OPINIONS IN THE GERMAN-VENEZUELAN COMMISSION

CHRISTERN & CO., BECKER & CO., MAX FISCHBACH, RICHARD FRIEDERICY, OTTO KUMMEROW, AND A. DAUMEN CASES

DUFFIELD, *Umpire:*

The Commissioners disagree as to the allowance of interest on the claims hereinafter mentioned, which have been referred to the umpire for decision.

The Commissioner for Germany is of the opinion that all claims should bear interest from their origin, while the Commissioner for Venezuela is of the opinion that no interest should be allowed except in cases arising upon contracts, and in such cases only from the date of the demand for payment of the claim, unless there is an express stipulation for interest in the contract. They also disagree as to the rate of interest, if any should be allowed.

Some phases only of the question are presented in the claims hereinafter mentioned, but as the question will necessarily come up for decision in all its phases during the progress of the Commission, it seems appropriate and convenient to determine the principles which shall govern.

The protocols provide:

Article III of the agreement of February 13, 1903:

That the Commission shall decide —

both whether the different claims are materially well founded and also upon their amount, [and in case of] injury to or a wrongful seizure of property * * * whether the injury to or the seizure of property were wrongful acts, and what amount of compensation is due.

Article V:

For the purpose of paying the claims * * * the Venezuelan Government shall remit to the representative of the Bank of England in Caracas, in monthly installments, beginning from March 1, 1903, 30 per cent of the customs revenues of La Guaira and Puerto Cabello. * * *

Article II of the agreement of May 7, 1903:

The decisions of the Commission shall be based upon absolute equity without regard to objections of a technical nature or of the provisions of local legislation.

These words of the protocols must be interpreted according to the law of nations, and not according to any municipal code. Mr. Webster said in a similar case: " When two nations speak to each other they use the language of nations."

The importance of a correct decision has induced a careful examination of the subject, both in principle and upon precedents, which is the reason for the length of time that has been taken in the preparation of the opinion.

Primarily, interest was the sum due from a borrower to the lender for the use of a sum of money. In ancient times the strongest prejudice existed

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[1] Vol. IX of these Reports, p. 122.
[2] *Ibid.*, p. 481.
[3] Infra, p. 499.
[4] Vol. IX of this Report, p. 470; *infra*, p. 492.

against its exaction, and as late as the reign of Edward VI an act of Parliament of Great Britain declared the "charging of interest a vice most odious and detestable, and contrary to the Word of God." This prejudice, however, has long since given way to the enlightened view that reasonable compensation for the use of money, like any other property, may justly be demanded.

Domat defines interest to be "the reparation or satisfaction which he who owes a sum of money is bound to make to his creditor for the damage which he does by not paying him the money that he owes him."

Pothier defines interest as including the loss which one has suffered and the gain that one has failed to make. The Roman law calls its two elements the "*lucrum cessans et damnum emergens.*" The pay of both is necessary to a complete indemnity.

The rule is thus stated in Rutherford's Institutes (Book 1, ch. 17, sec. 5):

> In estimating the damages which any one has sustained where such things as he has a perfect right to are unjustly taken from him or withholden or intercepted, we are to consider not only the value of the thing itself, but the value likewise of the fruits or profits that might have arisen from it. * * * So that it is properly a damage to be deprived of them as it is to be deprived of the thing itself.

The jurisprudence of all civilized nations now recognizes this principle as between individuals in case of contract, and has extended it to compensation for the taking of or injury to property. The general language of the civil law accords with the Anglo-Saxon common law in this respect, and the French civil code enacts the principle. (Sedgwick on Damages, 8th ed., sec. 697.) It is certainly a reasonable presumption from this uniform international recognition of this right as between individuals, that the nations would recognize its justice between themselves.

