## ORINOCO ASPHALT CASE

DUFFIELD, *Umpire:*

The Commissioners have agreed upon the allowance of the first six items

[1] See *infra*, p. 436.

[2] See Topaze case, Vol. IX of these Reports, p. 389; De Caro case, *infra*, p. 635; Martini case, *infra*, p. 644.

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of the claim, at 4,414.82 bolivars. They disagree upon items 7 and 8. These are based upon the alleged refusal of the Venezuelan consul at Trinidad, for the period between April and October, 1902 — twenty-two weeks — to give clearance papers to the boats of the company, *Ibis* and *Explorador*, from Port of Spain, Trinidad, where the principal office of the company is, to the Island of Pedernales, where its mines are, in consequence of which the said boats were forced to lie in Port of Spain for the period in question, and communication between the mines and the outside world was cut off. In addition to its rights under international law, the company asserts the concession to it from the Government of Venezuela to maintain communication between its mines and Trinidad by means of its boats used for that purpose, and in support of it sets up an Executive decree of February 7, 1901; it also claims a right under the laws of Venezuela — la ley XVI de Hacienda, Articulo 39. The damages arising from this act of the Government are presented in detail.

The Commissioner for Venezuela maintains that his Government is not liable, because in April, 1902, revolutionary forces occupied the country about Pedernales, where the mine of Pedernales is, and Guiria, where the custom-house of Venezuela for that territory is situated, and the Venezuelan consul refused to clear the boats on that account. He insists that the action of the consul was justified because the —

> boats which were cleared from Guiria would serve the revolution which took them; and besides, if the revolution collected duties it would bring them in money resources, and that the Government of Venezuela had declared the blockade of these regions, and the consul in Trinidad obeyed the Government's decrees. That because of the war, guarantees were suspended, and in such a period free transit or free traffic especially suffers when it is a traffic of boats which may serve or do serve the revolutionists, and that in no event would Venezuela consuls clear boats for places occupied by the rebels.

The first contention of the Commissioner for Germany, based upon an alleged concession to the company, is not supported by the facts. Article 1 of the Executive decree of the 7th of February, 1901, is as follows:

> ARTICLE 1. The port of Pedernales, on the island of the same name in the delta of the Orinoco, is established only for the exportation of asphalt and petroleum which is taken from the mines belonging to the Orinoco Asphalt Company.

In the opinion of the umpire, this is in no legal sense a legal concession; no consideration appears to have been given for it. It is a mere privilege or favor shown to the company, by which, instead of clearing for or from Guiria, they may clear from Port of Spain to the island where their works are, and *vice versa*. So far as this decree goes, the umpire is clearly of the opinion that it might be at any time revoked by the Government of Venezuela.

The argument that any special rights were conferred upon the company or any other importers by article 39 of the sixteenth law of hacienda is not, in the opinion of the umpire, maintainable. The law merely provides and prescribes the official duties of consuls, for the ordinary breach of which it would seem clear that Venezuela would not be liable, and that the party injured thereby must look to the consul and his bond for indemnification.

The case, therefore, must be decided upon general principles of international law, whether Venezuela, even though her ports were in the possession of revolutionists, might lawfully close them to traffic with neutrals. That she did so in this case, and that the consul acted under her instructions, is not disputed.

It is said in Wharton's Digest of International Law, section 361, that the received tenets of international law do not admit that a decree of a sovereign

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government closing certain national ports in the possession of foreign enemies or of insurgents has any international effect, unless sustained by a blockading force sufficient to practically close such port.

Mr. Lawrence, in a note on Wheaton, Bk. IV, chapter 4, paragraph 5, states the rule and the reasons for it as follows:

> Nor does the law of blockade differ in civil war from what it is in foreign war. Trade between foreigners and a port in possession of one of the parties to the contest can not be prevented by a municipal interdict of the other. For this on principle the most obvious reason exists. The waters adjacent to the coast of a country are deemed within its jurisdictional limit only because they can be commanded from the shore. It thence follows that whenever the dominion over the land is lost by its passing under the control of another power, whether in foreign war or civil war, the sovereignty over the waters capable of being controlled from the land likewise ceases.

