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The Alsop Claim (Chile, United States)

5 July 1911

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THE ALSOP CLAIM

PARTIES: Chile, United States of America.

COMPROMIS: Protocol of 1 December 1909.¹

ARBITRATOR: George V, King of Great Britain.

AWARD: 5 July 1911.

Claim originated in a contract between Bolivia and Alsop and Co., a firm in liquidation, registered in Chile and composed of American citizens— War — Occupation of a part of Bolivia's territory by Chile — Transfer of Bolivia's liability to Chile as a result of arrangements between the two States — Claim put forward by the United States on behalf of Alsop and Co.— Controversy as to the amount equitably due to the claimants — Submission of the case to an arbitrator as an *amiable compositeur* — Functions of an *amiable compositeur* — State succession in the matter of obligations — Extinctive prescription — Protection of the rights of aliens — Relevance of Notes exchanged between the respective representatives of two States on the occasion of the negotiation of a treaty, and intimately related to the subject matter of such treaty.

¹ As the full text of this Protocol is given in the award, it is not printed again under a special heading.

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SYLLABUS

The firm of Alsop and Co. was registered in Chile, but it was composed of American citizens. The Alsop claim arose out of an agreement made with the Government of Bolivia so long ago as the year 1876. In that year the firm was in liquidation, and through its liquidator, a certain Mr. Wheelwright, entered into arrangements with the Government of Bolivia for the settlement of a debt arising out of previous transactions between that Government and one Pedro Lopez Gama, a Brazilian citizen, which debt had been assigned to Alsop and Co. These arrangements were set out in the form of a contract between the Bolivian Government and Wheelwright. By this contract Bolivia admitted that it was then indebted to Alsop and Co. in the sum of 835,000 bolivianos, and agreed that the debt was to carry interest at the rate of 5 per cent per annum. For the payment of this sum two kinds of security were given: (1) a charge was created upon the custom-house at Arica, in which Bolivia then had an interest; and (2) a share was granted in the rich Government mines of Caracoles along the Bolivian coast.

After the war between Chile, Bolivia and Peru, in 1879 and 1880, the territory which had been charged with the payment of these obligations passed into the hands of Chile. The Government of the United States of America began to put forward the claim of Alsop and Co. as a good claim against the Government of Chile. The latter agreed to assume Bolivia's liability under the Wheelwright contract to a limited extent by arrangements entered into between the two States, and offered the payment of a certain sum in respect of the claim. This sum was rejected by the Government of the United States as insufficient.

The claim was presented to the United States and Chilean Claims Commission in 1890 and 1894 and dismissed by that Commission for want of jurisdiction.

As the two parties were not able to agree upon the amount equitably due to the claimants, they concluded a Protocol dated the 1st of December 1909, by which they submitted the whole controversy to the decision of the King of Great Britain, as an *amiable compositeur*, who handed down his award on 5 July 1911.

AWARD PRONOUNCED BY HIS MAJESTY KING GEORGE V AS
AMIABLE COMPOSITEUR BETWEEN THE UNITED STATES OF
AMERICA AND THE REPUBLIC OF CHILE IN THE MATTER OF
THE ALSOP CLAIM, 5 JULY, 1911¹

Réclamation ayant pour origine un contrat conclu entre la Bolivie et *Alsop and Co.*, une Société en liquidation qui avait son siège social au Chili et qui était composée de nationaux américains — Guerre — Occupation d'une partie du territoire bolivien par le Chili — Transfert à ce dernier des obligations de la Bolivie par suite d'arrangements entre les deux Etats — Réclamation présentée par les Etats-Unies au nom de *Alsop and Co.* — Contestation au sujet de la somme équitable due aux réclamants — Désignation d'un arbitre chargé, en tant qu'amiable compositeur, de trancher la question litigieuse — Compétence d'un amiable compositeur — Succession d'Etats en matière d'obligations — Prescription extinctive — Protection des droits des étrangers — Respect dû aux Notes échangées entre les représentants respectifs de deux Etats à l'occasion de la négociation d'un traité et ayant un rapport intime avec l'objet de ce traité.

WHEREAS by a Protocol dated the 1st day of December, 1909, the Government of the United States of America and the Government of the Republic of Chile resolved that, as they had not been able to agree as to the amount equitably due to the claimants in the Alsop case, they would submit the whole controversy to His late Majesty King Edward VII as an *amiable compositeur* to determine the amount equitably due to the said claimants; and

WHEREAS on account of his untimely death His late Majesty was not able to carry out the duty which he had undertaken; and

WHEREAS at the request of the two Governments We agreed to act in place of His late Majesty; and

WHEREAS We determined to designate a Commission to study the papers submitted to Us on either side, and submit a Report to Us for Our consideration as to the amount equitably due to the said claimants; and

WHEREAS We appointed for that purpose:

Our right trusty and right well-beloved cousin Hamilton John Agmondesham, Earl of Desart, K.C.B., a Member of the Permanent Court of Arbitration;

Our right trusty and well-beloved William Snowden, Baron Robson, G.C.M.G., a Lord of Appeal in Ordinary, and a Member of Court Most Honourable Privy Council; and

Our trusty and well-beloved Cecil James Barrington Hurst, C.B., of the Middle Temple, Barrister-at-Law, Assistant Legal Adviser to Our Principal Secretary of State for Foreign Affairs; and

WHEREAS the said Commission have submitted unto Us for Our consideration the following Report:

¹ *Papers relating to Foreign Relations of the United States*, 1911, p. 38.

May it please Your Majesty:

On the 1st December, 1909, the Government of the United States of America and the Government of the Republic of Chile entered into the following Protocol submitting to His late Majesty what is known as the Alsop claim against the Republic of Chile:

PROTOCOL

The Government of the United States of America and the Government of the Republic of Chile, through their respective plenipotentiaries, to wit: Seth Lew Pierrepont, Chargé d'affaires of the United States of America, and Agustin Edwards, Minister of Foreign Affairs of Chile, who, after having communicated to each other their respective full powers, found in good and due form, have agreed upon and concluded the following:

Protocol of Submission

WHEREAS the Government of the United States of America and the Government of the Republic of Chile have not been able to agree as to the amount equitably due the claimants in the Alsop claim;

THEREFORE, the two Governments have resolved to submit the whole controversy to His Britannic Majesty Edward VII, who as an " amiable compositeur " shall determine what amount, if any, is, under all the facts and circumstances of the case, and taking into consideration all documents, evidence, correspondence, allegations, and arguments which may be presented by either Government, equitably due said claimants.

The full case of each Government shall be submitted to His Britannic Majesty, and to the other Government through its duly accredited representative at St. James, within six months from the date of this agreement; each Government shall then have four months in which to submit a counter-case to His Britannic Majesty and to the other Government as above provided, which counter-case shall contain only matters in defence of the other's case.

The case shall then be closed unless His Britannic Majesty shall call for further documents, evidence, correspondence, or arguments from either Government, in which case such further documents, evidence, correspondence, or arguments shall be furnished within sixty days from the date of the call. If not so furnished within the time specified, a decision in the case shall be given as if such documents, evidence, correspondence, or arguments did not exist.

The decision by His Britannic Majesty shall be accepted as final and binding upon the two Governments.

IN WITNESS WHEREOF, the undersigned Plenipotentiaries of the United States and Chile have signed the above Protocol both in the English and Spanish languages, and hereunto affixed their seals.

DONE in duplicate, at the City of Santiago, this first day of December, 1909.

