between the company and the Government which would obviate the necessity of its determination by this tribunal. When it became evident that the parties could not reach a point of agreement the honorable Commissioners, with the efficient aid of the learned agents of both Governments, undertook to reach a decision. After careful and painstaking effort it was found impossible by the honorable Commissioners to reconcile their serious differences and the case was sent to the umpire for him to decide.

He acknowledges his indebtedness to the claimant company and its efficient secretary, to the learned British agent and the honorable Commissioner for Great Britain for the careful preparation and presentation of the several claims of the company and of the proofs in support of the same, both direct and collateral; also his like indebtedness to the respondent Government, its learned agent and its honorable Commissioner for a like painstaking presentation of the points in defense and the proofs to sustain them. But, notwithstanding the wisdom thus assembled in his aid, the umpire has found the consideration of the various questions in issue to be quite complex and not at all easy of safe and wise solution. He has given the matter his most careful, persistent thought and has brought to bear upon the various questions involved such authorities and precedents as were at his hands and has reached conclusions which he conscientiously believes to be approximately just and equitable.

The Puerto Cabello and Valencia Railway Company (Limited) was organized to take over a concession made to Messrs. Cutbill, Son & De Lungo and to their associates or successors by the Government of Venezuela, of date February 24, A. D. 1885, which concession was negotiated of that date by Gen. Guzmán Blanco, ambassador extraordinary of the United States of Venezuela, then resident in the city of London, England, and was approved and confirmed by the Congress of the United States of Venezuela sitting in Caracas on the 18th day of April, A. D. 1885.

Article 4 of said concession stipulated that the Messrs. Cutbill, Son & De Lungo and their associates and successors would organize a joint stock company (limited) for the construction and the working of the railroad provided for in said concession from Puerto Cabello to Valencia and to construct the same complete for the sum of £820,000.

Article 3 of the said concession settled the width between the rails and provided for the equipment of the road with locomotives, carriages, and wagons indispensable for the complete traffic, and having the solidity and modern quality of railroad construction, and having also the station houses and goods sheds indispensable for its use and for the line of the railway. The right to construct and to operate this railway was an exclusive one for ninety-nine years from the date of its completion. The Government also conceded free importation of all the materials, machinery, tools, implements, and provisions which might be required for the construction, maintenance, and working of the railway; freed its property during the said ninety-nine years from all taxes or like contributions of all and every kind; freed its employees from all military service; conceded 150 meters of land on each side of the line of the railroad where the lands were public, and gave right of eminent domain over lands of private ownership, and permitted a free cutting of all timbers required for the construction of the railway in the forests belonging to the nation.

Article 19 of the concession provided that —

All questions arising in respect to the fulfillment of this contract will be determined by the competent tribunals of Venezuela.

Article 12 of the concession provided that —

The railway company shall have the benefit of the guaranty of 7 per cent on the total sum of £820,000 above referred to, which can be issued in ordinary shares and in bonds in the proportions most convenient to the company. The said guaranty to begin on the completion of the railway, ready to be opened for public traffic.

As a part of this concession the Government subscribed in ordinary shares at par to the amount of £160,000.

The claimant company was incorporated under the companies acts, 1862 to 1883, and was registered in England on the 26th day of September, 1885. Its capital is £820,000, of which amount the Venezuelan Government subscribed for £160,000 in the share capital and continued to hold these shares until March, 1896, when it sold them to the Southwestern of Venezuela (Barquisimeto) Railway Company, reserving its interest in all dividends accrued or accruing to that date.

The transfer of the concession by Cutbill, Son & De Lungo to the said railway company was made on the 29th day of September, A. D. 1885.

The share capital of the company was divided into 46,000 shares of £10 each. The balance of the capital was provided for by the issue of debenture bonds to the amount of £360,000; £20,000 of these were not issued in fact, but were retained in the treasury of the company, where they still remain, as the umpire understands it.

The railway was opened to public traffic and the guaranty began according to its terms on April 1, A. D. 1888, although the work of construction had not then been completed. The total amount expended in the contract of construction of the railway and equipment was £782,216 17s. 6d., leaving of the £820,000 the sum of £37,783 2s. 6d. The capital expenditure was increased from time to time, and, as is shown by the company's balance sheet of December 31, 1902, had amounted to £790,899 3s. 7d., leaving £29,100 16s. 5d. unexpended, of which the sum of £20,000 had been reserved by the company for working capital.

The respondent Government being in arrears upon its guaranty and having made representations to the claimant company of its inability to meet the agreement at 7 per cent, by mutual concession, hereinafter to be referred to in detail, on May 26, 1891, the guaranty was reduced from 7 per cent to 5 per cent per annum and the arrears up to December 31, 1890, inclusive, were discharged by the respondent Government.

For the year 1893 only, the company shows receipts in excess of the sum claimed by it in discharge of the guaranty of the respondent Government.

In addition to the questions arising under said guaranty, there is raised the question of liability or nonliability by the respondent Government for injuries received by the property of the railway company in the successful revolution of 1892 and the unsuccessful revolution of 1898.

The claim for a deficit of railway receipts to be made good to the company through the Government guaranty begins with the year 1891, and concludes, so far as this Commission is concerned, December 31, 1902. Connected with this question of guaranty is the disputed point of the right to the respondent Government to its share of the net earnings of the claimant company, when the guaranty of the Government is met, during the time the Government was a shareholder in said claimant company. The respondent Government also contends that this guaranty does not cover the £20,000 reserved as working capital.

REVOLUTIONARY CLAIMS

It was settled for this Commission by the opinion of the umpire in the claim of the Bolivar Railway Company<sup>1</sup> that the respondent Government, subject to certain exceptions, was liable for the acts of successful revolutionists and for the acts of the titular government as well, the liability in either case being predicated upon the same state of evidential facts. The facts stated, constituting the cause of complaint of 1892, appear to come within this established rule of liability; hence it does not become necessary to take these sums away from the accounts and they are allowed as and of the annual accounts as presented. It is quite possible that if the umpire had before him the specific details of expenditure he might find it necessary to point out certain parts as being allowed distinctively on the ground of the responsibility of the Government for its own acts and the acts of successful revolutionists outside of its guaranty, and there might be some item that would be disallowed as not coming within either feature of the case; yet, viewed as a whole, being destitute of any such detailed information, he will pass the whole as a rightful charge, as above stated.

Concerning the sums charged of March 29 and of June 28, 1898, it is to be said that had these injuries been received at the hands of the Government, or of successful revolutionists, they might be allowed; but as the result of the acts of unsuccessful revolutionists, which is the character in which they appear before the umpire, they can not be allowed. As the property destroyed is clearly a part of the plant — a part of its capital expenditure — it does not come under the guaranty and therefore the Government is not liable under that head. Hence this amount must be deducted from the accounts of 1898.

The claim of November 11, 1899, falls within the general rule of nonliability for damages which occur in the track of war, or during battle, or bombardment, and can not be allowed. Being a part of the plant itself and therefore a part of the company's capital expenditure, it falls within the class referred to in the preceding paragraph and is, likewise, not within the guaranty. There is, therefore, no governmental liability under this claim, in either aspect, and it is disallowed.

THE £20,000 DEBENTURE BONDS NOT ISSUED

Concerning the question whether the guaranty of the respondent Government was upon the fixed and certain sum of £820,000, or was upon the actual constructional expense, it may be said, that, fortunately, the Government and the railway company early concurred in their interpretation of this very general expression in the concession so far as to make clear that both held it to be a guaranty that the enterprise would yield annually a net revenue of 7 per cent on the capital expenditure necessary to the completion of the railway and its indispensable equipment, but whether that expenditure was fixed and determined in advance, or whether it was not to exceed a certain sum, seems to be the question undetermined and in dispute. As an estimate it was too high. It was agreed that the capital should be obtained through the issue of shares and bonds in such proportions of each as best suited the interests of the company. It is contended by the Government, and such has been its contention certainly since 1896, that the nonissued £20,000 of bonds are not entitled to the benefit of the guaranty.

