REPORTS OF INTERNATIONAL ARBITRAL AWARDS

RECUEIL DES SENTENCES ARBITRALES

Claims Commission established under the Convention concluded between the United States of America and Venezuela on 5 December 1885

Case of Melville E. Day and David E. Garrison, as surviving executors of Cornelius K. Garrison v. Venezuela, decision of the Commissioner, Mr. Findlay

Commission de réclamations constituée en vertu de la Convention conclue entre les États-Unis d'Amérique et le Venezuela le 5 décembre 1885

Affaire concernant Melville E. Day et David E. Garrison, en tant qu'exécuteurs testamentaires de Cornelius K. Garrison c. Venezuela, décision du Commissaire, M. Findlay

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to her people in distress. The claim, if otherwise good on the face of the papers, would be obnoxious to an objection for delay in presentation for reasons stated in No. 36. The demurrer will be sustained and the case dismissed.

It may be worth while to add a few facts about this case obtained from the public records. Having been commissioned in 1811 to go to Venezuela as agent for the Government of the United States, Mr. Scott started in March, 1812, and got as far as Baltimore, where he found there were no vessels going to Venezuela because of the then recent embargo. While thus detained in Baltimore, Congress passed the act of May 8, 1812, "for the relief of citizens of Venezuela," authorizing the President to purchase $50,000 worth of provisions and "to tender the same in the name of the Government of the United States to that of Venezuela for the relief of the citizens who have suffered by the late earthquake." He was directed by President Madison to proceed to that country in one of the vessels carrying the provisions and aid in their distribution. He was paid by the United States, as its agent, for his services, including $700 paid him while detained in Baltimore, $4,115, and thereafter employed in its service.

Case of Melville E. Day and David E. Garrison, as surviving executors of Cornelius K. Garrison *v.* Venezuela, decision of the Commissioner, Mr. Findlay[*]

Affaire concernant Melville E. Day et David E. Garrison, en tant qu'exécuteurs testamentaires de Cornelius K. Garrison c. Venezuela, décision du Commissaire, M. Findlay[**]

Contract between citizens and a State—principle of continuity of treaties upon any succeeding government—right for a government *de facto* to contract private obligations—contract viewed as a lawful emanation of power.

State—distinction between a State and its government—existence of the State not affected by changes of governments—principle of continued responsibility of the State for wrong and injuries—duty of the State to respect its international obligations notwithstanding domestic changes.

Government *de facto*—equivalency of the legal effect for acts made by a government *de facto* or *de jure*—a government *de facto* viewed as a government submitted to by the great body of people and recognized by others States.

Arbitration clause—question of the validity of the arbitration clause for any differences or difficulties after the annulment of the contract.

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[*] Reprinted from John Bassett Moore (ed.), *History and Digest of the International Arbitrations to Which the United States has been a Party,* vol. IV, Washington, 1898, Government Printing Office, p. 3548.

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Contrat entre des citoyens et un État—principe de continuité des traités à l'égard de tout gouvernement successeur—droit d'un gouvernement *de facto* de contracter des obligations privées—contrat considéré comme une émanation légale du pouvoir.

État—distinction entre un État et son gouvernement—l'existence d'un État n'est pas affectée par des changements de gouvernements—principe de continuité de la responsabilité étatique pour faits illicites et dommages—devoir d'un État de respecter ses obligations internationales malgré les changements internes.

Gouvernement *de facto*—équivalence entre l'effet juridique des actes accomplis par un gouvernement *de facto* ou *de jure*—un gouvernement *de facto* est considéré comme un gouvernement auquel se soumet le corps du peuple et qui est reconnu par d'autres États.

Clause d'arbitrage—question de la validité de la clause d'arbitrage pour tout différend ou toute difficulté survenant après l'annulation du contrat.

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After several revolutions in Venezuela, continued at intervals of greater or less duration from 1848, leaving the country in an unsettled and almost chaotic condition, General Paez assumed the dictatorship on the 29th of August 1861, and from that time to the ratification of the so-called treaty of Coche, on the 22d of May 1863, held possession of the capital at Caracas. During the period of his government, however, outside of the province of Caracas, the country was by no means pacified, but in one part or another of its extensive territory was embroiled in civil tumult and insurrection aimed against the ruling power, by the faction which it had succeeded in displacing. This state of affairs was terminated by the treaty referred to, and in consequence of it General Falcon succeeded Paez, who abdicated his dictatorship, and became the President of the Republic on the_____day of July 1863, and was confirmed in his place by a constitutional convention which assembled on the 21st of December 1863. The United States refused to recognize the Paez government, and disavowed the act of its minister, Mr. Culver, in attempting to do so.