[SEAL] Seth LOW PIERREPONT

[SEAL] Agustin EDWARDS

Your Majesty has been pleased at the request of the parties to the reference to consent to act as arbitrator in place of His late Majesty. The duty which Your Majesty has been pleased to undertake is one of pronouncing an award which shall do substantial justice between the parties without attaching too great an importance to the technical points which may be raised on either side. This is what we conceive to be the function of an " amiable compositeur ".

In accordance with the terms of the Protocol, cases have been submitted to Your Majesty by both the above-named Governments. These cases are very voluminous and elaborate, and the United States Government annexes three volumes of appendices.

The arguments put forward are, in relation to some matters, of a very technical character, and in relation to all matters are elaborated at great length.

The United States case runs into 352 pages, their countercase into 198 pages, and there are, as stated above, three volumes of appendices.

The Chilean case is of 54 folio pages, the countercase of 335 folio pages, but, the material documents being quoted over and over again in the cases and countercases, only a short appendix of documents is annexed.

Your Majesty has been pleased to do us the honour of directing us to give our consideration to the whole matter, and to report to Your Majesty thereon.

It was necessary for us for this purpose to consider and weigh the arguments set out in these books, and this occupied a considerable time, but we are glad to be able to state that in our judgment the issues raised and our conclusions can be set out for the consideration of Your Majesty in a comparatively small compass.

The firm of Alsop and Co. was registered in Chile, its seat of business being in Valparaiso, but it was composed of American citizens. The claim arises out of an agreement made with the Government of Bolivia so long ago as the year 1876.

In that year the firm was in liquidation, and through its liquidator, a Mr. Wheelwright, entered into arrangements with the Government of Bolivia for the settlement of a debt arising out of previous transactions between that government and one Pedro Lopez Gama, a Brazilian citizen, which debt had been assigned to Alsop and Co.

These arrangements were set out in the form of a contract between the Bolivian Government and Wheelwright, called herein, for convenience of reference, the Wheelwright contract, and it is in respect of the unfulfilled obligations of Bolivia under that contract, which obligations are alleged by the United States Government both to have fallen upon, and to have been specifically undertaken by, the Government of Chile, that the claim arises which has been submitted for the decision of Your Majesty.

The amount of the claim put forward by the United States Government on behalf of Alsop and Co. is for the sum of 2,803,370 dol. 36 c.

The Chilean Government admit that they have assumed Bolivia's liability under the Wheelwright contract to a limited extent by a treaty entered into between the two states in 1904, and have offered the payment of a certain sum in respect of the claim. This sum has been refused by the United States Government as being insufficient to satisfy either the just claim of Alsop and Co. on Bolivia or Chile, or the liability which Chile has herself undertaken on behalf of Bolivia.

The claim has now been the subject of discussion and controversy between the Government of the United States and of Chile for more than twenty-five years, and the failure to arrive at any conclusion acceptable to both governments has induced them to invite Your Majesty to pronounce an award which both parties have undertaken to accept as final and binding upon the two governments.

It has already been stated that the object of the Wheelwright contract was to provide for the payment of a debt from the Government of Bolivia to Alsop and Co. as the assignees of Gama, who had been involved in various transactions of a complicated nature with the Government of Bolivia, resulting in

that government's admission that there was due a capital sum of 835,000 bolivianos and certain arrears of interest thereon.

The contract itself states that it is "for the consolidation and amortisation of the credits which he (Wheelwright) has pending against the state".

It is important to notice that, though the Wheelwright contract was made with the Government of Bolivia, it is against the Government of Chile that the Alsop claim is now put forward by the Government of the United States.

Bolivia admitted by this contract that she was then indebted to Alsop and Co. in the sum of 835,000 bolivianos, and agreed that the debt was to carry interest at the rate of 5 per cent. per annum, not compoundable. The contract provided for the liquidation of this debt by giving Wheelwright the right to the sums by which the Bolivian share of certain customs receipts might exceed 405,000 bolivianos annually, and also by giving him the right to work the government silver mines in the coast department of Bolivia for a term of twenty-five years upon the terms that the government share of the proceeds of the mines should be retained by him and applied in reduction of the debt.

At the time of this contract these customs dues were collected in Peruvian territory, at the port of Arica, which was the natural port of access to a large part of the territory of Bolivia, and an arrangement was in force between the two Republics under which the customs duties levied at the port were divided between them, and no further duties were levied at the Bolivian frontier on goods going to that country. Under this arrangement Bolivia took a fixed annual sum of 405,000 bolivianos as her share, the balance, whatever its amount, going to Peru. Bolivia was, however, dissatisfied with the arrangement, and had given notice to terminate it; she hoped that under any new agreement her income from this source would be increased, and it was this anticipated increase which she agreed to apply toward the liquidation of the Alsop claim.

The origin of the government silver mines, of which the proceeds were to be applied to the same purpose was as follows: Under the Bolivian mining law the discoverer of a mine was entitled to two, sometimes three, "estacas", or plots, of certain size, which were first marked off along the reef or lode. Another "estaca" of 60 by 30 metres was then marked off, and was government property. The right to work these small mines was given to the firm of Alsop and Co., upon the terms that 60 per cent. of the net proceeds were to go to the firm as a reward for its labours, and 40 per cent. was to be regarded as the share of the government, but was to be retained by the firm and applied in liquidation of the debt.

Early in the year 1879, less than three years after the making of the Wheelwright contract, war broke out between Chile and Bolivia, and the coast province of Bolivia rapidly passed into the military occupation of the former republic. Shortly afterwards Peru also became engaged in the conflict, and by June, 1880, the port of Arica had passed into the possession of the Chilean Government.

The result of the war, therefore, was that both the sources to which Alsop and Co. were entitled to look for the money which would pay their debt had passed out of the control of Bolivia into the possession of Chile, and in Chile's possession they still remain. Her military occupation of the coast province of Bolivia was rendered permanent by the Pact of Indefinite Truce of 1884 between Bolivia and Chile, and this military occupation was definitely converted into sovereignty by the Treaty of Peace of 1904. Subject to a future plébiscite, Arica was transferred from Peru to Chile by the Treaty of Ancon, 1883.

The debt admitted by Bolivia in 1876 as due to Alsop and Co. has never been paid, and though it is not alleged by the United States of America that the

conquest of Arica, and of the coast province, would of itself affect the indebtedness of Bolivia, or transfer the liability to Chile, it is contended by them that, on other grounds, the firm of Alsop and Co. are now entitled to recover the amount of their claim from Chile.

These grounds are, (1) that Chile appropriated to her own use the proceeds of the customs house of Arica, thereby preventing any money coming to Bolivia which Alsop and Co. might claim under the Wheelwright contract to be applicable to the repayment of the debt; (2) that Chile prevented Alsop and Co. from working the government silver mines in the coast province in the way they were entitled to work them by applying Chilean law in the province from the date of the military occupation, and thereby subjecting Alsop and Co. to more onerous terms than would have been the case under Bolivian law; and (3) that from time to time Chile undertook to pay the claim.

The Government of the United States of America began to put forward the claim of Alsop and Co. as a good claim against the Government of Chile from a comparatively early date, though it is only recently that the claim has assumed its present shape and magnitude. The United States, however, so far as concerns the original debt admitted in 1876 by the Government of Bolivia (viz., 835,000 bolivianos carrying interest at 5 per cent.), also allege that Bolivia is still the debtor.

The Republic of Bolivia is not a party to the submission of the matter to Your Majesty, and cannot be bound by the result, but her standpoint is that her liability has been entirely transferred to Chile as a result of her loss of the coast province, and of the arrangements concluded between her and Chile.

