

**REPORTS OF INTERNATIONAL  
ARBITRAL AWARDS**

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**RECUEIL DES SENTENCES  
ARBITRALES**

**Salem Case (Egypt, USA)**

8 June 1932

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XXXII.

SALEM CASE<sup>1</sup>.

**PARTIES:** Egypt, U.S.A.

**SPECIAL AGREEMENT:** January 20, 1931.

**ARBITRATORS:** Walter Simons (Germany), Fred K. Nielsen (U.S.A.), Abdel Hamid Badawi Pasha (Egypt).

**AWARD:** Berlin, June 8, 1932.

Mixed Courts in Egypt.—Denial of justice.—Capitulations of 1830.—Grammatical interpretation.—“Preparatory work”.—Domestic jurisdiction.—Nationality and diplomatic protection.—Double nationality.—Effective nationality.—Fraudulently obtained nationality.—Affidavits as evidence.

<sup>1</sup> For bibliography, index and tables, see Volume III.



**Agreement between the United States of America and Egypt  
regarding arbitration of the claim of George J. Salem.  
Signed at Cairo, January 20, 1931.**

*French and English official texts<sup>1</sup> transmitted to the Secretariat of the League of Nations by the Department of State of the Government of the United States of America, April 6, 1932. As the United States of America is not a Member of the League of Nations, it did not register this Agreement with the Secretariat<sup>2</sup>.*

Whereas THE GOVERNMENT OF THE UNITED STATES OF AMERICA has presented to THE ROYAL GOVERNMENT OF EGYPT a claim in behalf of George J. Salem for damages resulting from acts of the Egyptian authorities;

Whereas the Royal Government of Egypt has denied its liability in the premises; and

Whereas the two Governments are equally committed to the policy of submitting to adjudication by a competent tribunal all justiciable controversies that arise between them which do not lend themselves to settlement by diplomatic negotiations;

Therefore the undersigned William M. JARDINE, Envoy Extraordinary and Minister Plenipotentiary of the United States, and His Excellency Abdel Fattah YEHIA Pasha, Minister for Foreign Affairs of the Royal Government of Egypt, duly empowered therefor by their respective Governments, have agreed upon the stipulations contained in the following articles :

*Article 1.*

The claim of the United States against the Royal Government of Egypt arising out of treatment accorded George J. Salem an American citizen by Egyptian authorities shall be referred to an Arbitral Tribunal in conformity with the conditions hereinafter stated, the decision of the said Tribunal to be accepted by both Governments as a final, conclusive and unappealable disposition of the claim.

*Article 2.*

The Tribunal shall be composed of three members one selected by the Government of the United States, one by the Government of Egypt and the third who shall preside over the Commission should be selected by mutual agreement between the two Governments. If the two Governments shall not agree within one month from the date of the signature of this agreement in naming such third member then he shall be designated by the President of the Permanent Administrative Council of the Permanent Court of Arbitration at The Hague.

<sup>1</sup> The text is reprinted from the United States Executive Agreement Series, No. 33, 1932.

<sup>2</sup> Note addressed by the Secretary-General on February 3, 1926 (C.L.7. 1926, V), to the Members of the League and States having received the Memorandum of May 19, 1920.

*Article 3.*

The questions to be decided by the Tribunal are the following: first, is the Royal Government of Egypt under the principles of law and equity liable in damages to the Government of the United States of America on account of treatment accorded to the American citizen George J. Salem? Second, in case the Arbitral Tribunal finds that such liability exists what sum should the Royal Government of Egypt in justice pay to the Government of the United States in full settlement of such damages?

*Article 4.*

The procedure to be followed by the two Governments and by the Tribunal shall be as follows: Within ninety days from the date of the signing hereof the Government of the United States and the Government of Egypt shall respectively file with the Tribunal and with the Foreign Office of the other Government a statement of its case with supporting evidence.

Within ninety days from the expiration of such period the two Governments shall in like manner file their respective counter-cases with supporting evidence with the Tribunal and with the Foreign Office of the other Government.

Within sixty days from the expiration of this latter period each Government shall file in the same manner a reply to the counter-case of the other Government or notice that no such reply will be filed. Such replies if made shall be limited to the treatment of questions already developed in the cases and counter-cases and no new issues shall be raised or treated of therein.

*Article 5.*

The two Governments shall have the right to submit to the Tribunal both orally and in writing such arguments as they may desire but briefs of all written arguments shall be filed with the Tribunal and with the agent of the other Government not less than ten days before the time set for oral argument.

Ample time shall be allowed the representatives of both Governments to make oral arguments of the case before the Tribunal. Such arguments shall take place in Vienna and shall begin not more than sixty days from the expiration of the date for filing replies or notices that no replies will be filed.

*Article 6.*

Each Government shall designate an agent and such counsel as it may desire to represent it in the presentation of the case to the Tribunal and otherwise.

*Article 7.*

The decision of the Tribunal shall be given within two months from the date of the conclusion of the oral arguments and in case an award is made against the Royal Government of Egypt the amount thereof shall be paid to the Government of the United States within ninety days from the date of the said award.

*Article 8.*

All written proceedings in connection with this arbitration shall be in both the French and English languages. The oral arguments before the

arbitral commission may be made in either English or French but a translation thereof shall be submitted to the Tribunal and to the agent of the other Government at the end of each argument.

*Article 9.*

Each Government shall bear its own expenses including compensation of the arbitrator named by it.

The compensation of the third arbitrator and general expenses of the arbitration shall be borne by the two Governments in equal proportions.

Done in duplicate in the English and French languages at Cairo the twentieth day of January A.D. 1931.

William M. JARDINE.  
(*Seal.*)

A. CHELA.  
(*Seal.*)

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AWARD IN THE ARBITRATION CASE  
BETWEEN THE GOVERNMENT OF THE UNITED STATES  
OF AMERICA AND THE GOVERNMENT OF HIS MAJESTY  
THE KING OF EGYPT CONCERNING THE CLAIM OF  
GEORGE J. SALEM.

*Members of the Arbitral Tribunal :*

DR. WALTER SIMONS.  
DR. FRED K. NIELSEN.  
ABD EL HAMID BADAQUI PASHA.

This is a claim of the Government of the United States for an indemnity amounting to 211,724 Egyptian pounds (gold), on behalf of George J. Salem who was born in Egypt and naturalized in the United States.

The claim is based—

1. Upon the treatment experienced by Salem from the Egyptian local and mixed authorities which is regarded as a denial of his rights.
2. Upon the alleged violation of treaty rights of the United States.

FACTS.

The *facts* are as follows:

George J. Salem was born at Mehalla el Kobra, in the Province of Garbieh in Egypt on the 20th of February, 1883. About twenty years prior to this date his father, Josef Salem, had emigrated there from Damascus, Syria, to do commercial business. Josef Salem died in 1896 and left behind two minor children, George and Marie. These children were entrusted to the guardianship of Goubran (Gubrail, Gabriel) Salem, the childless brother of the deceased, who had also emigrated from Damascus to Egypt and was living at Mehalla. Goubran took possession of the inheritance of his brother and looked after the education of the children. The family including two

sisters of Josef and Goubran, Fadwa, who is married to Dr. Nicolas Hawara, and Selma (Salma) Salem belong to the Greek Church.

George Salem, after having been taught at several schools in Egypt and Syria, partly foreign and partly native, and finally at the Khedivial Agricultural School at Gizeh, went in 1903 to the United States of America. He studied at the Missouri State University at Columbia, Missouri, and graduated in 1905 with the degree of bachelor of science in agriculture. From 1905 to 1907 he worked as an agricultural expert with the Holt Manufacturing Company at Stockton, California; from 1907 to 1909 he was employed in the same position with the Reed Allan Realty Company of Chicago, Illinois, and his yearly income was 5,000 dollars and travelling expenses in addition. On the 18th of December, 1908, he was naturalized as an American citizen before the superior court of Cook County, at Chicago, having stated he was an Egyptian subject.

In 1909 George Salem returned to Egypt with an American passport. On the 20th of November of this year he was registered at the native court in Cairo as an agricultural expert. As such he carried out some work during the following years and on the 17th of January, 1918, he was suspended from office for six months for some irregularities, by a judgment of the above-mentioned court confirmed in the second instance. On the 1st July, 1912, he took a position as secretary to the Khedivial Agricultural Society in Cairo, but in October 1913 he was dismissed. Thereafter with the exception of several journeys he lived in Cairo or with his Uncle Goubran, who employed him in the administration of his large cotton fields.

In order not to endanger his rights as an American citizen through too long residence in Egypt, George Salem endeavoured to get a position as agricultural expert with the American Agent in Egypt or to be attached in some position or other to the American consular service in the Near East. But his endeavours were without result and he was compelled to return to America in 1911 to have his passport renewed. In 1913, George Salem was implicated in a criminal process in which he referred to his being an American citizen. The Egyptian Ministry of Foreign Affairs, therefore, asked the American Diplomatic Agent and Consul General at Cairo whether the consular authorities of the United States considered George Salem as an American citizen under their administration. The Agent, after receiving instructions from the State Department in Washington, answered by letter of July 9, 1913, that his Government considered that a presumption of expatriation had now arisen against Mr. Salem under the provision of section 2 of the act of March 2, 1907, and that he was therefore no longer entitled to protection as an American citizen. This answer was communicated to the authorities of the Province of Garbieh with instructions to treat George Salem as a local subject.

During a new visit to the United States in 1913, Salem procured an American passport dated July 16, 1913, and valid for one year. He had alleged before the Department of State at Washington that, at the time of his naturalization in 1908, he was neither an Egyptian local subject nor an Ottoman subject, but a Persian subject. In view of the documents produced by Salem the Department of State resolved that the period of continued residence in a foreign country provided by the act of 1907 as implying the presumption of expatriation was, in the case of Salem, not that of two years as applicable to an Egyptian who is a naturalized American citizen and has returned to Egypt, but that of five years applicable to a naturalized American citizen who takes up his residence in a foreign country other than his state of origin.

The Department informed the Diplomatic Agent of its resolution and the Agent, by a letter of August 24, 1913, passed the information to the Ministry of Foreign Affairs in Cairo, adding that he had registered Salem as an American citizen, entitled to the protection of this Agency and Consulate General. At the same time, Salem got a certificate of American citizenship. But when he referred to this citizenship during the criminal procedure, producing the passport of July 16, 1913, and the consular certificate, the Egyptian authorities doubted at first the validity of the passport and retained it; after hearing from the American Agent Arnold, on the 6th November, 1913, that the passport was valid and George Salem an American subject, they returned the passport to the Agent, but at the same time the Egyptian Minister for Foreign Affairs informed the Agent in his letter of the 2nd December, 1913, that his Government must reserve all objections regarding the real nationality of George Salem before he was naturalized in America.

Since the passport of July 16, 1913, was only valid for one year Salem returned again to the United States in 1914 in order to have it renewed. To get the permission of a permanent stay in Egypt, he requested his uncle Goubran to write a letter to the American Agent in Cairo. In this letter dated January 23, 1914, Goubran stated that George was the heir of all his family's fortune, that he, Goubran, himself was very old and had great need of him, that George was the only one in his family to be put in charge of his business affairs and that, therefore, George ought to be allowed to live in any place he liked in order that he might be able to look after those affairs. But neither of these steps taken by George Salem brought him to the desired end.

The outbreak of the World War hindered George Salem from making new journeys to the United States.

In 1915 George Salem was again mixed up in a criminal process. At a demand of the provincial authorities the Egyptian Foreign Office answered that the Egyptian Government could not dispute the American nationality of George Salem because his father had been acknowledged as a Persian subject by a declaration of the Foreign Office dated the 21st December, 1890, in consequence whereof George Salem must be regarded as being under American administration. When, some time afterwards, his rights as an American citizen were again doubted, the Governor of Cairo sent the last American passport, which had been produced by Salem and in the meantime become invalid, to the American Agent and inquired whether Salem still enjoyed American protection. The Agent replied in his letter of the 20th December, 1916, as follows:

I have the honour to inform your Excellency that Mr. Salem owing to his protracted residence in Egypt and his inability to present satisfactory evidence to overcome presumption of expatriation under the Act of March 2, 1907, is not now registered at this Agency as an American citizen, or entitled to the protection of the United States.

At the same time the Agent returned George Salem's expired passport to the Governor after having it duly cancelled. This attitude of the American Agency did not change in 1917 when George Salem was another time prosecuted by the police in Cairo and again referred to his rights as an American citizen (letter of the 15th December, 1917, from the American Agent to General Sir Reginald Wingate, at that time British High Commissioner in charge of the Egyptian Ministry of Foreign Affairs in Cairo).

At the beginning of 1917 Goubran Salem became very seriously ill. George affirms that his uncle sold to him a part of his estate of about 330 feddans, by an agreement acted in February 1917 but antedated the 26th January, 1917, for the price of 18,000 Egyptian pounds for which a receipt was given, that the deed was drafted, after dictation, by the secretary of Goubran, a Nequib Zeitoon, was signed by six of Goubran's friends as witnesses, but that actually this transfer of land was made in order to settle George Salem's claims against Goubran for his inheritance from his father Josef. On the 2nd August, 1917, the deed got a fixed date by registration at the Mixed Court at Cairo but was only transcribed on the 26th October, 1917, at the mortgage office of the Mixed Court at Alexandria.

In the meantime the illness of Goubran Salem took a fatal turn. After the rumour of the transcription of the deed of January 26, 1917, had reached Mehalla on the 27th October, the Deputy Public Prosecutor (Substitute of the Parquet) in Mehalla, a Fahmy Bishay, was called to the sick-bed of Goubran in order to take down a complaint. There he drew up a protocol according to which Goubran denied having sold any part of his estate with the exception of some small pieces which were sold to farmers in the neighbourhood.

According to the protocol Goubran Salem refrained from accusing any named person of having forged a document of sale. Four days later, on the 31st October, 1917, Goubran died.

On the 7th November of the same year a written agreement was made between the heirs according to which Adele, Fadwa, and Salma acknowledged the deed of the 26th January, 1917, as genuine; on the other hand, George retroceded to the coheirs the 330 feddans alleged to have been sold to him, so that the state of an undivided inheritance was practically restored by the agreement. Of this inheritance, Adele, Fadwa, and George received 6/24 each, Salma 5/24, and Marie 1/24. With regard to certain buildings and chattels belonging to the inheritance special conditions were made. The details are shown in the copies of the agreement filed and acknowledged by the high conflicting parties.

On account of the Persian nationality of the deceased and in accordance with Persian law and the Persian-Turkish treaty of December 1875, paragraph 8, the Persian consul general at Cairo claimed the right to raise a fee of 6 percent of the value of the estate of Goubran Salem. For this purpose the Persian consul general asked for the necessary assistance of the local authorities and this was granted in accordance with paragraph 4 of the treaty. But the heirs contested the claim of the consul general alleging that, being Egyptian local subjects, they were not under the authority of the Persian consul in this case of inheritance. At first George Salem had referred to his American citizenship; but on request of the Persian consul general the American Agent, by a letter dated November 3, 1917, had answered that Salem was no longer recognized by the Government of the United States as entitled to American protection. For the resistance which George offered he was arrested by the Persian consulate officials, accused and sentenced on the 5th December, 1917, by the Persian consular court to one month's imprisonment, which sentence however was not carried out.

As there was no doubt that some of the heirs were of Egyptian nationality Abdel Gawad Isfahani who was appointed as provisional manager of the estate by the Persian consul general requested that the Mixed Court at Cairo appoint him finally as custodian. In the proceedings all the heirs, including George Salem, declared by their counsel to be of Egyptian nation-

ality. Finally the court did not appoint Isfahani but Fadwa Hawara as custodian of the estate.

Contrarily to the heirs Isfahani did not recognize as valid the deed of the 26th January, 1917, which reduced the value of the inheritance considerably. He had become aware of the protocol of the Deputy Prosecutor Bishay dated October 27, 1917. While the Parquet in Cairo took no steps by reason of the protocol, Isfahani brought a criminal charge of forgery against Salem on February 28, 1918, and took the role of the civil party during the proceedings. The General Prosecutor entrusted Mohamed Zaki el Ibrashy Bey with the proceedings, not only against George Salem but also against the writer of the deed and the six witnesses, as accomplices.

In these proceedings Fadwa Hawara took the role of the civil party after she was appointed guardian to the inheritance on the 10th of April, 1918. The course of the investigation was as follows: First the accused and a great number of witnesses were heard by Ibrashy Bey, who handed to Seoudy Bey, an official of the Egyptian Ministry of Justice, a great number of documents which bore Goubran Salem's signature including the protocol of October 27, 1917, and requested him to ascertain by comparison of the signatures whether the signature of Goubran under the deed of the 26th January, 1917, was false or genuine. Some of these documents including the original of the doubtful agreement had been handed to the Prosecutor by George Salem. The expert gave his opinion in October 1918. Ibrashy Bey placed it before the accused George Salem and his counsel Me. George Nassif for comment. Both contested the conclusiveness of the opinion, whereupon the Prosecutor put their objections before the expert. Seoudy Bey made a supplementary opinion upholding his first opinion which stated that the signature of Goubran to the deed in question had been forged.

In consequence thereof on the 8th February, 1919, the Prosecutor resolved to summon the accused George Salem and the seven other accused persons before the native criminal court at Mehalla. The first hearing was fixed for the 24th February, 1919. A decision was not given then, as George Salem, through his counsel, applied several times for adjournment.

In March and April 1919 George Salem asked the Egyptian authorities for a passport to England to have an invention patented. He presented himself as a native and received the passport in spite of the pending criminal proceedings. He travelled with his Aunt Salma via Paris and London to the United States. In Paris he succeeded in procuring an American emergency passport.

On the 5th August, 1919, George Salem applied again to the Secretary of State in Washington in order to overcome the presumption of expatriation. This application remained unanswered (cf. American Counter-Case, p. 433). On the other hand, on the 10th of September he gave to the competent official for delivering passports a sworn declaration of his residence in the United States and outside the United States. On the 16th September, 1919, he supplemented his request by a sworn declaration made before a notary in Washington stating the reasons which compel him to return to Egypt at once. On the 18th September, 1919, the State Department granted him a new American passport.

In the meantime Salem's counsel had paid to the Persian consul general the amount of 5,168 Egyptian pounds for taxes and expenses whereon the consul withdrew his charge against Salem. The criminal proceedings were postponed till the 16th October, 1919, and then to 2nd November, 1919, to wait for the return of Salem. On the 16th October, 1919, George Salem,

who had returned to Cairo, received a certificate from the American consul general stating that he was bearer of a passport issued by the Department of State, on September 18, 1919, and an American citizen. By virtue of this certificate he induced the Egyptian Ministry of Foreign Affairs to declare to the Ministry of Justice that his right to American citizenship was acknowledged by the American authorities. The Minister of Justice telegraphed on the 1st of November, 1919, to the Parquet at Mehalla as follows:

The Ministry of Foreign Affairs informs us that the American Diplomatic Agency has informed them that George J. Salem who is accused in a criminal case for which there is a hearing tomorrow, is an American citizen. You are directed to take this into consideration.

During the hearing on the 2nd of November George Salem and his defending counsel applied for discontinuance of the proceedings on the ground of non-jurisdiction as he was an American citizen. George Salem presented the consular certificate and referred to the telegram of the Ministry of Justice. But the court, after having proceeded to the hearing of witnesses, decided to deal with the question of jurisdiction together with the chief case and the hearing was postponed to complete the inquiry. George Salem lodged an appeal against this decision and the other accused also lodged an appeal as their objections had been waived.

The proceedings before the Court of Appeal at Tantah were delayed as the court was in doubt over the question of the date of Salem's naturalization and in order to get more ample information adjourned the hearing several times. In the meantime George Salem had married and undertaken a long journey abroad. In view of this fact the court refused to allow the defending counsel Nassif to plead the matter in the absence of the accused, as proposed by him.

Not till the 5th February, 1921, was the decision issued that with regard to the question of jurisdiction a hearing should take place during the absence of George Salem. A hearing to reach a definite decision was fixed for the 12th March.

The consular certificate showed no legalization when presented by George Salem on November 2, 1919; but this omission was amended at a later date. Nevertheless, it could not be ascertained with certainty from the now legalized document at what date Salem's right of American citizenship had its commencement and whether it had lasted uninterruptedly since that date. For this reason an exchange of communications had taken place between the law courts and the administrative authorities with regard to the purport of the certificate. On the 26th of February, 1921, two weeks before the hearing was fixed, the American Agent sent a letter to the British High Commissioner who at that time controlled the Egyptian Ministry of Foreign Affairs, pointing out that the Government of the United States regarded George Salem as an American citizen entitled to the full protection of the Agency and that he, George Salem, had enjoyed this status without interruption since the 18th of December, 1908, the date of his naturalization. The Agent asked in his letter to have this fact brought before the native court and Parquet at Tantah. In consequence thereof on the 12th March, 1921, the Criminal Court of Appeal at Tantah in accordance with the request of the Parquet declared its lack of jurisdiction in the case against George Salem. The objections of the other accused were again waived and they were referred to the court of Mehalla.

George Salem had often tried to recover the documents which he had submitted to the Parquet at the beginning of the criminal procedure. After this procedure had been discontinued by the native courts George Salem started a new claim for the return of the documents. Upon his request the American Chargé d'Affaires Andrews sent notes on the 26th and 30th December, 1921, to Field Marshall Lord Allenby who conducted the Egyptian Foreign Office at that time, to the effect that the American citizenship of George Salem had not been clearly established when he gave the documents to the Egyptian Parquet but that it was now recognized under recent instructions of the Department [of State] of the United States. Andrews requested the delivery of the documents to the Agency so that they could be restored to the owner. As no reply was received the American Agent and Consul General, Dr. Howell, renewed the request on the 8th February asking the Acting British High Commissioner Ernest Scott for the delivery of the documents as soon as possible; on the same day he wrote directly to the Parquet at Mehalla and requested them to release all the documents belonging to George or Goubran Salem and to return them to the Agency, pointing out that the Parquet was not entitled either now or at any time before to take possession of the documents belonging to Salem, an American citizen. Further correspondence between the American Agency and the British authorities was without result. On the 24th and 27th April, 1923, after Egypt had ceased to be a British Protectorate, Mr. Howell by notes to Sarwat Pasha, the Egyptian Minister for Foreign Affairs, repeated his request that the documents be returned to the Agency without delay in order that he, the Consul General, may do with them what he deemed necessary in his official capacity. He referred to the personal conversations with Lord Allenby, in which he pointed out that if George Salem was a criminal he could only be prosecuted by a competent law court, which in this case would be the American consular law court. The American representative in his letter to the Minister for Foreign Affairs fixed as latest term for the restitution the 30th April, 1922.

As established by the letters presented by the Egyptian Government the reason why the documents had not been returned before was that the Egyptian judicial authorities declared the documents necessary for the proceedings against the other persons accused. In these proceedings a hearing was fixed for the 1st May, 1922, to pass a sentence. The Egyptian Minister of Justice thought it advisable to wait until this hearing had taken place before a definite decision with regard to the return was given. But after receiving the last letter from Consul General Howell, Minister Sarwat Pasha resolved in agreement with the Minister of Justice to give the American consular jurisdiction the precedence over the native jurisdiction and informed the Consul General accordingly by a letter dated April 29, 1922; the return of the documents took place on the 30th April.

Thereupon the American Consul General instituted an investigation against George Salem on the charge of forgery and instructed a solicitor Merzbach Bey in Cairo. Merzbach Bey closed his investigation with a report to the Consul General in which he found that the evidence of forgery was not brought out and that there was no room for prosecution (July 17, 1922). Therefore, the Consul General acknowledged the genuineness of the deed of January 26, 1917, and closed proceedings. The criminal case against Salem was now settled for him in all respects.