If there had been no settlement and arrangement in 1891, the umpire would have no serious difficulty in sustaining the Government's contention. It is clear to the mind of the umpire that by the first arrangement it was a guaranty

<sup>1</sup> *Supra*, p. 445.

at 7 per cent upon the essential capital expenditure, which was not to exceed £820,000. There is evidence that such was the better judgment of the directors of the railway company.

On May 26, 1891, there was made a new agreement between the claimant company and the respondent Government founded upon a new consideration, namely, upon mutual concessions. In consideration, among other things, that the Government would pay upon the fixed sum of £820,000, the railway company consented to reduce the guaranty to 5 per cent per annum, and in consideration that the railway company would consent to such reduction the Government consented to accept the fixed sum £820,000 as the basis of reckoning. This is the umpire's interpretation of their agreement, which is in terms as follows:

ARTICLE I. In view of the difficulties which have presented themselves, and of those which might present themselves in the future, with regard to the payment of the 7 per cent guaranteed by the Government of Venezuela to the Puerto Cabello and Valencia Railway Company, inasmuch as the said guaranty weighs very heavily on the country, and this company being perfectly organized, the Puerto Cabello and Valencia Railway Company agrees that from the 1st of January of the present year of 1891, the Government of Venezuela only guarantees an interest of 5 per cent annually on the sum of £820,000, which is the fixed capital in the original contract, and upon which the guaranteed interest has up to now been calculated. Consequently article 12 of the 24th February, 1885, remains annulled, relative to the 7 per cent.

To remove any question upon this point, to settle favorably to itself a mooted question of this importance, was one of the very important considerations for the large concession here made by the claimant company.

Solely because of this agreement and of the consideration entering into the same, it is the judgment of the umpire that the fixed sum of £820,000 was then made the certain and established basis upon which to reckon said guaranty.

#### WORKING EXPENSES UNDER A GUARANTY

It having been determined by the apparent agreement and acquiescence of both of the parties to the contract that the guaranty stated in such general terms in the concession was in fact a guaranty of net revenue, it becomes important to determine what charges are to be included in working expense and, therefore, to be deducted from the gross receipts in order to leave that net annual revenue which it is guaranteed shall equal £41,000. In principle there is apparent agreement. In details of application of this principle there is apparent serious disagreement.

The claimant company, through its efficient secretary, has supplied the Mixed Commission with the annual, or semiannual accounts of about 80 different railroads situated in various parts of the world, railroads both large and small, guaranteed and unguaranteed. These accounts were furnished in order that the tribunal might, through inspection and comparison, ascertain, if such was the fact, a general method of railroad bookkeeping and a general placing of certain expenses to the different accounts, as, for instance, working expense, and under that head the respective subdivisions to contain in the revenue account both the income and the expenditures from all the different sources and occasions of each. The umpire has availed himself of this large area of opportunity, and has carefully examined them with reference to the different classes of expenditure and the proportionate charge to capital, gross income, and length of railway. He appreciated at the start that a small railway would have, relatively, a larger charge for oversight and management than a

larger railroad, and the inspection which he has made proves his anticipations to be correct.

From some of these railway accounts he has been unable to determine the length of the railway in miles, and in a few instances he has not been sure of the proper exchange to be reckoned, and therefore he has not taken them into consideration. In regard to the average expense per mile of railway, placed by the different accounts to general charges or equivalent expressions, he has assembled 50 railway accounts, has ascertained the number of miles in each of these 50 railways, and the expense per mile existing under the head of "general charges." The railways so analyzed by him have varied in extent from 21 miles to many thousand. The highest charge per mile under this head has been £274 per mile and the lowest found was £16. The average expense under this head is a little less than £80. There are 34 miles of railway belonging to the claimant company, and at this charge per mile the "general charges" would be £2,720. The "general charges" allowed by the umpire range from £6,070 in 1891 to £3,234 in 1902 and the average expenses per mile from a little more than £172 in 1891 to a little more than £95 in 1902. As the average found for the 50 railways, as above stated, is £2,720 for 34 miles of railway and the average per mile is £80, it is readily to be seen that the lowest allowance made by the umpire is in excess of the average.

The "general charges" allowed by the umpire, as explained in another part of this opinion, divided by 34, the number of miles of railway, giving the expense per mile under that head, will be here stated:

1891 . . . . .	£6,070 ÷ 34 =	£178 +
1892 . . . . .	4,861 ÷ 34 =	143 -
1893 . . . . .	4,791 ÷ 34 =	141 -
1894 . . . . .	5,298 ÷ 34 =	155 +
1895 . . . . .	4,549 ÷ 34 =	133 +
1896 . . . . .	5,275 ÷ 34 =	155 +
1897 . . . . .	4,499 ÷ 34 =	132 +
1898 . . . . .	4,273 ÷ 34 =	125 +
1899 . . . . .	4,023 ÷ 34 =	118 +
1900 . . . . .	3,557 ÷ 34 =	104 +
1901 . . . . .	3,535 ÷ 34 =	104 -
1902 . . . . .	3,234 ÷ 34 =	95 +

This makes for the twelve years an average of £132 to the mile and an average allowance for the 34 miles of £4,488.

The umpire will now name the railways which he has examined and used to obtain this average if "general charges" per mile as hereinbefore stated. He will state the companies both by number and by name. Should he have occasion hereinafter to refer to these different companies or any of them he will employ the number only. These numbers are, of course, of his own adoption, although they correspond to the numbers placed before the different accounts by the secretary of the claimant company up to and including No. 53; thereafter the numbers used by him and by the umpire do not correspond.

- No. 1. The Great Eastern Railway Company.
- No. 2. London, Brighton and South Coast Railway Company.
- No. 3. Great Central Railway Company.
- No. 4. Midland Railway Company.
- No. 5. Great Western Railway Company.
- No. 6. The Great Northern Railway Company.
- No. 7. London and Southwestern Railway Company.
- No. 8. Lancashire and Yorkshire Railway Company.



- No. 9. London, Tilbury and Southend Railway Company.
- No. 10. Breton and Merthyr - Lydfil Junction Railway Company.
- No. 11. Alexandra (Newport and South Wales) Docks and Railway.
- No. 12. Isle of Wight Central Railway.
- No. 13. Great Northern Railway Company (Ireland).
- No. 14. East Indian Railway Company. Guaranteed by British Government.
- No. 15. Assam - Bengal Railway Company. Guaranteed by British Government.
- No. 16. South Indian Railway Company (Limited). Guaranteed by British Government.
- No. 17. The Barsi Light Railway Company (Limited).
- No. 18. Bengal - Dooars Railway Company.
- No. 19. Bengal Central Railway Company (Limited). Guaranteed by British Government.
- No. 20. The Bengal and Northwestern Railway Company (Limited).
- No. 21. Rohilkund and Kumson Railway Company (Limited). Guaranteed by British Government.
- No. 22 to No. 24 inclusive. The Nisam's Guaranteed State Railways Companies (Limited).
- No. 25. Bengal Nagpur Railway Company (Limited). Guaranteed by British Government.
- No. 26. Bengal Company (Limited). Guaranteed by British Government.
- No. 27. Indian Portugal Guaranteed Railway Company (Limited).
- No. 28. Burma Railways Companies (Limited). Guaranteed by British Government.
- No. 29. Demerara Railway Company. Guaranteed by Great Britain.
- No. 30. Quebec Central Railway Company.
- No. 31. Egyptian Delta Light Railway Company (Limited). Guaranteed by Egypt.
- No. 32. Sungoi (Malay Ujong Peninsula) Railway Company (Limited). Guaranteed.
- No. 33. Canadian Pacific Railway Company.
- No. 34. Grand Trunk Railway Company.
- No. 35. New York, Ontario and Western Railway Company.
- No. 36. Missouri, Kansas and Texas Railway Company.
- No. 37. The Mexican Southern Railway (Limited).
- No. 38. The Western Railway of Habana (Limited).
- No. 39. Macuta Railway Company (Limited). Guaranteed.
- No. 40. The Cuban Central Railways (Limited).
- No. 41. Leopoldina Railway Company (Limited). Guaranteed.
- No. 42. The Interoceanic Railway of Mexico.
- No. 43. Espirito Santo and Caravellas Railway Company (Limited). Guaranteed.
- No. 44. Salvador Railway Company (Limited). Guaranteed.
- No. 45. Lima Railway Company (Limited).
- No. 46. The Dorada Railway Company (Limited).
- No. 47. Alegeciras Railway Company (Limited).
- No. 48. Great Southern of Spain Railway Company (Limited).
- No. 49. The Zafra and Huelva Railway Company (of Spain).
- No. 50. Alsoy and Candia Railway and Harbor Company (Limited).
- No. 51. The Ottoman Railway Company, from Smyrna to Aden.
- No. 52. West Flanders Railway Company. Guaranteed.
- No. 53. The Metropolitan Railway Company (Limited).
- No. 54. Bohia Blanca and Northeastern Railway Company (Limited).
- No. 55. Argentine Great Western Railway Company (Limited).
- No. 56. The Northwestern of Uruguay Railway Company. Guaranteed.
- No. 57. The Great Western of Brazil.
- No. 58. The Midland Uruguay Railway Company (Limited). Guaranteed.
- No. 59. The Central Uruguay Railway of Montevideo (Limited).
- No. 60. Buenos Ayres and Pacific Railway Company (Limited).