Chile, on the other hand, repudiates liability for the claim altogether so far as the claim is based on her appropriation of the Arica customs, or on the application of Chilean law to the province she had conquered; and so far as the claim against her is based upon her undertakings to pay, she maintains that it is a matter in which she is only liable to the extent of the provision made in the treaty between her and Bolivia and that to that extent she is and always has been ready and willing to pay Alsop and Co., but that the amount offered has been refused.

Before passing to a detailed examination of the claim it is desirable to state that in 1890 a claims commission was appointed to deal with the various outstanding claims between Chile and the United States of America, but the commission was unable to deal with the Alsop claim within the time at its disposal. This commission was revived in 1894, and the Alsop claim was again brought before it, but was disallowed on the ground that Alsop and Co. had no *locus standi*, not being included within the term "corporations, companies, or private individuals, citizens of the United States", as the firm had been organized as a partnership under Chilean law, and had thereby become a juridical entity possessing Chilean nationality. The labors of the commission therefore failed to bring about a settlement of the dispute, and it now comes before Your Majesty to determine the amount, if any, which is equitably due to the claimants, the representatives of the former partners of the firm of Alsop and Co., now in liquidation, all of whom are alleged to be citizens of the United States.

The Chilean Government, in the case presented to Your Majesty, again suggest that, as the firm was registered in Chile, and is a Chilean company, their grievances cannot properly be the subject of a diplomatic claim, and that the claimants should be referred to the Chilean courts for the establishment of any rights they may possess.

We hardly think that this contention is seriously put forward as precluding Your Majesty from dealing with the merits of the case. It would be inconsistent with the terms of the reference to Your Majesty, and would practically exclude the possibility of any real decision on the equities of the claim put forward.

The remedy suggested would probably be illusory, and, so far from removing friction, an award in this sense, transferring the real decision from an impartial arbitrator with full powers to the courts of the country concerned, which in all probability have not sufficient power to deal equitably with the claim, could afford no effective solution of the points at issue or do otherwise than increase the friction which has already arisen between the two States.

We are clearly of opinion, looking to the terms of reference and to all the circumstances of the case, that such a contention, if intended to be seriously put forward by Chile, should be rejected. We think that it may be disregarded by Your Majesty.

We pass now to a more detailed examination of the claim.

The Wheelwright contract was entered into by the parties with the intention of placing upon a permanent basis the large claims which Alsop and Co. then had against Bolivia.

The claims originated in the transactions between a Brazilian citizen of the name of Pedro López Gama who had advanced money to the Bolivian Government in connection with the exploitation of guano and the working of mines. Gama was financed by the house of Alsop, but he became involved in financial difficulties and in 1875 he assigned the whole of his interests in his concessions and the whole of his claims against the Republic to the firm.

The finances of Bolivia were, as it is stated, at that time in a very bad condition, and it was of the first importance to the liquidator of Alsop and Co. to come to some definite arrangement with the Republic and to obtain, if possible, payment of, or security for, the sums which she owed. Such an arrangement was effected in 1876 by the Wheelwright contract, which fixed the amount of the State's liability to the firm of Alsop at 835,000 bolivianos, and provided two sources to which the firm might look with some degree of hope for the payment of the debt.

It is not, in our opinion, incumbent upon Your Majesty to go behind this contract of 1876 or to deal in any way with the transactions which preceded it.

It is contended by the Government of Chile that the transactions between Gama and Bolivia were of so speculative a character, and that the cash advances which Bolivia had received from Gama were so small in amount, that, in determining the amount of the Chilean liability, if any, in connection with the claim, it would be reasonable to disregard the Wheelwright contract as a settlement between the parties. Apart from the fact that the statements on this point are not conclusive, we cannot advise Your Majesty to adopt this view. The Government of Bolivia definitely admitted in the contract that they owed a particular sum to Alsop and Co., and agreed that this sum should carry interest at a specified rate. No sufficient grounds are shown for holding that Chile, any more than Bolivia herself, is entitled to say that at the time of the contract Bolivia really owed Alsop and Co. a smaller sum than she herself admitted.

The important articles of the contract are as follows:

In view of a proposition made by Mr. John Wheelwright, a member and representative of the firm of Alsop and Co., of Valparaiso, in liquidation for the purpose of providing for the consolidation and payment of its claims against the Government by an assignment of the rights which were acknowledged in favor of Pedro López Gama, a new compromise has been concluded in a Cabinet meeting with Mr. Wheelwright which finally terminates this matter. It is drawn up in the following terms:

First. The sum of 835,000 bolivianos is acknowledged as due the aforesaid representative of the firm of Alsop and Co., together with interest at the rate of 5 per cent per annum, not addable to the principal, and to be reckoned from the date on which the contract is duly executed.

Second. The said principal and interest shall be amortised by means of drafts, all of which are to be drawn in quarterly instalments on the surplus which, from the date on which the present customs contract with Peru terminates, shall arise from the quota due Bolivia in the collection of duties in the northern customhouse, over and above the 405,000 bolivianos which the Peruvian Government now pays whether the customs treaty with that Republic is renewed or whether the national customhouse is re established.

Third. All of the silver mines of the Government in the department along the coast are hereby devoted to payment of the said amortisation, for which purpose 40 per cent of the net profit shall be utilised, except in the mine known as "Flor del Desierto," concerning which provision is made in the ensuing article. . . .

Special arrangements with regard to the Flor del Desierto were made, because under article 4 of the contract Bolivia admitted that, in addition to the sum of 835,000 bolivianos referred to above, she was in arrears with the interest to the extent of 170,700 bolivianos, and under the same article Alsop and Co. received in settlement of this sum for arrears of interest the right to work two mines, of which one was the Flor del Desierto and the other was to be agreed between the parties. If these two mines produced more than enough to pay this interest claim, the surplus was to go in reduction of the principal debt; but, if they failed to do so, the loss was to fall on the firm.

The second mine was selected; both were worked, and they failed to produce sufficient available profits to pay the claim for arrears of interest. Under the terms of this article, therefore, the liability for arrears of interest fell to the ground, and no question with regard to it arises in the present arbitration.

Arica customs

The first of the two sources to which, under the Wheelwright contract, Messrs. Alsop were to look for the payment of their debt was the income which Bolivia might draw from the northern customhouse in excess of the sum of 405,000 bolivianos.

The northern customhouse was situated at Arica, a port at that time in Peruvian territory. There was, however, only a narrow belt between Arica and Bolivia, and it formed the natural port of access to the sea for a considerable portion of the territory of Bolivia. On the 23d July, 1870, an arrangement had been made between Bolivia and Peru under which Peru was to levy, in accordance with the Peruvian tariff, all the customs dues on goods imported at the port of Arica, whether they were intended for Peru or for Bolivia, and out of the proceeds was to pay a fixed annual sum of 405,000 bolivianos to Bolivia, keeping the whole of the remainder for her own use. This arrangement had been concluded for a term of five years certain, and was thereafter terminable by 18 months' notice on either side. Notice to terminate had been given by Bolivia on the 5th of October, 1876, and in the ordinary course would have taken effect on the 5th April, 1878.

At the time of the Wheelwright contract Bolivia presumably anticipated that before long she would receive a larger income from this source, and though she was not in a financial position to suffer any diminution of her existing income, she was willing to apply the anticipated increase, whatever it might be, to the payment of this debt.

No further agreement was, in fact, come to between Peru and Bolivia until October, 1878, and by mutual arrangement the agreement of 1870 continued in force until May, 1879.