George Salem then put forward a claim against the Egyptian Government for damages which he had sustained owing to the criminal proceed-

ings taken against him and to the retention of his documents. He assessed the damages at 96,000 Egyptian pounds and requested the American authorities to present his claim to the Egyptian Government. Acting on the instructions of the State Department the Agency advised Salem to bring an action before the Mixed Court. Salem consequently brought in July 1923 an action before the Mixed Court at Cairo against the Egyptian Minister of Justice. The proceedings were closed by a judgment of the 3rd March, 1924, which dismissed the action. This judgment finished a hearing in which an adjournment was asked for by the counsel for the plaintiff but refused on account of the protest of the defendant's counsel. A further request of the plaintiff to strike the action from the roll as having been withdrawn was also refused because the defendant, a few days before the hearing, had delivered to the court written answers on the merits of the case. The judgment was based on the argument that in accordance with the regulations of the civil law the Minister of Justice cannot be held responsible for mistakes made by the judicial authorities; that a claim for compensation of damages can only be directed against the official in fault and this only in the shape of a so-called *prise à partie*; and that therefore the action against the Minister of Justice was inadmissible.

Against this judgment George Salem lodged an appeal at the Mixed Court of Appeal at Alexandria. After long exchange of memoirs between the parties, in which the faults which Salem brought against the judicial authorities and the question of his nationality were discussed to a certain length, a hearing took place during which the counsels of the parties restricted themselves to the question of the admissibility ("receivability") of the action, as the documents of the criminal proceedings before the native courts were presented too late to the Mixed Court of Appeal and could not be studied by the counsels. In another hearing of the Mixed Court of Appeal on the first of April, 1926, the representative of the Attorney General, Ahmed Bey Fayek, declared as follows:

It is very painful to myself who has the honour to belong to the native judiciary, to see a forger or at least a man prosecuted for forgery presuming to draw the native judiciary before this tribunal and to accuse them of forgery; it requires daring indeed to make such an accusation.

The Mixed Court of Appeal issued judgment on the 2nd April, 1926, declaring the appeal lodged by Salem admissible but without foundation and confirming the judgment of the Mixed Court at Cairo given the 3rd March, 1924, but for other reasons. The court found that the action of Salem inasmuch as it claimed compensation for alleged damages was, or would be considered as receivable but that it was devoid of any serious base, and declared that this decision put an end once for all to the claims raised by George Salem. After Salem's effort to obtain compensation through the Mixed Courts had failed the American Government took up the claim for damages through diplomatic channels, viz., through their representative at Cairo. During the years 1926 to 1930 a great number of memoirs and of letters passed between the two Governments. As no agreement could be reached the Governments made a protocol of arbitration on the 20th January, 1931, by which the case would be referred to an Arbitral Tribunal consisting of three persons to be nominated one by the Government of the United States, another by the Government of Egypt, and the third by mutual consent of the two Governments. According to paragraph 3

of the protocol the questions which the Arbitral Tribunal has to decide are the following:

1. Is the Royal Government of Egypt, under the principles of law and equity liable in damages to the Government of the United States of America on account of treatment accorded to the American citizen George J. Salem?
2. In case the Arbitral Tribunal finds that such liability exists, what sum should the Royal Government of Egypt in justice pay to the Government of the United States in full settlement of such damages?

The procedure to be followed before the Arbitral Tribunal is fixed in accordance with paragraphs 4 to 8.

After Cases, Counter-Cases and Replies in accordance to paragraph 4 had been exchanged between the Governments the Arbitral Tribunal consisting of Mr. Fred K. Nielsen as American Arbitrator, His Excellency Abd el Hamid Badaoui Pasha as Egyptian Arbitrator, and Dr. Walter Simons as Presiding Arbitrator, appointed by both parties, met in Vienna on the 16th November, 1931. Briefs of both parties summarizing the arguments they intended to discuss at the hearing were filed with the Arbitral Tribunal.

The exchange of memoirs and briefs had given rise to objections from both sides.

On the one hand, the American Agent had, from the beginning, formulated a written objection against the method adopted by the Egyptian Agent, viz., to give only a translation of the memoirs (Case, Counter-Case, and Reply) but not of the supporting evidence. He has also objected, before the beginning of the oral arguments, to the admission of an annex (G), added to the Brief of the Egyptian Agent because, under the rules of the protocol, the Brief could not be supported by new evidence.

On the other hand, the Egyptian Agent had formulated and maintained an objection against the fact that a translation of the American Brief was missing and that, moreover, this Brief, in view of its length and importance, was presented too late. In the hearing of 16th November however both Agents abandoned their objections.

The verbal discussions, with interruptions necessary to make translations of the protocols, lasted from the 20th November until the 22nd December, 1931. Ample time was granted to the Agents of both Governments, Mr. Bert J. Hunt for the American Government and Mr. Linant de Bellefonds for the Egyptian Government as well as their juridical advisers, Messrs. Francis M. Anderson and Joseph E. Davies for the American Government and Mr. Geouffre de La Pradelle for the Egyptian Government, to make their pleadings and answers.

The pleadings were protocolled in the English and French languages.

After an exhaustive deliberation continued during several days the Arbitral Tribunal fixed their decision on the 23rd December as shall be shown hereafter, reserving for the Presiding Arbitrator the task of drafting the motives of the decision.

#### DISPUTED POINTS.

As a result of the exchange of memoirs, proofs, and briefs and the oral arguments it appears that the two questions put to the Arbitral Tribunal

implicate a great number of controversial points which may be grouped as follows:

A. The American Government reproaches the Egyptian Government with the following:

I. The different Egyptian judicial authorities have caused severe moral and material damage to the American citizen George Salem by illegal and partial treatment and by excessive delay in juridical proceedings, that is to say :

1. The Deputy Prosecutor Bishay has contravened the law in taking a protocol on the 27th October, 1917, from Goubran Salem, a dying man who was unable to depose; his signature was forged and the rules for drawing up a protocol were violated.

2. The Egyptian authorities, contrarily to the law, assisted the Persian consul general in arresting and prosecuting George Salem.

3. Prosecutor Ibrashy Bey has acted unduly as follows:

(a) He arrested Salem, a well-known and respectable person, and submitted him to the Bertillon process.

(b) The investigations against Salem for forgery were continued for months in spite of obviously insufficient proofs.

(c) He asked Seoudy, who was not registered at the law courts as an expert, to give his opinion with regard to the genuineness of the signature of Goubran Salem on the deed of the 26th January, 1917.

(d) He summoned Salem for trial before the criminal court in spite of the obvious errors and paralogies of Seoudy's opinion.

4. The Egyptian administration of justice is responsible for having allowed a system of investigation according to which the prosecutor acts in the same case as accuser, as investigator, and as judge committing the accused for trial. This is beneath the standard of international law.

5. The president of the criminal court at Mehalla, Fayek Bey, refused the objection of Salem and of his defendant Nassif to the competence of the court and the application to adjourn the hearing; in doing so, he acted in a passionate and partial way and contrary to law.

6. The Criminal Court of Appeal at Tantah has delayed for many months, without any reason, the hearing and decision relating to the question of its competence.

7. The Egyptian judicial authorities made Salem deliver his documents by menace of compulsion and have retained these without any legal reason and in face of the repeated protests of Salem, his counsel, and the American Diplomatic Agency.

8. The Mixed Court at Cairo has, on obviously false grounds, refused as inadmissible the action of Salem for damages against the Egyptian Minister of Justice.

9. The representative of the Parquet at the Mixed Court of Appeal at Alexandria, the former Judge Fayek Bey, has again marked Salem as a forger and prejudiced the law court against him by a preconceived opinion, although Salem was legally exonerated by the competent American consular court from the charge of forgery.

10. The Mixed Court of Appeal at Alexandria has pronounced a sentence on the merits of the case although the counsels of both parties had agreed only to plead the question of admissibility of the action

and in spite of the fact that the counsel for Salem had no opportunity to produce his proofs of the faults of the judicial authorities or of the damage consequently incurred; moreover, the court has dismissed the action by means of obviously insufficient and false arguments.

II. The Egyptian native jurisdiction and the Egyptian Government have violated, through the criminal proceedings against Salem, the treaty rights which are due to the United States as a capitulatory power in virtue of the treaty of 1830 between them and Turkey (par. 5) and the practice of international law of capitulations.

1. The Egyptian judicial authorities had no right to open criminal proceedings against Salem at all. Even if Salem lost for a time the right of diplomatic protection by the United States he has not ceased to be under American jurisdiction in criminal cases.

2. The criminal court at Mehalla, on account of the certificate of the American consul attesting that Salem was an American citizen, should have declared on the 2nd November, 1919, its lack of jurisdiction. The absence of the formality of legalization of the certificate was remedied by the telegram of the Minister of Justice to the Parquet at Mehalla and this telegram was presented to the court.

3. The Court of Appeal at Tantah should also have declared its incompetence after the presentation of the legalized certificate of the American consul general attesting Salem's American right of citizenship but it delayed giving a decision, without any reason, for many months.

4. The Egyptian judicial authorities were obliged to return Salem's documents which were illegally in their possession as soon as they had the proof of Salem's rights as an American citizen, and at the latest when the American consular court discontinued the proceedings against Salem for forgery. In spite of this fact they refused to deliver up the documents until the 29th April, 1922, although they were claimed several times by Salem, his counsel Nassif, and the American Diplomatic Agent.

III. To prove the claim for compensation the American Government states as follows:

1. The reproach of forgery which was laid on Salem the whole time from the beginning of 1918 until 1921 and which was repeated by the prosecutor Fayek Bey before the Mixed Court of Appeal, has caused severe prejudice to his reputation. The struggle for his rights which was continued for years has damaged his health severely and permanently. The American Government estimates the damage at 10,000 Egyptian pounds.

2. By the retention of the documents which constituted his title to a portion of the estate of Goubran Salem, George Salem was prevented from selling considerable parts of the estate to solvent purchasers and who were willing to pay at the time when its value was highest, namely, during the years 1919 and 1920. The value of cotton land had decreased by the time the documents were returned. In consequence there was a loss of 64,009 Egyptian pounds. To this sum are [*sic*] to be added 8 percent interest for the time from 1920 until 1932, amounting to 60,440 Egyptian pounds; total 124,449 pounds.

3. For 15 years George Salem has lost time fighting for his rights, which he could have employed otherwise. In consequence he has lost a profit of 10,000 Egyptian pounds and 4,500 interest at 8 percent for an average period of  $7\frac{1}{2}$  years; total 14,500 pounds.

4. In consequence of the illegal conduct of the Egyptian Government Salem has had travelling expenses amounting to 5,104 Egyptian pounds and 9 percent interest for an average period of 6 years = 2,449 Egyptian pounds; total 7,553 pounds.

5. For attorneys' fees he has had to pay, up to 1922, 5,596 Egyptian pounds; to this add 9 percent interest for 10 years = 4,476 Egyptian pounds, the total coming to 10,072 Egyptian pounds.

6. By reason of attorneys' fees from 1922 up to date, i.e., for 10 years, including this arbitration, Salem has had to pay 34,000 Egyptian pounds.

7. According to the decision of the American Congress the Government of the United States has to deduct from the amount of the award the amount expended by the Government in this arbitration; this would not have happened but for the illegal conduct of the Egyptian Government; the claim is therefore increased by the amount of these expenses, viz., by 10,200 Egyptian pounds.

IV. In support of their complaints on the illegal conduct of the Egyptian Government, the American Government refer especially to the numerous affidavits of George J. Salem and his counsel Me. George Nassif.

B. To these arguments of the American Government the Egyptian Government answer as follows:

I. On the first hand they contest the right of the American Government to bring forward Salem's claim.

1. In their opinion, Salem, as shown by numerous evidences, never had the intention to settle forever in the United States when he was naturalized on the 18th of December, 1908, but only to ensure for his Egyptian interests the protection of a capitulatory power. His repeated voyages to America were undertaken for no other purpose than to prevent the threatened loss of this protection or to regain the already lost protection. Salem procured likewise the passport of the 18th September, 1919, by tricks and false affidavits. His right as an American citizen was only acquired by fraud, was regained by fraud, and cannot therefore be regarded as legal by the Arbitral Tribunal.

2. Even if Salem's American nationality was admitted the question of double nationality arises. As Salem stated himself he was an Egyptian subject (local subject) before he was naturalized; afterwards in his relations with the Egyptian authorities he always declared himself to be an Egyptian subject whenever the American protection was refused to him. In cases of double nationality the international judge must, in the opinion of the Egyptian Agent, ascertain which nationality must be regarded as effective and most suitable to the conditions of the life of the claimant. In this case Egyptian nationality must prevail because Salem lived chiefly in Egypt, because he had his social and economic interests there and because he accepted there some public positions.

3. The Persian nationality as asserted by George Salem and acknowledged by the State Department in 1913 could not be considered by the Arbitral Tribunal to be lawfully acquired.

(a) Salem himself stated in a letter of September 17, 1918, to the Judicial Adviser of the Egyptian Government, Sir M. S. Amos, that his father Joseph and his uncle Goubran had acquired Persian nationality by fraud, that they really were Syrians and had purchased Persian protection in Egypt by paying 40 Egyptian pounds each.

(b) This fact was stated likewise by Salem's counsel Me. Nassif during the different lawsuits between George Salem on the one side and sometimes the physician Dr. Gahel, sometimes Mr. Isfahani on the other side, before the Mixed Courts of Egypt.

Nationality acquired by such means need not be acknowledged by the Egyptian Government.

II. But even if the title of the American Government to bring forward Salem's claim should be acknowledged the claim itself seems inadmissible to the Egyptian Government.

1. In their opinion the claim fails for the reason that the Mixed Courts are alone competent to deal with claims for damages such as that put forward by Salem and that in these cases the diplomatic method is excluded, as may be seen from the genesis of the Egyptian Judicial Reform. The Mixed Courts were created by an agreement between Egypt and the capitulatory powers for the special purpose of founding an international jurisdiction for foreigners instead of the old practice according to which the Egyptian Government did not allow [itself] to be sued by foreigners for such claims before native courts and therefore every claim had to be submitted to diplomatic intervention, whereby the good relations between the interested countries and Egypt might be complicated and disturbed.

2. If the Mixed Courts be regarded as national, the diplomatic channel and the appeal to the Arbitral Tribunal should be excluded in the Salem case by virtue of international law because Salem has not yet exhausted all national legal remedies. Salem has the right to *recours en requête civile* against the decision of the Mixed Court of Appeal at Alexandria in accordance with paragraph 264 of the Mixed Code of Civil Procedure, because the Court of Appeal gave a decision on a point of controversy which had not been pleaded. In case Salem would make use of this legal remedy the Egyptian Government has formally undertaken not to object to it by raising the argument that Salem is an Egyptian subject and in consequence the mixed jurisdiction is incompetent.

3. Inasmuch as the claim is based on an alleged denial of justice of the Mixed Court themselves, it is also inadmissible because the Egyptian Government cannot be made responsible for the functioning of those courts. The organization of the Mixed Courts and the law they apply are based on international agreements; if all the judges are formally appointed by the Egyptian Government the foreign judges form the majority in each Mixed Court and each bench in issuing judgments. The Egyptian Government are bound to ask the powers whose nationals have to be chosen to designate the judges.

III. The conduct of the Egyptian authorities gives no reason for complaint.

1. As far as the complaints of the American Government are based on the affidavits of George J. Salem and Me. George Nassif, these proofs

could not be admitted. They are partial statements of the claimant himself and of his counsel made extrajudicially in outside legal proceedings and without the possibility of cross-examination; in consequence they are inadmissible before the Arbitral Tribunal when they are in favour of the claimant.

2. The other means of evidence show no violation of law, denial of justice, or faulty delay by the native jurisdiction to the prejudice of Salem. All laws and rules in force have been observed by all authorities in question. The delay in the proceedings of the Criminal Court of Appeal is explained by the circumstances.

3. The judgments of the Mixed Court at Cairo and the Mixed Court of Appeal perhaps contain juridical errors upon which however a claim could not be based even if Egypt was responsible for these courts.

IV. The Egyptian Government did explain repeatedly to the American Government that it was far from their thoughts to evade their contractual duties with the United States. No such reproach can be levelled against the Egyptian authorities.

1. When the criminal proceedings against Salem were opened he was no longer under American protection; now with regard to the question of territorial jurisdiction the notions of foreign protection and foreign jurisdiction are identical. This is proved by the fact that when the Egyptian authorities presented to the American consul general certain documents in order that he might prosecute Salem the consul general returned the documents with the remark that Salem was no longer inscribed in the consular register as an American citizen.

2. According to the practice of the capitulations and according to the rules in force for the Egyptian judicial authorities proceedings which have been legally opened before the native law courts must be brought to an end by themselves, even if the accused acquires the nationality of one of the capitulatory powers during the proceedings. In consequence the Criminal Court of Appeal at Tantah had no right to declare its incompetence when Salem presented his legalized certificate of American citizenship. This would have been possible only if the American Agent in claiming jurisdiction on behalf of his national had informed the Egyptian Government officially that Salem had never ceased to be an American citizen since 1908. As soon as such a declaration was made all the Egyptian authorities concerned caused immediately the discontinuance of the proceedings.

3. As he has repeatedly admitted, Salem voluntarily delivered his documents to the Parquet at Mehalla without the least menace of compulsion and with the belief that he was acting in his own interests. The retention of these documents for the purpose of the proceedings was legal. Even after the Criminal Court of Appeal had declared their lack of jurisdiction over Salem there was no need to return the documents as the proceedings against the other accused were continued. At any rate the requests made at first by Salem and by the American Agent to the purpose that the documents should be returned to the owner were inadmissible. Although it cannot be considered as a rule that in a conflict between the native and the consular jurisdiction the latter would take precedence over the other in any stage of the proceedings, the Egyptian Government gave the order to return the documents instantly after the American representative had explained that these

were required for the purpose of taking proceedings by the consular court.

V. As to the claim for damages brought forward by Salem this claim is contested both as to its juridical foundation and as to its alleged amount.

1. The damage which Salem is supposed to have sustained has no connection with the faulty conduct of the Egyptian authorities. The retaining of the certificate of the 26th January, 1917, could not have caused any damage to Salem because this certificate was replaced to all purposes by the inheritance agreement of the 7th November, 1917. When afterwards the estate of Goubran Salem was divided between the heirs, Salem received other estates than those designated as sold to him by the deed of the 26th January, 1917.

2. The claims of Salem are in every way highly excessive.

3. The claim for compensation for an amount which Salem must recognize as legally deducted from the award by the American Government for arbitration expenses is contradictory to paragraph 9 of the protocol of the 20th January, 1931.

VI. In as much as the pecuniary claim of the American Government is based on an alleged violation of the treaty of 1830 between the United States and Turkey, such a claim is not well founded in international law.

1. This treaty confers a unilateral right on the United States. Now, according to established principles of international law, no pecuniary claim for damages can be based on such a one-sided agreement.

2. At last the Egyptian Government remarks that in this case the American Government makes no claim for damages of its own rights. The whole pecuniary claim refers to the damage sustained by the claimant Salem.

C. The American Government replies as follows:

I. With regard to the question of the right of citizenship of George Salem:

1. The American nationality of Salem can no longer be contended in the arbitral proceedings, because according to paragraphs 1 and 3 of the protocol of the 20th January, 1931, this nationality was acknowledged as existing and could not therefore be submitted to a decision of the Arbitral Tribunal.

2. The question whether Salem has obtained the right of citizenship by fraud can only be decided by the competent American law court in accordance with the law of the 29th June of 1906 and cannot be decided by an international arbitral tribunal.

3. Besides, the facts prove beyond doubt that the intention of Salem to become an American citizen was serious and durable. In this connexion the American Government refers to a great number of affidavits, certificates of good conduct and other documents, and to the fact that Salem was living in America for many years and that he has educated his son, an issue of his divorced marriage, in an American school.

4. If double nationality should be admitted, the principle of effective nationality cannot be acknowledged.

5. If George Salem could possess another nationality besides the American nationality, it can only be the Persian nationality. In this

case the Egyptian Government is not entitled to object to the American Government that he is a Persian.

II. The reasons stated by the Egyptian Government for the inadmissibility of the claim are erroneous.

1. It cannot be supposed that the capitulatory powers by agreeing to the Egyptian Judicial Reform had renounced their sovereign right to assist their nationals diplomatically in case the rights of such nationals should be ignored by the Egyptian authorities.

2. By the fact that the Egyptian Government have in express terms submitted to the Arbitral Tribunal the question if such injury existed, they have thereby acknowledged the competence of this Tribunal without regard to an alleged exclusive jurisdiction of the Mixed Courts.

3. The national legal remedies are exhausted by the appeal Salem did lodge with the Mixed Court of Alexandria. There can therefore be no question of any further recourse, viz., *recours en requête civile* in this particular case. At any rate the Mixed Court of Appeal themselves declared that their decision was final. By submitting the question to the decision of the Arbitral Tribunal the Egyptian Government has waived the right to refer Salem to the legal remedy of the *recours*.

#### MOTIVES.

##### *A. Salem's American citizenship.*

I. The Egyptian Government contends that George J. Salem acquired American citizenship by fraud and that in consequence the American Government is not entitled at all to act for him or raise claims for violation of his rights of citizenship by the Egyptian authorities. But this question of title can only be investigated by the Arbitral Tribunal if the power to do so is assigned to us by the high disputing parties under the arbitration agreement of the 20th of January, 1931. In view of the wording of the protocol this does not seem to be the fact.

Paragraph 1 says that the claim of the United States against the Royal Government of Egypt arising out of treatment accorded George J. Salem *an American citizen* by Egyptian authorities shall be referred to an arbitral tribunal, and paragraph 3 precises the first question to be decided by the Court of Arbitration as follows:

Is the Royal Government of Egypt under the principles of law and equity liable in damages to the Government of the United States of America on account of treatment accorded to the *American citizen* George J. Salem?

According to the obvious grammatical construction of these sentences, Salem is indicated to be an American citizen and ought to be acknowledged as such by both high parties; the Court of Arbitration could no longer doubt this fact.

The grammatical construction is however not the only possible one. The sentences of both paragraphs can also be read to mean that by the words "American citizen" the juridical basis for the claim for damages is indicated, and as the claim is disputed between the high parties in its entirety the investigation of the validity of this basis would also fall under the jurisdiction given by them to the Arbitral Tribunal.

That an arbitral tribunal is authorized to interpret the arbitration agreement (compromise) whereunder it is constituted has been contested in certain cases, but the prevailing opinion in international practice acknowledges their right to do so. Such interpretation is however only admissible if the wording of the compromise allows of several meanings of which none can be recognized as the clear will and purpose of the parties. In this case the Arbitral Tribunal has to investigate which meaning agrees with what has been the joint will of the parties when they concluded the compromise. Now, in order to ascertain the joint will of the parties, an arbitral tribunal is likewise entitled, according to the predominating international practice, to refer to the discussions and negotiations which led to the compromise. Such negotiations are embodied in the correspondence between the American General Agency in Cairo and the Egyptian Government which was presented by the high disputing parties to the Arbitral Tribunal (see annexes to the American Case, Nos. 2 and 3, and the American Counter-Case, No. 155, and annex C of the Case of the Egyptian Government). From this correspondence the following can be noted:

1. On the 8th September, 1928, the Egyptian Minister of Foreign Affairs presented to the American Diplomatic Agent a memorial which had indeed only a semi-official character but which was referred to officially, later on, by both disputing parties. In this memorial is written under No. 19 (annex C, p. 26) the following:

According to a well-established rule of international law, in cases where a subject has acquired a foreign nationality by fraud and such foreign nationality has been recognized by his government, that government is entitled, on discovery of the fraud, to withdraw its recognition. It will, therefore, be evident that the facts now disclosed as to the fraudulent means used by George Salem to obtain recognition first of Persian and then of American nationality, entitle the Egyptian Government to withdraw their recognition of Salem's American citizenship. The Ministry for Foreign Affairs accordingly reserves this question for discussion with the United States Legation.

2. In the note of the 11th March, 1929 (annex C, pp. 34 ff.), the Egyptian Minister of Foreign Affairs refers to this point as follows:

The Royal Government wishes specially to draw the attention of the Government of the United States to the following consideration: in view of the facts which have lately come to the knowledge of the Royal Government and which are set forth in the semi-official memorial to the Legation of the United States in November 1928 it seems possible that Salem succeeded in being treated as a Persian subject only by fraud. If this is the case (i.e., if his Persian origin has not been established) it would follow that he also could not legally acquire the American nationality.