- No. 61. La Guaira and Caracas Railway Company (Limited).
- No. 62. The Bolivar Railway Company (Limited).
- No. 66. Venezuelan Central Railway Company (Limited).
- No. 69. Atchison, Topeka and Santa Fe Railway Company.
- No. 70. Chicago, Burlington and Quincy Railroad Company.
- No. 71. New York Central and Hudson River Railroad Company.
- No. 72 to No. 75, inclusive. Pennsylvania Railroad Company.
- No. 76. Reading Company.
- No. 77. Baltimore and Ohio Railroad Company.
- No. 78. Erie Railroad Company.
- No. 79. Lehigh Valley Railroad Company.

Nos. 32, 38, 39, 40, 42, 43, 44, 45, 46, 49, 50, 52, 53, 54, 55, 56, 57, 60, 61, 62, 63, 65, 66, 67, 68 were not used in determining the average general charges per mile of railway, either because the mileage was not given or that for some other reason it was not available to the umpire's use in that respect.

Inspection of the accounts of these different railway companies was made for the purpose of ascertaining in detail their charges to revenue account in comparison with the different items so charged by the claimant company. With quite possibly some errors, the following results were obtained:

No. 1. There were no charges to revenue account for depreciation and no charge for renewals as such.

No. 2. There were no charges for depreciation or for renewals as such in revenue account, and general insurance was paid out of net revenue.

No. 3. There were no charges for depreciation or for renewals as such in revenue account.

And the same may be said of Nos. 4, 5, 6, 10, 11, 12, 14, 15, 16, 17, 18, 19, 20, 21, 22 to 24, inclusive, 25, 26, 27, 28, 32, 35, 36, 42.

Of No. 7 the same may be said as of No. 3, so far as revenue account is concerned; but in net revenue there is found a reserve for renewals.

In No. 8 there is no charge for depreciation, but an amount is set aside out of revenue for renewals.

No. 9 sets aside in revenue account an amount for depreciation of locomotives, carriages, and wagons as a special fund, and sums are set aside to renew permanent way, to construct station buildings and to make additions and improvements to stations and signals.

In No. 13 interest was paid on the reserve fund from net revenue, and no insurance was charged against the general revenue account.

No. 30 is destitute of charges, the same as No. 3, and places cost of ballasting, compensating claims, etc., in net revenue.

No. 38 has no charge for depreciation and does not place renewals in current expense.

No. 40 is the same as No. 3 in regard to depreciations and renewals, but places the amount for exchange in net revenue.

In No. 41 it is stated that there is no charge for depreciation of furniture; "it is paid for when it occurs." The loss or profit of exchange is placed in net revenue "when it occurred."

No. 44 has a charge in revenue account for depreciation of furniture and the difference in exchange, but not for renewals.

No. 46 places a charge for depreciation of furniture in net revenue.

No. 47 places a charge for depreciation of furniture, and also a difference in exchange in net revenue.

No. 49 places its loss on exchange in revenue account.

No. 50 charges for depreciation of rails and rolling stock for the year in revenue account; also charges off against that account bad debts, loss on its exchange, and interest on debenture bonds, etc.

No. 51 charges interest, commission, and exchange against the revenue account.

No. 64 charges loss on exchange and furniture depreciation to net revenue, and has no charge for renewals as such.

No. 65 charges loss on exchange and commissions, etc., in net revenue, but has no charge for depreciations or renewals as such.

No. 66 puts loss on exchange in current-revenue account.

If the umpire has not erred in his examination, the following railways are those having guaranties from the British Government, viz: 14, 15, 16, 19, 21, 25, 26, 28, and 29; and if he is not in error there are guaranties by other governments in Nos. 22 to 24, 27, 31, 32, 41, 44, 56, and 58.

The umpire has carefully analysed the accounts of all these companies, excepting a few not easily reducible to pounds sterling, and has compared "gross receipts" with "general charges," as well as "capital expenditure" with the same, and he is made to know from these examinations that the average per cent charged is much less in these companies than is the per cent allowed by the umpire in these two regards in the allowance which he has made for "general charges" during the years over which his inquiry extends, in connection with the claimant company's "gross receipts" and "capital" on the one hand and "general charges" on the other.

The examination of the accounts of these different railways in regard to the class of expenditure which has been regarded as proper to be charged to capital expenditure instead of to revenue account, or even to net revenue, shows that the different companies have had a wide area of plan and method, but that the usual rule is not to charge to revenue account anything in the way of construction, although it may be of a minor character. Among the items charged to capital expenditure taken from the accounts of these different railway companies are found the following, namely: New engines, carriages, gas fittings for carriages, screw couplings for cattle wagons, continuous brake works, additional machinery, additional cartage stock, widening lines, additional works at stations, new docks, enlargement of stations, extension of shops, additional siding, new works, remodeling of goods yard, engine shed, offices, additional improvement of water supply sheds, reconstruction of viaducts, conversion of brakes, automatic machinery, tools for companies' workshops, cottages, enlargement of yards, heating apparatus, lighting, fencing road crossings, increasing waterway, deepening foundation of bridges, repairing damages by floods, ballast and permanent way, bridge of two spans of 30 feet to each span in place of one span of 20 feet, two horse boxes, alterations and additions to tramways, buildings, custom warehouse, surveys, new culverts and cattle guards, medicine chest, engineers' instruments, office furniture, lights, barges, tugs, water service, turntable, receiving shed, drainage, water meters, additions to boilers, paving new yard, oil tanks, water tank, new signals, drinking trough, extension of cross siding, alteration to sidings, extension of telephone wires, installation of electric lights in coaches, new level crossings, bell signals for level crossings, strengthening bridges, renewal of line.

As a part of the documentary evidence introduced by the claimant company are letters from the secretaries of the various South American railway companies for the most part guaranteed, together with a copy of a part of the concession made by Chile to guaranteed railways and the Republic of Uruguay concerning the same.

In the letter of the secretary for the Brazil Great Southern Railway Company (Limited), of date April 28, 1903, he speaks of London office expenses, maintenance of way, works, and station, and repairs of rolling stock as being approved by the Brazilian Government, which Government is guarantor of

that railway in terms very largely like the guaranty in question. It will be observed that there is no statement that renewals of these different kinds of property were either claimed or approved by the Brazilian Government. In regard to exchange he says:

Notwithstanding the great depreciation of the milreis the Government insists upon the accounts being kept at the par value (2s. 3d.).

The Government of Chile gave a railway concession to Mr. Gustave Lenz in 1884, and a portion of that concession is made a part of this documentary evidence. From that part of the Chilean concession which is submitted it is learned that there is a guaranty of 5 per cent per annum, at a certain fixed exchange value, for twenty years on the fixed and certain sum of \$30,000 for every kilometer of the line delivered for public use and that when the net proceeds exceed this 5 per cent the excess goes to the Government treasury to aid in reimbursing the Government for the sums paid out under said guaranty. These net proceeds are settled at 40 per cent of the gross proceeds for the first ten years and at 45 per cent for the remaining ten years. But by far the most important and valuable single document submitted by the claimant company, outside of its own reports and papers, is the document containing the "Regulations for fiscal intervention in railways guaranteed by the State," prescribed by the Republic of Uruguay.