Under the new agreement concluded on the 26th October, 1878, goods for Bolivia were to pay import dues at Arica in accordance with the Bolivian tariff, and the proceeds of such dues were to belong to Bolivia, but in return for the use of the customhouses, ports, and public works, Peru was to levy for her own use on such goods a duty of 4 per cent (subsequently raised to 5 per cent).

In June, 1880, after the treaty of 1878 had only been in operation for about a year, the port of Arica was occupied by the Chilean troops, war having been declared by Chile against Peru in the meantime.

From the moment when Chile as a military invader occupied the port of Arica the arrangement in force between Bolivia and Peru was necessarily superseded; such import dues as were levied by Chile by virtue of her military occupation and because the goods were being introduced into what was, for the time being, Chilean territory. A further result was that Bolivia became entitled to set up a customhouse on her own frontier and there levy a duty upon such goods as should be imported into her territory, even though they had already paid duty to Chile at Arica, but the papers do not disclose whether any attempt was made by her to do so.

The result was that from the time of the Chilean occupation of Arica until an arrangement was come to between Chile and Bolivia, the import dues levied at Arica were levied by Chile and appropriated to her own use as being import dues paid on goods introduced into territory of which she was in possession.

This state of things continued until the 29th November, 1884, when the ratifications were exchanged of the pact of indefinite truce between Chile and Bolivia. Under this treaty the system of levying at Arica the customs dues on imported goods intended for Bolivia was revived. By article 6, as interpreted by the additional protocol of the 8th April, the total receipts of the Arica customhouse were divided as follows: Twenty-five per cent were allotted to Chile for her own use, 35 per cent were allotted to Bolivia for her own use, the remaining 40 per cent were considered to belong to Bolivia, but were to be retained by Chile until certain claims by Chile for losses suffered by Chilean citizens at the hands of Bolivia during the war were satisfied.

The United States maintain that Chile had no right to the customs dues she levied at Arica between the date when her military occupation of the port commenced and the pact of indefinite truce or to the share which she received under that truce.

It is contended that the effect of the Wheelwright contract was to hypothecate in favor of Alsop and Co., or even actually to assign to Alsop and Co., after the manner of an equitable assignment of book debts, all the receipts of the Arica customhouse to which Bolivia could lay claim, except the 405,000 bolivianos which she had been accustomed to receive annually under the former arrangement.

They further contend that such assignment of hypothecation of customs was a transaction which could not be set aside, and constituted an arrangement which Chile was bound to respect: in support of this theory reference is made to the well-known case of the Silesian loan, and to others where specified customs receipts have been set aside in favor of a particular group of creditors. It is therefore contended that as and when Chile received these customs receipts they formed in her hands money which was had and received to the use of

Alsop and Co., and which she was bound to pay to Wheelwright until the debt to the firm had been paid off.

In their case the United States of America give a table of the customs receipts at Arica from the time of the Chilean occupation up till 1884, and contend that the whole of these sums, except 5 per cent, would have gone to Bolivia under the 1878 agreement with Peru, and were therefore subject to the assignment to Alsop and Co., and that if Alsop and Co. had received them, the whole of their debt would have been paid off by the end of 1882.

They further contend that the value of the original debt with interest should be calculated in gold at the date when it would have been paid off under the above calculation, and that from that time it became a debt payable in gold and bearing interest at 6 per cent, the legal rate in Chile, instead of a debt payable in bolivianos, and bearing interest at 5 per cent as stipulated in the Wheelwright contract.

The net result is a claim under this head of \$2,337,384.28.

In view of these contentions it becomes necessary to analyze the situation created by article 2 of the Wheelwright contract and by the Chilean military occupation of Arica with some care.

At the time of the contract Arica was a Peruvian port, and consequently Bolivia could have no interest in customs dues levied there except by virtue of some arrangement subsisting between herself and the sovereign of Arica.

Under no possible circumstances could an agreement between Bolivia and a private individual affect anything more than the remittances she might from time to time receive from the sovereign authority of Arica under the arrangement subsisting between them. Such a contract as that of 1876 between Wheelwright and Bolivia necessarily presupposes, so far as it affects Arica and the customs dues levied there, the existence of an agreement in force and operative between Bolivia and the sovereign of Arica. The effect of the Chilean occupation of Arica was to put it out of the power of Peru to carry out the agreement of 1878; consequently Bolivia's right to any share in the customs collected at Arica determined from that moment and continued in suspense until such time as that or some new agreement was again in operation between herself and the power in possession of Arica.

In the light of these considerations it is desirable to consider closely the wording of article 2 of the Wheelwright contract; it will be noticed that it makes no mention whatever of Arica; all it says is that the indebtedness to Alsop is to be amortized by drafts on the surplus of the quota due Bolivia in the collection of duties *in the northern customhouse* over and above the 450,000 bolivianos whether the customs treaty with Peru is renewed or *whether the national customhouse is re-established*. It is in fact no more than an undertaking by Bolivia that *her receipts* from a specified part of the customs dues shall be applied to the Alsop debt whether those customs dues are levied at Arica or elsewhere.

Such an undertaking does not amount to an hypothecation of the Arica customs, the Arica customs could not be hypothecated or assigned except by the sovereign of Arica, and Bolivia was not in 1876, nor at any subsequent time has she been, the sovereign of Arica.

The precedents, such as the case of the Silesian loan and others, to which the attention of Your Majesty is directed, have therefore no bearing on this case at all, as they were all instances where arrangements had been made or were in contemplation with reference to the disposition of customs receipts by the sovereign who was entitled to levy them.

The Wheelwright contract was not binding on Peru, the then sovereign of Arica, as she was not a party to it; still less was it binding on Chile, who by right of military occupation ousted Peru from Arica in 1880. In short, the conditions which were the basis of this part of the agreement had ceased to exist. As a prospective source of payment it had disappeared, and it was for the debtor to find some other source of payment or some security.

There remains a further question whether the arrangements embodied in the pact of indefinite truce of 1884 between Chile and Bolivia constituted violation of the rights of Alsop and Co., and afford any just ground for complaint against the former Republic.

Under the pact Chile was to receive 25 per cent of the proceeds of the customs receipts on Bolivian goods at Arica, and was to retain a further 40 per cent in payment of certain Chilean claims, and Bolivia received 35 per cent for her own use. In 1876, the date of the Wheelwright contract, Bolivia was receiving nothing from the Arica customs beyond the 405,000 bolivianos which she was to retain; she undertook under that contract no obligation, either to vary the arrangement then in force and insure to herself an increased income, or to set up her own customhouses; nor was she debarred from making an altogether different arrangement under which she might never receive more than the 405,000 bolivianos; all she undertook that Alsop and Co. should have was the surplus she hoped to receive above the 405,000 bolivianos as and when she did receive it.

It follows from this that the 1884 pact constituted no breach of duty on the part of Bolivia toward the firm of Alsop and Co., still less was it an infringement of the rights of the firm on the part of Chile. It is, however, noteworthy that in the year 1885, when Bolivia's 35 per cent yielded a sum which substantially exceeded the 405,000 bolivianos which she was entitled to retain, Alsop and Co. appear to have made no attempt to secure the surplus in reduction of their debt.

The result is that with regard to this part of the case we can only report to Your Majesty that the Wheelwright contract effected no assignment or hypothecation of the Arica customs, that the arrangement embodied in article 2 of that contract was not binding on Chile, that Chile in appropriating the proceeds of the Arica customs, either before or after the pact of indefinite truce in 1884, did not receive the money to the use of Alsop and Co., and that the claim under this head for \$2,337,384.28 payable in gold is not sustainable.