3. On the 25th June, 1929, the Egyptian Minister of Foreign Affairs handed to the American Minister an *aide-mémoire* wherein the Egyptian Government declared themselves ready to attest to the Government of the United States that this Government declare now that Salem had possessed the American nationality without interruption, but that they have to point out that Salem has in reality not been treated by the American authorities in Egypt as if he had possessed this nationality uninterruptedly and that he himself had declared sometimes to be an

American and sometimes to be of another nationality. (See annex C, p. 47, No. 2.)

4. The American Ministry replied in a letter of the 26th June, 1929 (annex C, p. 46):

I note that the Royal Egyptian Government is prepared to give the Government of the United States official assurance in writing that it now declares that Salem has enjoyed American citizenship uninterruptedly.

5. The Egyptian Minister of Foreign Affairs *par interim* replied by letter dated the 30th June, 1929 (annex C, p. 48):

On reading your letter of the 26th June it seems to me that the statement which was sent you with regard to the nationality of Salem has possibly not been understood exactly. I have said that the Egyptian Government is ready to attest to the Government of the United States that *this latter Government* now declares that Salem had possessed the American nationality without interruption but that the Egyptian Government points out at the same time that in reality Salem has not been treated by the American Authorities in such way as if he was in possession of the American nationality without interruption and that Salem himself sometimes stated he was an American citizen and sometimes a subject of another State.

I wish to make this point quite clear in order that no misunderstanding exists between us with regard to this matter and that you may inform your Government exactly of the point of view of the Egyptian Government.

6. The American Minister replied in his letter dated 8th July, 1929 (annex C, p. 50):

I cannot refrain from expressing some surprise that in the statement accompanying Your Excellency's last letter there appears to be a certain hesitancy to furnish me with a clear and unequivocal recognition of Mr. Salem's American citizenship. By the foregoing I do not mean in any sense to question the *bona fides* of the presently considered proposal for the settlement of this case but rather to express the opinion that it would be entirely consistent with the bases of that proposal were such recognition to be stated in advance and a clear assurance furnished me that, should Mr. Salem institute the suggested *requête civile* proceedings before the Mixed Court of Appeal, no question would be raised by the Egyptian Government as to his right to come before that Court as an American citizen in good standing.

7. On the 23rd July, 1929, the American Minister left an *aide-mémoire* with the Egyptian Minister of Foreign Affairs, page 1, in which was written (annex C, p. 51):

The presently received telegram from the American Government states in part that the Department of State understands that "the Egyptian Government will admit for the purpose of the re-submission of the case to the Court of Appeals Salem's continuous citizenship as an existing fact".

In an annex to the *aide-mémoire* the American Minister suggests to the Egyptian Government the following wording:

For the purpose of obtaining a new judgment in the case of Salem the Egyptian Government is willing to admit as an existing fact the uninterrupted nationality of Salem.

8. The Egyptian Government handed the American Minister draft of a note to settle the case [of] Salem on the 29th November, 1929.

The American Minister sent an explicit reply on the 13th February, 1930, in which is said (annex C, pp. 56, 57):

No. 10 *c.* (It is suggested) that Salem's American citizenship [shall] be recognized without question.

No. 12. My Government understands that the Egyptian Government, by [its] draft Note also accepts stipulation 10 (*c*) in that the Egyptian Government is willing to recognize Salem as an American citizen in good standing continuously since the original notification given by the American Diplomatic Agency to the Egyptian Ministry of Foreign Affairs in October, 1919.

No. 16. If an agreement cannot be reached on one of the above alternatives, my Government feels it necessary to demand an immediate settlement of the case through diplomatic channels or by arbitration.

9. On the 20th March, 1930, the Foreign Egyptian Minister replied (annex C, pp. 60, 61):

The purpose on the draft of the 29th November, 1929, was to convey the assurance of the Egyptian Government asked for by Your Excellency on the 8th July, but it did not signify that the Egyptian Government agreed with the terms of the *aide-mémoire* of 23rd July.

The Egyptian Government has no difficulty in accepting the proposal of the Government of the United States that the questions which are in dispute between both Governments in the case of Salem should be submitted to an arbitration.

10. During the following negotiations concerning the wording of the arbitration agreement the American legation proposed in their letter of the 14th May, 1930 (annex C, pp. 62 ff.), a protocol of which No. 3 is in accordance with paragraph 3 of the final protocol.

11. To this proposal the Egyptian Government replied in their letter of the 3rd of June, 1930, that the paragraph would suitably be worded otherwise. They attached to the letter the draft of a protocol wherein paragraph 3 reads as follows (annex C, p. 67):

Paragraph 3. The questions the Tribunal have to decide are as follows:

(a) Can the Egyptian Government according to International Law be held liable to the Government of the United States for a judgment of the Mixed Courts instituted in Egypt by international conventions?

(b) If this question is answered in the affirmative, can the judgment of the Mixed Court of Appeal of the 22nd April, 1926, be regarded as a denial of justice?

(c) If this question is answered in the affirmative, must the measures taken by the Egyptian domestic and legal authorities against George J. Salem during the time from 1st November, 1919, until 30th April, 1930, be regarded as failure on the part of the Egyptian Government to fulfil their duties towards an American citizen?

12. The American Minister objected to this proposal by letter on the 17th July, 1930, as follows (annex C, p. 68):

The Government of the United States purposely drafted Article 3 of the Protocol in broad terms in order that the Royal Egyptian Government might raise at the arbitration any points having to do with the general question of its responsibility as a Government towards the Government of the United States and the American Claimant.

13. The Egyptian Government replied accordingly on the 22nd September, 1930 (annex C, p. 72):

The Egyptian Government notes with satisfaction the explanation of the Government of the United States that they have drafted paragraph 3 of the protocol purposely in broad terms to enable the Egyptian Government to raise all points at the arbitration with reference to the general question of their responsibility to the United States.

14. This interpretation of the Egyptian Government was acknowledged by letter of the American Ambassador of the 17th November, 1930 (annex C, p. 74):

*Third.* The Government of the United States claims the right to present its case to the Arbitral Tribunal in such form as it deems proper in order to develop in an appropriate manner all phases of the case.

*Fourth.* The Government of the United States concedes the right of the Egyptian Government to have the same unrestricted privilege.

From the very development of these negotiations it is obvious that article 3 ought to be interpreted not in accordance with the limited grammatical construction but in a broad sense (*sensu lato*).

II. The Arbitral Tribunal is therefore entitled to examine whether the American citizenship of Salem really exists. Such examination is not impeded by the principle of international law that every sovereign State is, generally speaking, sovereign in deciding the question as to which persons he will regard as his subjects, because the bestowal of citizenship is a manifestation of his international independence. In fact, as soon as the question of nationality is in dispute between two sovereign powers, it cannot be exclusively decided in accordance with the national law of one of these powers. In the present case it should be ascertained whether one of the powers, by bestowing the citizenship against general principles of international law, has interfered with the right of the other power, or if the bestowal of the citizenship is vitiated because it has been obtained by fraud. In order to decide the question of fraud it will be necessary to examine if the false representations with which the nationality of a certain power has been acquired refer to those points on which, according to the law of that power, the acquisition of nationality is essentially dependent. So far the notion

of fraud cannot be constructed without taking into consideration the national law of the power which bestowed the citizenship. In this respect, according to the affirmations of the Egyptian Government, the bestowal of American citizenship to Salem was due to a fraud concerning the essential conditions of the act.

As will be seen from the genesis of the law of March 1907 it was issued for the express purpose of discharging the American agencies abroad of the obligation to defend against the governments to which they are accredited the claims of such persons who, according to the regulations in force, have acquired American citizenship but have done this only for the purpose of returning to the old country or moving to other parts abroad and to enjoy there the protection of the United States. (Cf. Leland T. Gordon, *The Turkish-American Controversy over Nationality*, *American Journal of International Law*, Vol. XXV, p. 666.) If this fact could be proved in the case of Salem the fraudulent acquisition of his American citizenship would be established.

The objection of the American Government that such proof can only be furnished to the American courts who, under the law of June 29, 1906, section 23, are competent to deprive any naturalized person of citizenship if fraud is proved, is not admissible before an international arbitral tribunal. The judgment of a national court may be indispensable to engender the legal effects of such a fraud under national law, but nevertheless in a litigation between States regarding the nationality of a person the right of one State to contest, as acquired by fraud, the nationality claimed by the other State cannot depend on the decision of the national courts of this State. (Cf. Edwin M. Borchard, *The Diplomatic Protection of Citizens Abroad*, p. 522.)

In Salem's case the Arbitral Tribunal does not consider the fraud as being clearly proved. It is true that there is much ground for suspicion. Salem's stay in the United States was one extended long enough to complete the 5-years' period necessary for the acquisition of the citizenship. Later on he repeatedly antedated the beginning of this period to wipe out this impression with the American authorities. He altered the date 1903 to 1902 and 1901. In fact he did come to the United States in 1901, not for a continuous stay, but only for a short visit. His repeated voyages to the United States from 1911 to 1919 inclusive, seem to be undertaken solely for the purpose of maintaining the protection of the United States or to regain the same after his passport had expired. The voyage of 1919 began and was carried through under very special circumstances and Salem gave sworn declarations to the Egyptian authorities as well as to the American authorities which do not coincide with the truth. The sort of life and of activity he manifested during many years, between 1909 and 1919, seem to show an obvious intention of permanent residence in Egypt. Finally the letter of Goubran Salem addressed to the American Agent on the 23rd January, 1914, which was presented by the American Government themselves would make believe that it was the intention of George Salem to serve Goubran's and his own interests by administrating permanently the Egyptian estates of the family.

These grounds of suspicion are however counterbalanced by a number of facts which show the intention of George Salem to settle finally as a citizen in the United States. Such facts are the nature of his activity in the United States until 1909 and the keeping up of friendly relations with several prominent American citizens. It is also clear that his connections with his American acquaintances have never been broken and finally it

is affirmed without contradiction that after the failure of his claim against the Egyptian Government he returned to the United States, that he lived there for a succession of years and that there also his son by his divorced wife Celine Salem gets his education.

It is in no way exceptional or unusual that he who acquires a new nationality should keep up to a certain degree the domestic and business interests which connect him with his previous home. Salem states indeed that it was his intention since 1909 to settle the inheritance of his father and to return to America. Doubtless in view of the deed of 1907 acted between George Salem and his uncle Goubbran the settlement of the inheritance of Josef Salem does not seem a plausible motive for such a long and continuous sojourn. But George would expect to get a liberality from his old relation—and later events have shown that he was constantly preoccupied with this idea; on the other hand, the advanced age of his uncle could make him foresee as imminent an heritage, regardless of its smallness. These prospects allow to state that George Salem had a legitimate interest to stay in Egypt and the fact that he did so with the said intention does not prove that in acquiring the American citizenship he committed a fraudulent act.

As an arbitral tribunal should use the greatest caution when giving a decision that the nationality which is claimed and acknowledged as valid by a sovereign power has been acquired by fraud, and as each doubt in this respect should be interpreted in favour of the validity of the act of naturalization the Arbitral Tribunal cannot, in the Salem case, consider that there was a fraudulent acquisition of American citizenship.

III. Although Salem's right of American citizenship has been acknowledged it has yet to be decided if he possesses another nationality at the same time, which can be opposed to the claim of the United States.

1. When acquiring American citizenship Salem called himself an Egyptian subject. He always fell back on this fact when the protection of the American Agency in Egypt was withheld. In particular when he was cited as a foreigner before the Egyptian courts he referred to his native nationality and contested the competency of the Mixed Courts. Also at the beginning of the criminal proceedings opened against him for forgery, he affirmed through his counsel that he was an Egyptian subject.

This corresponds with the fact that he was born in Egypt and that he lived until 1919 chiefly in Egypt with the exception of the period from 1903 to 1909, that he accepted positions with Egyptian authorities and as far as can be ascertained was never registered as a foreigner with another consulate than the American consulate.

If he was an Egyptian subject when he acquired American nationality, the Egyptian Government could oppose to his naturalization the fact that he had acquired American nationality without the consent of the Egyptian Government, which means that he never lost Egyptian nationality. This follows from the rules of the Turkish law of 1869 which was then in force in Egypt. These rules did not cease to be applied until the time when an Egyptian nationality law was promulgated. That law is based on the same principles as the Turkish law. The status of nationality, as it existed in Egypt before the changes and modifications that took place in its relations to international public law, continued to prevail with regard to other powers even during and after those changes.

As to the notion of local subject, a very complex and contested notion, it is, in this case, out of the question. Concerned with considerations of a purely local character, it has nothing to do with a matter essentially international. The term "local subject" seems indeed to be equivocal, but applied to the case of George Salem it has no other significance or purport than to indicate the Ottoman nationality of a person residing in Egypt. Therefore all the rules relating to this nationality are applicable to the notion of "local subject".

2. The Turkish law which makes the acquisition of foreign nationality dependent on the permission of the Government is internationally not to be objected to. Indeed it is generally admitted that every person of age is entitled to choose his nationality. This rule however does only mean that the State which he leaves cannot reclaim him from the State the nationality of which he acquires, and that the State of origin shall not be entitled to contest the other State's right to bestow nationality on an immigrant. But the above-mentioned principle does not prevent the State of origin making by its national legislation the loss of its nationality dependent on a special permission of its government, which means that it may treat the emigrant again as its national as soon as he returns into its territory.

On the other hand the Arbitral Tribunal cannot admit that where such a return occurs the State of origin be entitled by international law to maintain that its claim is more important in justice than the claim of the new State. The principle of the so-called "effective nationality" the Egyptian Government referred to does not seem to be sufficiently established in international law. It was used in the famous *Canevaro* case; but the decision of the Arbitral Tribunal appointed at that time has remained isolated. In spite of the *Canevaro* case, the practice of several governments, for instance the German, is that if two powers are both entitled by international law to treat a person as their national, neither of these powers can raise a claim against the other in the name of such person (Borchard, l. c., p. 588). Accordingly the Egyptian Government need not refer to the rule of "effective nationality" to oppose the American claim if they can only bring evidence that Salem was an Egyptian subject and that he acquired the American nationality without the express consent of the Egyptian Government.

IV. In the opinion of the Arbitral Court the Egyptian Government is unable to bring such evidence. Indeed from the circumstances it must be assumed that Salem was not an Egyptian subject but a Persian subject when he acquired American nationality.

1. By uncontested documents the American Government has proved that the father of George Salem as well as his uncle Goubran Salem were officially and in express terms treated as Persian subjects by the Persian as well as by the Egyptian authorities. In particular there exists a statement by the Egyptian Foreign Office of the year 1890, in which the Egyptian Government formally recognized the Persian nationality of Josef Salem. According to Persian law the legitimate son of a Persian subject whether born within the frontiers of Persia or abroad, is always a Persian subject. If Josef Salem was a Persian subject consequently George Salem was also a Persian subject. The fact that he seems not to have been registered at the Persian consulate in Cairo as a Persian subject is not an important consideration in regard to his Persian

nationality and the less so as in 1917 the Persian consul general claimed Salem in express terms as a Persian and as subject to his jurisdiction.

In 1917 and 1918 the Egyptian Government also acknowledged the request of the Persian consul general to treat Salem as a Persian subject by assisting him officially when he took official steps against Salem.

Salem as well as his counsel Me. Nassif however contested the validity in law of the treatment of Josef and Goubran Salem as Persian subjects. Salem, in a letter of the 17th September, 1917, addressed to the British Judicial Adviser of the Egyptian Government, Sir M. S. Amos (see annex E to the Case of the Egyptian Government, p. 16), informed him that Josef as well as Goubran Salem purchased the protection of the Persian Government by a payment of 40 Egyptian pounds to the Persian consul. Me. Nassif, in the action which was opened against George Salem as a Persian subject before the Mixed Court by the doctor who treated Goubran Salem in 1918, presented a number of documents from which it seems to follow that the father of Josef and Goubran as well as themselves and their sisters Fadwa and Salma were Ottoman subjects of Syrian origin from Damascus; and in consequence the Mixed Court acknowledged Salem as an Egyptian citizen and declared its non-jurisdiction. (See memorandum of 8th November, 1928, annex C of the Egyptian Case, pp. 24 ff., and Judgment of March 2, 1918, annex F, p. 183.) George Salem has likewise contested his Persian nationality when objecting to the steps taken by the Persian consul general with regard to the alleged forgery of the document of the 26th January, 1917, and has declared himself to be a native.

But neither the documents presented nor the declarations of George Salem and his counsel are sufficient to destroy the evidence resulting from the official attitude of the Egyptian Government and the Persian authorities. In view of this attitude the Arbitral Tribunal is the less in a position to deny Salem Persian nationality as in the present proceedings the Persian Government is not represented and is in consequence unable to vindicate its right to claim Salem as its national.

It is beside the point to ask whether Salem lost his Persian nationality or not by the acquisition of American nationality. Paragraph 7 of the Persian law relating to nationality is interpreted differently by both contending parties. According to the Egyptian version it would appear that, in virtue of Persian law, a Persian subject can only acquire a foreign nationality with the consent of his own Government; according to the American version paragraph 7 says that a Persian subject loses his nationality by unauthorized emigration, but that, in case of his return to Persia, he will be regarded as a Persian subject and will be punished for his emigration. Whatever may be the true interpretation, the Egyptian Government cannot set forth against the United States the eventual continuation of the Persian nationality of George Salem; the rule of international law being that in a case of dual nationality a third power is not entitled to contest the claim of one of the two powers whose national is interested in the case by referring to the nationality of the other power. (Cf. *MacKenzie v. Germany*, 1922, Opinions of the Mixed Claims Commission, United States and Germany, p. 628.)

- B. *As it has been ascertained that the American Government has the right to support George Salem as their citizen against the Egyptian Government we must now*

consider the question whether the claim based on this right can be invalidated by the Egyptian Government through other objections.

I. First the Egyptian Government takes exception to the claim in pointing out that Salem did not exhaust the national legal means which were at his command and that therefore his claim could not yet be urged through diplomatic steps. The American Government replies that this objection can no longer be lodged since by the arbitration agreement exclusive jurisdiction as regards the claim for damages in question is assigned to this Arbitral Tribunal.

This reply of the American Government however does not prove effective. International arbitral tribunals have repeatedly acknowledged that the conclusion of an arbitration agreement involves no abandonment of the claim to exhaust all legal means; for instance see the decision given March 19, 1925, by the American-British Arbitral Tribunal, instituted in accordance with the agreement of 18 August, 1910, in the dispute of the Canadian claims to refund paid customs duties, in *Nielsen American and British Claims Arbitration*, pages 347 ff. The American Government argued that the claimants have not exhausted all legal means, which the laws of the United States put at their disposal with regard to the recovery of payments made in excess of the legal duties. The British Government pointed out that such objection against the arbitration agreement is not admissible.

The Arbitration Tribunal decided:

The submission of the claims to this Tribunal by the Government of the United States constituted no implied waiver and did not operate to take them out from under the ordinary statutory provisions.

However, the rule of exhausting national remedies is not acknowledged by international law as being absolute. The international tribunals which had to deal with this objection have judged it in accordance with the circumstances. The practice of the international tribunals and of the Government of the United States is detailed in the work of the Harvard Law School (*Research in International Law, Nationality, Responsibility of States, Territorial Waters*, Cambridge, Mass., 1929) on pages 153-156. (Edwin M. Borchard, *Theoretical Aspects of the International Responsibility of States* (*Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*), 1929, Bd. I. S. 223 ff., 242 ff.) In this case it must be considered that the *recours en requête civile* is no regular legal remedy but intends to reopen a process which has already been closed by a judgment of last resort. As a rule it is sufficient if the claimant has brought his suit up to the highest instance of the national judiciary.

On the other hand, the Egyptian Government, by constructing the judgment of March 26, 1926, in another sense than the American Government, seem not to be without doubt if the Mixed Court of Appeal did indeed judge *ultra petita*, even if it had to be admitted that to decide a claim that has not been pleaded as to its merits would mean the same as to decide a claim that was not brought forward at all. As to the American Government, they seem to be impressed by the final statement of the court that its decision puts an end once for all times to all claims brought forward by George Salem in his action, and therefore to think that Salem could not reasonably entertain any hope of obtaining a better result by means of the *recours en requête civile*.

In presence of these mutual doubts, the American Government did formulate special conditions in order to secure better chances of a favourable issue of the *recours*. The Egyptian Government feeling unable to accept those conditions, the negotiations concerning this point failed. Under these circumstances and in view of the fact that this Arbitral Tribunal is bound to decide in equity we are of opinion that the objection made to the claim of the American Government and purporting that Salem did not exhaust all legal means at his disposal under the mixed law of Egypt is not well founded.

II. Further the Egyptian Government points out that the claim cannot be dealt with by diplomatic means and by the Arbitral Tribunal, because under the agreements made between Egypt and the capitulatory powers in the year 1873 and the following years the decision of such claims is reserved to the exclusive jurisdiction of the Mixed Courts. The American Government replies that this objection is inadmissible in view of the plain wording of the protocol of January 20, 1931, because the protocol determines in article 3 the competence of this Arbitral Tribunal to decide the claim. Against the view of the American Government the same arguments used in the discussion of the question of the American citizenship of Salem can be employed. As for the exclusive competence of the mixed jurisdiction for Salem's claim, the point was likewise discussed in the preliminary negotiations between the American legation and the Egyptian Government which led to the arbitration agreement.

In the note of March 20, 1930, the Egyptian Minister of Foreign Affairs declares (annex C, p. 61):

It is the view of the Egyptian Government that their international liability cannot be engaged by judgments of the Mixed Courts which exercise the jurisdiction regarding foreigners in Egypt.

On the 14th May, 1930, the American Minister replied (annex C, p. 62):

My Government contends that the Egyptian Mixed Courts are for all intents and purposes municipal courts in so far as concerns actions by or against foreigners. . . . My Government has directed me to say that while it has no objection to meeting these technical defenses if urged by the Government of Egypt, it assumes that the Egyptian Government is desirous of speedy disposition, on its merits, of the real questions at issue and that regardless of technical points at issue it shall still be the duty of the Arbitral Tribunal to decide the case on its merits. My Government would be pleased to be informed whether it is correct in this assumption.

The Minister of Foreign Affairs replied in his letter of July 3, 1930 (annex C, p. 65):

The Egyptian Government does not regard these questions as mere technical defenses; they represent one of the most important elements of the dispute which has arisen between the two Governments and accordingly of the arguments which must be pleaded before the Arbitral Tribunal.

The American Minister acting on special instructions of his Government kept to the proposed wording of article 3 and declared as follows (note of 17th July, 1930, annex C. p. 68):

My Government considers that article, as proposed, eminently fair to the Royal Egyptian Government and could only view any change limiting this general question by technical definitions of the elements composing it as tending to thwart the purpose of the two Governments to bring about a thoroughly just and fair adjudication of this troublesome question.

The American Minister confirmed his version of article 3 in this letter of November 17, 1930 (annex C, p. 74); in the letter of 30th December, 1930 (p. 78), the Egyptian Minister of Foreign Affairs agreed in the following words:

Happily the terms of the letter of Your Excellency dated 17th November make disappear any ambiguity as to the sense and importance of Article 3.

Therefore the Arbitral Tribunal must examine if the objection of the Egyptian Government is well founded.

2. The competence of the Mixed Law Courts of Egypt for passing judgments on claims of foreigners against the Egyptian Government is based on paragraphs 10 and 11 of the *Règlement d'Organisation Judiciaire pour les Procès Mixtes en Égypte* agreed upon between Egypt and the capitulatory powers. Under paragraph 10 all lawsuits between the Egyptian Government and foreigners belong to the jurisdiction of these courts. Paragraph 11, No. 3, provides that the Mixed Courts "are not entitled to construe an act of administration or delay its execution but they are competent to decide on injuries done by such acts to acquired rights of a foreigner recognized by treaties, laws or conventions."