Article 7 of said regulations states the books which the companies must keep for the exclusive service of the bookkeeping relating to the Government, and to that end these requirements are made:

*a. The traffic receipts*, according to the monthly reports which are sent in from the station, and other operations which may be regarded as receipts from the working of the line.

*b. The expenses of working*, which will include wages and salaries due to the staff, consumption charges, and those for materials and labor employed in the repairs of the line, and their maintenance in a sufficient state for service.

*It is understood that every class of construction which may imply improvements of the line, as also other extraordinary expenses foreign to the working will be considered as capital expense, and consequently ought not on any account to figure in its ledger.* (See art. 18 of law of 27th August, 1884, and also arts. 25 to 28, inclusive, to these regulations.)

(The italics are in the original.)

In article 24, under chapter 8, supplementary, there are found the following provisions:

The charges for maintenance and working, to which paragraph *b* of article 9 refers, will comprise:

First. All the ordinary and extraordinary repairs which may be of a necessary character.

Second. Taxes of all kinds paid by the companies to the state, and custom-house duties, should there be any.

Third. The general estimate of employees on salary or by day, including the London board.

There are excepted from these charges:

First. The interest and amortization on arrangements made by the companies, and especially those which the latter may have made for the carrying out of works, in cases where the capital guaranteed by the state has been insufficient.

Second. Amounts invested in favor of establishments which do not exclusively pertain to the working of the railway.

ART. 25. From the working account there will also be excluded the expenses which may pertain to capital account (*cuenta de capital*) and first establishment charges (*primer establecimiento*), as, for example:

The finishing of works, whether noted or not in the official report of the provisional approval of the works or at the time of delivering the lines over for working.

The expenses which may result from works executed in a notoriously defective and insufficient manner, or which may have to be rebuilt or added to within a very short time after opening the line to public service.

Works destined to secure drainage, the construction of which had been delayed until the line had commenced working.

Cuttings which may have to be consolidated and widened.

Embankments whose slopes may have to be cased.

Works situated in the proximity of level crossings (art. 18 of the reglementary decree of September, 1884), and which have not been made before opening the line for traffic.

The erection of palisades or barriers (art. 17 of decree named), the execution of which may have been omitted before handing the line over to public service.

The fencing (art. 30 of the same), which may have been omitted.

ART. 26. The charges more or less directly necessary for the working up of traffic and which, by article 18 of the law of 27th of August, 1884, refer to the *improvements which ought to be computed as net revenue* (should they figure in the accounts) are the following, commissions excepted:

Works for widening stations, laying second lines or sidings, increase of rolling stock, construction of engine sheds, construction of repairing sheds, construction of roofs of goods sheds.

The installation of water stations (*tomas de agua*) for the engine service, with tanks or deposits.

The installation of turntables and cranes in the stations which may not have them at present.

There are also comprised in this category:

All classes of reconstruction, such as larger water tanks, change of turntables, cranes of larger dimensions, and every class of work it may be necessary to reconstruct with new or different materials.

All these changes correspond to capital account.

To avoid a double employment of the account for original installation, the amount corresponding to provisional installation will be charged to maintenance.

ART. 27. The companies will give previous notice to the control office of all classes of work to be executed, whether as repairs or constructions required to keep the line in an efficient state for service, such as works of art in general, raising embankments, ballasting the line, etc., for which purpose they will send the plans of said works and the estimates, with full details, to the control engineers.

ART. 28. Without the previous approval of the control engineer in writing, all works provided for in the foregoing article which may be effected on the line will be considered as improvements, or for the private convenience of the companies, and consequently will not enter into the category of working expenses.

In addition to this documentary evidence and with reference thereto the umpire has consulted the authorities accessible to him which bear upon such matters, and after careful reading and thought he has decided to adopt the following as correctly stating the working basis, viz:

The phrase "net earnings" has been defined as "the excess of the gross earnings over the expenditures *defrayed in producing them*, aside from and exclusive of the constructing and equipment of the works themselves." (23 Am. Eng. Encycl. of Law, 1st ed., 612.)

Citing Bradley, judge, in *Union Pacific Railroad Company v. U. S.*, 99 U. S., 402. Also, citing Belfast, etc., *R. Co. v. Belfast*, 77 Me., 445, where Peters, chief judge, defines the net earnings of a railroad as —

The gross receipts less the expenses of operating the road to earn such receipts.

Interest on debts is paid out of what remains — that is, out of the net earnings.

\* \* \* When all liabilities are paid, either out of the gross receipts or out of the net earnings, the remainder is the profit of the shareholders to go towards dividends, which in that way are paid out of the net earnings. (2 Cook on Corporations, 5th ed., 1165, sec. 546, note 5, citing in said note *St. John v. Erie Railroad*, 10 Blatch., 271 279; s. c. affd. 22 Wall., 136; *Warren v. King*, 108 U. S., 389.)

A distinction quite usually recognized is made in the books between net revenue and net profits. Out of the former floating debts are to be paid and the interest thereon and interest on the funded debts. Out of the former a reserve is made for depreciation and for renewals; allowances for losses are set aside, and all permanent improvements of roads and rolling stock, or of additions thereto, or extensions thereof are paid when not charged to capital expenditure.

On consideration of the evidence adduced and herein referred to, on consideration of the law applicable to such matters herein referred to, and in virtue of his duty to decide all questions submitted in accordance with justice and equity, the umpire decides that in this case the proper test to be used to determine what are or are not working expenses is found in answer to the question, Is it an expense which aided in or was a necessary incident to the production of the gross receipts? Such expenses, when deducted from the gross receipts, will show the net earning for any given year. Whatever of expense, whatever of payment made which does not fall within the fair scope of this test must be charged elsewhere than to working expenses. There may be large net revenues and yet there be no dividends, because of the necessary payments therefrom, and the wise, prudential setting aside of sums of money as reserves for renewals, extensions, and betterments, all which may be provided for, if such be the will and policy of the shareholder, out of net revenues, but none of them are working expenses in the sense to be used here and are not, as against the respondent Government, to be chargeable to the gross receipts. With the plant all provided in advance, did the given expense aid, or was it properly incurred, in gaining gross income? If yea, then it may be rated as working expense; if nay, then it can not be.

In many — indeed, in most — particulars, this has been the plan of book-keeping pursued by the claimant company, but there are some exceptions. The company has reserved out of net revenue a fund to provide for additions to its rolling stock; it has established a renewal fund and has supplied it from the net revenue; it has paid the interest on its debenture bonds out of net revenue; out of the same fund it has cared for its doubtful assets; it has paid its income tax and some of its traveling expenses out of net revenue. But, on the other hand, it has also placed in working expense a certain annual charge for renewal of locomotive and a certain annual charge for depreciation of furniture; it has charged to working expense money paid for insurance of the property of the company; it has charged similarly payments made on account of exchange between Venezuela and England of the money earned by the company in Venezuela; it has charged to this same account all of the expense of the company in England, and during a portion of the time, at least, it has charged to working expenses the cost of its agency at Caracas.

Were it not for the question of guaranty which rests upon net revenue as the determinable quantity of its annual responsibility it would not be of serious importance whether this or that should be placed to working expense or deducted from net revenue; but as the matter stands before the umpire this question assumes great importance.

In the judgment of the umpire it is not what shall be deducted before a dividend may be declared and is determinable by no such standard. It is, what are the revenues in hand for all purposes after deducting that, and that only,

which is properly chargeable to operating expenses? The test which the umpire will employ has already been stated and is found in this expression:

Net earnings are properly the gross receipts less the expenses of operating the road to earn such receipts.

Those expenses of operating which aid or are intended to aid in its earnings, which result from endeavors to earn, or which are essential to the existence of the company are the only expenses to be charged to gross receipts against this guaranty.

Apply this rule to the accounts of the company as presented in the abstracts of expenditure on revenue accounts.