The Government silver mines

The second source to which Alsop and Co. were to look for the repayment of their debt was the right given them by article 3 of the Wheelwright contract to exploit the Government silver mines in the coast department.

Third. All of the silver mines of the Government in the department along the coast are hereby devoted to the payment of the said amortization, for which purpose 40 per cent of the net profit shall be utilized. . . .

The terms on which these mines were to be worked were set out in a subsidiary document, which formed part of the contract. Among the articles which it contained were the following:

1. Mr. John Wheelwright shall have a period of three years within which to examine the Government silver mines and find the necessary capital with which to put them in operation, it being his duty to take the necessary preliminary measures to this end as soon as possible. The mines shall remain at the disposal of the concessionary during these three years, and the Government shall enable him to gain actual possession thereof by giving the proper instructions to the authorities. . . .

4. The concessionary . . . shall present semiannual balances, on the strength of which, together with the records of the books, the distribution shall be made of the net proceeds, 40 per cent being applied by the Government to the paying off of the debt according to the terms agreed upon in the compromise of this date, and 60 per cent going to the petitioners.

5. The Government shall appoint one or more agents to superintend the work performed, who shall be compensated out of the common funds of the enterprise.

6. This contract shall last for 25 years, after which time, if there is any residue after paying off the Government debt in accordance with the compromise, it shall be turned over to the Government.

7. If, within the first three years or thereafter until the expiration of the 25 years mentioned in the foregoing article, any persons or companies should offer to operate one or more of the mines included in this contract, they may do so provided the present concessionary does not care to undertake the operation thereof, and so states in writing to the Government, or else deliberately neglects to make such statement.

It has already been stated that these Government "estacas" were plots measuring 60 by 30 meters which were marked off on the lode or reef of a mine after those which belonged under the Bolivian law to the discoverer of the mine.

Under the Bolivian decree of the 23d July, 1852, these "estacas" were applied to the treasury of public instruction, but under subsequent legislation the Government was authorized to enter into contracts for the working of the mines for the benefit of the State, and it was under this power that the Government acted when it entered into the Wheelwright contract in 1876.

The parties are not agreed as to the exact nature of the rights which the Wheelwright contract conferred on Alsop and Co. in respect of the Government mines. The United States of America contend that it amounts to an absolute lease of the mines for a period of 25 years, creating a vested right in the firm to the possession of the mines, which the Government of Chile were bound to treat as the property of Alsop and Co.

On the other hand, the Chilean Government contend that the contract amounted to no more than a contract of "anticresis", which is defined in the Chilean Code as a contract whereby there is delivered to the creditor a real property in order that he may pay himself out of the proceeds (Code, art. 2435). They state that the question of the extent of the rights created by the contract was the subject of litigation in the Chilean courts in the case of the mine "Amonita", that the courts held that the rights so created amounted to a contract of "anticresis", and contend that in a matter relating to real property the decision of the national courts must be final.

The point is only of importance in connection with the question whether the rights of the firm in these various Government mines were rights which could be described as "property" in such sense that Chile was bound, under the modern practice of nations, to respect them as the private property of an individual when by force of arms she acquired possession of the province in which the mines were situated. It is not easy to define the exact nature of the rights which the contract gave to the firm. We can only report to Your Majesty that their nature seems to us to be more accurately described as an "option". The liquidator was entitled, as against the Bolivian Government, to be put into possession of any of the Government "estacas" which he desired to occupy. That the rights of the firm under the contract were no more than an option is, we think, made clearer by article 7 of the document quoted above, under which any person who desired to work one of the Government "estacas" was to be allowed to do so if the firm did not care to undertake its

operation and either informed the Government to that effect or neglected to answer. The permit giving the right would have been issued under this article by the Government and not by Wheelwright.

As soon as the contract of 1876 had been made, Wheelwright turned his attention to these mines to see what could be made out of them. The result was not reassuring. His agent admits that he had to contend with a thousand difficulties. People had unlawfully taken possession of the mines; boundary marks had been moved; the documents of title were lost; local authorities were half-hearted, and, in short, up till the time of the Chilean war but little had been accomplished. Furthermore, the mining industry of the district was heavily handicapped by the scarcity of cheap transport and the high freights. Judging from the half-year's reports furnished by Wheelwright to the Bolivian Government during 1877 and 1878, there can be little doubt but that the exploitation of the mines had been carried on at a loss up till the outbreak of the war.

The actual effect of the Chilean occupation of the Province on the mining operations of the firm of Alsop is not very clear; but the Chilean Government states, and so far as can be gathered, correctly states, that Wheelwright was left in possession of all the mines of which he had been able to obtain the control. His position, however, was very materially affected in respect of mines of which he had not been able, up till then, to obtain possession. The obligation of the Bolivian Government to assist him to obtain possession of any particular mine was one they were no longer able to carry out, and the rights of the Bolivian Government to these "estacas" were rights upon which Wheelwright could no longer base his claims to the possession of the mines.

Two decisions in the Chilean courts demonstrated the change which the Chilean occupation had effected. The first was the decision in the case of the mine "Justicia", in an action brought by Wheelwright to recover an "estaca" which had been erroneously included in other mines. Wheelwright claimed that the owners of these latter mines were bound to put him in possession of the "estaca". The court of second instance, on appeal, decided against him on the ground that Wheelwright's contract was, with regard to the mines, one of "anticresis"; that the particular "estaca" to which the suit related had not existed in fact during the Bolivian dominion, and could not now be created; that with regard to it the 1876 contract had not been actually carried into effect by the handing over of the real property, and that his claim therefore failed.

The second decision was one which related to the mine "Amonita", where the action was brought against an occupier in possession, and a declaration was asked for that the mine belonged to the Bolivian State, whose rights Wheelwright represented. The court admitted that the "Amonita" was a Government "estaca", but decided that the Government "estacas" were among the Bolivian Government possessions which had passed to Chile; consequently, as Wheelwright's right to the mine was not a real right, but only a right of "anticresis", and as he had not obtained possession his title was not one which a conqueror was called upon to respect, nor did it prevail against a private person who was in possession. Against this decision no attempt was made to appeal.

The effect of these decisions must have been to deprive Wheelwright of the means of obtaining possession of "estacas" in the occupation of persons with an adverse title. They probably also rendered it necessary for him to work the mines of which he had obtained possession in order to prevent any

third party gaining a good title. They did not, however, deprive Wheelwright of the possession of any mines of which he was in occupation.

The deductions which the Government of the United States draw from these decisions are very far-reaching. They contend that the decision deprived Alsop and Co. of private rights which they held under the Wheelwright contract, and constituted a violation of the modern principle of international law, that a conqueror must respect private rights. Upon them is therefore based a claim on behalf of Alsop and Co. to a sum of \$508,538.14 made up as follows: \$333,823.91 represents the profits which the concessionnaires calculate they would have obtained from certain profit-bearing "estacas" of which they ought to have been enabled to obtain possession; \$61,013.43 represents sums expended in working mines to prevent their being denounced by others; \$48,340.91 represents expenses of litigation rendered necessary by these decisions; and \$65,359.89 represents expenses of increased working staff rendered necessary in the same way. In all cases these sums include interest calculated up till the signing of the protocol of submission in 1909.