The above-mentioned rules admit the competence of the Mixed Courts to decide such claims as brought forward in the case of Salem; but is this competence an exclusive one? The Egyptian Government states indeed that the Mixed Courts are to be regarded as international arbitral tribunals, and that therefore no further arbitration proceedings can be opened against the decision of these courts. Now it must be admitted that the Mixed Courts have no exclusively national character; if they were instituted at the instigation of the Egyptian Government and by the indefatigable work of the great Egyptian statesman Nubar Pasha, they are with regard to their organization and to the laws which they have to apply the result of agreements concluded with the capitulatory powers. Moreover, they have a sort of international character because the majority of the members of these law courts, in accordance with these agreements, must be foreigners. Experts of the Egyptian mixed jurisdiction, among them official representatives of the American Government, have emphasized the international character of the Mixed Courts. For instance, the American representative in the International Commission which was established in 1880 after the expiry of the first 5-years' period of the Mixed Courts stated in a report to his Government that these law courts are more an international than a national institution (see Brinton, *The Mixed Courts of Egypt*, p. 18, note 12). A similar appreciation of their character was given by Sir Malcolm McIlwraith, British Judicial Adviser to the Egyptian Government for many years. This appreciation has also found many adherents among the authors writing about the mixed jurisdiction.

The Arbitral Tribunal, however, cannot formally accept this appreciation. All the judges of the Mixed Courts were appointed by the Khedive and are

at present appointed by His Majesty the King of Egypt; without any exception they receive their salaries from the funds of the Egyptian Government. The law according to which the Mixed Courts give their decisions as well as their rules of organization are issued as national laws. The Egyptian Government always claimed a certain freedom as regards the appointment of judges. This attitude appeared most clearly when the American Government claimed that among the members of the Mixed Courts American citizens should be of a larger number than as at present. In a note of 16th May, 1926 (see annex 155 of the American Counter-Case, pp. 650 ff.). the Egyptian Ministry of Foreign Affairs wrote as follows:

If the Egyptian Government has agreed with some Powers to select a certain number of judges among their subjects, its own right of free selection of candidates for the rest of appointments has often been acknowledged.

In fact the Great Capitulatory Powers, formerly seven and at present four (France, Great Britain, Italy and the United States of America), are each entitled for themselves to a member (Councillor) of the Mixed Court of Appeal and later on the Egyptian Government has granted to each of them the right to the place of a judge of first instance. In certain cases the Egyptian Government has also granted in like manner to other Capitulatory Powers the right of having appointments either of one councillor and one judge or two judges of first instance. But beyond these limited measures the Egyptian Government always reserved their [sic] right to select freely among all Capitulatory Powers and even Non-capitulatory Powers for the rest of existing or still to be created positions of judges at the Court of Appeal and at the Courts of first instance.

In this respect the Egyptian Mixed Courts differ fundamentally from the so-called Mixed Arbitral Tribunals which have been instituted by the Allied Powers in the treaties of peace with Germany and its allies for the purpose of settling disputes caused by the Great War; they differ likewise from the Mixed Claims Commission instituted between the United States of America and Germany by the treaty of 1922. The decisions of the Mixed Courts of Egypt are no[t] international decisions but are issued in the name of His Majesty the King.

This however would not exclude the fact that the capitulatory powers in concluding the conventions about the institution of the Mixed Courts have abandoned the diplomatic settlement of claims of their subjects, in favour of this national jurisdiction, in all cases in which these subjects can bring forward, according to the *Règlement d'Organisation Judiciaire*, an action against the Egyptian Government before this mixed jurisdiction. That this was indeed the intention of the Egyptian Government and of the capitulatory powers when instituting the mixed jurisdiction is proved by a series of essential facts. In the famous memorandum submitted to the Khedive Ismail by Nubar Pasha wherein he introduced his action for the Mixed Courts (cf. Testa, *Recueil des traités de la Porte Ottomane avec les puissances étrangères*, vol. VIII, p. 355; *Rapport de Nubar Pascha à S. A. le Khédive*, 1867), reference is made to the disastrous effects in the international relations of this country through the increase of diplomatic disputes regarding the violation of the rights of foreigners in Egypt. The abolition of these diplomatic disputes was indeed to the advantage of Egypt as well as of the foreign powers and their representatives in Cairo, as has been acknowledged

by many a representative in the commission negotiations and in the reports sent to their governments. It is a fact that such diplomatic claims have ceased after the institution of the Mixed Courts; the settling of foreign claims for violation by Egyptian authorities of acquired rights has generally passed to the Mixed Courts.

The fundamental idea of the interested governments at the time when they undertook the Reform of the Egyptian Judiciary during the years from 1873 to 1876 is most characteristically shown by the following fact: In accordance with part I, paragraph 40, of the *Règlement d'Organisation Judiciaire* the new laws and the new organization of the courts have no retroactive effect. In consequence all disputes which were pending at the time when the Judicial Reform came in force, viz., on the 1st of January, 1876, fell under diplomatic settlement. In spite of this the capitulatory powers by special agreements with the Egyptian Government have transferred a great number of such disputes to the Mixed Courts or to special commissions formed by their members. In this way the mixed jurisdiction, acting as a real international arbitral jurisdiction, settled in the first years of their existence many hundreds of diplomatic disputes (see Brinton, *l. c.*, pp. 51, 52).

These facts prove that the mixed jurisdiction in Egypt bears different character to the other national courts among the members of which are foreigners and which are instituted for disputes between natives and foreigners, as has been the case in Turkey and Siam. From the attitude of the powers it can be seen that they regard the mixed jurisdiction instituted with their consent and partly composed of judges of their respective nationalities as a substitute or compensation of their former right to raise claims for damages on account of the treatment of their subjects in Egypt by the diplomatic channel.

The Agent of the American Government before the Arbitral Tribunal declared it impossible that the American Government in consenting to the Egyptian Judicial Reform would have intended to abandon one of their most important rights of sovereignty, the right to defend their citizens against a foreign power. The Arbitral Tribunal cannot admit such an impossibility. The American Government pointed out in their memorials that they joined the Judicial Reform of Egypt nine months after it came in force so that they were not engaged at all in its institution. Apart from the fact that the American representatives were busily engaged in the commission for preparing the Reform (cf. Brinton, *The American Participation in the Foundation of the Mixed Courts*, in the *Livre d'Or*, pp. 73 ss.; *idem*, *The United States and the Mixed Courts*, appendices H and J of the above-mentioned work on the Mixed Courts of Egypt, pp. 385-395) this belated adherence cannot cause a difference in the relations between the respective capitulatory power and the Judicial System of the Reform in Egypt.

It must therefore be assumed that on transferring the competence for such claims to the Mixed Courts both parties, the capitulatory powers and Egypt, took upon themselves a certain risk: the capitulatory powers took the risk that the Mixed Courts can decide against them without their having the opportunity to keep open the diplomatic way for settling the claims of their nationals and the Egyptian Government took the risk that the Mixed Courts would consider the foreign interests before Egyptian interests, the foreign judges being in a majority, and that they often would decide for that reason against the Government.

On that account the Arbitral Tribunal is inclined to accept the general view of the Egyptian Government. In this case however the American

Government seems to have insisted tenaciously that the Arbitral Tribunal instituted by the protocol of January 20, 1931, should examine Salem's claim on its merits in spite of the objections raised by the Egyptian Government. This request which is clearly pointed out in the above-mentioned notes of the American Minister has indeed been objected to by the Egyptian Government with the same insistence; but the ambiguity in article 3 as regards this point which the Egyptian Government declared having disappeared may in fact be considered as still subsisting. In these circumstances the Arbitral Tribunal believe it to be their duty to make an exception in the Salem case and to go into the merits of his claim without taking into consideration the decisions of the Mixed Courts at Cairo and Alexandria.

Besides, the objections of the Egyptian Government would only concern one part of the American claims, namely, that part which refers to the damages of George J. Salem. but not that part that is based on the alleged violation of an international treaty, viz., the violation of the judicial prerogatives of the United States in all criminal cases in which their citizens are mixed up in Egypt. This claim is not a private one which the Government only takes up diplomatically in the interest of one of its nationals, but is a claim originating directly from Government to Government. For such a claim the mixed jurisdiction of the Egyptian Reform is not competent.

In this respect, the Arbitral Tribunal would have exclusive jurisdiction to examine the American claim. It is however questioned by the Egyptian Government whether the American Government is entitled to a pecuniary claim only based on the damage which the American citizen sustained through violation of the treaty. The Egyptian Government considers the pecuniary claim to be inadmissible because the treaty on which the alleged violated capitulation rights of the United States are based, namely, the treaty of 1830 with Turkey, granted the United States unilateral rights and because, according to international law, no claim for money in respect of violation of such a one-sided agreement could be entertained. The Arbitral Tribunal cannot acknowledge the existence of such an international rule; it will always depend upon the circumstances whether compensation in money can be claimed in respect of the violation of a valid treaty, even if it be unilateral. This treaty however cannot be described as a purely unilateral agreement. If according to paragraph 5 of the treaty of 1830 Turkey grants to the United States the exclusive right to issue criminal sentences regarding their subjects on Turkish territory by consulate jurisdiction, the Government of the United States undertake at the same time the obligation to exercise their jurisdiction on the same standard of efficiency as the native jurisdiction and consequently to employ all the necessary personal and material means required for that purpose.

*C. The alleged violation of law and denial of justice by the Egyptian authorities.*

*I. The native judicial authorities.*

1. The American Government considers the protocol of 27th October, 1917, as the origin of all the injuries committed by the Egyptian authorities against Salem. The original text of the protocol and of the complaint which led to its drawing up are no more existing. The American Government suggest [*sic*] that they have been destroyed by the Egyptian authorities; Salem and his counsel have denounced the protocol as a forgery and insinuated that the original documents have been destroyed in order to make it impossible to prove the forgery.

The Egyptian Government however points out that the documents disappeared after Salem had been able to inspect them in the office of the Parquet at Mehalla with the other documents of the file of his criminal process and suggest the possibility that Salem appropriated them at this opportunity. The Arbitral Court is unable to take into consideration these suspicions of the high disputing parties; it is sufficient that acknowledged copies of the documents are in existence and that the Substitute of the Attorney General who drew up the protocol has been heard in detail by the investigating prosecutor.

If he is criticized for having taken on record the statement of a dying person who is said to have been unable to give such a statement, this criticism is nullified in the opinion of the Arbitral Tribunal by the result of the investigation. Bishay states indeed that Goubran showed great weakness and that he could only speak in a low voice; what he did say shows however that he retained his mental faculties sufficiently to comprehend the importance of the action. This appears from the great caution Goubran took not to accuse a person by name and that he confined himself in denying a sale which was rumoured to have taken place. If Bishay is further criticized for having neglected to observe certain formalities when drawing up the protocol the Arbitral Tribunal cannot join in this accusation; the special circumstances of the case made it necessary for Bishay to repeat to his secretary the words of the patient.

The medical testimonies which were procured by the American Government to prove that Goubran was already in agony at the time the protocol was taken are not sufficient counterproofs against the protocol: it is known that persons seriously ill emerge sometimes from their state of unconsciousness for a short period during which they keep their mental faculties intact, either without a perceptible outward cause or as the effect of an exceptionally energetic influence exerted on them as in the present case. At any rate, there is no reason to assume that the official act of Bishay was in any way influed by hate against Salem or that he had the intention to treat him unfairly. According to the evidence of Salma Salem, Bishay himself resented keenly his awkward position at the bed of the dying man but had to carry out his official duty, taking down the necessary statements referring to a denunciation of a crime.

The assumption that Bishay received money from Adele Salem as a bribe for this official act has remained unproved.

2. No reproach can be addressed to the Parquet at Mehalla because they have not made further investigations relating to the protocol of 27th October. It contained no accusation against a certain person. On the other hand there is no reason to suspect that they regarded the protocol as forged or illegally made.

3. Salem and—on the strength of his and Me. Nassif's affidavits—the American Government describe the proceedings as if the Egyptian authorities of all degrees had illegally assisted the Persian consul general to blackmail the heirs, and especially George J. Salem, abusing the Persian nationality of Goubran Salem. But this representation does not correspond to the facts; at any rate it cannot be regarded as proved.

Under the Persian-Turkish treaty of December 1875, paragraphs 4 and 8, and the Persian laws the Persian consul was entitled to charge a fee of 6 percent of the value of the estates left in Egypt by Persian subjects who died there. If the Egyptian authorities at the request

of the Persian consul general at Cairo assisted him in executing these treaty rights they have only done their duty.

The fact that they did not refuse this assistance when the Persian consul general proceeded against George J. Salem on account of his opposition to the trustee Isfahani appointed by the consul to take possession of the inheritance, must be taken as a legal attitude of the authorities as long as it could be assumed that a criminal case between Persian subjects was at stake.

After the heirs of Goubran Salem denied they were Persian subjects and claimed to be Egyptians, the dispute regarding the inheritance was duly transferred to the mixed jurisdiction. Neither was any irregularity concerned when the Mixed Court of Appeal by a decree refused to acknowledge the appointment of Isfahani and appointed Fadwa Hawara, a coheir, as trustee of the inheritance. The claim for damage, which Salem originally raised with regard to this appointment and the alleged bad management by the trustee, has not been maintained by the American Government.

4. When Isfahani made his accusation against Salem for forgery of the certificate of 26th January, 1917, and when he constituted himself as a civil party in the criminal proceedings he was as yet [*sic*] entitled to do so by virtue of his official appointment. Ibrashy Bey acted therefore legally when he opened the investigation. The protocol of October 27, 1917, furnished sufficient grounds for this. The Arbitration Court had the impression from the English translation of the Arabic protocols relating to the investigation that it had been carried out by Ibrashy Bey with great care and that the witnesses for the accused had been heard in full detail. No trace of a prejudice against the accused can be noticed. After all, the result of the investigation has not been, as the American Government states, such as to obviously expose the weakness of the evidence furnished for the accusation and in consequence to show the illegality of the trial before the criminal court. There are certain facts which were manifested by the investigation or which became known later on and which are difficult to conceive if it is supposed that the deed dated 26th January, 1917, was really acted [*sic*] shortly after that date. The details need not be referred to, as it is not the task of this Arbitral Tribunal to decide the question of the genuineness or falseness of this document, a question decided on behalf of American jurisdiction by the consular decree ordering the discontinuation of the criminal proceedings against Salem and on behalf of the Egyptian jurisdiction by the sentence of the Criminal Court of Appeal at Tantah declaring its incompetence. For the Arbitral Tribunal it is sufficient to state that by summoning Salem for trial no attempt to violate the law can be found.

In particular the methods used in procuring Seoudy's opinion are not, as the American Government believes, an indication of partiality. Seoudy, it is true, was not registered in the roll of experts admitted to the native courts to which the Parquet, by the rules of procedure, were bound to refer; he was however a qualified official of the Ministry of Justice and, according to the rules, could legally, in view of his special qualifications, be commissioned to deliver such opinions. The Arbitral Tribunal is unable to decide whether his opinion is scientifically defensible or not; if the arguments of the American Agent seem to put forward important reasons for its incorrectness, it cannot be concluded

therefrom that Ibrashy Bey partially disregarded the law in relying, among other evidence, upon this opinion when he opened proceedings before the criminal court.

The American Government take it indeed already as a culpable violation of the rights of Salem that, according to Egyptian law, the public prosecutor who was charged with the investigation was likewise entitled to open the trial, combining thereby in his person the role of accuser, investigating magistrate and judge deciding on the opening of the trial; they assert that such a method of jurisdiction does not procure the accused with sufficient guarantees against a frivolous injury done to his reputation by public criminal proceedings due to an indictment for which no sufficient grounds of suspicion exist. The American Government relies [*sic*] upon principles of the Anglo-Saxon law according to which a special jury other than that judging the crime is charged with the decision if the accused shall be brought to trial or not. But in the different codes of criminal procedure in force with civilized nations this sort of guarantee is not so general that another method of preparing the trial could be designated as being below the standard of international law. The system whereby the trial is preceded by an investigation executed by a judge is under most codes of procedure an exception and only carried out when grave crimes are at stake; generally the investigation is left to the Parquet so that the accusing and the investigating magistrate coincide. It is true that even under the law of such countries where the rules of criminal procedure are based on the French system the result of the investigation is mostly examined by a judge before the trial is opened, but each lawyer conversant with the so-called continental system of criminal procedure knows well that the examination of the file, in the case of minor delinquencies, is more or less formal. According to Egyptian law forgery of private documents is not regarded as a grave crime but as a minor offence (*délit*). Besides, with regard to the vast material which Ibrashy Bey gathered during the investigation, there is no reason to assume that a judge of the court at Mehalla would have refused a motion of the Parquet if this material had been presented for the purpose of a formal decision to open the trial. It cannot therefore be admitted that Salem was damaged by the absence of a rule purporting that a judge and not a member of the Parquet is competent to summon the accused for trial.

The Arbitral Tribunal cannot see how the interests of Salem could have been prejudiced because the files of the investigation by the Parquet were destroyed in the meantime. He was in possession of a complete and legalized copy of the protocol. There is not the slightest proof that the Egyptian authorities were prompted by an unfair intention in destroying these documents. On the other hand the Arbitral Tribunal is of the opinion that there is no sufficient evidence to show that Salem cut out from the copies of the protocol in his possession and which the American Agent presented to them such parts or pages as were not in his favour.

On the whole, it is sufficient to state that a claim for damages cannot be based on the proceedings of the public prosecutor regarding the investigation directed against Salem on the charge of forgery.

5. The same remark applies to the reproaches which the American Government have raised against the proceedings of the native courts in the criminal case against Salem. The American Government relies

[sic] in this respect very largely on the sworn affidavits of George Salem and Me. George Nassif. This kind of evidence is in itself admissible. As has been shown by many instances cited in the Brief of their Agent and counsels and by others known to the Arbitrators, the presentation of such affidavits sworn by parties or representatives of parties, viz., by persons who are interested in the issue of the dispute, are in accordance with the regular practice of international law. The proceedings before international arbitral tribunals are essentially confined to written evidence because those tribunals have no jurisdiction to force witnesses to appear and testify before them; the non-admittance of affidavits would therefore rob international arbitration of a very important means of procuring evidence. It is however left to the discretion of the Arbitral Tribunal to judge how far they will give weight to such sworn affidavits.

In the present case this could only be done in a very limited measure. Indeed, Salem and his counsel have been sorely tried by the long drawn out and fruitless fight with the Egyptian authorities and courts and have thereby reached a state of excitement which it is easy to remark. They cannot, therefore, be regarded as unbiased and objective. It is also clear by comparison of the sworn affidavits one with another and with other evidence contained in the record of this case that they have often made contradictory statements. In particular the various sworn affidavits of George J. Salem show that he could not, even in a sworn declaration, always sufficiently resist the temptation to describe the facts less with regard to the truth than to the advantage he hoped to secure thereby for his own interests.

If under this reservation the proceedings at the courts at Mehalla and Tantah are examined it is found that it is impossible to separate the complaint made in the name of Salem and regarding violation of law and denial of justice from the complaint made in the name of the United States themselves and regarding violation of their treaty rights. For the very first reproach raised against the court at Mehalla regards both Salem's personal rights and the treaty rights of the United States. It is reproached to the court at Mehalla that when Salem and his counsel presented the certificate of the American consul concerning the American citizenship of the accused on November 2, 1919, the court did not immediately discontinue the proceedings. This however cannot be regarded as an injustice against Salem or a violation of the treaty rights of the capitulatory power. After the hearing of the case had been adjourned many times, at first at the request of Salem's counsel, then on account of the non-appearance of Salem (he was on a voyage to the United States), and lastly in view of his imminent return, Judge Fayek Bey had fixed the hearing finally on November 2, 1919, in order to decide the case on its merits. The certificate presented lacked the legalization by the Egyptian authorities which was essential according to Egyptian law and international custom. This legalization was not fully replaced by the telegram of the Minister of Justice addressed to the Parquet, the less so as, in accordance with the telegram, the Parquet did not propose the discontinuance of the proceedings against Salem. Indeed the Minister of Justice had not instructed them to ask for the discontinuance of the proceedings but to consider the facts revealed by the telegram. In consequence the decision of the court to join the proceedings concerning the question of competence with

the merits is no illegal act either against Salem or against the United States.

With regard to the attitude of the native courts it must be taken into consideration that twice, in 1915 and 1917, the Diplomatic Agent of the United States in Cairo informed the Egyptian authorities that Salem was no longer entitled to American protection because a presumption of expatriation had arisen against him, and that the American Agent had even refused to claim jurisdiction against Salem in a criminal case. The certificate which was presented in 1919 does not show when nor under which conditions Salem regained the American citizenship. According to the Egyptian law the courts were instructed to continue the criminal proceedings legally opened against a person even if this person acquired a foreign nationality during the proceedings. This rule is in accordance with the principles of international law and with the jurisdiction of the Egyptian Mixed Courts. (Cf. Maurice de Wée, *La compétence des juridictions mixtes d'Égypte*, 1926, pp. 183, 184; decision of the Mixed Court of Appeal of February 12, 1903, Bull. XV, p. 143, where it is said: "a change of nationality occurring in the course of an action cannot have the effect of divesting a jurisdiction legally vested at the introduction of the claim".) When the investigation against Salem began he was, according to his own statement, a local subject; even if he had claimed that time to be a Persian subject the native courts would have been competent because his alleged crime was committed against local subjects, namely, his Egyptian coheirs. In accordance with the notifications of the American representative at Cairo the Egyptian authorities were entitled to regard him as a native. The United States cannot maintain against Egypt that according to American law the loss of the title to diplomatic protection is independent from the loss of standing under American consular jurisdiction. If an American who has lost the right to claim diplomatic protection by his Government commits a crime in Egypt and the American consular jurisdiction refuses to prosecute him it is self-evident that the territorial jurisdiction recovers the competence to prosecute him; the criminal proceedings directed against such a person by the national courts cannot, therefore, be contested under international law.

The American Government is of opinion that this question should have been only discussed between the Egyptian Ministry of Foreign Affairs and the American consul general and that the national courts ought to have discontinued the proceedings against Salem until the diplomatic action had come to an issue. This the Arbitral Court cannot acknowledge. According to the principle of division of powers—a principle which is also adopted in the constitution of the Egyptian judiciary—the court which is legally dealing with a criminal process is to be regarded as equally entitled to examine and decide, in perfect independence, its own competence and jurisdiction.

Such an examination could not be carried out by the court at Mehalla because the case, through the appeal of Me. Nassif, was transferred to the Court of Appeal at Tantah. This court, it is true, required considerable time to discuss the question of their competence with the administrative authorities. But the Arbitral Tribunal cannot see in this attitude a faulty delay in administering justice because no document was presented from which it could be seen beyond doubt that the American Agency had clearly established to the knowledge

of the occupying power with which, in its quality of directing at that time the Egyptian Ministry of Foreign Affairs, the question ought to have been discussed, that Salem's right of citizenship had been a permanent one: nor that such explanations were given to the competent native authorities of Egypt. Verbal negotiations with Lord Allenby to which the American representative seems to refer cannot replace a clear notification to the native authorities.

The first express and positive declaration is to be found in the letter of 26th February, 1921, from the Diplomatic Agent of the United States at Cairo. Mr. Spriggs, to the Administrator of the Egyptian Ministry of Foreign Affairs, Lord Allenby. The letter reads as follows (American Case, annex 19, p. 164; Egyptian Case, annex A, p. 85):

The American Diplomatic Agency at Cairo presents its compliments to the Egyptian Ministry for Foreign Affairs and in accordance with an instruction which it has just received from the Secretary of State, has the honor to inform the Ministry for Foreign Affairs, that Mr. George J. Salem is an American citizen entitled to the full protection of this Agency and that he has enjoyed this status without interruption from the date of his naturalization on December 18, 1908.

The American Diplomatic Agency would be grateful if the Egyptian Ministry for Foreign Affairs would convey this fact, through the media of the Ministry of Justice and the Ministry of the Interior, to the Native Court and Parquet at Tantah and the Mudirieh at that place, for their full information and in order that no action prejudicial to Mr. Salem's interests and rights as an American citizen may be taken at the coming session of the Court on March 12th.

The Agency would consequently appreciate the Ministry's apprising the appropriate departments of the Government as suggested, prior to the above-mentioned date.

Thereon the British General Director of the Ministry of Foreign Affairs, Mr. Greg, wrote on the 6th of March to the legal adviser of the Egyptian Government to inquire as to the exact position of the case against Salem in the courts, and on the 7th he wrote to the deputy manager of the American Agency, Mr. Gottlieb, asking him to make sure that the Persian Diplomatic Agency in Cairo had withdrawn their claim to treat Salem as a Persian subject. (Cf. American Case, annex 4, exhibit T (2), p. 83; Egyptian Case, annex A, p. 86.)