There first appears a charge of "repairs of station and building." It is the opinion of the umpire that there can be no fair question concerning the propriety of this charge. These buildings and stations were furnished as a part of the capital expenditure and now aid in producing the gross annual income; they are one of the means whereby the patronizing public have convenient access to the cars and proper protection for themselves and their freights. Betterments and improvements should not be included, and presumably they are not. The language employed would exclude such. These repairs are necessary to keep up their efficiency, to continue their valued service. Unless these are kept in a fair state of preservation the company would be unable to properly serve the public and must lose at least a measure of its patronage. Having furnished them as a part of its capital expenditure the company may make to them ordinary repairs out of its gross income, because such repairs come properly and easily within the established test.

Then come "repairs and removals to permanent way." Under this general charge is found maintenance, ballasting, clearing landslides, rails, fastenings, and sleepers. If these charges cover only ordinary repairs necessary to the running of the road, they come under the same rule already promulgated concerning repairs to stations and buildings. Examination of some of the early charges, especially for sleepers, rails, and fastenings, excites wonder that so large a sum should be so soon required in the respect named, and suggests strongly that these repairs so soon made might well have been to take the place of unfit materials when first laid down; but no such inference can properly be drawn to be acted upon and the umpire is relieved from any duty in this regard, as the objection of the Government does not rest at all upon such a state of facts, but rests instead upon the hypothesis that as charged they are not proper working expenses. Hence, while if he had the details before him and they were specifically objected to, the umpire might find that some of the items charged under this head were of the nature of betterments and improvements and so not chargeable here; without these details and without such specific objections it remains for him to decide upon the charges as they appear, and as charged he finds that since they are essential to the earnings of the gross income, since the expenditure is incidental to and connected with the continuing efficiency of the plant, since such repairs must have been in the mind of the guarantor as expenses incident and essential to the maintenance of the enterprise, they are properly chargeable to the gross receipts. A similar line of reasoning cares for repairs and renewals of bridges, walls, culverts, and drains, to locomotive, carriage, and wagon repairs, to water supply, to workshop, and to repairs to machinery and tools. The wages of the operatives, employees, foremen, and clerks in these several lines and in the more immediate operation of the railroad do not permit of question, if the guaranty is allowed to rest, not upon the gross income, but upon gross income less operating expenses.

Similar reasons apply to the charge for telegraph expenses. Under the

head of general charges, that which has already been said applies with equal force to the administrator and staff and storekeeper and staff. An efficient superintendence and direction of the energies of the subordinates; a careful prevision and supervision of its affairs are easily most important factors in the gross earning of the company, on the husbanding of its resources, in the safeguarding of its line and of its property, in the marshaling and management of its business. It will be borne in mind in all these matters that no details are before the umpire. It is the general character of the charge alone with which he has to deal. Being such, and such only, he must hold the charge last above referred to be proper and necessary in the development and management of the company's business and as easily passing the established test. For these there must be an office or offices, hence office expenses are allowed; for the conduct of its business there must be stationery, telegrams, and postage, and these are allowed. To incite and procure patronage reasonable advertisement is no doubt necessary, and it is allowed. There must of necessity be some traveling expenses. If the question were as to amount and the details were before the umpire some of the annual charges in this regard might well be carefully examined. For instance, in 1891, when these expenses mounted to £713 1s. 6d., or about £21 to the mile, or over £2 to the day, including Sundays. But there are no details before the umpire and he can only deal with general features. Superintendence of a railroad, care for its line, its properties, and the like require more or less traveling, and they are therefore a proper charge against the gross income.

The umpire understands the charge for medical attendance to be for services rendered to employees and passengers, if accident and injury occur. If this is a correct view, and he has no doubt that it is, then he considers such expense as a wise use of the gross income and as easily passing the adopted test.

Similarly the law charges. No suggestion is made that they have to do with other than the incidental matters which necessarily arise in the operation of a railway from year to year, and they are therefore in aid of its gross income. In protecting the company against unjust claims, in giving advice to promote wise action on the part of its officers, in asking and passing upon its current contracts a good lawyer could and presumably did greatly aid and protect the company, enhance its prosperity, and either increase its earnings or prevent their unlawful diminution. Therefore this charge in the Valencia account passes the required test. "Sundry expenses" and "compensations and allowances" having been before the Government in many annual accounts, and meeting with no specific objection, are rightfully assumed by the umpire to be not open to objection and are rightfully considered by him as containing items in detail not objectionable to the Government and of a character beneficial to the company in aid of its annual receipts or as necessarily incidental to its earnings. It would certainly be unfair to the company to assume to the contrary when the question easily could have been raised and the character of such of those charges as were objectionable have been exploited before him for his consideration and decision.

Under the head "General charges, London," the remarks made under the head of "General charges, Valencia," may be held to apply here, and so printing and stationery, office rent and cleaning, advertisement, postage, and telegrams pass the required test. The Government must have reckoned in reference to such expense when it made its guaranty. The company being a British company it necessarily must have its office in England, hence reasonable rent and care thereof are proper charges. In the absence of proof, or even suggestion, to the contrary, the umpire, in fairness to the company, must hold the presumption that those were in aid of income.

Traveling expenses in England do not appeal to the umpire as susceptible of



any such finding, and, so far as they are specifically stated, he will feel bound to disallow them, as they apparently fail to come within the established test.

The charges for directors, auditors, trustees, and other offices in London are disallowed. It is true that the concession provided for the organization in London of a joint-stock company to construct and to operate this railway. Such being the agreement, there is an assumed contract to permit the necessary and reasonable annual expense attending the corporate existence of such company. This reasonable annual expense must be measured by the importance of the railway and the size of its annual income. It has done a small business only, and the general charges of London and Valencia are too large for the business. Gross income bears pretty nearly all its fair share of the burden when it cares for the services which produce it. This production is all necessarily Venezuelan in its character, quality, quantity, and origin. Management in Venezuela has a direct and important bearing upon gross income. Official service in London is of no value to that income any further than it is essential to the existence of the company. The greater part of these official cares in London deal only with the wise administration of net revenue as between the company and its creditors, between the company and its shareholders, in regard to reserves, renewals, and dividends, and therefore the greater part of such expense should be placed upon the department which causes it or which it serves. The umpire has learned from the inspection he had made of other guaranteed companies, even including those of Uruguay, that some of this expense is allowed as against gross income, and were there only this question to consider he would allow a certain round sum for each year. But he is conscious that he has allowed a considerable amount each under working expense which should have been charged either to net revenue or capital expenditure. He could make no deductions, for he had no details. He has decided to make a set-off of the amount covered by this head to meet such allowances, feeling that thereby he does no injustice and establishes no noxious precedent.

Insurance is for the protection of the capital of the company. It is a wise provision against serious loss of its capital. If fire occurs and destruction follows, the charge for rebuilding, in the judgment of the umpire, could not be placed in working expense as against the Government's guaranty. The means of reconstruction must be found in such cases in net revenue or in capital expenditure. Hence, the annual expense to protect net revenue or capital account must be charged against the account it protects, which is not gross receipts, and it is therefore not a part of working expense. It does not at all aid in the production of gross income. It utterly fails to pass the required test, and as against the Government and its guaranty must be disallowed.

Exchange is subject to the same objection in the main. It is true that so far as it was incurred in payment for stores and for materials and the like, where such payments were made to secure a cheaper article and at a lesser expense, it might well be considered, and might well have been charged as a part of the cost of those materials and stores; and if the umpire had such charges before him properly segregated from the general sum, he would be pleased to allow them. Inspection, however, will determine that, as a rule, the greater part of this exchange was not incurred in the payment for stores from abroad. The whole amount of stores got in all lines in 1891 amounted to £5,410 7s. 6d., and if there be added all of the London general charges which are allowed herein against working expense the sum is £6,341 12s. The balance to net revenue account that year was £32,008 9s. If we add to £6,341 12s. the sum of £1,943 10s., which is the amount disallowed in the London general charges, there is a total sum of £8,285 2s., which added to the net revenue account makes, approximately, the sum sent to London, viz. £40,294 11s. This assumes that all stores

were bought abroad. The share in the exchange expense for such stores that year would be, approximately, as 40 to 5. The whole exchange charged is £140 18s. 9d. The exchange for stores therefore would be, approximately, one-eighth of this, or a little over £17, which is upon the assumption, as stated before, that all stores were bought abroad. If the umpire knew that such was the case he could allow this sum of £17, but as he knows nothing as to where the purchases were made he can make no correct division, and he is again compelled to disallow all, because he has not the details and because, in principle exchange, as a whole, is objectionable as a charge upon working expense. It is a proper charge upon the account which it aids, which is not gross receipts, save as to an inconsiderable and indeterminable part.