As applied to the case of reprisals, in which great caution is enjoined to keep within the strictest principles of justice, Mr. Wheaton says, in his work on International Law (Lawrence's ed.), page 363:

> If a nation has taken possession of what belongs to another, if it refuses to pay a debt, to repair an injury or to give adequate satisfaction for it, the latter may seize something belonging to the former and apply it to its own advantage till it obtains payment of what is due, *together with interest and damages.*

A report to the House of Representatives of the Forty-third Congress of the United States of America, second session (No. 134), published by authority of Congress in 1875, called "The Law of Claims Against Governments," contains an exhaustive discussion and examination of authorities on the question of interest on claims against governments. (See pp. 219 to 232.) Among other precedents there cited is the report of the Committee on Appropriations of the House of Representatives upon the question whether the United States of America should pay the sum due from it to the Choctaw Indians for lands ceded by them to the United States. The committee decided the question in the affirmative. In support of its decision it cites as precedents the allowance of interest upon claims under the treaty of 1794 between the United States and Great Britain; the treaty of 1795 between the United States and Spain; the convention with Mexico of 1839; the same of 1848; the convention with Colombia of 1864; the convention with Venezuela of 1866; by the Mixed American and Mexican Commission; by the United States to the State of Massachusetts; the American-British Mixed Commission under the treaty of 1871; the United States in dealing with the Indians; the United States in 53 cases of private claimants cited.

The principle of this report was approved by the Senate of the United States in the adoption of the report of its committee containing the following language:

Your committee have discussed this question with an anxious desire to come to such a conclusion in regard to it as would do no injustice to that Indian nation whose rights are involved here, nor to establish such a precedent as would be inconsistent with the practice or duty of the United States in such cases. Therefore your committee have considered it not only by the light of those principles of the public law — always in harmony with the highest demands of the most perfect justice — but also in the light of those numerous precedents which this Government, in its action in like cases, has furnished for our guidance. * * * Your committee can not believe that the United States are prepared to repudiate these principles, or to admit that, because their obligation is held by a weak and powerless Indian nation, it is any the less sacred or binding than if held by a nation able to enforce its payment and secure complete indemnity under it. (H. R. Report No. 134, 43d Cong., 2d sess., p. 230; Lawrence, Law of Claims.)

Other instances are:

Two Cargoes of Flour — interest allowed against the Republic of Venezuela (Moore's History and Digest, p. 3545); Ward's case (id., 3734); Rochereau's case (id. 3742); finally, the Geneva arbitration (Alabama Claims Commission), which, because of the gravity of the questions at issue, and the character, ability, and learning of its members, representing the United States, Great Britain, Italy, Switzerland, and Brazil, was justly regarded as the greatest the world has ever seen. In the great case before it, as in this case, the treaty was silent as to interest. The Commission, on account of the importance and gravity of the question, called for a special argument thereon, and by a decision of four to five allowed interest on the claims.

The umpire is therefore of the opinion that interest is allowable upon all claims arising upon contracts, and on all claims for wrongful seizure of or injury to property.

Claims for injuries to the person, however, stand upon a different footing. Damages in such cases are necessarily unliquidated and their exact amount can not be precisely ascertained. In such cases as between individuals interest is not usually allowed. (Sedgwick on Damages, 8th ed., sec. 320.) In the case of Lincoln *v.* Claflin, 7 Wall., 132, 139, the Supreme Court of the United States speaking through Mr. Justice Field, said:

> Interest is not allowable as a matter of law, except in cases of contract or the unlawful detention of money. In cases of tort its allowance as damages rests in the discretion of the jury.

Under nearly all systems of jurisprudence the damages in claims of this nature are left to a jury to assess, instead of to a single judge, upon the accepted theory that because of their peculiar character the united judgment of a number of men will more nearly approximate the exact compensatory amount than the judgment of a single mind. In many courts, and in all the courts with the practice of which the umpire is familiar, it is not the practice for the plaintiff to ask or the jury to assess interest per se. Doubtless the latter may and often do consider the lapse of time between the injury and the recovery of damages therefor in arriving at the amount of their verdict, but they do not specially compute or allow it eo nomine. The same course is open to the Commissioners and to umpire, and in their wise exercise of their discretion, in cases of this character, no practical injustice need be done in any case.