The essence of the United States contention is that the rights of Alsop and Co. to these mines under the Wheelwright contract, whether the firm were in possession of the "estacas" or not, were landed property rights, and that Chile was bound to protect such rights, either by applying Bolivian law to the interpretation of the contract or even by enacting laws for the purpose if her own laws were insufficient, and that, as the "Amonita" and "Justicia" decisions did not protect the rights of Alsop and Co. in the "estacas", these decisions constituted violations of international law for which Chile is liable in damages. No suggestion is made that the decisions were corrupt, and with regard to one of them it has been stated that there was no appeal.

These contentions do not appear to us to be well founded. The right which Alsop and Co. possessed under the Wheelwright contract to work a particular "estaca" was merely a contractual right against Bolivia; until they had secured possession of the "estaca" they had nothing which could fairly be described as "property".

The outbreak of the war and the occupation of the province by Chile deprived Bolivia of these Government "estacas". It also put it out of her power to carry out her obligation under the Wheelwright contract to facilitate the acquisition of the "estacas" by Alsop and Co., but though the "estacas" passed to Chile she did not thereby become bound by Bolivia's contract to put Alsop and Co. into possession; she was under no obligation to facilitate the transfer of the "estacas" to Alsop and Co. in order that they might use them to obtain money for the payment of a debt owing by Bolivia.

Where the rights of Alsop and Co. to a particular "estaca" had been converted into "property" by the firm obtaining possession, their rights were not affected by the "Amonita" and the "Justicia" decisions, except that it might become necessary to work the mine, which, if it were worth working, would have been no injury. Where no possession of a particular "estaca" had been obtained, the firm had merely a contractual right, which the war put an end to so far as regards Bolivia, and which was not valid against Chile.

The decisions of the Chilean courts, therefore, in the cases of the "Justicia" and the "Amonita" do not, in our opinion, afford any real ground for the contention put forward by the United States.

This matter may be regarded from another point of view. Your Majesty is acting as "amiable compositeur", and is free to look at the essence of things without too strict a regard to technicalities, and from that point of view also it

appears to us that the claim put forward on this head is not one which should be approved by Your Majesty.

It is to be observed that in respect of the mines of which Wheelwright had obtained possession and which he had worked, the general result, though one or two mines might have been remunerative, was not favorable to him, and with regard to the "estacas", of which he had not obtained possession before the Chilean occupation, it can hardly be assumed, for the purpose of assessing damages, that, even if the imposition of Chilean law denied him the right of entering into possession of other mines which he might possibly have obtained under Bolivian law, the result would have been profitable to him.

Further, it is fairly clear from the facts that whatever might have been the theoretic strength of his position under Bolivian law, he had not in fact been able under that law and administration to obtain possession of the mines which he alleged to be Government "estacas" which were in the occupation of other persons. His complaints to the Bolivian Government on this head show that in fact he was no better off under the Bolivian administration than he was under the Chilean, and there is really nothing to indicate even a probability that he would have obtained possession of these "estacas" if Bolivia had continued in occupation of the territory in which they were situated. So far as it goes the evidence is all the other way.

Chilean law and Chilean administration left him in possession of the mines he had occupied. They did not help him to oust others who were in possession of mines he had not occupied, and which were being worked by other people and of which under Bolivian law and Bolivian administration he had not been able up till then to obtain possession.

Further, if Your Majesty should be pleased to adopt the recommendation we shall venture to make at a later stage of this report, the principal object of the concession will be satisfied, which was to provide for the repayment of the debt of 835,000 bolivianos and interest. If this obligation be met, we do not think that Wheelwright can substantiate any equitable claim for damages in respect of possible profits he might have made for himself if he had been able to get possession of more of the "estacas". There is really nothing to indicate that such profits would have arisen.

The only plausible ground from his point of view on which to claim damages is that he spent money to prevent strangers acquiring a title by adverse possession, which would not have been necessary if Bolivian law had been applied in the construction of the contract.

If, however, the mines could be made profitable, this involved no hardship and no ultimate loss, and if they were worthless, there was no occasion for him to spend the money, while the requirement itself is reasonable and may be justified as being in the public interest. The claim to retain possession of an "estaca" indefinitely without developing or working it, is one of a very objectionable character, and is not, we think, in accordance with the spirit of the contract itself.

We do not think that, either technically or on grounds of equity, the claimants are entitled to damages under this head, and we can only report to Your Majesty that, in our opinion, the claims put forward by the United States, based upon an alleged wrongful deprivation of the mining rights of the firm of Alsop and Co., should not be admitted.

The Nature of Chile's Undertaking

The third ground upon which the United States contend that Chile should pay the Alsop claim, is that she has undertaken to do so. Such undertakings are alleged to have been given both to the United States and to Bolivia.

None of the undertakings given directly to the United States, which are enumerated in their case, amount to anything in the nature of a contract or agreement to pay the claim. They cannot be regarded as undertakings to pay the claim either in the form in which it is now put forward or in the form in which it was put forward at the time. There is no need to deal with them in detail; many of them are of the vaguest character, others are mere assurances that the claim will be dealt with in the definitive treaty of peace when one is concluded between Bolivia and Chile; others are only announcements that the claim has been provided for in such a treaty, but come to nothing because the treaty in question was not ratified; others relate to the contemplated treaty, which was completed in 1904, and are merely announcements as to what will happen when that treaty is ratified.

The only one which, as we think, needs express mention is the statement made by the Chilean agent before the claims commission which dealt with American and Chilean claims in 1901. The case of Alsop and Co. was brought before that commission by the United States Government, but the Chilean agent filed a plea to the jurisdiction on the ground that Alsop and Co. was a Chilean firm and that the claim was therefore not within the jurisdiction of the commission, because the treaty gave the commission no power to consider claims on the part of Chilean citizens against Chile.

The commission upheld this view, but in doing so they referred to the following passage in the brief of the agent for Chile:

The Chilean Government has always regarded it (the Alsop Claim) and does still regard it, as a liability on the part of Bolivia toward the claimant; and in order to induce the Bolivian Government to sign the definite treaty of peace which has been negotiated for many years, the Chilean Government offers to meet this and other claims as part of the payment or consideration which it offers to Bolivia for the signature of the treaty.

The commission therefore remitted the claimants to the Government of Chile for relief.

There is in the above passage nothing more than an undertaking to pay the Alsop claim *as a claim against Bolivia* and as part of the consideration for a permanent settlement between the two Governments. This was in effect the attitude of the Chilean Government toward the claim throughout the period which followed the occupation of the coast province of Bolivia. The Chilean Government were aware that the Government of Bolivia could not pay the debt, and they had themselves obtained possession of both the sources to which the claimants were to look, under the Wheelwright contract, for money to pay it off. They were willing, therefore, to take over the liability for that and other claims as part of the general settlement which they desired with the neighboring Republic.

Offers on the part of Chile to pay the claim as a claim against Bolivia can only be made upon the assumption that Bolivia is still liable for the debt, and the question must first be considered whether anything has happened to terminate Bolivia's liability.

Bolivia has not paid the sum which she admitted in the Wheelwright contract she owed to Alsop and Co., but it is suggested in the Chilean countercase that Bolivia had in effect been discharged from liability under her contract by reason of the absence of any effort on the part of the firm or of the United States of America to obtain payment of the debt from her, and bankruptcy and the principle of the limitation of actions are referred to as affording by analogy arguments of substance in support of this view.

It is undoubtedly true that from the time of the Chilean occupation no real effort was made to secure payment of the debt by Bolivia, or even to treat her as the principal debtor, until 1906. But the explanation is not difficult to find. It is the plain fact that Bolivia was not in a position to pay, and no advantage would have accrued from attempts to make her do so.