In the judgment of the umpire, depreciation of furniture has no more place here than a general charge or several special charges for depreciation of the entire plant. That such depreciation exists, notably as to locomotives, rolling stock, ties or sleepers, rails, bridges, and the like, depreciations which can not be met by repairs, the same as in the matter of furniture, is apparent. None of these, however, are charged to working expense, nor should they be, nor should these be so charged. It is not an expense; it does not represent a cash outlay. It has not, in fact, lessened the gross income. It belongs with other proper reserves, to be set aside by the directors out of net revenue.

As between the income and the shareholder it is well placed; as between the company and its guarantors it has no place.

The same stricture is to be made upon the charge in the locomotive department for locomotive renewals. A proper provision for a foreseen demand is a prudential act; but it is to be so charged off, not as a part of the working expense, but out of net revenue in the reduction of net profits. It may come in before the division of net profits as dividends; but it is not a working expense; it is not a cash outlay; it is a retention of money by the company in its treasury to provide for a cash expenditure some time to be made. It has no place as against the Government as a guarantor.

The charge for the drawing office which appears in some of the accounts does not appeal to the umpire as being a proper charge under working expense. It must have reference to designs or plans for new structures and new property, for betterments, extensions, or improvements of the railway plant. It can not be in aid of repairs of machinery or of plant. So it appears to the umpire, and hence he disallows it. If any part of the charge was for work in aid of the gross income or was a proper charge against it as herein defined, the umpire regrets that it was not more clearly expressed. As it is stated, it is outside of the test adopted and can not be allowed as a proper charge against the guarantor.

As a part of the London expense all law charges are objectionable to the umpire as not being capable to assist in the production, or to protect the production, of the gross income of the company. Undoubtedly these charges were proper as against the company and would be a proper tax upon its net revenue, but they do not seem to have part in working expense as against the guaranty.

A similar conclusion is forced upon the umpire in regard to the Venezuelan agency fees. The work of this agency appears frequently before the umpire in the papers before him as representing the company in interviews with the Government in endeavors to agree with it and to secure from it the amount of the guaranty which the company claimed to be due. Shall the company charge against the Government the expense which it has incurred in such matters? In such case the Government would be bound to determine whether it would be better to yield its contentions at once or to pay the expense of both attack and defense. Clearly this charge had no part in the production of the

gross income, or any part in protecting it, nor was it an incident necessarily connected therewith, but has evidently only to do with what occurs between gross income and subsequent results. To the company it is a proper charge, and the expense was proper, but it is not a proper charge against the Government as a guarantor.

In the London general charges there appears one for inspection of stores, which seems in principle a correct charge against gross income, as it has apparently to do with a proper care for the materials through whose use the income materializes. That it is too much or too little is not the question raised before the umpire. It being in his judgment correct in principle, it is allowed.

Summarizing under this head, the umpire allows as proper working expenses all charges appearing under "No. 7 A, maintenance of ways, works, and stations;" all charges under "No. 8 B, locomotive department," except "locomotive renewals", all charges under "No. 9 C telegraph expenses;" all charges under "No. 10 D, traffic expenses;" all of "No. 11 E, general charges, Valencia," except "insurance, exchange, depreciation of furniture, drawing office, and agency;" all of "No. 12 F, general charges, London," except the first item of "directors," etc., "traveling expenses and law charges." That which is excepted under these general heads are held not to be proper charges against gross receipts as a part of working expense when considered in reference to determining the deficit properly chargeable in any year to the Government under this guaranty.

Neither locomotive renewals, agency fees, nor law charges in London account were in any of the charges prior to the settlement of 1890.

The Government, through its honorable Commissioner, admits a liability of £73,000 10s. 3d. and denies a liability for any sum of a greater amount.

#### INTEREST UPON THE UNPAID DEFICITS

On the one hand the claimant company demands interest at 5 per cent on each annual balance, and on the other hand all interest is denied. The respondent Government insists that the nonpayment of the guaranty is the fault of the claimant company in denying and resisting the reasonable claims and objections of the respondent Government; that it has always been ready to pay the sum due when ascertained; that there has been no default on its part in fact; that it was the undetermined balance and nothing else; that the courts of Venezuela have always been open for the determination of that balance, that the claimant company as a part of the concession and guaranty had agreed that the Venezuelan courts should settle all matters of agreement before them, and therefore that the delay is the fault wholly of the claimant company and not at all that of the respondent Government, and that therefore interest, as damages, is not to be charged against it; that there is no claim that there was or is any agreement to pay interest.

There is no inconsiderable force to this argument of the honorable Commissioner for Venezuela. The umpire finds that there were just objections to the account as presented and to the claims as made, and he is well satisfied that no interest should be allowed in a punitive sense.

But by the laws of Venezuela interest on overdue accounts may be allowed at 3 per cent when there is no agreement concerning interest in the contract. If interest is to be allowed here, it is on the ground that the claimant company has been without the use of certain sums of money of which use the respondent Government has had a corresponding benefit. Equity would require compensation for such use in order to secure a fair and perfect balance between the

two parties. When the claimant company secured the concession and the guaranty it undoubtedly knew the lawful rate of interest in Venezuela when no rate was prescribed in the contract. If it were then unwilling to content itself with such lawful rate in case of default or delay of payment, it should have secured a stipulation for a more favorable rate. That it did not do this must be taken as sufficient proof that it rested content upon the lawful rate. Again, the respondent Government knew its lawful rate of interest at the time of entering upon such contract of guaranty, and in therein providing that all questions in dispute should be determined by its courts, where only the lawful rate could be considered and adjudged, it in effect secured a stipulation that both of the contracting parties were to abide by the lawful rate. Always since 1896 the attitude of the respondent Government toward these accounts has been as now. During all this time there has been opportunity to the claimant company to have recourse to the courts for a settlement of the questions in dispute. Denial of justice through these courts can not be assumed. That the company preferred instead to obtain its alleged rights through diplomacy and agreement is clearly its privilege; but its action has an important bearing upon the rate of interest to be allowed when more than the law rate is asked. To the reasons which have governed the umpire in his previous decisions upon the rate of interest where there was no agreement that the courts of Venezuela should settle the matters in dispute, there is here added the very important effect of such an agreement upon the question of whether the lawful rate should prevail.

The umpire decides that interest at the rate of 3 per cent per annum, the lawful rate, is to be reckoned from the time when default began to the time of this award. As some time must elapse after the year has closed before the exact conditions can be transmitted to the Government, as a reasonable time must then elapse for inspection, explanation, final audit, and allowance, and as there then must be a reasonable time before, in due course of procedure, the warrant in payment can issue, the umpire fixes as the sufficient time for all this one year after the account closes before default begins.

#### DIVIDENDS CLAIMED BY THE GOVERNMENT

The respondent Government claims the allowance of dividends on £160,000 up to and including December 31, 1895. Its contract with the Southwestern of Venezuela (Barquisimeto) Railway Company (Limited) making sale of said shares especially reserved such right; hence the purchasing company has no claim upon and no right to any profits which may have been earned in any way, or which may accrue to the claimant company in consequence of the payment by the Government of its guaranty covering the period named. It is inequitable that the purchasing company should be enriched over and above its fair contract in that regard; neither is there equity in permitting the remaining £300,000 of share capital to have all of the profits belonging to the entire share capital to the loss of the respondent Government who by paying its guaranty carries into the company's treasury the profits to be divided. As stated by the learned agent for Great Britain, although it is not a universal method it seems a better one where dividends are to be paid that they be paid to those who are registered as shareholders at the time when dividends are declared.