Mr. Gottlieb replied on the 9th of March he trusted that the Tantah court might be duly apprised of Salem's standing before March 12th, in order that his interest might not be prejudiced by any action of the court subsequent to that date. (Cf. American Case, p. 81; Egyptian Case, annex A, p. 87.)

Before receiving this letter, viz. on the 8th March, the Egyptian Ministry of Justice wrote to the general prosecutor that George J. Salem should be treated as an American citizen, adding that the Ministry of Justice had been fully informed to this purpose and that, consequently, it seemed advisable to declare the incompetence of the native courts in the criminal case against Salem. (Cf. Egyptian Counter-Case, annex F, p. 50.) At the hearing of 12th March, the prosecutor put the motion accordingly and through a decision of the same day, the court declared its incompetence to proceed against Salem and adjourned the pro-

ceeding against his co-accused. Against these the process was continued. (Cf. Egyptian Case, annex A, p. 88.)

It follows of [*sic*] all these facts that the law courts as well as the administrative authorities of Egypt, from the moment the permanent status of Salem was clearly established by the American Government, have done everything necessary to acknowledge and guard the treaty rights of the United States.

6. The American Government consider it however a special violation of the treaty that the documents which Salem had put at the disposal of the Parquet in his criminal case were not returned to him or to the American Agency immediately after the issue of the certificate of 19th October, 1919. But as long as the proceedings against Salem were pending at the native courts, the retention of the documents containing the very evidence in the case cannot be regarded as a failure of the Egyptian authorities any more than the continuation of those proceedings itself. The numerous petitions which were sent during that period by Salem and Me. Nassif to the different Egyptian or British authorities met therefore with a legal refusal.

The situation, however, changed as soon as the second court had declared the incompetence of the native jurisdiction to proceed against Salem. At this moment two competing judiciary powers were opposed to each other: the native jurisdiction with regard to the co-accused of Salem and the American consular jurisdiction with regard to Salem himself. The claimed documents were the evidence in both cases. The question therefore arises whether one jurisdiction, according to the principles of international law, has the precedence before the other. Such a precedence cannot be derived from international rules. Generally speaking, the native and the consular jurisdiction are, each in its own sphere, in the position of perfect equality of rights. But if both have to be exercised in the same criminal case, conflicts are inevitable.

Now, the mixed legislation provides a method of procedure for settling such conflicts between the mixed and the consular jurisdiction (cf. *Règlement d'Organisation Judiciaire*, tit. II, arts. 22-25); for the conflicts between the native and the consular jurisdiction there is no such legal method. In consequence the Arbitral Tribunal cannot regard it as being against international law or as justifying any liability on the part of the Egyptian Government that the Egyptian authorities have hesitated to return the documents, all the more since finally they counted on a speedy settlement of the criminal proceedings against the co-accused of Salem. The American Government is of opinion that the Egyptian authorities were bound to return all the documents which they received from Salem, at the latest, as soon as his American citizenship was decided. The Arbitral Court would agree to this view if the retention of the documents had been in itself an infringement of the capitulatory rights of the United States. In this case it would have been immaterial whether the documents were still required in a native criminal process, or whether the American Agency had asked for their return or not. But as explained above, the native authorities had the right to seize the documents in 1917, and therefore the later action of the Egyptian authorities in using these for the purpose of criminal proceedings against Salem's co-accused was not illegal. In any case they were not bound to return the documents, as both Salem and the American Agency at first requested, to Salem himself.

As soon as the American Minister informed the Egyptian Minister of Foreign Affairs Sarwat Pasha of the purport of the request, viz., to use the documents for proceedings against Salem in the consular court, the Egyptian authorities returned the documents immediately and with all possible dispatch even just before the final hearing at the criminal court of Mehalla as regards the other accused persons.

7. The American Government raises most ardent complaints against the proceedings before the Mixed Courts at Cairo and Alexandria concerning Salem's action for damages. The representative of the Parquet, the former judge Fayek Bey, and the courts themselves are said to have shown partiality against the plaintiff and to have warped justice in an obvious manner.

As far as the above-mentioned reference of the Prosecutor Fayek Bay to the forgery which Salem was charged with is concerned, the Arbitral Tribunal is likewise far from approving this language. However it must be taken into consideration that the decree of discontinuance issued by the American consul general in the case of Salem did not legally affect the proceedings which were pending at the same time against the co-accused before the native courts, and that Fayek Bey was irritated by the charge of forgery which Salem's solicitor had repeatedly levelled against the former deputy prosecutor Bishay, a member of the Parquet like Fayek Bey himself. Besides, it cannot be proved that this remark of Fayek, quickly modified as it was, did influence the court.

The decisions of the Mixed Courts cannot be examined by the Arbitral Tribunal in the same manner as a higher court is entitled to do with regard to decisions of lower courts. It is possible that the Mixed Court at Cairo was in error in applying paragraph 776 of the Code Civil Mixte, and that the Mixed Court of Appeal at Alexandria in dismissing the claim as not well founded in spite of the fact that this part of the litigation had not been pleaded, did employ terms which went beyond its real meaning. Such errors in judgment cannot be regarded as a denial or a warping of justice in the sense of international law. The principle of division of powers must be maintained also in international arbitration; it implies that as a rule the validity of judgments issued by competent law courts is acknowledged. In consequence international law has from the beginning conceived under the notion of "denial of justice" forming base of political claims only exorbitant cases of judicial injustice. Absolute denial of justice; inexcusable delay of proceedings; obvious discrimination of foreigners against natives; palpable and malicious iniquity of a judgment—these are the cases which, one after another, have been included into the notion of "denial of justice". If the American theory and practice seem inclined to extend this notion, the Arbitral Tribunal cannot follow this example. (Cf. The Research Work of the Harvard Law School, cited above, pp. 174 ff., Borchard, *The Diplomatic Protection of Citizens Abroad*, pp. 330, 335.) As a rule, a foreigner must acknowledge as applicable to himself the kind of justice instituted in the country in which he did choose his residence including all deficiencies of such jurisdiction, imperfect as it is like every other human work.

It must be added that in the opinion of the Arbitral Court, the Egyptian Government cannot be made responsible at all for such errors of the mixed jurisdiction. The Arbitral Court has already pointed out

that this jurisdiction was instituted and is continued not only through the will of the Sovereign Egyptian State, but by conventions concluded with the capitulatory powers. Both parties, by executing these conventions in form of corresponding national legislations, made a sacrifice of their sovereignty; the capitulatory powers resigned a part of their jurisdictional prerogatives on Egyptian territory by waiving for a time the civil jurisdiction of their consuls; the Egyptian Government resigned likewise a part of their jurisdictional sovereignty by undertaking to let themselves be judged in civil cases, especially in cases for alleged violation of foreigners' rights on the part of Egyptian authorities, by a court composed of a majority of foreigners. If the Mixed Courts are at fault the Egyptian Government is unable to prevent the repetition of such faults; they can neither remove the judges nor punish them by disciplinary action—this action is reserved to the Mixed Court of Appeal—nor can they modify the laws in accordance to which the court is composed and has to decide its cases. None of these measures could have been taken during the period provided by the international conventions for the functioning of the mixed jurisdiction without the consent of the capitulatory powers. (Cf. *Règlement d'Organisation Judiciaire*, tit. III, art. 40.)

The responsibility of a State can only go as far as its sovereignty; in the same measure as the latter is restricted, that is to say as the State cannot act in a free and independent manner, the liability of the State must also be restricted. Consequently the alleged denial of justice committed by the Mixed Courts cannot be brought forward against Egypt as a cause of complaint neither to support the claim made in the name of George J. Salem nor to prove the alleged violation of the treaty rights of the United States.

For these reasons the Arbitral Tribunal thinks it useless to examine how far the contested arguments of the American Government have been proved regarding the damage which is alleged to have been caused to George J. Salem by the criminal proceedings and by the retention of his documents.

#### **Award.**

The answer of the Arbitral Tribunal to the first of the two questions put before them is:

The Royal Government of Egypt is not liable under the principles of law and equity in damages to the Government of the United States of America on account of treatment accorded to the American citizen George J. Salem. Consequently, there is no room to answer the second question.

Berlin, June 8th 1932.

DR. WALTER SIMONS.  
A. BADAOUI.

## DISSENTING OPINION OF Dr. FRED K. NIELSEN.

This claim is based, broadly speaking, on allegations of improper action on the part of administrative and judicial authorities of Egypt. Among the complaints made by the United States, that which to my mind is the most important one relates to the failure of Egyptian officials to observe stipulations of a treaty, guaranteeing to the United States certain rights, inuring to the benefit of the claimant as an American citizen. I regret that there is a difference of opinion between myself and my learned associates in relation to some charges made by the Government of the United States.

The issues raised in the case involve to a considerable degree uncertainties as to applicable rules of law. This is particularly true with regard to practices that have been followed with a view to the execution of provisions of treaties. Nearly every aspect of the case discloses a great number of tangled facts. It is merely common sense for the Arbitrators to recognize their personal limitations, as well as the limitations imposed by the law, in connection with attempts to reach positive conclusions with respect to situations which it was sought to reproduce before the Tribunal. This is true in spite of the great diligence of the Agent for each Government in exhaustive researches for documentary evidence and in able and fair presentations to enable the Tribunal to arrive at the truth.

I shall not attempt to discuss in detail all of the many issues of law and of fact that were raised in the pleadings, the briefs and the oral arguments. Any purposes that may be served by a discussion of certain questions does not require me to deal with all of those touched upon in the opinion of my associates. With some of their conclusions, I find myself in little or no disagreement. I shall limit myself to important subjects with respect to which considerable differences exist.

## QUESTIONS PERTAINING TO NATIONALITY.

The conclusions respecting questions of nationality which have been stated by my associates were evidently not the basis of the rejection of the claim. But they involve important questions in relation to which my views differ largely from theirs.

An arbitral agreement is, of course, as binding on the Tribunal as it is on the Contracting Parties who made it. There is a general rule of law that non-observance of terms of submission is ground for regarding an award as invalid. Because of the rejection by my associates to a considerable extent of arguments advanced by counsel for Egypt with respect to matters pertaining to nationality in relation to the jurisdiction of the Tribunal, that rule has no direct application to the decision in the instant case. But in view of issues that have been raised and the disposition that has been made of them, and in view further of the great power of an international tribunal as a court of first and last resort, so to speak—a court vested with final, unappealable determination of issues of law and fact, I think it is pertinent to take account of principles pertaining to the solemn duty of a tribunal with respect to the observance of provisions of an arbitral agreement.

Nationality is the justification in international law for the intervention of a Government of one country to protect persons and property in another country. Most arbitration agreements framed for the purpose of having

adjudicated numerous cases do not incorporate the names of the claimants and, therefore, of course stipulate nothing with respect to their status. When it is provided, as it is in practically all agreements of this character, that claims of nationals of each contracting party shall be tried, the first preliminary point for the decision of a tribunal is, of course, a jurisdictional one with respect to the nationality of each claimant. When a question of nationality is not thus dealt with in a jurisdictional article, it pertains to the right of a nation under international law to protect its national. I think that this distinction is at times useful, and that it is pertinent to take account of it in the instant case.

Article 1 of the Protocol concluded January 20, 1931, between Egypt and the United States, stipulates that the "claim of the United States against the Royal Government of Egypt arising out of treatment accorded George J. Salem an American citizen by Egyptian authorities shall be referred to an Arbitral Tribunal in conformity with conditions hereinafter stated".

Article 3 reads as follows:

"The questions to be decided by the Tribunal are the following: first, is the Royal Government of Egypt under the principles of law and equity liable in damages to the Government of the United States of America on account of treatment accorded to the American citizen George J. Salem? Second, in case the Arbitral Tribunal finds that such liability exists what sum should the Royal Government of Egypt in justice pay to the Government of the United States in full settlement of such damages?"

In my opinion no question can arise under this Protocol as to what counsel for Egypt termed the "competency" of the Tribunal to hear the case on its merits. Jurisdiction is the power of a tribunal to determine a case conformably to the law creating the tribunal or some other law defining its jurisdiction. The applicable law in the instant case is, of course, the Protocol of January 20, 1931. Under the general principle of law which I have stated with respect to the limitations on a Government as regards the protection of its own nationals solely, a tribunal acting under a different protocol, leaving open the question of citizenship, might hold that there could be no responsibility on the part of Egypt towards the United States for treatment accorded to Salem by Egyptian authorities. I am now stating a hypothetical case that postulates lack of proof of citizenship of the claimant. But the Tribunal is concerned with a different situation.

It is not permissible to interpret when there is no need of interpretation, that is, when the terms of a treaty are clear and precise. Vattel, *Law of Nations*, Chitty's edition, Sec. 263, p. 244; Pradier-Fodéré, *Traité de Droit International Public*, Vol. II, Sec. 1179, p. 884; Hall, *International Law*, 6th ed., Chap. 10, pp. 327-329. It is also a well-established rule that every interpretation that leads to an absurdity or to a nullification of the language of an instrument should be rejected. *Geofroy v. Riggs*, 133 U.S. 258; *Lau Ow Bew v. United States*, 144 U.S. 47; Vattel, *op. cit.*, p. 251; Grotius, *De Jure Belli et Pacis*, Whewell's edition, Vol. II, p. 161; Pradier-Fodéré, *op. cit.*, Vol. II, Sec. 1180, p. 885.

In my opinion, the Tribunal would have no right in effect to eliminate or to nullify the stipulations of the two Governments with respect to Salem's citizenship. It should not give to the Protocol a seemingly absurd meaning, to the effect that, when it is stipulated that the Tribunal shall judicially determine whether the treatment accorded to George Salem, an American citizen, entails responsibility, it could refuse to take jurisdiction and throw

the case out of court on the ground of the lack of citizenship, the existence of which has been stipulated.

I agree with the view expressed in the majority opinion in general terms that a tribunal may properly examine negotiations leading up to the conclusion of the *compromis*—that is, when there is need of interpretation. That principle has repeatedly been applied by domestic and international tribunals and by nations in the course of diplomatic exchanges. Pradier-Fodéré, *op. cit.*, Vol. II, Sec. 1188, p. 895; Crandall, *Treaties, Their Making and Enforcement*, 2nd ed., pp. 384-386; *Nielsen v. Johnson*, 279 U.S. 47, 52. However, I have doubts as to the relevancy and as to the usefulness of the correspondence which is cited and quoted in the majority opinion as interpretative of the Protocol with respect to the question of jurisdiction. That correspondence seems to me to relate solely to a suggestion made by the Egyptian Government to the effect that the claimant, Salem, should do something more in the matter of resorting to local Egyptian remedies than to obtain a decision of the court of last resort dismissing his claim; that he should further avail himself of the *recours en requête civile*, which may be roughly defined as a measure by which the claimant would undertake to have the Court set aside its own decision.

But even if it be conceded that this correspondence may properly be used for purposes of interpretation, it seems to me that it does not support the contentions of the Egyptian Government, nor the views of my learned associates, that the question of want of jurisdiction, resulting from lack of American nationality of the claimant, may be raised under the Protocol.

From the note, quoted in part in the majority opinion, which was sent by the American Minister at Cairo to the Egyptian Foreign Office under date of July 8, 1929, it appears that the Government of the United States was of the opinion that it should be understood that if the claimant, Salem, had recourse to the *requête civile*, no question would be raised by the Egyptian Government as to his right to come before that Court as an American citizen. In a note of March 20, 1930, the Egyptian Government informed the American Minister that by a communication of November 29, 1929, it was intended to convey the assurances of the Egyptian Government asked for by the United States in the note of July 8 to the effect that, if Salem instituted the "*requête civile*", no question would be raised by the Egyptian Government as to his right to come before the Court as an American citizen in good standing. It was added that the Egyptian Government, however, did not agree to the terms of an American *aide mémoire* of July 23. The last-mentioned communication had asked for assurances with respect to the recognition of Salem's *continuous* citizenship.

It seems to me to be clear, therefore, that even this correspondence extensively quoted in the majority opinion shows that the Egyptian Government recognized the American citizenship, although a reservation may have been made with respect to the *continuous* character of the citizenship. The definite recognition of Salem's American citizenship by Egyptian authorities prior to the signing of the Protocol is shown also by other records, including those of an Egyptian court.

If there was no question as to Salem's American nationality before and at the time of the conclusion of the Protocol of January 20, 1931, then in my opinion there can be no issue as to jurisdiction under the Protocol, even though the instrument might permit contentions with respect to the right of the United States to call the Egyptian Government to account for acts committed against Salem at some period when he was not a citizen.

I do not mean to imply that any acts complained of by the United States fall within any such period.

In view of the specific definitions in the Protocol of the issues to be decided, definitions which do not embrace but rather specifically exclude jurisdictional questions pertaining to nationality, I think that, if interpretation is undertaken, application may properly be given to the principle of *expressio unius est exclusio alterius*.

I strongly differ from the view of my learned associates that there are before the Tribunal any such questions as those indicated by the following passage in their opinion:

“In the present case it should be ascertained whether one of the Powers, by bestowing the citizenship against general principles of International Law, has interfered with the right of the other power, or if the bestowal of the citizenship is vitiated because it has been obtained by fraud. In order to decide the question of fraud it will be necessary to examine if the false representations with which the nationality of a certain Power has been acquired refer to those points on which, according to the law of that Power the acquisition of nationality is essentially dependent.”

I likewise differ from their conclusions with respect to the effect of the American law of March 2, 1907, 34 Stat. 1228, and the law of June 29, 1906, 34 Stat., Part. 1, p. 596.

The construction of the vague language of section 2 of the Act of March 2, 1907, is discussed at considerable length in the opinion written for the Commission in the *Castello* case in the arbitration between the United States and Mexico under the Convention of September 8, 1923, *Opinions of Commissioners, Washington, 1929*. A considerable number of citations is made in that opinion to show that the law has been construed by American judicial, legislative and administrative authorities simply to deprive naturalized American citizens, while residing abroad under specified conditions of protection, and not entirely to nullify their citizenship.

This interpretation is in harmony with an opinion rendered by Attorney General Wickersham on December 1, 1910, 28 *Ops. Atty. Gen.* 504. Mr. Wickersham expressed the view that the law was limited to naturalized citizens while residing in foreign countries beyond certain periods stated in the Act, the object thereof being to relieve the Government from the obligation to protect such citizens during residence abroad, and that it did not apply to citizens who returned to the United States. I do not believe that the law has ever been construed by any American authorities—administrative, legislative or judicial—to be one under which there could be raised any question of “fraudulent acquisition” of American citizenship in the manner indicated in the opinion of my associates.

Section 15 of the Act of June 29, 1906, contains the following paragraph:

“If any alien who shall have secured a certificate of citizenship under the provisions of this Act shall, within five years after the issuance of such certificate, return to the country of his nativity, or go to any other foreign country and take permanent residence therein, it shall be considered *prima facie* evidence of lack of intention on the part of such alien to become a permanent citizen of the United States at the time of filing his application for citizenship, and, in the absence of countervailing evidence, it shall be sufficient in the proper proceeding to authorize the cancellation of his certificate of citizenship as fraudulent, and the diplomatic and consular officers of the United

States in foreign countries shall from time to time, through the Department of State, furnish the Department of Justice with the names of those within their respective jurisdictions who have such certificates of citizenship and who have taken permanent residence in the country of their nativity, or in any other foreign country, and such statements, duly certified, shall be admissible in evidence in all courts in proceedings to cancel certificates of citizenship."

I know of no counterpart of this Act in the laws of any other country. It differs materially from the Act of March 2, 1907, in that the former relates to a cancellation of citizenship. And it raises—somewhat oddly and harshly perhaps it may be said—a presumption of fraudulent intent on the part of a person who, within the specified period, leaves the United States and takes up a permanent residence in some other country.

If the law may be considered to be harsh in attributing, in retrospect so to speak, an initial intent of fraud to a person who, after becoming naturalized in the United States, becomes permanently resident elsewhere, it is important to note that such a person's rights of American citizenship are safeguarded by requirements of the law for his protection. There must be investigation by American diplomatic and consular officers, examination of the reports of such officials by the Department of State and further examination and conclusions by the Department of Justice, and finally a trial before an American court of equity, a Federal tribunal in which the interested person has an opportunity to make a defence.

I cannot agree with the views of my associates "that there is much ground for suspicion" with respect to the conditions under which Salem obtained naturalization. And I am of the opinion that this Tribunal has no power to pass upon a question whether Salem obtained a fraudulent certificate of citizenship within the meaning of the law of June 29, 1906.

As I have observed, so far as I know, no other Government attributes a fraudulent intent to a naturalized citizen who, after obtaining naturalization in one country, may take up a permanent residence in another. If the Tribunal had before it a case identical to that of Salem, except with respect to the subject of nationality, no question of fraudulent naturalization such as that contemplated by the law of 1906 could arise. If such a charge of fraud is to be fastened upon an American citizen, it can be done only by taking account of the kind of fraud which the law creates and of the methods by which alone that fraud can be established. The Tribunal cannot properly undertake to make itself investigator, prosecutor, examiner and a domestic court of equity.

It is particularly pertinent to note that the law is concerned with "permanent residence" outside of the United States. The record before the Tribunal establishes clearly, in my opinion, that, when the Protocol of January 20, 1931, was signed, and when the Tribunal deliberated on this case, Salem was a permanent resident of the United States. It seems to me to be clear, therefore, that at the time no administrative or prosecuting authorities of the United States could properly have given serious consideration to a proceeding to cancel Salem's naturalization; no American Federal tribunal could justly have pronounced a cancellation.

In these circumstances I am of the opinion that the Tribunal, taking account of the law of June 29, 1906, which has been invoked, could not dispense with consular or diplomatic investigation and with examination by the Department of State and by the Department of Justice, and in effect

make itself a court of equity and pronounce a decree for which there would be no basis in law, even if the proceedings were carried on by the competent American authorities.

The record reveals things which may perhaps be considered to have been a somewhat severe treatment of Salem by American authorities in connection with questions pertaining to his citizenship. It shows that the Department of State at one time admitted an error in its conclusion that, under the law of March 2, 1907, Salem was not entitled to protection. It further shows that on another occasion the Department determined that it had been in error with respect to previous decisions, and that at no time had Salem, since his naturalization, been deprived under the law of his right to American protection. Having in mind this scrutiny, which it is shown by the record was repeatedly made of questions relating to his nationality and his right of protection, and believing that without doubt an exhaustive examination was made and a sound conclusion reached with respect to all such questions prior to the decision of the Government of the United States to propose arbitration, I find myself entirely at variance with the reasoning of my associates on this aspect of the case.

Apart from any consideration pertaining to the law of June 29, 1906, I have serious doubts with respect to the propriety of attempts of any international tribunal in effect to nullify the decrees of a domestic tribunal conferring naturalization. Citation was made by counsel for Egypt of the *Flutie* case, *Venezuelan Arbitrations of 1903, Ralston's Report*, pp. 38-45. The Commission in that case considered the naturalization of an American claimant to be fraudulent in the light of evidence from which the conclusion was reached that he had not, prior to his naturalization, resided in the United States the period required by law. I am not free from doubt with respect to the decision of the Commission that it could in effect set aside the claimant's naturalization conferred upon him by an American court. The meaning of the term "residence" as used in the Naturalization Act must certainly be construed in accordance with principles of American law. It is a term which has occasioned considerable difficulty for both American administrative and judicial authorities. Finally, it may be pertinently noted that the *Flutie* case differs, of course, very materially from the present case, in that in the latter there is no question as to Salem's residence in the United States continuously for the required period of five years prior to his naturalization. The *Medina* case, Moore, *International Arbitrations*, Vol. III, p. 2583, also cited by counsel was similar to the *Flutie* case.

Generally speaking, the law of nationality is a domestic affair, but questions of nationality interestingly enter into international relations. And although international law may directly be concerned with this subject in one or two respects, it is necessary to look to domestic law for the definition of status.

International law is a law for the conduct of nations grounded on the general consent of the nations of the world. The existence or non-existence of a rule of the law is established by a process of inductive reasoning; by marshalling the various forms of the evidence of the law to determine whether or not the evidence reveals the general assent that is the foundation of the law. Such assent cannot of course be adequately proven by fragmentary excerpts from a text book or by a proposal submitted to an international conference with a view to incorporation into a multilateral treaty, which, even though it might come into legal effect according to its terms, might lack the basic requirement of conventional law—that is, the general assent.