In 1861 New Granada being in a state of civil war, its Government announced that certain ports would be closed, not by blockade, but by order, and it was held that the method was one which could not be adopted against a foreign enemy holding the ports in question, and consequently could not be adopted against a domestic enemy. Lord John Russell said on this subject that —

> "it was perfectly competent for the government of a country in a state of tranquillity to say which ports should be open to trade and which should be closed; but in the event of insurrection or civil war in that country, it was not competent for its government to close ports which were de facto in the hands of the insurrectionists, and that such a proceeding would be an invasion of the international law relating to blockades." Subsequently the Government of the United States proposed to adopt the same measure against the ports of the Southern States, upon which Lord John Russell wrote to Lord Lyons that " Her Majesty's Government entirely concur with the French Government in the opinion that a decree closing the southern ports would be entirely illegal, and would be an evasion of that recognized maxim of the law of nations that the ports of a belligerent can only be closed by an effective blockade." In neither case was the order carried out. In 1885 the President of Colombia, during the existence of civil war, declared [certain ports] to be closed without instituting a blockade. Mr. Bayard, Secretary of State for the United States, in a despatch of April 24th of that year fully adopted the principle of the illegitimateness of such closure, and refused to acknowledge that which had been declared by Colombia. (Hall, p. 37, note.)

In the case of the *Only Son* the umpire of the United States and British Commission of 1863 allowed the claim of the owners of the schooner of that name for the wrongful act of the collector of customs at Halifax, Nova Scotia, compelling the master of the schooner to enter his vessel and pay duty on his cargo, instead of reporting for a market and proceeding elsewhere if he thought it advisable. In the preceding diplomatic correspondence the British Government had acknowledged its liability, but claimed that no loss was suffered. (Moore on Arbitration, pp. 3404-3405.)

In the case of the *William Lee*, a whaling ship detained for three months by the refusal of the port to give a clearance, the claimant was allowed $22,000. (Moore, pp. 3405-3406.)

In the case of the *Labuan*, United States and British Claims Commission, 1871, the claimant was allowed by the unanimous judgment of the Commission $37,392 because the custom-house officials at New York refused his vessel a clearance from November 5 to December 13, 1862. The action of the customhouse in New York was in pursuance of instructions from the United States Government, which claimed the right to detain the ship, in common with other vessels of great speed destined for ports in the Gulf of Mexico, in order to prevent the transmission of information relative to the departure or

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proposed departure of a military expedition fitted out by the authorities of the United States. The contention of the claimant's counsel was that the refusal to clear the vessel was in effect taking private property for public use, and, while it may have been justified by the necessity of the case, it involved the obligation of compensation, citing 3 Phillimore, 42, and Dana's Wheaton, 152, note. (Moore, pp. 3791-3793.)

The umpire is therefore of the opinion that the Government of Venezuela was not justified in directing its consul at the Port of Spain to refuse clearances to the ships of the claimant company. It appears from the case, however, that the Venezuelan consul at the Port of Spain offered to clear —

> the boats belonging to that company, which she intends shall carry provisions to the laborers in the mines. * * * But under the written conditions sent by the Government * * * that that company must pay into this consulate, upon the delivery of the clearance of this boat, the amount of all the duties which it would have to pay at the custom-house at Guiria.

This conditional permission was not accepted, and the claimant was justified in refusing it.

It results that the claimant company is entitled to recover such damages as they have established by their proof, which are:

Item 7a, 640 bolivars for the loss of freight for the lighter *Ibis*, 40 tons capacity one trip in the month of April.