The reasons for this are such as are stated by the learned agent, and they are controlling in the mind of the umpire; yet there is something very incongruous and manifestly unfair in requiring Venezuela to make good an annual net income based upon the entire capital when £160,000 of this is the property of that Government; to compel it to reckon its liability to indemnify its own

property and still have no interest in the proceeds. The anomaly, the incongruity, and the inequity of this has grown upon the umpire to such an extent and effect that he is impelled through his sense of right and justice to make a more equitable, seemly, and honorable arrangement. He regards it the contractual duty of the respondent Government to make good its obligations to the company to the extent even of paying the entire sum of £41,000. But when the amount necessary to do this in any year is determined, and when all proper sums having been charged off by the directors there appears a clear net profit out of which dividends may be declared, then let it be determined what per cent may be so divided, and ascertain the share of the Government therein upon this £160,000. The sum thus obtained shall be deducted from the amount which otherwise the respondent Government would pay under its guaranty and the remainder shall be the amount due on such guaranty in that year. This will save to Venezuela her equity. It will not harm the Southwestern of Venezuela (Barquisimeto) Railway Company, as it took the shares subject to the right of the respondent Government in the profits of those years; it will do no harm to the claimant company, for it has only to charge off as satisfied the sums which would otherwise be placed to the credit of those shares and make its dividends upon the remaining shares in the same manner and to the same effect as it proceeded to do with the earnings of the company in its action of 1891, where, in accordance with the terms of the settlement of May 26, of that year, the Government waived as a part of the consideration for the concession all interest in and right to the dividends which might be declared out of the net revenues of the company up to and including December 31, 1890. The remaining capital gets all of its interest in the profits of those years, while as concerning Venezuela, serious wrong, injustice, and inequity is prevented. To illustrate, take the conditions of 1892. To obtain the true net revenue for this purpose, as estimated by the umpire, deduct from the amount charged in the claimant company's account for working expenses for that year as follows:

	£.	s.	d.
Locomotive renewals . . . . .	500	0	0
Paid for insurance . . . . .	149	15	4
Depreciation of furniture . . . . .	100	7	10
London expenses, in part . . . . .	1,873	0	0
<b>Total deduction . . . . .</b>	<b>3,213</b>	<b>19</b>	<b>2</b>
The working expenses, as stated in the account for that year, are . . . . .	36,602	2	0
Reduce this by said . . . . .	3,213	19	2
<b>And working expenses are held at . . . . .</b>	<b>33,388</b>	<b>2</b>	<b>10</b>
The gross receipts named in the account were . . . . .	40,473	4	4
Subtract therefrom these working expenses . . . . .	33,388	2	10
<b>And there is obtained the sum of . . . . .</b>	<b>7,085</b>	<b>1</b>	<b>6</b>
To this is to be added the sum of . . . . .	116	1	8
found on the credit side of No. 5 net revenue account for 1892.			
<b>The result is the total net revenue, viz' . . . . .</b>	<b>7,201</b>	<b>3</b>	<b>2</b>
On the debtor side of the said No. 5 net revenue account there is charged interest on debenture bonds . . . . .	23,800	0	0
Income tax . . . . .	467	0	0
<b>In all . . . . .</b>	<b>24,267</b>	<b>0</b>	<b>0</b>

which is the sum to be paid out of the net revenue when enriched by the Government's guaranty.

As soon as the umpire has taken from working expenses, as stated in the company's accounts, the sum of £3,213 19s. 2d., and that sum, less £ 500 for

locomotive renewals, viz, £2,713 19s. 2d., must be added to expenditure of net revenue, as stated in said accounts, viz, £24,267, and there is then a total charge upon that account of £26,985 19s. 2d. The guaranteed net earning is £41,000. Subtracting therefrom the entire expenditures on account of net revenue, viz, £26,985 19s., 2d. and there is obtained the sum of £14,014, which sum is net profits and available for dividends.

This is a little more than 3 per cent on £460,000, the entire share capital; stated more exactly, it is .03046 plus. This per cent calculated upon £160,000, Venezuela's interest in the share capital, and the result thus obtained is the equity of Venezuela in these net profits, namely, £4,873 12s. Toward the net revenue the company contributes the difference between its working expense and its gross receipts, which, as determined by the umpire, is £7,084 1s. 6d. To this may be added £116 1s. 8d., which is found on the credit side of No. 5, as above stated, and there is then had £7,200 3s. 2d. as the sum total of net revenue produced by the company, which, taken from the guaranteed revenue of £41,000, gives the sum for which Venezuela is responsible, viz., £33,799 16s. 10d. From this may be deducted the sum found to be Venezuela's interest in the net profits for that year, viz, £4,873 12s., and in this final remainder of £28,926 4s. 10d. there is expressed the sum for which the respondent Government was liable in 1892. To this sum add interest from December 31, 1893, to the date of the award.

(NOTE. — The £500 for locomotive renewals deducted by the umpire is not added to net revenue expenditure as are the other deductions because (a) unlike them it was not at this particular time an expense, but a part of a fund reserved; (b) when it was in fact expended it was not to renew or even to replace existing locomotives, but to purchase an additional one; (c) it may be properly charged to capital even if expended in renewals in fact during the five years for which the Government remained a shareholder, as the life of an ordinary locomotive is rated above eight years, and no locomotive was in use on this railway until the spring of 1892, and the interest of the respondent Government as a shareholder is reckoned only to December 31, 1895; (d) from all of the facts it seemed inequitable to be added to net revenue expense in order to obtain the respondent Government's interest in the revenue remaining.)

Aside from the years 1891-1895 the several amounts due from the respondent Government on account of its guaranty are ascertained in substantially the same manner as in 1892, as above set forth.

Those in 1891 and 1892 will now be specifically set forth, beginning with the year 1891.

From the working expense as stated by the claimant company in its abstracts of expenditures in revenue account, page 14, 15, 16, and 17, there are to be deducted the following:

	£	s.	d.
Locomotive renewals . . . . .	500	0	0
Insurance . . . . .	149	15	0
Exchange . . . . .	140	18	9
Depreciation of furniture . . . . .	87	19	4
Drawing office . . . . .	42	0	7
London expenses, in part . . . . .	1,943	10	0
Deducting this sum of . . . . .	2,864	3	8
from the entire working expenses as stated by the company, viz' . . . . .	32,359	4	3
and there is found the sum of . . . . .	29,395	0	7
which is the true working expense of that year as settled by the umpire. Deducting this sum from the gross receipts which are . . . . .	64,267	13	3

	£	s.	d.
and the net earnings are established at . . . . .	34,872	12	8
The credit side of net revenue contains the items of transfer fees and interest amounting to . . . . .	55	1	3
which, added, make the total net revenue, viz . . . . .	34,927	13	11
This sum taken from the guaranty of . . . . .	41,000	0	0
gives as a difference the sum of . . . . .	6,072	6	1

The debtor side of "No. 5, net revenue account," year of December 31, 1891, has the following:

	£	s.	d.
Debenture interest . . . . .	23,800	0	0
Income tax . . . . .	456	11	0
Traveling expenses . . . . .	180	0	0

To this must be added the amount taken by the umpire from working expenses, less £500.

	£	s.	d.
Locomotive renewals, viz. . . . .	2,364	3	8
and there is found . . . . .	26,800	14	8
which is the sum to be paid out from net revenue before net profits can be considered. This sum deducted from the guaranteed net revenue of . . . . .	41,000	0	0
leaves the net profits available for dividends, viz. . . . .	14,199	5	4

The per cent per pound is obtained and applied as in 1892, with a result that . . . . .	4,938	14	0
is to be deducted in behalf of Venezuela from the difference as obtained, viz: from . . . . .	6,072	6	1
and it is found that . . . . .	1,133	12	1

is the sum guaranteed for that year by the Government of Venezuela to the claimant company, it being the actual deficit after allowing Venezuela its fair equity in the net profits of that year. As the year 1893 will show a surplus of earnings over expenditures, interest will be allowed on the sum just obtained from December 31, 1892, to December 31, 1893, at 3 per cent per annum, which is, substantially . . . . .

Making a sum total December 31, 1893, of . . . . .

