METZGER CASE

DUFFIELD, *Umpire:*

The claimant alleges that on the 28th of May, 1902, while lawfully going from his house to his office, in Carúpano, he was assaulted by an officer of the Vene-zuelan army because the claimant would not give up the mule he was riding. The officer attempted to take the mule by force, and upon the claimant resist-ing another officer struck him two severe blows on the shoulder with a saber, inflicting serious injury. His life was also threatened, and he was subjected to other indignities.

If the occurrence had not arisen out of the demand for the mule it might be held that this was a purely wanton assault by the officer, for which, as the

Venezuelan Commissioner contends, the Government of Venezuela could not be liable under the circumstances in the case.

But it is so notoriously the practice of army officers to impress property of this kind for the use of the Government, that I think Venezuela must be held liable for the act of the officer, if proven. It is said by Hall (4th ed., p. 226) that a government's —

> administrative officials, and its naval and military commanders are engaged in carrying out the policy and the particular orders of the government, and they are under the immediate and disciplinary control of the executive. * * * Where, consequently, acts or omissions which are productive of injury, in reasonable measure, to a foreign State or its subjects, are committed by persons of the classes mentioned, their Government is bound to disavow them, and to inflict punishment and give reparation when necessary.

It is contended, however, by the Commissioner for Venezuela, in opposition to the opinion of the Commissioner for Germany, that Venezuela is liable, that the " expediente " does not prove the case. He objects to the form of the testimony of the witnesses, and " their omission to explain the facts." He also claims that " Buran did not see what took place, as is inferred from the letter of the claimant on his complaint," and also that the testimony of the witnesses and the statement of the claimant conflict. Certainly the certificate signed by the two witnesses is irregular in form, and if the case stood only on it the umpire is of the opinion that it is insufficient. It has been held, however, in this Commission that under the protocol the declaration of the claimant is competent evidence.

The letter of the complainant, in the opinion of the umpire, is not susceptible of the inference that Buran did not see what took place. That letter simply named two witnesses. It is true that Buran was not one of them. He, however, took the place of one who was named and presumably for some reason did not testify. Neither do the testimony of the witnesses and the statement of the claimant disagree. The former is, as has been said, scarcely competent evidence, and is confined to the mere statement of the injuries. In this particular respect there is no discrepancy, the only difference being that the complainant amplifies, and properly so, the statement of facts.

Considering the case made by the proofs in its entirety, and especially the letter from General Velutini, in which he states that the " assailant of Mr. Metzger is still in prison expiating his crime," the umpire is of opinion that, notwithstanding the irregularities and insufficiencies pointed out by the Commissioner for Venezuela in the testimony, the fact of the injury itself is established.

The Commissioner for Venezuela, however, insists that the right of action does not survive and pass to the heirs of Metzger, who are, as shown by the proofs, his mother, sister, and brother, all of whom are German subjects. It is conceded that under the laws of Germany such right of action does not survive, but the German Commissioner is of the opinion that this is not a claim between an individual and Venezuela, but " an international demand which the German Empire makes." In the opinion of the umpire this position is not maintainable. A similar question arose before the American and British Claims Commission in the cases of McHugh, No. 357, Elizabeth Sherman, No. 359, and Elizabeth Brain, 447. (Moore's Digest of International Arbitration, vol. 4, p. 3278.). The United States demurred to the claim, insisting that the right of action did not survive, and that that was the law of both Great Britain and the United States. In the McHugh case the demurrer was sustained, apparently because he left only collateral relatives not dependent upon him for support. In the other two cases the demurrers were overruled, Mr. Commissioner Frazer dissenting. Upon the final hearing upon the merits,

however, the claim of Mrs. Sherman was disallowed unanimously, and although an award was made in favor of Mrs. Brain it was only on account of property taken from her husband and included no damages for his imprisonment. (Moore, etc., p. 3280). All the Commissioners seem to have agreed with Mr. Commissioner Frazer in the opinion that under the treaty only claims "on the part of citizens or subjects of the respective countries are submitted to the Government." The protocol under which this Commission is acting is substantially similar, and the umpire agrees with the reasoning of Mr. Commissioner Frazer, and is of the opinion that the claim now before this Commission is not a claim of the German Nation but a claim of an individual.

The Venezuelan code gives the injured party a right to recover his damages in a civil action in all cases of torts. (Código Civ., Arts. 1116, 1118.)

ART. 1116. Every act of a man which causes injury to another makes him through whose fault the injury happened liable to make reparation for the same.

ART. 1118. He is also liable not only for the injury which he caused by his own act, but also for that caused by the act of persons for whom he is responsible, or by the things which he has in his care.

This is in addition to fine and punishment in a criminal prosecution.

The heirs of a decedent succeed to all his property rights at the moment of his death, and no actual taking of possession is necessary. (Id., Arts. 894 and 896.)

ART. 894. Succession is opened at the moment of death at the place of the last domicile of the deceased.

ART. 896. Possession of the property of the deceased passes by law to the heir without the necessity of taking physical possession.

A right of action for damages for personal injuries is property. A fortiori is the claim in this case which had been presented and proved before the death of Metzger.

It appears, therefore, that under the laws of Venezuela the right of action for personal injuries does survive and pass to the heirs of the deceased, in so far as damages for corporeal injuries is concerned. This, in the opinion of the umpire, presents a different case from the above cited. The question is ably and, in the opinion of the umpire, convincingly argued in the opinion of Mr. Commissioner Frazer. Following its reasoning, the umpire is of the opinion that the law of the domicile determines the rights. Metzger, therefore, being domiciled at the time of his death in Venezuela, his heirs will take according to Venezuelan law, and they may recover in this case such damages as are just for corporeal injuries, including the expense and loss of time which naturally followed the injury, but not for the damages to his feelings and reputation. Neither can anything be allowed in the way of punitive or exemplary damages against Venezuela, because it appears, as above stated, that the general commanding the army promptly took action against the offender and punished him by imprisonment.

The claimant states his damages at 20,000 bolivars, and the Commissioner for Germany is of the opinion that he should be allowed one-half that sum, or 10,000 bolivars. There is no evidence in the "expediente" to show how severe his wounds were, nor any evidence of medical or surgical treatment or of any expense on account of same, and the clear presumption from the proofs is that the injuries were not permanent and did not in any way conduce to his death. As has been said, the action of the Venezuelan Government in promptly arresting and punishing the offender relieves her from any liability for a malicious injury, and the damages which Metzger might have recovered, if still living, because of the insults and indignities and damages to his reputation

and standing in the community, not passing to his heirs under either the German or the Venezuelan law, which excludes all damages save those based on corporeal injuries, the umpire is of the opinion that the amount allowed by the German Commissioner is not warranted. If the claimant had, as was his duty, particularized the nature, extent, and severity of his wounds, it would be much easier to make a satisfactory assessment, and if the amount allowed should not be full compensation, it is because of this lack of evidence.

Basing the amount to be awarded upon the grounds above stated, in the opinion of the umpire the sum of 3,000 bolivars is ample. It results that the claimant will be allowed 3,000 bolivars without interest.