The status of Salem as an American citizen is defined in the light of American constitutional and statutory provisions. It is not, in my opinion, determined, as argued by counsel for Egypt, by any principle with respect to "effective nationality", nor in any respect "according to international law". I have referred to the methods by which the law of nations, customary or conventional, is established. In the light of the general principles with respect to the ascertainment of the general assent of Nations, I think it can scarcely be said that there has been even an approach to the establishment of a rule of international law with respect to a principle of effective nationality.

In relation to the connotation of the term "general assent" which is the foundation of international law, it is interesting to note that the eminent authority, Dr. Oppenheim, in spite of the very general assent given to the Declaration of Paris, does not affirm that this Treaty has become international law. Many Nations signed, others adhered subsequently to the signing of the Treaty. The United States has observed the Treaty in practice and affirmed that it should be regarded to be international law. Nevertheless, Dr. Oppenheim conservatively says:

"The few States, such as the United States of America, Spain, Mexico, and others, which did not then sign, have in practice, since 1856, not acted in opposition to the declaration, and Japan acceded to it in 1886, Spain in 1908, and Mexico in 1909. One may therefore, perhaps, maintain that the Declaration of Paris has already become, or will soon become, universal International Law through custom." *International Law*, Vol. I. 3rd ed., pp. 74-75.

The Government of the United States did not bestow citizenship on Salem in a manner that "interfered with the rights" of Egypt or of any other Power. Dr. Hall suggests that easy requirements for naturalization may be inconsistent with *comity* between Nations. *International Law*, 5th ed., 241. When the United States bestowed citizenship on Salem after subjecting him to the rigid requirements of the law of 1906, including five years' continuous residence in the United States, it did not act at variance of any principle of comity. Nor did it contravene any rule or principle of international law. Dr. Hall has expressed the view that it is contrary to international law to impose nationality upon sojourning aliens against their will. *International Law*, 7th ed., p. 226. No such action was taken in the case of Salem. Domestic measures in connection with the naturalization of aliens can probably contravene the law of nations only in some such way as is indicated by the distinguished English author—by a compulsory naturalization; by the imposition of nationality in a way that might be regarded as unworthy of a Government; inconsistent with the rights, duties and dignity derived from the allegiance of a person to his State.

No question of dual allegiance arises in the present case, in the sense that the United States is pressing a claim against Egypt in behalf of one of Egypt's own nationals. From the evidence before the Tribunal, particularly from that coming from Egyptian sources, the Tribunal is not warranted in reaching the conclusion that Salem ever warranted Ottoman nationality. If such a thing as a "local nationality", as distinguished from Ottoman nationality, existed in Egypt before that country became independent of Ottoman rule, such a status cannot be invoked as a bar to the right of interposition, international law takes cognizance only, I think, of that nationality

which is created by Nations which treat with each other as members of the family of nations.

Since it has not been proved that Salem was an Ottoman national, it is unnecessary to consider whether, if he did possess Ottoman nationality, Egypt might be precluded from denying to him capitulatory rights as an American citizen, in view of the stipulations of the Treaty of May 7, 1830, securing to American citizens, without qualification, the right to be tried before American extraterritorial courts.

It appears to be a reasonable and well-supported view that, whatever control a Nation may exercise within its territory over one of its nationals having a dual allegiance, it cannot maintain a claim in behalf of such a person against another Nation of which that person is also a national. Ralston, *Arbitral Law and Procedure*, p. 112. The principle governing a case of that kind is not applicable to a person who may have a dual nationality but who is not a national of a respondent Government against which a claim is pressed. It is, therefore, immaterial whether or not Salem now owes allegiance to Persia which the Government of Egypt and the Government of the United States have considered he in any event once did.

#### PRELIMINARY INVESTIGATION BEFORE MOHAMED ZAKI EL IBRASHY BEY.

The majority opinion discusses the investigation instituted before an Egyptian magistrate, when a charge of forgery was initiated against the claimant, Salem, and others by a Persian consular officer. It was attempted in behalf of the United States to fasten responsibility on the Egyptian Government for the proceedings carried on before the magistrate. The general principles of international law applicable to the contentions advanced involve no difficulty. The questions of domestic law are not so clear. There is considerable uncertainty with respect to pertinent facts.

It may be said with a reasonable degree of precision that the propriety of acts or of laws against which complaint may be made in connection with an international reclamation should be determined according to ordinary standards obtaining among members of the family of nations. Practical application may be given to this general rule if an international tribunal adheres to the principle that it can properly award damages only on the basis of convincing evidence of a pronounced degree of improper governmental action. Such a rule takes account of the status of members of the family of nations which, although their standards may differ, are equal under the law of nations. The thought I have in mind with respect to the conditions under which one Nation may properly call another to account is interestingly expressed by a writer as early as the celebrated Vattel, who says:

“The sovereignty united to the domain establishes the jurisdiction of the nation in her territories, or the country that belongs to her. It is her province, or that of her sovereign, to exercise justice in all the places under her jurisdiction, to take cognizance of the crimes committed, and the differences that arise in the country.

“Other nations ought to respect this right. And, as the administration of justice necessarily requires that every definitive sentence, regularly pronounced, be esteemed just, and executed as such— when once a cause in which foreigners are interested has been decided in form, the sovereign of the defendants cannot hear their complaints. To undertake to examine

the justice of a definitive sentence is an attack on the jurisdiction of him who has passed it. The prince, therefore, ought not to interfere in the causes of his subjects in foreign countries, and grant them his protection, excepting in cases where justice is refused, or palpable and evident injustice done, or rules and forms openly violated, or, finally, an odious distinction made to the prejudice of his subjects, or of foreigners in general." *Law of Nations*, Chitty's edition, 1869, Book II, pp. 165-166.

As I have indicated before, it may be observed from a practical standpoint that a failure to adhere to these general principles might easily at times result in a tendency on the part of a tribunal to stultify itself by dogmatic attempts to reconstruct past events in the light of inadequate evidence or on the basis of insufficient information respecting domestic laws, practices or institutions. However, it of course often becomes the duty of an international tribunal to deal with questions of domestic law, which frequently may be more difficult than those involved in the application of the proper principles of international law. These proceedings in connection with the preliminary investigation were analyzed with great care and in minute detail by the American Agent. It was contended that they were improperly conducted, and that evidence was not produced to justify the commitment of Salem for trial. It was further argued that, apart from questions pertaining to irregularities, the proceedings fell below international standards, in that the magistrate, by virtue of Egyptian law defining his functions, improperly combined in himself the functions of investigator, prosecutor and judge.

Without reference to details of various codes with their differences and similarities, it may be generally observed that these proceedings were in the nature of those employed in countries governed by the principles of the civil law. They might be characterized as a stage of prosecution, or in a sense as a stage of trial; or they might be compared to the proceedings before a common law grand jury or before a committing magistrate in a country governed by the principles of the common law.

It may be observed that a grand jury or a prosecutor in a jurisdiction where probable cause may not always be determined by a grand jury exercises functions which in a measure partake of the commingled functions complained of by the United States in the present case, even though they are not such in terms of legal definition. The contentions of the United States had particular reference to the seriousness of the offence with which Salem was charged. In a case of this character, it was argued, the different functions should not be combined.

Complaints growing out of the imprisonment of aliens have frequently come before international tribunals. In dealing with such cases tribunals have taken account of principles pertaining to the common law offence of malicious prosecution. In many countries, it is possible for a person, who has been maliciously and falsely accused upon a charge made by a private person, to institute an action against such private person for damages for false imprisonment. And actions will lie against prosecuting authorities, who have acted maliciously. In the present case, the question before the Tribunal is whether there is international liability on the part of the Government of Egypt for the conduct of the Egyptian magistrate who conducted the preliminary investigation in Salem's case.

The arrest of an alien and his acquittal after trial do not of themselves justify demands for indemnities in behalf of the alien. The same is true

respecting the release of an alien without subjecting him to trial. Before trial there must be proceedings to determine the propriety of commitment for trial. In view of the general principle of international law with respect to redress of grievances of aliens by resort to appropriate local remedies, it would seem to be difficult, generally speaking, to maintain an international reclamation in a case in which an alien is cleared after a proper trial.

International law requires that, in connection with the execution of criminal laws, an alien shall be accorded certain rights, such as are guaranteed under the laws of civilized countries generally both to aliens and nationals. Among other things, there must be some grounds for arrest and grounds for trial or, as is said in terms of domestic law, there must be probable cause. In the case of *Trumbull v. Chile*, Moore, *International Arbitrations*, Vol. 4, pp. 3255, 3260, the following definition was given:

"Probable cause is the existence of such facts and circumstances as would excite the belief in a reasonable mind, acting on the facts within the knowledge of the prosecutor, that the person charged was guilty of the offence." See also *William Collier v. Mexico*, Moore, *International Arbitrations*, Vol. 4, pp. 3244, 3246; *Gilbert Bennett Borden v. Chile*, *Ibid.*, Vol. 4, p. 326.

Domestic courts have asserted the same general principles as those by which international tribunals have been guided. *Foshay v. Ferguson* (1846), 2 Denio's Reports (N.Y.) 617; *Hicks v. Faulkner* (1878), L.R. 8 Q.B.D. 167, 173; *Mayer v. Peabody*, 212 W.S. 78.

It is interesting to note the conclusions of a domestic court, sitting as a prize court. Such a tribunal is required to base its decision ultimately on international law, although it may be necessary incidentally to deal with important questions of domestic law. In the case of the American steamship *Edna*, the ship was released by an English court as not subject to condemnation and on appeal to the Judicial Committee of the Privy Council, the decree of the lower court was confirmed.

The trial judge who released the vessel evidently was not free from doubt with respect to the question of probable cause, but he did not hold that probable cause was wanting. He expressed himself in this seemingly conservative manner: "but on the whole considering the curious companies that were concerned in the matter and considering what the history of this vessel is, I am not prepared to say that there was no reasonable cause for seizing her". Lloyd's *Reports of Prize Cases*, IX, 51, 70.

Having in mind the general principles of international law governing international tribunals in dealing with complaints against authorities of a Government, administrative, legislative, or judicial, I am not prepared to say that this Tribunal should sustain the fundamental contentions of the United States with respect to the lack of probable cause for the commitment of Salem.

Of course, in analyzing proceedings of this kind, it is necessary to bear in mind that the question of probable cause for arrests or trials is not dependent on facts with respect to guilt; that there is a great distinction between evidence to establish guilt and evidence to establish a rational belief with respect to possible guilt. I am of the opinion that any doubt with respect to the proceedings under consideration should be resolved in favor of the Egyptian Government. But it is to me unthinkable that, unless evidence very different from that produced in the preliminary investigation had been submitted to a trial court, if a trial had been held, any judge or jury could have found Salem guilty of the charge of forgery. I make use of this specu-

lation to distinguish a trial from a preliminary hearing to determine the question of probable cause.

Although I concur in the view that the Tribunal should not make a pronouncement with respect to the lack of probable cause, I am not altogether in accord with the conclusions submitted in the majority opinion with respect to these protracted proceedings. Particular reference is made to the use of a handwriting expert, who was not registered on the roll of experts. It is said that although not registered, he was, however, an expert official of the Ministry of Justice. I do not think that, by the application of proper principles of evidence, the conclusion can be reached that, just because there is a mere mention in an elaborate document in the record of some man employed in the Ministry of Justice, with the same name as that of the expert, it may be assumed, without any identifying evidence, that this man was the expert who acted in the case of Salem.

I agree in a general way with the discussion in the majority opinion of the complaint with respect to the commingling of functions in a single official. It is said that the American Government relies upon principles of Anglo-Saxon law in the condemnation of these proceedings. However, it is proper to take account of the fact that the contentions were of a somewhat broader scope. The proceedings were analyzed in behalf of the United States in the light of comparisons of laws of many countries. In my opinion the arguments submitted could be established only by a process of reasoning of that kind. International responsibility for acts of officials committed in violation of domestic laws will be determined by considerations pertaining to the specific character of the acts; and the manner in which they infringe the local law will naturally be an important consideration. The propriety of any law or of any institution must, I assume, be determined in the light of comparisons with other laws and institutions, in order to reach a conclusion whether ordinary standards of civilization have been outraged.

While I am not disposed to disagree with the conclusions of my associates, it seems to me that, in the view which we all take, it is unnecessary for the Tribunal to deal with this particular point. For if the complaint that probable cause was wanting is not sustained, there seems to be no occasion to undertake to condemn the laws under which the magistrate acted. It may be assumed, I think, that, if the representatives of the United States had found no reason to make the charge of lack of probable cause, they would not have felt constrained to attack the institution of the Egyptian preliminary hearing.

#### THE QUESTION OF NON-OBSERVANCE OF TREATY STIPULATIONS.

The complaint made by the United States with respect to non-observance of treaty rights I consider to be well grounded. I am of the opinion that Egyptian administrative authorities, as well as judicial authorities, failed to take steps that could properly be expected of them to give effect to such rights as were secured in favor of the United States by the Treaty concluded May 7, 1830, between the Ottoman Empire and the United States; rights which inured to the benefit of the claimant, Salem. In view of the importance of this question, and in view of the difference of opinion between myself and my associates, I shall discuss at some length the official records and the legal principles on which I ground my views. This complaint involves both judicial and administrative authorities.

Recourse to judicial tribunals is of course useful and indeed, as a practical matter, at times necessary, in connection with the enforcement of treaties. A Government confronted by a complaint of contravention of provisions of a treaty may be constrained to take the position that, as a matter of practical procedure, resort for the establishment of substantive rights secured by treaties should properly be made to courts, which are open to aliens for the determination of such rights and which are qualified for that important function of dealing with questions requiring judicial analysis. But it is proper to bear in mind, particularly I think with respect to the present case, that the interpretation of treaties pertains to administrative authorities as well as to judicial authorities, and that there may be cases in which something more may be expected from administrative authorities than the passive attitude of giving advice as to recourse to judicial remedies. Occasionally such remedies are not available or are inadequate. The general character of treaties, the rights invoked in a given case, and the methods of enforcement available are things determinative of the character of the action that will be appropriate to give effect to stipulated rights.

In connection with the subject of judicial action for the enforcement of rights under treaties, it is pertinent to take account of the fact that there are instances when courts are not empowered to give application to a treaty in the absence of local law giving effect, so to speak, to the treaty. *Robertson v. General Electric Company*, 32 Fed. 2nd, 495; *Colombian Mining & Exploration Co., Ltd.* case, Supreme Court of Colombia, 16 December 1926, *Annual Digest of Public International Law Cases*, Years 1927-1928, McNair and Lauterpacht, p. 411; 33 *Gaceta Judicial* 66.

Furthermore at times courts may consider themselves bound by local legislation, when it is in conflict with treaties and, therefore, feel constrained to give effect to the domestic law. Thus, instead of upholding rights under treaties they enforce measures contravening them. *Court of Cassation of Yugoslavia*, *Ibid.*, Years 1925-1926, p. 346; *Kmjesechnik No. 3*, Vol. XIV (March 1928); *Withney v. Robertson*, 124 U.S. 190; *Head Money Cases*, 112 U.S. 580.

The judiciary of one nation cannot give to a treaty a final interpretation which must be accepted as conclusive by another contracting party. Only an international tribunal created by both parties to render a final decision can furnish a construction by which both are bound. Of course, it may happen that frequently both are satisfied with an interpretation which a domestic court of either may pronounce.

When a treaty stipulates no specific methods with respect to enforcement, as is the situation with respect to stipulations involved in the present case, neither party can prescribe a procedure by which the other must be bound. But Egyptian rules which properly safeguard the rights of both Nations and of nationals to whom the benefits of treaty provisions inure will, of course, be acceptable to the United States.

The legal situation with respect to jurisdiction of American consular courts and local Egyptian courts in criminal matters involving Americans can be briefly indicated. By Article IV of the Treaty of May 7, 1830, jurisdiction of the local courts is excluded and is vested in what may be called extraterritorial courts. It is provided that even when American citizens "may have committed some offence they shall not be arrested and put in prison, by the local authorities, but they shall be tried by their minister or consul, and punished according to their offence, following, in

this respect. the usage observed towards other Franks". *Malloy*. Vol. II, p. 1318.

It appears that, when aliens in Egypt are occasionally taken into custody by local police authorities. being apprehended *flagrante delicto*, they are turned over for prosecution to consular officers of the Government to which they belong. It is interesting to take an account of what appears to be the general practice in the Mixed Courts. when questions of nationality are occasionally raised before them. The nationality of a foreigner is established by a certificate issued by a consular officer of the Government to which the foreigner belongs. if the representative of another Government does not claim the allegiance of the same person. In the latter situation the question of nationality is solved through diplomatic action, and the Mixed Courts postpone action until the question has been definitely adjusted. Numerous judicial precedents were cited by the Agent of the United States respecting this general practice. Citation was also made before the Tribunal of an interesting Egyptian judicial decision rendered on January 10, 1914, to the effect that the question of nationality can be raised in the native courts, even before the court of last resort.

Evidently the native courts take the view, the logic of which appears to be unquestioned, that the rights of aliens to be tried in extraterritorial courts are not solely personal rights that can be waived as matters of personal jurisdiction are sometimes waived before domestic courts. They are rights which are secured by Nations and which inure to the benefit of their nationals. It would therefore appear to be accurate to say that the action of any local court in taking jurisdiction over an alien in contravention of the stipulations of a treaty may properly be regarded to be a void act.

By way of analogy. reference may usefully be made. I think, to immunities of diplomats under international law and immunities of consular officers occasionally stipulated by treaties. Governments insist rigidly on the observance of such immunities, and the view has been taken that a diplomat has not, himself, the power, without the consent of his Government, to waive them. Moore, *International Law Digest*, Vol. IV, p. 642.

It would seem to be clear that an alien in Egypt cannot by some personal waiver of jurisdiction nullify rights of his Government, such as those stipulated in Article IV of the Treaty of May 7, 1830. Notwithstanding the differences in the character of immunities growing out of the so-called capitulatory rights and of those accorded to diplomats under the law of nations, or those occasionally secured to consular officers by treaties, it seems to me that it is pertinent and useful in dealing with issues involved in the instant case to take account of points of similarity.

Still another analogy may be useful. Domestic courts have, from time to time, dealt with cases involving the status of ships owned or operated by a Government. or of property owned by a Government, or of the status of a Government itself, before a domestic tribunal. It has been said that such cases involve questions of jurisdiction. Perhaps the view might equally well be taken that they are concerned with rules of substantive domestic law, and of international law, pertaining to the immunities of a Government or of government-owned property. But, in any event, there has been a general recognition of the appropriateness in such cases of diplomatic action to avoid international difficulties; to facilitate a prompt recognition of rights secured to nations. *The Exchange*. 7 Cranch 116; *Parlement Belge*, L.R. 4 P.D. 129; *Ex parte in the matter of Muir, master of the Gleneden*. 254

U.S. 522; *The Oliver American Trading Company, Inc., v. The Government of the United States of Mexico, et al.*, 5 Fed. (2nd) 659.

In the case of the *Gleneden*, *supra*, the Supreme Court of the United States discussed in its opinion methods of procedure in dealing with the questions of jurisdiction which had been raised in behalf of the British Government. In relation to that point, the Court observed that "if there was objection to appearing as a suitor in a foreign court, it was open to that Government to make the asserted public status and immunity of the vessel the subject of diplomatic representations to the end that, if that claim was recognized by the Executive Department of this Government, it might be set forth and supported in an appropriate suggestion to the court by the Attorney General, or some law officer acting under his direction?". The final disposition of this case and of other similar cases in the American courts was considerably delayed. See *The Gul Djemal*, 264 U.S. 90; *The Pesaro*, 255 U.S. 216.

Unfortunate delays occur throughout the world in connection with the proceedings of judicial tribunals and the action of administrative authorities. They may be unavoidable at times. Occasionally litigants may themselves be responsible. Action similar to that suggested by the Supreme Court in the *Gleneden* case was finally taken in Salem's case on March 12, 1921. But, in my opinion, the delays up to that time were unnecessary and unjustifiable.

It would seem that in cases involving capitulatory rights, resort may at times properly and usefully be had to diplomatic action to facilitate prompt observance of treaty rights, and that in Salem's case Egyptian administrative authorities could appropriately contribute to that end. It is shown, indeed, that they did so effectively, approximately a year and a half after the issue with respect to lack of jurisdiction of local courts over the claimant, Salem, was raised. *Annex E to the Memorial of the Egyptian Government*, p. 67.

I have mentioned the practice with respect to diplomatic adjustment of questions pertaining to nationality, when two foreign Governments claim the same person in Egypt. It would seem that similar diplomatic action might with equal or more appropriateness be taken, when the Government of Egypt claims as a national of that country, a person in whose behalf the plea of alienage is made.

Records useful in reaching a determination of the issue respecting observance of treaty rights have been submitted to the Tribunal by both Governments.

It appears that on November 2, 1919, the lawyer representing Salem presented to the Egyptian Court at Mehalla a certificate signed by the American Diplomatic Agent and Consul General and reading as follows:

**"TO WHOM IT MAY CONCERN:**

"This is to certify that Mr. George J. Salem, bearer of Passport No. 118252, issued on September 18, 1919, by the Department of State, Washington, D.C., is an American Citizen." *American Case*, p. 76.

It is shown that information concerning Salem's American nationality had been communicated through diplomatic channels to the Egyptian Foreign Office. In the American Case there is printed a copy of a telegram of November 1, 1919, reading as follows:

“CAIRO, *November 1st 1919, 12.20 p.m.*

“*To the substitute of the Parquet at Mehalla el Kobra,*

“The Ministry of Foreign Affairs informs us that the American Agency has informed them that George J. Salem who is accused in a criminal case for which there is a hearing to-morrow is an American citizen. You are directed to take this into consideration.

(Signed) UNDER-SECRETARY OF STATE  
MINISTRY OF JUSTICE.”

It seems that the certificate of the American Diplomatic Agent and Consul General was rejected by the Court on account of lack of authentication. A rule of evidence requiring authentication would seem to be entirely proper in an ordinary litigation or in criminal proceedings of which the Egyptian courts have jurisdiction. And it may be a plausible view that the technical ruling of the Judge in the Salem case could also be justified. Yet when account is taken in particular of the international aspects of the case, it would seem to be a reasonable conclusion that it would have been appropriate for the Judge to give consideration to the principles with respect to jurisdiction which I have briefly indicated and to have taken some steps to ascertain, on his own initiative, whether or not he had jurisdiction.

The telegram which was sent by the Under-Secretary of Justice to the Substitute of the Parquet under date of November 1, 1919, was explicit. I have referred in general terms to the appropriateness of administrative action at times in giving effect to provisions of treaties. Somewhat different translations of the Under-Secretary's telegram to the Substitute of the Parquet appear in the record. However, it would seem to be a reasonable conclusion that the telegram was sent with the purpose of having him take action looking to the dismissal of the case similar to the steps effectively taken on March 12, 1921, before the appellate court at Tantah. Salem being an American citizen, the Court was without jurisdiction. There is no indication in the telegram that the Egyptian administrative official who sent it had any doubt on that point. If he had, it would seem that Egyptian authorities should properly have sought an explanation from the appropriate American authorities, and that such explanation could easily have been given.

The lawyer for Salem petitioned the court for a continuance in order to obtain an authentication of the American diplomatic and consular representative's certificate, and the petition was refused. Again, it may be observed that, from a technical standpoint, in an ordinary litigation or criminal proceeding before a local court, such a strict ruling might not be objectionable. But in a case involving treaty rights, it would seem that the Judge should have had no hesitation in granting the application submitted to him, and that, considering the international features of the case, he might indeed have desired to clarify the question with which he was confronted.

It seems to me that the argument employed by counsel for Egypt tends to support rather than to refute the complaint of the United States with respect to the non-observance of treaty stipulations. I think this may be said, even though due allowance may be made for a degree of latitude counsel may at times allow themselves in the matter of a strict adherence

to the record. In reaching a decision on this important point of treaty rights, the Tribunal must ground its conclusions on records before it. It cannot read into those records things of which there is no trace. It must not resort to fantasy. It is not justified in attributing to the Judge action for which there is no basis in the record. If such action were improperly taken by him, that might be cogent evidence of a failure properly to give effect to the Treaty.