In the opinion of the umpire, therefore, *no interest should be allowed, as such, upon claims for purely personal injuries,* not involving the seizure of or injury to property.

The Commissioners further disagree upon the questions from what time interest shall accrue and the rate to be allowed. It is the opinion of the Commissioner for Germany that interest should begin to run from the date of breach

of contract, or date of wrongful seizure of or injury to property, but the Commissioner for Venezuela is of the contrary opinion except in cases of claims based upon contracts expressly stipulating for interest. In all cases he maintains that no interest is to be allowed until a proper demand for payment has been made on the Republic of Venezuela.

There is much force in the argument of the Commissioner for Germany that the government, as a principal, is presumed in law to have knowledge of all the acts of its officers, as its agents, and if the case was one between private parties it would be difficult to avoid the conclusions drawn by him. The umpire is of the opinion, however, that as to claims against governments it would be unjust to enforce so strict a rule of agency. Of necessity a national government must act through numerous officials, many of whom are very subordinate and quite remote from the seat of government. In the ordinary course of business a creditor under a contract, or a party injured by a tort, presents his claim to the central powers of the government and asks satisfaction thereof from some official whose special function it is to represent the government *in the premises*. It is generally presumed that governments are ready and willing to pay all just claims against them. This is a corollary to that other presumption of law which is of universal application — omnia rite acta præsumuntur. If such is the case in respect of individuals it must certainly be true in respect of governments. The umpire is not prepared to go the full length of the argument of the Commissioner for Venezuela as to the formality necessary to constitute a sufficient demand in all cases, but he is of the opinion that some evidence of a demand upon the government for payment of a claim is necessary to start the running of interest in all cases which the Government of Venezuela has not either stipulated for interest or given an obligation from which an agreement to pay interest can fairly be implied. The sufficiency of the demand is to be decided according to the particular facts in each case.

The umpire is of the opinion that where no rate of interest is fixed by the terms of the contract interest should be computed at 3 per cent per annum in all cases, that being the rate fixed by the statute of Venezuela in like cases. It is not inconsistent with the language of the protocol to refer to the law of Venezuela fixing that rate. All foreigners residing in or doing business with a country are equally bound with its citizens to know the laws of the country. When they determine to reside in or do business in that country they should be and are prepared to accept the commercial laws of the country. Such general laws are not, in the opinion of the umpire, local legislation, within the meaning of the protocols. Certainly in a suit between a foreigner and a Venezuelan citizen arising upon a contract which is silent as to the rate of interest, the former could only recover against the latter the rate of interest prescribed by the law of Venezuela. There is no good reason for any different rule when the claim of the foreigner is against the Government.

The umpire agrees with the suggestion of the Commissioner for Germany that in all cases in which interest is allowed it should be computed up to a common date. While the precise date when the labors of the Commission will actually terminate can not now be certainly determined, in the opinion of the umpire substantial justice will be done by computing interest upon all claims up to and including December 31, 1903. In each case the amount of interest up to that date will be added to the principal sum, and an award made for the aggregate amount in gross.

Shall these awards bear interest? In the opinion of the Commissioner for Germany the arguments for such allowance, upon grounds of equity and justice to the claimants, are strongly put. On the other hand, the Commissioner for Venezuela presents with ability the equitable considerations in favor of the