The principle of the limitation of actions does not, in our opinion, operate as between States. It is based upon the theory that the party had a right of action capable of being enforced by legal proceedings, neglect of which should in time relieve the debtor from further liability, but as against, or between, sovereign States this rule does not apply, and it would be unreasonable that the creditor's rights should suffer because he realizes that his only course is to wait until the financial position of the debtor improves. The liability of Bolivia under the Wheelwright contract remains, in our view, unaffected.

The various undertakings by Chile to Bolivia, upon which the United States of America rely as constituting an obligation upon Chile to pay the claim, are all contained in notes, protocols, or treaties between the two powers which were intended to constitute or to form part of a general settlement and permanent treaty of peace between them. As to five out of the seven such undertakings specified it is only necessary to state that they never became binding instruments, and they are therefore immaterial.

A permanent settlement was at last effected by the treaty of the 20th October, 1904. Under article 5 of that treaty Chile devoted 2,000,000 pesos in gold of 18 pence to the cancellation of certain specified obligations of Bolivia, among them being "the debt recognized to Don Pedro López Gama, represented by Messrs. Alsop and Co., successors of the former's rights", and 4,500,000 pesos to certain other claims.

Attached to this treaty were a variety of notes and protocols, of which the following bear upon the Alsop claim: By a protocol, dated the 15th November, 1904, Chile was to be free to "examine into, pass judgment upon, and liquidate said credits", and by notes dated the 17th and 21st November, 1904, it was agreed that as the total of the claims, for the settlement of which 6,500,000 pesos were to be paid under article 5, amounted to more than 6,500,000 pesos, that sum was to be distributed *pro rata* among them.

Two other notes of great importance had been signed on the 21st October. These notes were not published at the time, and were almost certainly intended (at any rate by Chile) to remain secret, but they were published in the Bolivian newspapers in the following February, and, since 1906, have not been treated as secret by Bolivia.

The Bolivian note was as follows:

The Government of Bolivia agrees with your excellency's Government on the necessity of determining the purport of the wording of article 5 of the treaty of peace and friendship signed to-day by your excellency on behalf of the Government of Chile and by the undersigned in representation of the Government of Bolivia.

Both in regard to the claims of the Corocoro, Huanchaca, and Oruru companies, and of the bondholders of the Bolivian loan of 1867 which were being paid out of 40 per cent of the receipts of the Arica customhouse, and in regard to the claims against Bolivia of the bondholders of the Mejillones Railroad, of Alsop and Co. (assignees of Pedro López Gama), of the estate of Juan Garday, and of Edward Squire, it has been agreed that the Government of Chile shall permanently cancel all of them, so that Bolivia shall be relieved of all liability, the Government of Chile being obligated to answer every subsequent claim presented either by private means or through diplomatic channels, and considering itself liable for every obligation, bond, or document of the Government of Bolivia relating to any of the

claims enumerated, Bolivia's liability being entirely eliminated for all time, and the Government of Chile assuming all liabilities to their full extent.

My Government desires that your excellency may be pleased to state to me, on behalf of the Government of Chile, whether this is the purport which it has given to article 5 of the treaty of peace and friendship signed to-day between the representatives of the two Governments.

I avail, etc. . . .

The Chilean reply was as follows:

In reply to the note which your excellency addressed to me on this day, I take pleasure, in compliance with your request, in defining the purport which this chancellery assigns to clause 5 of the treaty of peace and friendship signed to-day by your excellency in representation of the Government of Bolivia and by the undersigned on behalf of the Government of Chile.

My Government considers that the obligation which Chile contracts by article 5 of the said treaty comprises that of arranging directly with the two groups of creditors recognized by Bolivia for the permanent cancellation of each of the claims mentioned in said article, thus relieving Bolivia of all subsequent liabilities.

It is consequently understood that Chile, as assignee of all the obligations and rights which might be incumbent on or pertain to Bolivia in connection with these claims, shall answer any reclamation which may be presented to your excellency's Government by any of the parties interested in the said claims.

I renew, etc. . . .

The contention put forward in the Chilean case with reference to these notes is that they do not mean that Chile is to take over the whole liability of Bolivia for the capital debt (835,000 bolivianos and interest at 5 per cent), but are intended to insure that Bolivia should be relieved finally from any liability under the Wheelwright contract by the payment of the sum provided in article 5 of the treaty; that their purpose was in fact to insure that Chile should not pay to any of the claimants their proportion of the 6,500,000 pesos without procuring from the claimant a full discharge so that no further claim could be preferred either against Bolivia or Chile.

The arguments which are adduced in favor of this construction are not convincing. The more natural construction of the wording of the two notes is that they were intended to relieve Bolivia altogether of any further liability under these claims whether the proportionate share of the six and a half millions was accepted in final settlement or not, and the more closely the surrounding facts are looked into, the more carefully the details of the long diplomatic struggle between Bolivia and Chile are studied, the stronger does this conviction become.

The treaty of 1904, with its accompanying notes, was a contract to which the only parties were Bolivia and Chile, while the claims were claims by strangers; it is obvious that the rights of such strangers could not be prejudiced by any agreement to which they were not parties. In so far as the claim of Alsop and Co. was a valid claim against Bolivia, it could not be extinguished by an agreement between Bolivia and Chile. Chile undoubtedly might (and did) agree to provide a certain sum in payment of the claim; but if that sum was less than the full amount for which the claim was good the liability for the balance would, unless the claimant was content to waive the balance, remain a burden upon Bolivia.

The fact that Bolivia was poor and Chile was rich would not affect the above argument in the least; it might no doubt have a very potent effect upon the

mind of the claimant in considering whether or not to accept the sum offered in full discharge, because an immediate cash payment of a smaller sum might be worth more than a larger liability which was unlikely to be met, but in the absence of acceptance of the sum offered the liability of Bolivia would not and could not be affected.

It is impossible to read through the abortive treaties which were drawn up between Chile and Bolivia without appreciating the reluctance of Bolivia to part with the sovereignty of her coast province and her determination that, if that province was to be lost, she should be freed from any further liability in connection with certain claims which, to use her own expression, "encumbered the littoral". It is clear also from the contemporaneous documents that Bolivia believed that this had been effected by the treaty arrangements of 1904.

If Bolivia's liability to the claimants was to be extinguished it could only be done by the whole burden of the claim being undertaken by Chile, and this is what appears to be the natural construction and effect of the notes. It is clear from the language that the possibility of the sum not being accepted was contemplated.

The object of Chile in keeping the notes in which this arrangement was embodied secret is obvious. Chile had no desire to pay more than the claims were really worth; if she could ostensibly limit her liability to a particular sum it might be possible to coerce the claimants into accepting the reduced amount, and the fact that the majority of the claimants referred to in the treaty were Chilean citizens would facilitate her so doing. Were she, on the other hand, to undertake full liability for the claims in the treaty it must have been clear to her that she would have to deal with her own citizens upon the same footing as the foreign claimants whose claims were strongly pressed by their own Governments.

The rights which Chile claimed under the protocol of the 15th November to deal with each individual claim upon its merits was to insure that Chile should not be worse off than Bolivia in dealing with these claims. Bolivia would not be bound by the amount which a claimant himself chose to put upon his claim, and under the protocol Chile was to have a like power.

An argument is suggested, but scarcely pressed, in the Chilean case and counter-case, that these notes have no validity because they were not included in the ratification, but neither were the later notes nor the protocol of the 15th November, which admittedly formed part of the treaty arrangement.