It was said by counsel for Egypt during the course of oral argument that it seemed to the Judge before whom Salem's trial was instituted that Salem had suddenly acquired an American nationality which he did not have at the opening of the trial and that the Judge found himself extremely embarrassed. Detailed conclusions were stated with respect to the Judge's mental attitude and line of reasoning. To be sure these conclusions may have been based on the assumption that the preliminary investigation, conducted by Ibrashy Bey, to determine whether Salem should be brought to trial on the charge of forgery may, in a sense, be regarded as a stage of the trial, and that the Judge was familiar with these preliminary proceedings; or that he assumed that Salem, having been brought to trial after a preliminary hearing, there could be no question in his case as to nationality. This last assumption probably is not without some justification. In any event, it seems to me to be doubtful—and certainly it is not clearly shown—that the Judge had examined the very voluminous record of the preliminary investigation conducted by Ibrashy Bey. And lack of jurisdiction was pleaded at the opening of Salem's formal trial before Judge Fayek. An important point, determinative of his right to proceed, was then raised.

It seems to me that my associates likewise depart too freely from the record. It is said in the majority opinion that with regard to the "attitude of the native courts it must be taken into consideration that twice, in 1915 and 1917, the Diplomatic Agent of the United States in Cairo informed the Egyptian authorities that Salem was no longer entitled to American protection because a presumption of expatriation had arisen against him". It is further said that the certificate which was presented in behalf of Salem in 1919 to the court "does not show when, nor under which conditions, Salem regained the American citizenship". He had not lost it.

In dealing with proceedings before an Egyptian court in 1919, I do not perceive the relevancy of certain incorrect statements made by an American representative in 1915 and 1917, respectively. It has been pointed out that the provisions of Section 2 of the law of March 2, 1907, are not concerned with the loss of American citizenship but with a possible temporary withholding of protection of naturalized American citizens residing abroad. It was shown to the Tribunal that the instructions under which the American representative acted in stating Salem was not entitled to protection were erroneous and were subsequently corrected. However, if this official's declarations in some way confused the Egyptian judicial authorities concerned with the trial of Salem, this fact might be regarded as an excuse for delays before the court. But I do not perceive any relationship between these communications of 1915 and 1917 and the proceedings instituted in an Egyptian court in 1919 before which a plea to the jurisdiction on the ground of alienage was made.

The complaints before the Tribunal relate to proceedings before the Native Courts between the years 1919 and 1921, and not with other proceedings. When an American consular officer erroneously refused to take

jurisdiction in a case affecting Salem, in the year 1915, his action had no relation to the proceedings with which this Tribunal is concerned.

I agree with the views expressed by Judge Purdy of the United States Court for China in the case of *Worthington v. Murray*, Hudson, *Cases on International Law*, p. 352. The presumption referred to in Section 2 of the Act of March 2, 1907, had arisen against the defendant. Although the presumption had not been rebutted and registration of the defendant in the American Consulate General had been refused, the Court held him to be an American citizen and subject to the jurisdiction of the Court.

Because an American extraterritorial court tried Salem no sooner than it did, the Government of the United States did not "abandon" him, as said by counsel for Egypt. Nor do I think that there is any justification for the statement of counsel that "American justice failed to fulfill its duty". It did not shirk its duties under the capitulatory régime or, more specifically speaking, duties under the Treaty of May 7, 1830, which are referred to in a *dictum* in the majority opinion. There is no virtue in the trial of an innocent man. Egyptian authorities did not institute a prosecution until a Persian consular officer acted to that end. It is readily perceivable, I think, why the American extraterritorial court did not act sooner than it did in the prosecution of Salem. But it did conduct a trial. That was unfortunate for Salem. Indeed, it is a most grievous misfortune for any innocent man to have to stand trial, although such things, of course, occur. And only occasionally does public authority undertake to afford some redress to the victim.

I doubt that the *dictum* just mentioned accurately states obligations on the part of capitulatory Powers. Into stipulations guaranteeing the right to have nationals tried by courts of their own, my associates read a requirement that the courts shall be maintained "on the same standard of efficiency as the native jurisdiction". The two jurisdictions are different. And I assume that some Powers insist on the maintenance of the extraterritorial courts because they consider, rightly or wrongly, that those courts have a higher standard than that of some local courts.

I am of the opinion that both administrative and judicial authorities failed to take, with a view to giving effect to treaty rights, such steps as might properly be expected of them at first stage of the proceedings which are shown in records before the Tribunal. I think that something more than was done might properly be expected from the authorities of any country in a similar case. With a very thorough appreciation of the difficulties inherent in local laws, and of occasional delays incident to judicial proceedings all over the world, I do not conceive that any Government's legal system should be so inelastic as to stand in the way of action more effective than that revealed by the records of these proceedings.

However, if the view be taken that a violation of the Treaty cannot justly be predicated on these preliminary proceedings, or that a question of non-observance of the Treaty could properly be raised only after a decision of an appellate court, I think that the complaint of the United States can be sustained on the record of the proceedings before the appellate native court at Tantah and on other records revealing the attitude of administrative authorities. Copies of the court records were submitted to the Tribunal. *Annex E to the Memorial of the Egyptian Government*, p. 55 *et seq.*

It appears that on December 7, 1919, Salem's lawyer again pleaded before the appellate court the lack of jurisdiction of the native courts and

again produced a certificate of nationality—on this occasion, an authenticated one.

The Judge instructed the Parquet to investigate allegations made by the lawyer for Salem with respect to the latter's nationality, and directed an adjournment until February 8, 1920. The issue with respect to nationality and treaty rights was therefore at this stage postponed two months. On February 8, 1920, the Parquet asked for further adjournment to ascertain from the Ministry for Foreign Affairs if the accused possessed American nationality "at the time of the forgery".

Then follows a series of hearings which, irrespective of their precise nature, seem somewhat odd, in that the accused parties repeatedly failed to make their appearance, and the Court repeatedly adjourned.

On February 22, 1920, there was an adjournment. Only Salem appeared, a number of co-defendants having absented themselves. On February 29, 1920, there was a hearing, and again only Salem appeared, and there was an adjournment to March 21, 1920. On March 21, 1920, an adjournment was taken to allow the Parquet to carry on further investigations with respect to the question of nationality. On May 15, 1920, the accused parties did not appear, and an adjournment was taken to enable the Parquet to obtain information which it was said he was still awaiting with respect to the subject of nationality. On July 1, 1920, the accused parties were called but did not appear, and an adjournment was taken. At a hearing on August 5, 1920, the same situation existed, an adjournment being taken because the accused parties did not appear. On October 16, 1920, the accused parties failed to appear, and the lawyer for Salem declared himself ready in the absence of the latter to deal with the question of the incompetency of the Court. There was further adjournment. On November 18, 1920, the accused parties did not appear, and an adjournment was taken. On January 15, 1921, the parties failed to appear; Salem's attorney asked for a decision on the question of incompetency; the Court ordered an adjournment for fifteen days at the end of which a judgment was to be given as to the right of the lawyer to represent Salem in the latter's absence. On January 29, 1921, the accused parties failed to put in an appearance, and the Court not having terminated its deliberations ordered an adjournment for eight days. On February 5, 1921, the accused parties were absent, and the Court ordered that the power of attorney of Salem's lawyer be recognized. During all this time the question of treaty rights was left undetermined. On March 12, 1921, the Parquet requested to be allowed to declare the incompetency of the native courts with respect to George Salem, whose status as an American citizen was said to have been established by a letter from the Minister of Justice addressed to the Procureur Général. Lack of jurisdiction over Salem was then declared by the Court.

The somewhat brief analysis made in the majority opinion of these proceedings which I have just sketched gives to them an aspect of regularity. But it seems to me that the conclusion which I have previously expressed as to the failure of administrative action, as well as judicial procedure, to give effect to the treaty rights becomes convincing in the light of these records. It is shown how easily the combined action of the Egyptian administrative and judicial authorities could be taken to give effect to rights secured by the United States and inuring to the benefit of Salem. Account being taken of difficulties inherent in international practices in matters of this kind, more effective action than that generally taken among nations

should not be exacted from Egypt. But that which may reasonably be expected from any Nation should, at least, be done.

When consideration is given to the character of the questions before the Egyptian Foreign Office and before the Egyptian courts—questions pertaining to treaty obligations and affecting, therefore, the relations of the two Governments; questions which, as shown by the record, seriously concerned the property rights of Salem and his standing in the community—one cannot fail to take account of the fact that approximately for more than a year and a half no final disposition was made of them. It has been suggested that the assertion of treaty rights was not for a time pressed very strongly by the Government of the United States. But the observance of stipulations of treaties or of rules of international law should not be dependent on the use of coercive methods; nor should it be proportionate to the degree of vehemence with which rights are asserted.

It may be interesting and useful for purposes of illustration to consider the legal situation with respect to the enforcement of treaties in the United States, where there are many aliens and where it may perhaps be considered there is a somewhat inelastic, or in any event a fairly rigid, legal system in view of the independence of the executive, judicial, and administrative departments of the Government, and in view, further, of the system of dual sovereignty of the Federal Government and of the States of the Union.

In the United States, hundreds of decisions relating to the interpretation of treaties have been rendered by the Federal courts and by State courts. Among the numerous subjects dealt with by such decisions are: the functions of consular officers, including important duties in relation to the settlement of estates; matters of extradition; questions relating to industrial property; rights under treaties and statutes relating to immigration; commercial matters, including the treatment of vessels and matters pertaining to customs; the conduct of business by aliens; titles to land; matters of taxation; rights in relation to inheritances; and boundary waters. Crandall, *Treaties, Their Making and Enforcement*, 2nd ed., pp. 466-634.

No special procedure is prescribed by legislation of the United States with respect to the trial, solely in the Federal courts, of aliens accused of crimes, or of citizens accused of offences against aliens. Nor is any specific procedure provided with respect to the use of the proceeding of injunction to prevent the operation of State statutes which may be considered to contravene stipulations of treaties. However, it is interesting to note that in the United States, in which the courts deal so extensively with the interpretation of treaties, Executive authorities sometimes intervene in judicial proceedings with a view to taking all possible steps looking to the observance of treaties and the avoidance of any possible international difficulties growing out of differences of interpretation. For illustrations see: *Sullivan et al. v. Kidd*, 254 U.S. 433; *Cheung Sum Shee et al. v. Nagle*, 268 U.S. 336.

More interesting than the cases just cited is perhaps the case *In re Anderson's Estate*, 166 Iowa 617, in which, originally, authorities of the Federal Government intervened in the proceedings in a State court. The case involved the interpretation of treaty stipulations between the United States and Denmark in relation to matters of taxation. At the instance of the authorities of the Government of the United States, the case was carried to the Supreme Court of the United States. *Petersen et al. v. State of Iowa*, 245 U.S. 170.

It has been said that the construction of treaties is a matter of law to be governed by the same rules *mutatis mutandis* as prevail in the construction of contracts and domestic laws. Francis Wharton, *International Law Digest*, Vol. II, p. 36. In other words, as a matter of necessary practice, international courts in construing treaties will apply common sense principles of interpretation underlying rules of construction such as are applied throughout the world. It seems to me that we may examine the complaint under consideration with respect to a treaty infringement from an angle very favorable to the respondent Government and still find its defense inadequate.

The violation of a treaty is a violation of a recognized rule of international law. I have expressed the opinion that, generally speaking, to substantiate such a charge requires evidence of a pronounced degree of improper governmental administration. It seems to me that, even in the light of such a principle of responsibility applied to facts disclosed by the record, there was an unjustifiable culpability in the delay of approximately one year and a half in giving effect to the rights invoked in behalf of Salem in November, 1919.

The wrongful application of the law by the courts may result from errors that have not their origin in prejudices or in improper motives. Perhaps it may be said that in such cases international tribunals will be disinclined to make pronouncements with respect to improper administration of justice, when charges of wrongful judicial acts are made. My associates have not overlooked the action of Judge Fayek when he appeared in some capacity before the Mixed Court of Appeal during December, 1925, in the proceedings instituted by Salem under advice of his own Government. I find it difficult entirely to overlook the declarations then made by the Judge, or former Judge, when he characterized Salem before the Mixed Court of Appeal "as a forger or, at least, a man prosecuted for forgery". I understand that the function of this Judge in this latter capacity was to enlighten the court on the law. Administrative authorities of the Egyptian Government had taken the position that he had no jurisdiction in the case against Salem. He had himself so held. The charge of forgery had therefore not been sustained in the Native Court. Furthermore, there had been a trial of Salem before the appropriate American extraterritorial tribunal, and Salem had been acquitted of the charge of forgery. It may be difficult accurately to characterize this so-called trial as one conducted in harmony with principles of law governing trials in criminal courts in the United States or in other American extraterritorial courts. It seems to be more logical to regard this proceeding as one in the nature of a recommendation by a prosecuting attorney, designated by the American Minister of a *nolle prosequi*, which was approved by the Minister, after a thorough consideration of the results of an impartial and careful investigation made by the prosecutor.

It seems to me that in connection with the attitude of the Judge in dealing with the plea to the jurisdiction presented to him when he presided over the court at Mehalla in 1919, it is proper to take account of the declarations made by him before the Mixed Court of Appeal. They may not have a bearing on the question of his judicial impartiality with respect to the interpretation of treaty rights pleaded. But the record discloses that he could make use of the term "forger" in the absence of a trial before himself, and even after there had been a trial and an acquittal before an appropriate tribunal. It seems to me that, furthermore, it may be observed that this

charge of forgery, made under these conditions, could perhaps be said to be the more remarkable, if counsel for Egypt were right in his conclusion that the Judge examined the record of the preliminary investigation before Ibrashy Bey. I may somewhat reluctantly admit that the results of the investigation might have justified a trial. But, as I have already observed, the record of the investigation indicated innocence and not guilt on the part of the accused. Whatever allowances may be made for the opening statements of counsel in a case of this character these particular remarks, in my opinion, do suggest prejudice against the claimant. It is especially unfortunate that there was an alternative statement that Salem was either a "forger" or, at least, a person prosecuted for forgery. In my opinion, neither from a legal nor from an ethical standpoint was there any justification for the suggestion that he might be a forger.

In addition to this attitude of the Judge of the Court of First Instance at Mehalla, it seems to me that it may also be pertinent to note excerpts from the record of the Court at Tantah, which delayed for a protracted period its pronouncement as to lack of jurisdiction. In the record of the proceedings of the Court on December 7, 1919, to which I have referred in some detail, we find statements such as these: "The first party (Salem) having committed forgery in Mehalla el Kobra in connection with a private deed. . . ."; "The forgery has been committed by fixing to the deed a forged signature. . . ."; "He then made use of this deed, which he knew to be forged"; "The other parties, . . . having assisted George Jousel Salem, the principal author of the crime of forgery, in the accomplishment of said crime". *Annex E to the Egyptian Memorial*, Exhibit 12 (A). No improper prejudging of guilt may have been intended. Perhaps this is the Egyptian way of referring to a person *accused* of a crime. I am not informed concerning that point. But it is noticeable that references are at times made in the record to "accused" persons instead of to forgers.

In reaching my conclusion with respect to non-observance of treaty provisions I have taken account of all of the facts in the record which I have sketched in some detail and of principles of law which in my opinion are applicable in dealing with this question. It is one which cannot be resolved by the application of some established, concrete formula, since none exists.

There is some suggestion in the majority opinion to the effect that statements or actions of Salem or his lawyer may have contributed to confusion with respect to the matter of nationality. In the absence of direct evidence, I think that a man's own testimony may be regarded as competent with respect to his citizenship. In the instant case that to which consideration must be given of course would include also evidence furnished by Salem to substantiate his American citizenship. If there has been inconsistency on his part, it is not the only inconsistency revealed by the record. The Egyptian authorities have said from time to time that Salem should be regarded as a Persian, and also that he should not so be regarded; that he should be considered to be an Ottoman subject, and also not an Ottoman subject; a "local subject"; and also not a "local subject"; that he must be recognized as an American; that he should not be so recognized. Authorities of the United States on two or three occasions said that Salem was not entitled to the protection of the United States, and at least on two occasions corrected such declarations. I do not mention these things by way of adverse criticism. The difficulty doubtless inhered in uncertainty as to facts. But if the experts of the Foreign Office of each of the two Govern-

ments can thus take contrary positions, there may be good excuse for some inconsistency or confusion on the part of Salem or his lawyer in connection with the difficult task of protecting the rights of the former.

I am not in sympathy with the generalities employed in the majority opinion to discredit Salem's testimony.

References to some petty affairs between Salem and the police authorities might convey the idea that he had a bad criminal record, which evidently is not the fact, whatever his faults may have been.

#### LOCAL REMEDIES AND INTERNATIONAL RESPONSIBILITY FOR THE MIXED COURTS.

The majority opinion refers to the contention made in behalf of the Government of Egypt that as stated in the opinion "the claim fails for reason that only the Mixed Courts are competent to deal with such claims for damages such as that put forward by Salem and that in these cases the diplomatic method is excluded, as may be seen from the genesis of the Egyptian Judicial Reform". It was argued that the Mixed Courts were erected for the special purposes of allowing foreigners to sue the Egyptian Government; that before that was done claims had to be settled through diplomatic methods. The Egyptian Government states, it is recited in the majority opinion, "that the Mixed Courts are to be regarded as international arbitral tribunals, and that therefore no further arbitration proceedings can be opened against the decision of these courts".

It was argued that, in so far as the claim was based on allegations with respect to denial of justice by the Mixed Courts, the claim was inadmissible, because the Egyptian Government is not responsible for the acts of those Tribunals. It was also argued that, if the Mixed Courts were regarded as national courts, the United States could not maintain this claim before this Tribunal on the merits, because Salem did not exhaust all his legal remedies against the decision of the Mixed Court of Appeal at Alexandria. After he had obtained the Court's final decision dismissing his case, there was open to him, it was said, the "*recours en requête civile*" against the decision of the Court. These contentions are analyzed to some extent in the majority opinion and the one with respect to non-liability for the action of the Mixed Courts appears to be sustained.

It is true that it is a *general* rule of international law that diplomatic intervention by a Government in behalf of a claimant against another Government is not justified until he has exhausted his legal remedies in the appropriate tribunals of the country against which he makes the claim. I think that there are times when the rule may be applicable in connection with attempts to vindicate rights under treaties as well as rights under domestic laws. My associates take the view that the rule should not be given application in the present case before the Tribunal, so as to preclude us from considering the case on its merits with a view to the determination of the question of the responsibility of Egypt in the light of the terms of submission contained in the Protocol of January 20, 1931. Even though I do not entirely agree with the reasoning of my associates in arriving at their determination on this point, I concur in the conclusion that the rule should not be applied.

I do not think that the use of the term "equity" in the Protocol has any bearing on this point. In my opinion provisions of the Protocol that cases shall be determined in accordance with the principles of law and equity

should properly be construed to state the requirement that cases should be determined by a just application of law. For a discussion of the connotation of the term "equity" in arbitral agreements see opinion in the *Russell* case in the arbitration between the United States and Mexico under the Convention of September 10, 1923, *Opinion of Commissioners, 1926-1931, Washington*, pp. 79 *et seq.*

I think that my associates must have misunderstood entirely the contentions made by the United States in the so-called *Canadian Claims for Refund of Duties*. It is said that the Government of the United States "argued that the claimants had not exhausted all legal means, which the laws of the United States put at their disposal with regard to the recovery of payments made in excess of the legal duties".

The arbitral agreement of August 18, 1910, under which that case was decided provides by Article III of the terms of submission that "no claim shall be disallowed or rejected by application of the general principle of international law that the legal remedies must be exhausted as a condition precedent to the validity of the claim". The United States, therefore, argued the case entirely independent of the application of that rule. It contended that no "excess" duties had been collected; that such duties as were charged were legal and not illegal or excessive. It invoked the principle of international law with respect to the unquestioned plenary sovereign right of a nation with respect to customs matters. It explained certain statutory provisions of the United States whereby importers may take prescribed steps to object to duties collected by customs officials, and if such steps are not taken, then the rates charged become the legal rates, fixed by Congress. *Report of the American Agent*, pp. 351-363.

In considering the question as to the application of the general rule in the instant case, it seems to me to be very pertinent that when the claimant, conforming to advice given him by his own Government, presented his case to the Mixed Court of First Instance, the Government of Egypt, as defendant, contended that the Court did not have a right to hear the case. The Court sustained the contention. And before the Mixed Court of Appeal at Alexandria the Government of Egypt made a similar contention as to the want of power of the Court to take cognizance of Salem's case. I am constrained to regard as odd, and indeed as seemingly implausible, an independent, collateral action (not an appellate proceeding) instituted in one set of local courts to determine whether another set of local courts have violated international law or stipulations of treaties.

The final opinion of the Court of Appeal on that subject may perhaps be considered to leave its holding in some doubt. The jurisdictional provisions of the law are comprehensive in language. And the Court seems to have passed on the merits of the case. I do not see how it could properly do that unless it had jurisdiction. But in the opinion are found the following passages:

"Whereas *if it be understood by 'admissibility'* the right of Salem to cite real or alleged grievances based on the acts of the Minister of Justice, either of the Minister himself or a Magistrate subject to his orders (in the sense at least that the Parquet represents the executive power and carries out the execution of judgments, constituting a body that is hierarchically organized, having at its head the Minister of Justice, who exercises disciplinary powers over its members, whom he may direct or forbid to exercise public action—see the treatises of Garsonnet and Cézard-Bru and Bonfils) and to ask for

an indemnity, *if his grievances should be recognized as well founded* on the part of the Egyptian Government on account of its instituting against him, a foreigner over whom the native judiciary has no competence, a penal inquiry and for having drawn up a procès-verbal to his prejudice, the case is resolved to a mere suit for damages instituted by a foreigner against the Egyptian Government on account of an administrative act infringing the acquired right of this foreigner derived from his immunity from the jurisdiction; *Whereas it appears in this sense that Salem seems to have so understood his action* since he textually raises in his summons the fact that the annoyances of which he complains originate 'all from the act and fault of the officials of the Egyptian Government.'

"But whereas in asking that the Salem suit be dismissed as inadmissible the Egyptian Government was itself led to examine into the merits and in fact the abnormal length of the complaint relating at length and by minute details the history of the nationality of Salem, supported by certificates and correspondence between the American and Egyptian authorities and the arguments, both oral and in writing, before the court making it indispensable to examine all the elements in the case in order to reach a decision to the effect that *in the meaning apparently desired by the Egyptian Government the action is manifestly inadmissible* although properly and more judicially speaking the action being *strictly admissible in its form* is devoid of any substance in its merits. . . .

"Whereas finally and in view of the uncontested circumstances of the case, George Salem *was inadmissible to claim anything whatsoever from the Egyptian Government, but if, however, strictly speaking, the action in so far as it aims for an indemnity of an alleged injury, is or could be considered admissible in its form*, it is sufficient, nevertheless, to scan the complaint and the statements of the parties with the evidence submitted on both sides to be convinced that this action is devoid of any serious foundation." (Italics inserted.) *Case of the United States*, pp. 283-284, 286.

With regard to the *recours en requête civile*, it seems to me that an international tribunal may commit itself to a sound principle as to what is an exhaustion of local remedies, when it defines that as a final decision of a court of last resort on litigant's complaint. Account being taken of the ramifications of this subject of local remedies, it seems to be logical to say that an alien need not go so far as to ask such a tribunal to set aside its own final decision. It also seems pertinent to consider the statement of the Court that the decision "puts an end once and for all to all the claims preferred by George Salem".

I disagree with the conclusions of my associates sustaining the contentions of the Egyptian Government to the effect that the Mixed Courts must be regarded to be international arbitral tribunals, in the sense that there is no international responsibility for the decisions of those tribunals in cases in which suit may be instituted before them by nationals of capitulatory Powers. These Powers, it is said in the majority opinion, "in concluding the conventions about the institution of the Mixed Courts have abandoned the diplomatic settlement of claims of their subjects, in favor of this national jurisdiction, in all cases in which these subjects can bring forward, according to the 'règlement d'organisation judiciaire', an action against the Egyptian Government before this Mixed Jurisdiction".