Government of Venezuela, and insists that the Commission is without the power so to do. It must be conceded that the Commission can not exceed the powers conferred upon it by the high contracting parties, either expressly or by necessary implication. The Supreme Court of the United States so held in the recent case of Colombia *v.* The Cauca Company, decided May 18, 1903,[1] and reduced the award of the Commission in that case some $160,000. It is material to remember, in considering this question, that while the amounts are for the ultimate benefit of the claimants, they are to be included in an aggregate sum of money to be paid by the Government of Venezuela to the Government of Germany. These two nations have stipulated, in the language quoted above, how this amount shall be paid, and partial payments have been already made and will continue to be made monthly. There is no express provision for interest in the stipulation. Is there any necessary implication to that effect? It is argued by the Commissioner for Germany that the agreement on the part of Germany to accept payment in subsequent accruing installments necessarily implies an understanding that the awards should bear interest, while the Commissioner for Venezuela insists that in making so particular a provision for the manner of payment the omission of any mention of interest is significant and decisive that no interest was intended to be allowed on the sum. It does not appear in the evidence whether the Bank of England is to pay interest on the successive payments of the customs receipts or not, and in the opinion of the umpire *it is immaterial.* If the bank does pay interest on these deposits it will increase the amount received by the Government of Germany for the benefit of its claimants. If it does not the Government of Venezuela still has paid and will continue to pay monthly installments in the manner and to the trustees named by the contracting Governments. It must be conceded that Venezuela can not under these circumstances be asked to pay interest on the full amount allowed without having credit for interest on these monthly partial payments. There is no provision made for a future settlement of these charges and credits of interest. No person is designated to compute the same or to settle any difference in the computation of the two Governments. The Chinese Indemnity Fund Commission of 1858 is a case directly in point. The treaty provided for the payment of the fund out of the Chinese customs receipts, as is the case here, but the Commission allowed no interest on awards. (Moore, p. 4627-4629.)

It is by no means settled that in cases where the convention fails to specifically provide for interest there is any power in the arbitrators to allow interest on awards. Referring to the decision of former arbitration commissions, the weight of precedent appears to be against the allowance. As opposed to the precedents cited by the Commissioner for Germany, in the following cases the awards did not carry interest: The Panama Riot Commission; the Mexican Claims Commission; the French Claims Commission of January 15, 1880; the French-American Claims Commission; the case of the Montijo; Ward's case; finally, in the Geneva arbitration of 1871 (Alabama Claims Commission), above referred to, no interest was allowed upon awards.

The umpire is influenced by these considerations to decide that it was not the intention of the high contracting parties that the Commission should allow interest on awards.

It only remains to apply these conclusions to the particular cases referred to the umpire.

The case of Becker & Co. is founded upon an order given in payment of certain blankets, in the following words:

[1] 190 U.S., p. 524.

CARACAS, *July 1, 1892* (29° and 34°)

To the Citizen Administrator of Municipal Rents:

To be charged to the expenses of war, according to the authorization of the President of the Republic, please pay to Messrs. O. Becker & Co., successors, the sum of 1,470 bolivars, the value of certain blankets taken by this office for the expeditionary army.

God and the federation.

PEDRO VICENTE MIJARES

There is no evidence of any demand for the payment of this order. Treating it as a draft, certainly a presentment and demand for acceptance is essential before interest will commence to run. Apart from the requirements of the civil law, in which the argument of the Commissioner for Venezuela finds considerable support, the umpire is of the opinion that according to the principles of commercial law the instrument would draw interest only from the date of demand for payment. It was decided by the Supreme Court of the United States that the presentment for payment of a drainage warrant, substantially similar to the order in this case, issued by the city of New Orleans, was necessary to start the running of interest. (New Orleans *v.* Warner, 176 United States Reports, p. 92.) [1]

In view of the full consideration given by the claimant for the order so many years ago, it would not be equitable to decide against any allowance of interest prior to the presentation of the claim to this Commission. The claimant will, therefore, be allowed a reasonable time to prove a demand for payment, so that interest may be computed from that date. The same course will be taken in the case of A. Daumen.

In the case of Christern & Co. simple interest at the rate of 3 per cent per annum will be allowed upon the sums hereafter found due by the Commissioners and the umpire from the dates of demand for payment of the several amounts, and a reasonable time will be allowed to prove such date.

The cases of Fishbach, Friedericy, and Kummerow are not yet ready for a decision on the merits. The umpire is waiting for further briefs from the Commissioners. In case of their allowance they will be governed as to interest by the conclusions reached in this case, so far as they may be applicable.