The year 1893 was peculiar in that there was no deficit. For this year there must be deducted from the account as stated by the company —

	£	s.	d.
Locomotive renewals . . . . .	500	0	0
Insurance . . . . .	166	8	4
Exchange . . . . .	249	18	9
Depreciation of furniture . . . . .	91	16	2
London expenses, in part . . . . .	1,703	0	0

Making a sum of . . . . .	2,711	3	3
which, taken from the gross expenses as stated, viz. . . . .	41,390	4	9
leaves the sum of . . . . .	38,679	1	6
as the gross expense allowed by the umpire for that year. Reduce the gross receipts for that year, namely . . . . .	82,488	17	2
by this sum and there is found the net earnings, namely . . . . .	43,809	15	8
There is to add to these net earnings the transfer fee found on page 12 of accounts, viz. . . . .	2	5	0
and there is the total net revenue for the year of . . . . .	43,812	0	8

There was retained for use a part of the net revenue because the guaranty had not been paid and there was nothing set aside for renewals; hence, in this calculation, to arrive at the equity of Venezuela, no deduction need be made but the whole of the net profits may be used in determining and settling the accounts of Venezuela with the claimant company. The net profits are determined by deducting from the net revenue which is, as last above written, £43,812 0s. 8d., the sum set aside on the debit side of "No. 5, net revenue account for the year ending December 31, 1893," namely, debenture interest, £23,800, income tax, £311 13s. 1d., and the amount taken from gross expenses by the umpire, less locomotive renewals, being £2,211 3s. 3d., making the sum of £26,322 16s. 4d., which leaves as net profits the sum of £17,489 4s. 4d.; in which Venezuela has an equity to the amount of £6,080.

The deficit of 1891, with interest for one year added, as found by the umpire was £1,167 15s. 1d.; to this add the deficit of 1892, £28,926 4s. 10d., and there is a combined sum of £30,093 16s. 11d. From which deficit take the ascertained equity of Venezuela above stated, viz. £6,080, and there is the sum of £24,013 16s. 11d., on which interest at 3 per cent is to be cast from December 31, 1893, to the date of the award.

The guaranty for 1894 liquidates at £11,594 4s. 5d. Interest from December 31, 1895, at 3 per cent, to day of award.

(NOTE. — The reserve for doubtful debts mentioned on the debit side of No. 5, net revenue account, is added in making up the debts to ascertain net profits.)

The guaranty for 1896 liquidates as £4,051 12s. 6d. Interest at 3 per cent per annum from December 31, 1896, to date of award.

(NOTE. — Income tax return is added to transfer fees and interest on the credit side of No. 5, net revenue account, of this year. Balance of the cost of engine No 10, £1,618 13s. 1d., is not added to the debit side. It should be placed to capital expenditures, as against the Government guaranty.)

After 1895 the equity of Venezuela in the net profits ceased and thence forward it is only important to carefully scan and correct if need be, the charges made to working expense.

It appears from the report of the directors in the year 1895 that —

Considerable improvements were effected in improving the waterways and preparations were made to move a portion of the line at Mater Piedra from its present proximity to the river to a position less likely to suffer from floods in the future.

In the report of the directors for 1896 it is said that "the improvements at Mater Piedra, referred to in the report for 1895, have been completed and others are in progress," but examination of the financial statements of both years shows in neither any charge to capital expenditure or to net revenue accounts, and there is no reference to improvements as such under the head of "maintenance of way, works, and stations." Although in fact these expenditures are probably included under that head in each of these years the umpire can only say that if they had been shown to him as so appearing in working expense he would have transferred them in 1895 to capital expenditure as against Venezuela that thereby her equity in the profits might have been protected, and in 1896 to net revenue account as against Venezuela that her guaranty might have been thereby equitably protected.

If their policy be to hold their capital to a fixed sum and to improve gradually and make better the railroad in its way and equipment out of the net earnings of the plant as against its shareholders it is of no particular importance whether these charges are placed against gross assets or net revenue. Against the guarantor, however, it is of importance; and in the opinion of the umpire such improvements can not be made a tax upon the revenue obtained through the



guaranty. The peculiar inequity of any such charge is apparent when, as in this case, there is a guaranty upon a sum which they estimated to be the cost of equipment and construction, but which is in fact an overestimate to the amount of £34,818 1s. 5d., as appears by report of December 31, 1883, and there was unused of this, as appears from the report of December 31, 1902, £21,100 16s. 5d. In the agreement of May, 1901, the claimant company reduced the per cent of the guaranty from 7 to 5, but as one of the conditions and considerations of such deduction it held Venezuela to the letter of the guaranty as to amount. It behooves the company to be careful to respond to the spirit of the original agreement in dealing with betterment and improvements.

Cook, in his work on Corporations, fifth edition, pages 1166, 1167, 1168, 1169, 1170, and notes, as cited by the umpire, is full authority for each and every position taken by him in reference to these accounts. Depreciations, renewals, and reserves as such should never be made a part of the working expenses. All betterments and improvements must be charged upon capital or net revenue, and upon the one or the other as the peculiar conditions of each may require. That any of these should be charged to working expenses is not even discussed. The working principle there suggested is that nothing be charged to capital unless the productivity or earning capacity is by such expenditure increased. Following this principle, Cook places additional equipment a proper charge to capital. Let it always be understood that the umpire does not presume to instruct the claimant company in its method of bookkeeping or in its management of its business. He only is to determine how far those methods are right and just as affecting the guaranties of the respondent Government and its equity as a shareholder in the divisible profits of the company when such guaranty is made good.

In 1896, making from working expenses as charged in the accounts of that year the same character of deductions as made in 1895, in all £3,220 7s., from the working expenses as charged, which were £30,675 19s. 1d., and there is found the true working expense of £27,455 12s. 1d. These gross working expenses deducted from gross receipts, viz, £60,472 18s. 6d, and the net earnings of the year of 1896 are established at £33,017 5s. 5d. This sum deducted from the guaranteed amount, viz, £41,000, shows the sum due from the Government on account of its guaranty to be £7,982 13s. 7d., upon which interest is to be reckoned at 5 per cent per annum from December 31, 1897, to the date of the award.

Proceeding in the same manner as to the accounts of 1897 and the amount due under the guaranty for that year is found to be £17,411 13s. 2d., to which is to be added interest from December 31, 1898, at 3 per cent per annum to the date of the award.

In 1899 the amount due under the guaranty is made less than it would otherwise be by the additional deduction of the amount charged in the account for injuries received at the hands of the revolutionists, which the umpire has disallowed and which therefore must be taken out of the amount. The final result is that £26,896 11s. 4d. is the amount due on the guaranty for that year and interest is to be reckoned at 3 per cent per annum from December 31, 1899, to the date of the award.

The guaranty for 1899 liquidates at £19,245 18s. 10d., and interest is to be reckoned at 3 per cent per annum from December 31, 1900.

The guaranty for 1900 liquidates at £26,769 7s. 4d., to which interest is to be added at 3 per cent per annum from December 31, 1901, to the date of the award.

For 1901 the amount under the guaranty is £32,828 13s. 4d., and interest is to be added at 3 per cent per annum from December 31, 1902, to the date of the award.

For 1902 the sum is £36,967 9s. 6d., and interest is to be added at 3 per cent per annum from December 31, 1903, to the date of the award.

The aggregate sum found to be due from the Government of Venezuela to the Government of Great Britain on account of and for the benefit of the claimant company on account of its guaranty is in the aggregate, as to principal sum, £207,722 11d., and is in the aggregate as to interest £24,022 7s., making the total sum due from the respondent Government to the date of the award £231,794 7s. 11d.

The umpire does not add to this the sum called for on freight account, because if it were to be treated as paid by this award it must be added to the gross earnings of the year 1902, and in that event the guaranteed sum would be made less by just so much as the amount of the freight so added to the gross earnings. If the umpire is not in error, all of the sums for which the respondent Government stands as guarantor it could require the company to earn if it had a sufficient amount of business of its own to equal what otherwise would be the deficit in the gross earnings of the company for any year. Hence it matters not, excepting as there would be in such case increased working expense, and therefore a larger sum to be earned in gross to produce a net of sufficient sum, whether the Government pays for freight and passengers or pays it out as guaranty, only when, as in this case, the working expenses are already charged, and hence are not to be increased, whether the Government pays in terms for traffic or solely upon guaranty.

The award will therefore be made for the sum of £231,794 7s. 11d.

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