Item 8a, for loss of freight of lighter *Ibis*, twenty-two weeks, 22 voyages, at 1,248 bolivars the round trip, 27,456 bolivars. It is held by the courts of England and the United States that damages in cases of demurrage, which is entirely analogous to the claimant's claim, if it is not in fact demurrage, are measured by the value of the use of the vessel. (Re Trent *v.* Humber Company, Eng. Law Reports, 4th Chancery, 112; The *Pietro G.*, 39th Federal Reporter, U.S., 366.) The United States Supreme Court have held, in The Potomac *v.* Conor (105 U.S., 630), that the average of net profits on the trip for the season may be adopted as the measure of damages for the loss of the use of the vessel resulting from collision. This latter case, however, was the case of a merchant vessel doing a general carrying business. The *Ibis*, it appears, was the company's own property and engaged in transporting the company's freight. It is quite certain that it would have had full freight from Pedernales to Trinidad on every voyage, and, taking into consideration the carrying on the return trip of supplies for the mines and food for the men, as well as machinery, it is fair and reasonable to believe that she would have had full freight on her return trip. The umpire therefore agrees with the Commissioner for Germany in the allowance of items 7 and 8a, viz, 624 bolivars and 27,456 bolivars.

Item 8b, for injuries occasioned to the *Ibis* by her long stay in salt water, 728 bolivars, is certainly a proper charge. It is held by the Supreme Court of the United States, if a vessel is capable of being repaired and restored to her original condition, the cost of such necessary repairs is a correct rule of damage. (The *Granite State*, 3 Wall., 310; The *Baltimore*, 8 Wall., 377.)

Item 8c, 4,520.66 bolivars for the wages of the captain and crew of the *Explorador* during the time she was detained in Port of Spain, seems reasonable in amount, and no reason is presented in the opinion of the Commissioner for Venezuela why it should not be allowed. The umpire agrees in the allowance by the Commissioner for Germany of this item.

The same is true of item 8d, which is like 8b except that it is for the *Explorador* instead of the *Ibis*. For the reasons stated in the other item, the amount is allowed, 829.74 bolivars.

Item 8h, 161,200 bolivars, is made up by the claimant as follows: By reason

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of the action of Venezuela, through her consul in Trinidad, the *Explorador* and the *Ibis* were practically put out of commission from the latter part of April to some time in October, 1902 — twenty-two weeks. As the claimant was unable to use the boats, and presumably for the same reason which prevented their use could not have obtained the services of any other vessels, even if they could have cleared for Pedernales, which under the decree establishing that port is doubtful, all operations at the mines were stopped because the character of the asphalt was such that any long exposure depreciated its quality and value. The claimant therefore charges for one hundred and twelve working days during this period, and claims that the normal production of the mines was 30 tons a day, and they could have produced during those days 3,360 tons, which was worth $25 United States gold (130 bolivars) a ton, which was the average price for the whole of that year, aggregating 436,800 bolivars, less the expense of production, transportation, and exportation, 275,600 bolivars, leaving a balance of 161,200 bolivars. It will be seen, however, that this makes no deduction for the value of 3,360 tons of asphalt at the mine; but this asphalt was never removed, and is still presumably as good in its natural state as it was during the period in question. There is no claim that the market value of the asphalt has fallen, and for three months of the year 1902 the claimant's basis of $25 United States gold (130 bolivars) per ton would govern. There is no evidence of the value of the asphalt at the mines in its natural state, although in its trial balance of December, 1901, the company puts in the item of real estate, including the asphalt mine at 405,326 marks. It seems very clear that the principal sum of 161,200 bolivars can not be recovered.

In the absence of any testimony on which any definite appraisal of the value of the asphalt at the mines can be based, the claimant has not shown the actual amount of his damage. In the opinion of the umpire a fair, and perhaps the only, measure of damage is interest on the amount for which the product of the mines would have sold during the period of stoppage of traffic. Perhaps mathematical accuracy might require this interest to be calculated for the average time, but under all the circumstances of the case the umpire is of opinion that it is just to allow interest for the entire period. The award made by the Commissioner for Germany on this item will therefore be reduced to interest for one hundred and fifty-four days at 5 per cent on 161,200 bolivars, namely, 3,447.84 bolivars.

On these figures the aggregate sum of 42,027.78 bolivars is awarded to the claimant, which includes the 4,466 bolivars agreed to by the commissioners for items 1-6, inclusive, with interest at 3 per cent per annum on 37,606.46 bolivars from the date of the presentation of the claim, August 10, 1903, to and including December 31, 1903.

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