With respect to the present case, it is pertinent to note that my associates have not held that Salem's suit was one that could be maintained before the

Mixed Courts. In their opinion they do not give effect to the rule respecting the requirement of resort to local remedies. The Government of Egypt contended before the lower court and before the appellate court that the suit was not admissible.

I am unable to take the view that courts composed of Judges who are named, paid and pensioned by the Egyptian Government and who apply Egyptian law, are either international or domestic tribunals for whose actions there is no international responsibility, such as is defined by established rules and principles of international law pertaining to a Nation's responsibility for acts of its judiciary.

The fact that the Egyptian Government succeeded in persuading certain Powers having capitulatory rights in Egypt to surrender those rights to some extent, because the Egyptian Government convinced the Powers that it had established tribunals equally or more satisfactory than the extra-territorial consular courts, did not result in creating the Mixed Courts international tribunals.

Nor did the interesting fact that Egypt considered that it might establish local tribunals satisfactory to the Powers by drawing to some extent on the legal profession of other countries result in the organization of a unique form of international or domestic tribunals, whose functions effect the extinction of the well-established rules of international law with respect to intervention and responsibility.

Diplomatic claims grow out of complaints of misconduct of authorities of a Government—administrative, judicial, legislative and military. According to a general rule of law, diplomatic intervention in behalf of aliens is not justified, until redress for complaints against such authorities has been sought through such proper means as a Government may afford. It stands to reason that there should be a progressive diminution of international reclamations as a Nation improves its judiciary. That has evidently happened in Egypt in a gratifying way since the organization of the Mixed Courts.

It seems to me that it may be inaccurate and misleading to cite, as is done in the majority opinion, the work of Judge Brinton as authority for the statement that "the Mixed Jurisdiction, acting as a real international arbitral jurisdiction, settled in the first years of their existence many hundreds of diplomatic disputes".

An international reclamation involves the assertion by one Nation against another Nation of rights under international law or under treaty stipulations and a denial of rights so asserted. A suit instituted before a domestic tribunal, either one of an established character or one temporarily and specially constituted, is not a diplomatic claim. Diplomatic claims are presented by Nations against Nations. On page 51 of Judge Brinton's interesting and valuable work, it is said:

"During their early years the Mixed Courts rendered services of great value to the cause of international justice which did not fall within the strict scope of their judicial duties as defined by their Charter. By a series of separate diplomatic agreements Egypt, at the time of the organization of the system, entered into arrangements with the principal capitulatory Powers, for utilizing the services of the judge of the courts for the adjustment of pending diplomatic claims. Two alternative systems, optional with the claimants, were established. One of them provided for a commission of three members of the Court of Appeals to be selected by agreement

between Egypt and each of the respective parties, and whose decision should be final. The other closely followed the existing judicial system and called for the submission of claims, first to a special chamber of the District Court, and, upon appeal, to the Court of Appeals. While following the procedure of the new courts, these special courts were required to give judgment in accordance with the laws and usages in existence at the time of the circumstances which gave rise to the respective claims."

Cases that by some "separate diplomatic agreements" are adjusted in some way by utilizing the services of judges of courts, in a manner distinct from that provided for by the law creating the courts, are not adjudicated pursuant to the organic law creating the courts and defining their jurisdiction. A Commission selected from the bench of the Court of Appeal is not a domestic court intrusted with the adjudication of claims of Nations against Nations. If commissions entertained proceedings instituted by private individuals with the agreement of their Governments, then the claims were private litigations which those Governments sanctioned with a view to *avoid* and not to settle diplomatic claims. An action by a foreign national against the Egyptian Government in the Mixed Courts is not an international reclamation pressed by a Government against Egypt. If commissions passed upon claims of foreign countries against Egypt they might be said to be international tribunals. But they would not in such activities act in their capacity as judges of the Mixed Courts of Egypt. Members of a domestic judiciary occasionally are chosen to sit on international tribunals.

In connection with the narration of Egyptian contentions, there is a statement in the majority opinion that the Egyptian Government "are bound to ask the Powers whose nationals have to be chosen to designate the judges". The assertion is not clear to me. The Egyptian Government, with a view to establishing a judiciary so acceptable to the Powers that they would diminish their extraterritorial jurisdiction, agreed to designate on those tribunals a number of foreign judges. As I understand the Egyptian practice, it is that the Government requests suggestions from the capitulatory Powers and, although it does not consider itself bound to accept specific designations of judges from them, it does not name any judges not acceptable to a capitulatory Power. Article 5 of the *Règlement d'Organisation Judiciaire pour les Procès Mixtes* reads:

"The nomination and the choice of judges shall belong to the Egyptian Government; but in order that it may be assured as to the guarantees presented by the persons whom it may select, it shall address itself unofficially to the Ministers of Justice abroad, and will engage only persons who have received the approval and authorization of their own Government."

It is stated in the majority opinion that the responsibility of a state can go only so far as its sovereignty; that in the same measure as the latter is restricted, the liability of the State must also be restricted; and that consequently a denial of justice committed by the Mixed Courts cannot be brought forward against the Government of Egypt. It is said that the Egyptian Government resigned a part of their jurisdictional sovereignty "by undertaking to let themselves be judged in civil cases, especially in cases for alleged violation of foreigners' rights on the part of Egyptian authorities".

Agreements originally providing for the establishment of the extraterritorial courts may well be said, of course, to have effected a limitation on

Egyptian sovereignty. Obviously, therefore, Egypt was not and is not now responsible for the extraterritorial courts. But the Mixed Courts were not established to create any such limitation on sovereignty but obviously for the reverse purpose, that is, in a measure to restore sovereign rights. And since by agreement with the capitulatory Powers Egypt to some extent decreased the limitation on the exercise of sovereign Powers by subjecting foreigners to the jurisdiction of a domestic judiciary, there is, in my opinion, responsibility for that domestic judiciary. I am unable to follow the reasoning of my associates which seems to be predicated on the theory that the establishment of the Mixed Courts effected a limitation on sovereignty.

I do not agree with the view expressed by my associates to the effect that the Powers abandoned diplomatic claims in all cases in which their nationals could sue in the Mixed Courts. It would seem to follow from this line of reasoning that diplomatic claims have not been abandoned by non-capitulatory Powers, although in certain cases their nationals are permitted to sue in the Mixed Courts. To my mind this would be an entirely illogical situation.

There can be no diplomatic claims based on allegations of denial of justice growing out of suits in those Courts until the litigations are completed. I do not perceive therefore how such diplomatic claims growing out of such suits can have been abandoned.

I find myself unable to agree with the interpretation given by my associates to Article 40 of the *Règlement d'Organisation Judiciaire*. I do not perceive that it has any bearing on the settlement of diplomatic claims. It provided that the new laws and the new judicial organization should have "no retroactive effect". I assume that this provision means that extraterritorial jurisdiction should not be retroactively ousted; and that as regards private suits against Egypt and as regards other matters contemplated by the *Règlement*, the law should have no retroactive effect.

Some Nations like the United States and Great Britain do not allow themselves, generally speaking, to be sued except in matters pertaining to contracts. Other Nations permit also suits in tort. Local laws in relation to such matters have no relation to diplomatic claims, in the sense that such laws extinguish the rule of international law with respect to a Nation's right to intervene in behalf of its nationals. Such domestic enactments may result in affording a greater or lesser degree of local remedies which, if adequate, may preclude diplomatic claims, in view of the general principle with respect to the necessity for the exhaustion of the appropriate remedies.

I am also unable to agree with the view that the Egyptian Government "resigned" a part of their jurisdictional sovereignty by letting themselves be judged in civil cases. In my opinion it cannot properly be said that action taken by a Government to afford redress for wrongs through judicial tribunals or quasi-judicial tribunals or administrative or legislative action involves any forfeiture or resignation of sovereignty. It seems to me that steps taken for such a purpose might better be regarded as a proper exercise of sovereign functions.

Egypt, as a member of the family of nations, enjoys all the rights and benefits of international law. I cannot agree that she has by international covenants been placed in that unique situation whereby, pursuant to local law and international law, she may insist on having complaints of aliens sent to a domestic judiciary and may then plead that there can be no

diplomatic reclamations because the action of that judiciary is final. As I have observed, some Nations allow themselves to be sued in matters pertaining to contracts, others, affording a wider scope of local remedies, also in matters pertaining to torts. If decisions rendered by the courts are unobjectionable in the light of international law then, generally speaking, there is no ground for diplomatic claims based on acts of the judiciary. But under international law a Nation is responsible for the acts of its judiciary. And I do not believe the Government of Egypt is an exception to that rule. The arrangements with respect to the organization of the Mixed Courts did not, in my opinion, result in wiping out, so far as Egypt is concerned, the rule of international law which recognizes the right of a Nation to intervene to protect its nationals in foreign countries through diplomatic channels and through instrumentalities such as are afforded by international tribunals.

During the course of oral argument, counsel for Egypt referred to questions raised at the Conference for the Codification of International Law held at The Hague in 1930. He called attention to a proposal made by the distinguished Egyptian Delegate, Abd al Hamid Badaoui Pacha, to include in a basis of discussion the following:

“A State shall not, however, be held responsible under the preceding provision if its internal law includes special guarantees established by treaty or custom to the advantage of certain Powers with a view to ensuring adequate protection for the person and property of the nationals of these Powers.

“This shall also apply to the cases in which, even without any treaty, these guarantees are in actual practice extended to other Powers.” *League of Nations, Conference for the Codification of International Law*, Vol. IV, p. 121.

No treaty was framed at the Conference with respect to the subject of responsibilities of States. Indeed nothing was said for or against the Egyptian Delegate's proposal, except that one delegate expressed an intention to vote against it. I presume that the Egyptian Delegate had specifically in mind advantages secured to so-called capitulatory Powers. It might be plausibly argued that no provisions of a new multilateral treaty would be necessary, if the proposed definition of non-responsibility had already been incorporated in the provisions of agreements establishing the so-called capitulatory régime. Evidently only through treaty arrangements could such a unique situation be established. I understand it to be the view of my associates that this had been done. I have quoted their statement that the Powers, in concluding conventions respecting the Mixed Courts, abandoned diplomatic claims. They ground their conclusions on no specific provisions. It seems to me, therefore, that they undertake by interpolations to re-write judicially international arrangements, so as to create a situation neither intended nor established by the contracting parties.

According to my understanding of rules and principles of interpretation, there is not in the *Règlement d'Organisation Judiciaire*, or in any of the arrangements by which the powers agreed to its application, any provision or declaration to which can be ascribed the effect of depriving a Power of the right of preferring against Egypt the kinds of diplomatic reclamations which under international law they are entitled to make against any other Nation. *British and Foreign State Papers*, 1874-1875, Vol. LXVI. pp. 106-112, 592. I think it may be assumed that, had the Powers desired

to enter into stipulations creating such an unusual legal situation, explicit language would have been used for such a purpose.

It is interesting and pertinent to take note of the conditions under which the United States accepted the jurisdiction of the Mixed Courts. It was done pursuant to an Act of Congress of March 23, 1874, 18 Stat., 23. The law authorized the suspension of extraterritorial jurisdiction by the President whenever he might "receive satisfactory information that the Ottoman government, or that of Egypt" had organized "other tribunals" on a basis likely to secure to citizens of the United States the impartial justice administered by the extraterritorial courts. (Italics inserted.) The Government of the United States did not by action taken conformably to this law participate in the creation of tribunals having the peculiar characteristics attributed to them by my associates. I fail to perceive how it can properly be said that any other Government did any such thing.

In construing provisions of a Treaty between Spain and the United States, Mr. Justice Story, of the Supreme Court of the United States, in the case of *The Amiable Isabella*, 6 Wheaton (U.S.) 1, 71-72, said:

"In the first place, this court does not possess any treaty-making power. That power belongs by the constitution to another department of the government; and to alter, amend, or add to any treaty, by inserting any clause, whether small or great, important or trivial, would be on our part a usurpation of power, and not an exercise of judicial functions. It would be to make, and not to construe a treaty. . . .

"In the next place, this court is bound to give effect to the stipulations of the treaty in the manner and to the extent which the parties have declared, and not otherwise."

In the *British Counter-Case* in the Alaskan Boundary Arbitration under the Treaty of January 24, 1903, between the United States and Great Britain, it was said:

"It is respectfully submitted on behalf of Great Britain that the function of the Tribunal is to interpret the Articles of the Convention by ascertaining the intention and meaning thereof, and not to re-cast it." Published in the American print, Vol. IV, p. 6.

In *Lake County v. Rollins*, 130 U.S. 662, 670, the Supreme Court of the United States, in dealing with the interpretation of provisions of the constitution of one of the states of the Union, said:

"We are unable to adopt the constructive interpolations ingeniously offered by counsel for defendant in error."

I am of the opinion that what I have referred to as a judicial re-writing of international covenants is contrary to established principles of interpretation.

I think that the following passage from Judge Brinton's book bears interestingly on the point whether the Mixed Courts may be considered to be international tribunals:

"It was an Egyptian statesman, supported by an Egyptian ruler, who called them into being. They form an integral part of the Egyptian judicial system. They are maintained by the national treasury. Their writs run in the name of the Egyptian Sovereign. It is he who appoints their judges. While a majority of these judges must be selected from among

foreign nations they are none the less officials of the Egyptian State. The little army of employees who serve the courts are in the main composed of Egyptian subjects. The courts are indeed Egyptian Courts and a national Egyptian institution." Pp. 349-350.

Other passages may be briefly cited to the same effect:

"The Mixed Courts are national courts, . . . they represent the national sovereignty. They are not in the proper sense 'international courts' and no such characterization would have been accepted by Nubar nor insisted upon by the Powers with whom was he negotiating . . .

"The courts are Egyptian courts." *Op. cit.*, pp. 18-19, 43.

To the same effect I may quote from an address delivered by an Egyptian member of the Mixed Courts, Ragheb Bey Ghali, Judge of the Mixed Court of Alexandria, on the occasion of the fiftieth anniversary of the establishment of the Courts. A portion was read during the oral argument before the Tribunal. He said:

"And it is thus that the Egyptian Government, in according to foreigners administration of justice adequate for their interests, in the interests of Egypt, subjected them to an Egyptian jurisdiction to be in accord with the principles of the constitutional law. For it must be well remembered that the mixed jurisdiction, notwithstanding its name, its mode of functioning, and the extraneous character of some of its magistrates, is none the less an Egyptian jurisdiction which depends, as other Egyptian jurisdictions, upon the judicial power of the Egyptian State, to the exclusion of everything else. This follows in an evident manner from the letter and the spirit of the Royal Rescript which established the constitutional regime in Egypt."

These descriptions of the Courts seem to me to show a concept very different from that of courts functioning in Egypt as international tribunals, with an absence of responsibility for their acts such as is imposed by the law on Nations for the acts of their judiciaries.

#### DETENTION OF THE CLAIMANT'S DEED OF JANUARY 26, 1917.

The Government of the United States contended that the Egyptian Government is liable for damages occasioned by a protracted, arbitrary detention of the claimant's deed, such detention having prevented Salem from selling his properties at a large profit.

I do not concur in the reasons given in the majority opinion for the conclusion that there is no liability for the withholding of this document. I consider that, to deprive the claimant of his property the return of which was so urgently insisted upon by himself, by his attorney and by the American Diplomatic Agency was unjustifiable.

I am constrained to regard as unsatisfactory the excuse for the withholding which was advanced by the Agent and by counsel for Egypt in the present proceedings and which is sustained in the majority opinion, namely, that the deed was needed to prosecute persons who were co-defendants with Salem. The prosecution of these persons was begun in 1918. The manner in which it was conducted—or perhaps it might better be said the manner in which the authorities failed to proceed with it—has been briefly discussed. Up to the present time those proceedings have not been carried forward. For these reasons alone I am unable to consider to be well grounded explana-

tions that the deed was withheld in order that the co-defendants might be prosecuted.

It would seem to me to be a plausible assumption that the authorities did not proceed with the prosecution because of the belief that they would be unable to obtain convictions. It may be noted, among other things, that several eye-witnesses, who seem never to have been discredited, testified at the preliminary hearing before Mohamed Zaki el Ibrashy Bey with regard to the manner in which the deed was made, their testimony going to prove effectively that forgery was not committed.

A so-called protocol, drawn at the deathbed of the claimant's uncle, is referred to in the majority opinion as the basis of prosecution. But after that document was formulated the prosecution was not even instituted by Egyptian authorities, until some months subsequent to the formulation of the protocol a Persian consular officer took the initiative. He, of course, had no interest in the administration of criminal jurisprudence in Egypt. And when he accomplished the purpose of obtaining certain taxes which he insisted were due under Persian law on the uncle's estate he dropped out of the prosecution. I do not, therefore, perceive the relevancy of the conclusion in the majority opinion that the Egyptian authorities "counted on a speedy settlement of the criminal proceedings against the co-accused of Salem".

It is observed in the majority opinion that, when a certain communication was sent by the American Diplomatic Agency to the Egyptian Foreign Office requesting the deed for use in the prosecution of Salem before the American extraterritorial court, the deed was delivered. But I am unable to perceive that this prosecution could in any way affect Salem's right to his own possession of his property.

It is said in the opinion that the Tribunal would agree to the contention of the United States with respect to the obligation of the Egyptian authorities to return the documents received from Salem at least as soon as the question of his citizenship was cleared "if the retention of the documents had been in itself an infringement of the capitulatory rights of the United States". But it is further observed that "the native authorities had the right to seize the documents in 1917". Regarding this point, I have not the feeling of certainty expressed by my associates. There is evidence in the record bearing on the construction of pertinent international arrangements which seems to suggest a contrary interpretation. There are recorded precedents from which it appears that Egyptian authorities at times applied to foreign diplomatic or consular officers to have them cause their nationals to appear to give testimony or to produce documents in the manner provided for by the domestic law process of a *subpoena duces tecum*. *American case*, pp. 132-133; *Annex E to the Memorial of the Egyptian Government*, Exhibit 12 (B).

However, I do not consider this point to be conclusive with respect to the merits of the complaint regarding the detention of the deed. I think that the action of depriving the claimant of his document at a time when the use of it was of great importance to him was in the nature of a confiscation. And I assume that it is generally recognized that confiscation of the property of an alien is violative of international law, just as it is generally forbidden by domestic law throughout the world. See citations on an opinion in the *Cook* case in the Arbitration under the Convention concluded September 8, 1923, between the United States and Mexico. *Opinions of Commissioners*, Washington, 1929, p. 270.

It is unnecessary to cite legal authority to support the statement that contractual rights are property. *Long Island Water Supply Company v. Brooklyn*, 166 U.S. 685. Without any detailed discussion of this point, I may refer, merely for the purpose of illustration, to the decision in the case of *Company General of the Orinoco* in the French-Venezuelan Arbitration of 1902, *Ralston's Report*, p. 244. Umpire Plumley held that Venezuelan authorities made impossible a contract of a French concessionaire to sell its rights to a British Company, and he decided that the sale price agreed upon was a proper measurement of damages, which might be claimed on behalf of the claimant against the Government of Venezuela.

COMPLAINT OF A DENIAL OF JUSTICE BY THE ACTION OF THE MIXED COURT OF APPEAL AT ALEXANDRIA.

My associates discussed but briefly the complaints against the Mixed Courts of Appeal at Alexandria. It would appear that no treatment of this point is necessary in connection with their decision, since they reached the conclusion that there can be no responsibility for the action of the Court whatever may be the nature of its decision in a litigation instituted by a national of a capitulatory Power. Moreover, if the contention submitted by the Egyptian Government as to the non-admissibility of the suit instituted by Salem in the Mixed Courts is sound, there would seemingly be little or no purpose in discussing the decision of a Court which had no jurisdiction to hear this suit. As I have observed, there seems to be an element of oddity about a proceeding instituted in one set of courts to determine whether another set of tribunals acted in violation of international law or of stipulations of treaties. With reference to this matter, I have referred to the attitude of the Egyptian Government, of the Mixed Court of First Instance at Cairo, and the seemingly uncertain language of the Mixed Court of Appeal.

In view of the manner in which these questions are treated in the majority opinion I shall merely refer briefly to some considerations of which it seems to me it is pertinent to take account.

I understand the principal complaint of the United States to be that Salem was not given the opportunity of being properly heard. The case came before the appellate court on an appeal from the decision of the lower court on the question of admissibility. Counsel for both sides apparently had the understanding that this point alone would be decided. The appellate court, as shown by its opinion, recognized this fact, but decided the case on the merits.

I agree generally with the views expressed in the majority opinion as to the reserve with which an international tribunal should approach questions relating to the acts of a national court. However, with reference to objections made by counsel for Egypt to the contentions made by the United States, it may be noted that allegations of denial of justice through judicial action have frequently been made before international tribunals. On several occasions such tribunals have considered contentions as to the impropriety of decisions of the Supreme Court of the United States. Moore, *International Arbitrations*, Vol. 4, p. 3298, *et seq.*; *Rio Grande* claim against the United States under the Special Agreement of August 18, 1910, between the United States and Great Britain, *American Agent's Report*, p. 332. As I have observed, a domestic court cannot give a final, binding interpretation to provisions of treaties or to rules of international law. It therefore may

be expected that complaints should be made in cases involving questions of that character, more often than in others concerned solely with questions of domestic law.

I have no specific disagreement with the more or less concrete considerations mentioned in the opinion as illustrations of things of which an international tribunal may properly take account in dealing with a difficult subject of this character. In addition to matters specified by my associates, I may mention failure of a court to receive and consider important evidence particularly in a case in which such action would be equivalent in effect to the refusal of a court having jurisdiction to deny an opportunity for proper hearing. See the *Morton* case in the arbitration between the United States and Mexico, under the Convention of September 8, 1923, *Opinions of Commissioners, Washington, 1929*, p. 151.

The appellate court appears to have grounded its decision on the pleadings and on contentions with respect to the technical point of jurisdiction. We had before us in the proceedings of this Tribunal a large amount of evidence which it appears was submitted to the Mixed Courts of Appeal without being translated from the Arabic. It was intended to have it made available if the case should proceed on the merit. The vast amount of pleadings, accompanying documents, and written and oral arguments submitted by the representatives of the two Governments to this Tribunal show their idea as to what they believed should properly be considered by a court passing upon Salem's complaints. The grievances laid before this Tribunal were the same as those submitted to the Court of Appeal at Alexandria, with the exception of the complaints made against the Court itself. Whether all the materials presented to this Tribunal were necessary for a decision or whether the Court of Appeal had abundant evidence and argument are matters of opinion. In any event, what I have stated in this opinion shows that I do not agree with the conclusions submitted in the opinion of the Mixed Court of Appeal, that the action involving Salem's complaints was "devoid of any serious foundation".

#### AMOUNT OF AWARD.

In the majority opinion are enumerated in detail elements of damages alleged by the United States. These items are not discussed, however, in view of the decision as to the non-liability of Egypt with respect to all complaints. In dealing with questions pertaining to damages, international tribunals properly apply principles of law common to legal systems of the Nations of the world. Some of the items may be questioned. However, in cases in which there is uncertainty with respect to the precise amount of damage but not with respect to the result of the wrong for which damages are sought, it is proper and useful for an international tribunal to apply principles such as were stated by the Supreme Court of the United States in *Story Parchment Company v. The Paterson Parchment Paper Company*, et al., 282, U.S. 555. The Court in its opinion referred to the general rule with respect to contingent and uncertain damages and then proceeded to say:

"Where the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts. In such case, while the damages may not be determined by mere speculation

or guess, it will be enough if the evidence show the extent of the damages as a matter of just and reasonable inference, although the result be only approximate. The wrongdoer is not entitled to complain that they cannot be measured with the exactness and precision that would be possible if the case, which he alone is responsible for making, were otherwise."

The various specific complaints against Egypt were analyzed separately by the United States, and the position was taken that all of them should be considered together, and that thus analyzed they showed a spirit of prejudice and unfairness against the claimant, Salem. The range of questions of law and of fact involved in the charges made is very extensive. I have discussed some of the important points dealt with in the opinion of my associates.

FRED. K. NIELSEN.