It would be very dangerous if States were to be at liberty to repudiate notes exchanged by their respective plenipotentiaries appointed to negotiate a particular treaty when those notes had an intimate relation with the subject matter of the treaty and when the action of the plenipotentiaries had not been disavowed by their Governments as soon as it was known. It would be highly inconvenient if secret notes attached to a treaty were obliged to be included in the ratifications.

It is also alleged that Bolivia's liability under the Wheelwright contract cannot have been transferred to Chile by these notes because that liability had been discharged by the absence during a prolonged period of any attempt on the part of the claimant to make good his claim against Bolivia. This contention has already been examined and we have stated that we do not consider it to be well founded; but if any such view had been held by the parties at the time, it would render their handling of the Alsop claim in article 5 of the treaty inexplicable.

The fair and reasonable construction of the secret notes is that they were intended to insure that Bolivia should be finally relieved of any liability for

the Alsop claim, whether the claimants accepted their share of the 6,500,000 pesos under article 5 of the treaty or not.

Another deduction which may be drawn from the wording of these notes, particularly that of the Chilean note, is that the parties intended that Chile should not merely indemnify Bolivia by repaying to her any compensation which Bolivia should pay the claimant but that Chile should deal directly with the claimants thus eliminating Bolivia from the transaction altogether. The United States are therefore justified in dealing directly with Chile.

The Bolivian liability which Chile thus assumed can only be the liability which Bolivia recognized under the Wheelwright contract of 1876, i.e., the debt of 835,000 bolivianos carrying interest at 5 per cent. Bolivia could not now be heard to say that she was not liable for the debt which she admitted in 1876, and which she has never paid; nor could she be heard to say that she was liable for the capital and not for the interest. The liability under the 1876 contract is for the capital debt carrying "interest at 5 per cent not addable to the principal and to be reckoned from the date on which this contract is duly executed".

In our opinion the payment of the debt with interest is consequently now incumbent upon Chile by virtue of the obligation undertaken by the treaty of peace of 1904 as embodied in the treaty and the supplementary notes and protocol.

The subsequent facts need be touched upon but briefly. In December, 1904, and again in 1907, the Chilean Government offered in settlement of the claim a sum which was the *pro rata* share of the 6,500,000 pesos provided in article 5 of the treaty of 1904, adding in the latter case a small sum by way of accrued interest, and explaining also that it was the final offer of Chile, and that, if the claimants were unwilling to accept it, they would be invited to turn for payment to Bolivia.

Both these offers were declined, and in 1908, the State Department at Washington asked whether the Chilean Government would furnish information regarding the case, as there was nothing in the archives of the Department which would justify the offer of a sum which was actually less than the debt admitted by Bolivia in 1876. No such information was supplied, and in April 1909, the Chilean minister in Washington stated that his Government had no such evidence to produce.

No serious effort is made in either the case or the countercase of the Chilean Government to show that if any liability to pay the claim attaches to them the merits of the claim do not warrant payment in full. It is true that suggestions are put forward that Gama's transactions with the Bolivian Government before 1876 were not such as to justify so large an admission of liability on the part of Bolivia as the debt which was recognized in the Wheelwright contract, but we have already stated that there seems to be no sufficient grounds for going behind that contract. The motives which induced Bolivia to sign it and the question whether it was reasonable for her to do so must be matters of mere speculation. Even if the bargain was a bad one for Bolivia, there can be no doubt but that she did in fact admit liability for the sum there mentioned, and in the view we take of the proper construction of the secret notes attached to the treaty of 1904 Chile agreed to relieve Bolivia of that burden.

It is perhaps worth while to point out that the liability which Chile assumed by those notes was not dependent on the merits of the claim. She did not undertake to pay the claim because she considered it a just claim; she agreed to it as part of the price which she was willing to pay for securing the recognition and acceptance by Bolivia of her title to the territory which she had wrested

from that Republic by force of arms; and even if she may consider the sum Your Majesty may be pleased to award large, having regard to all the circumstances, it is certainly small as compared with the advantages of a sure title to a valuable territory.

The indebtedness admitted by Bolivia under article 2 of the Wheelwright contract, which it is now incumbent upon Chile to discharge, was 835,000 bolivianos, with interest, but a question arises whether certain profits from the working of the mines by Alsop and Co. ought not to be deducted from this sum.

The United States admit that profits were obtained from the working of six of the mines, and under article 3 of the Wheelwright contract it might be contended that 40 per cent of these profits should be applied in reduction of Bolivia's debt. The amount of profit admitted in the United States case is \$45,095.22.

The great majority of the mines appear to have been worked at a loss; and so far as can be gathered from the accounts printed in the appendices, if the working of the mines is regarded as a whole, a loss ensued.

The power of the Bolivian Government to give the firm of Alsop and Co. the right to work the Government "estacas" under the Wheelwright contract was derived from the Bolivian decree of the 2nd November, 1871, which enacted that the working of the mines was to be *in partnership with the State*, the State being considered as an industrial partner and being under no obligation as such to reimburse losses to the partners.

If the working of each individual mine under article 3 of the Wheelwright contract is to be regarded as a separate venture, then losses in respect of any such mine would fall on the firm, while 40 per cent of the profits made at any such mine would go in reduction of the debt.

If the working of the Government "estacas" is regarded as a whole, then a share of the profits made at any particular mine would not go in reduction of the debt unless the mining venture as a whole was profitable. If, as a whole, the mining venture resulted in loss, the Bolivian Government would not benefit by the profits made at one or two mines.

It is not easy to determine which of these two views is the right one, but it seems to be more reasonable, and more consistent with the intention of the parties, to adopt the latter, and treat the mining venture as a whole.

The accounts of the mining operations of the firm of Alsop and Co. have not been laid before Your Majesty very fully, but the accounts which are printed in the United States case indicate that those operations, treated as a whole, resulted in a loss, and, if that is so, no part of the profits admitted to have been earned at six of the mines would go in reduction of the debt.

We have considered the question whether we ought to report to Your Majesty that further evidence should be called for under the power reserved to Your Majesty in the protocol of submission between the parties. The conclusion at which we have arrived is that it is not incumbent upon Your Majesty to do so.

If Chile desired to diminish the liability which she has undertaken, it was for her to establish that Alsop and Co. made profits out of the mines. Access to the books of the firm has been afforded to her, and she has not availed herself of the offer. In the absence of some proof by her that the firm did make profits out of the mines, we see no reason why Your Majesty should assume it.

The liability admitted by Bolivia was 835,000 bolivianos with interest at 5 per cent from the date of the execution of the contract, i.e., from the 26th December, 1876, that is practically 34 years and 6 months. The amount of

the debt at the present time, therefore, is 835,000 bolivianos for the principal, and 1,440,375 bolivianos for interest.

As the debt admitted by Bolivia was payable in bolivianos, the award must be payable in the same currency, or in gold at the current rate of exchange.

We humbly submit to Your Majesty that Your Majesty should be pleased to award that the sum of 2,275,375 bolivianos is equitably due to the representatives of the firm of Alsop and Co.

AND WHEREAS, after mature consideration, We are fully persuaded of the wisdom and justice of the said report:

NOW THEREFORE WE, George, by the Grace of God, of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the seas King, Defender of the Faith, Emperor of India, do hereby award and determine that the sum of two million two hundred and seventy-five thousand three hundred and seventy-five (2,275,375) bolivianos is equitably due to the representatives of the firm of Alsop and Company.

GIVEN in triplicate under our hand and seal at our Court of St. James's, this fifth day of July, one thousand nine hundred and eleven, in the second year of our reign.

[SEAL]

GEORGE R. I.
