

## BISCHOFF CASE

DUFFIELD. *Umpire* :

This claim is based on the taking of a carriage belonging to the claimant, at Caracas, in August, 1898, during an epidemic of smallpox. Information came to the police that the carriage had carried two persons afflicted with the disease, and the police conveyed it to the house of detention, where it remained for a considerable time. During this time it was exposed to the weather, and the claimant alleges it was substantially injured. Upon ascertaining that the information upon which they had acted was false, the police offered to return the carriage to the claimant, and the claimant refused to accept it unless they would pay for damage done to it. The claimant also asks 18,000 bolivars for injury to his business, counsel fees, 40 bolivars, and legal costs, 25 bolivars.

The Commissioner for Venezuela is of the opinion that there is no liability under this state of facts. The Commissioner for Germany, however, while admitting "that the taking was made in good faith, and because of the smallpox epidemic then existing was justified," is of the opinion that the claimant was not bound to accept the return of the carriage, and that Venezuela is liable for its value.

It seems to be well settled by the authorities that in the case of an original wrongful taking of personal property the owner is not bound to receive the property in an injured condition.

Where the owner of personal property has been tortiously deprived of it, he is not, it has been held, bound to accept its return or restoration, if proposed, but may stand upon his legal rights. (American and English Ency. of Law, 2d ed., Vol. VIII, p. 692, and cases cited.)

But this principle only applies in cases of wrongful taking. The case shows, and the Commissioner for Germany admits, that the carriage was taken in the proper exercise of discretion by the police authorities. Certainly during an epidemic of an infectious disease there can be no liability for the reasonable exercise of police power, even though a mistake is made. But it is held in a number of cases before arbitration commissions involving the taking and detention of property, where the original taking was lawful, that the defendant government is liable for damages for the detention of the property for an unreasonable length of time and injuries to the same during that period. (Moore, Vol. 4, pp. 3235 and 3265.)

In the case at bar the umpire is of opinion that these are the only damages

recoverable. As the claimant presents no evidence of the amount of these injuries he can not recover on the case as made. His mistake in refusing to accept the carriage was a mistake of law and not of fact, and, in strict right, he perhaps can not demand an opportunity to show the amount of these injuries. The case, however, is a hard one, inasmuch as he has lost his carriage through the mistaken though lawful action of the police, and has undoubtedly suffered damage to his business, which, however, is not legally recoverable. Under the words of the protocol providing for the examination and decision of claims "according to principles of justice," and that "the decisions of the Commission shall be based upon absolute equity," in the opinion of the umpire it is a proper case in which to allow the claimant an opportunity to show his actual damage. If the Commissioners can not agree upon this amount without further proof the claimant will be allowed five days in which to make the same.

It results, of course, that there can be no allowance made for extrajudicial or other legal costs. In any event, the former are not recoverable under the opinion of the umpire rendered in the case of Hugo Valentiner. As to the latter, the umpire is of opinion that there is no power in the Commission to allow the costs of proving the claim. In all civil actions costs are created by statute, and only such are allowed as the statute provides for. It is true in the claim of Richter the claimant was allowed the costs of the additional testimony, but that was because the Commission itself had directed him to take it.

An entry will be made in the record in accordance with the above opinion.

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