This being the condition of the government and the country, a Colonel Nobles, in the winter and early spring of 1863, while on a visit to Caracas for the purpose, succeeded in obtaining, through the aid of his associate, Dr. Beales, a power of attorney from General Paez to Simon Camacho, then, consul of Venezuela in New York, authorizing him to enter into contracts with the said Nobles and Beales for the establishment of a steamship service between New York and La Guayra, and also for the "establishment of a constant current of immigration to the Republic of Venezuela." To carry these enterprises into due effect, "the said consul will act without any limitation," so the power recites,

"only following as far as possible the instruction to be communicated to him by my secretary general." For fear that this broad grant of power might be restrained or limited by some unforeseen construction, the general proceeds to add, "and, to remove at once any objections which might be urged against the validity of the terms in which this authority is granted, I, José Antonio Paez, Supreme Chief of the Republic of Venezuela, hereby approve *now and for all times whatever may be contracted* for by Simon Camacho, consul of Venezuela in New York, with respect to the said contracts for the establishment of a line of steamships between New York and La Guayra, and the immigration and colonization scheme."

Under this power Camacho, on the 1st of May 1863, contracted for the establishment of the steamship line, by the terms of which the first steamer was to sail within one hundred days from the date of the contract, which time was afterward, on the 4th of June, extended to eight months in addition—that is, say, eleven months in all. And which extension, by the way, was contrary to the direction of the Secretary, and opposed to one of the principal objects of the scheme. Other steamers were to follow as they could be made ready, and they were to be suitable for carrying the mails, twenty-five passengers and six hundred tons merchandise. Preference was to be given to the effects, articles, and properties of the Government of Venezuela over all other cargoes and passengers, to be paid for, however, at the usual rates charged to merchants or private individuals. Officers and troops of the government were to be carried at reduced rates. Two young men, to be selected by the government, were also to be earned free of expense, in order that they might receive practical instruction in navigation and the management of steam machinery. Other provisions were made for the carriage free of seeds, plants, etc., not exported for profit. For these services and some others Camacho agreed that Venezuela should pay $50,000 in gold coin of the United States yearly, payable in monthly instalments of $4,166.66, to be deducted from the 40 per cent duty belonging to the government on the *imports* and *exports carried* by the steamers, but this limitation was removed by the 12th article of the contract, which expressly stipulated that any deficiency on this account occurring during any month should be made good by the receipts of the next month, although the company was to bear the loss on any deficiency at the end of the year. The thirteenth article then provides that this payment of $50,000 shall continue for three years only from the date of the contract, after which time the sum of $30,000 shall be paid for the period of twenty-seven years, as provided in the fourteenth article.

The eighteenth article then stipulates for submission to arbitration at Caracas: "Any doubts, *differences, difficulties,* or misunderstandings that may arise from, or have any connection with, or in any *manner relate* to this contract, *directly* or *indirectly*," and then, after providing that the opinion of the two arbitrators or the decision of the umpire, should there be one, shall be considered as a judgment," etc., goes on to say, "and, *therefore,* this contract shall *never, under any pretext or reason whatever, be cause for any international*

claims or demands." This provision is found in both contracts. It has already been observed that Messrs. Beales and Nobles, who alone sign this contract, put themselves under no pecuniary obligation whatever for the due performance of its stipulations, except an ineffectual and meaningless pledge of person and property; but it is now to be observed that these parties do not contract in behalf of themselves at all, but "*in behalf of the stock company to be formed* upon the following terms and conditions," etc.

Accordingly this imaginary company without a name, which appears only by reference to it as a body yet to be formed, is put forward by Beales and Nobles as the party agreeing to the terms of a contract which they in its behalf bind themselves and their successors to perform. Beales and Nobles, except as becoming security in the way mentioned for the company, don't agree to anything. Each article in the contract begins with a recital that "*the company* agrees and binds itself." It is too clear for argument that the contract was made by Beales and Nobles in behalf of a company which was yet to be created, and that, treating themselves as members of the said company, as if it had already been established, sign, as "*members* of *said* company, for themselves and their successors," accompanying the signature with the pledge of their persons and properties before referred to. Treating it as a contract, however, in the absence of any bond for performance, Venezuela could only look in case of failure to Beales and Nobles. The company which had no existence certainly could not be responsible.

This being the character of a contract which was to run for thirty years, made under a discretionary power of this kind, the question arises whether General Paez, as the lawful *de facto* authority of the state, had the right in its name to grant such a power. If he had, of course the contracts executed in pursuance of the power would be valid and binding upon any succeeding government, and any attempt to annul them, without compensation to the parties injured by the revocation, would be unjustifiable and illegal. In stating the proposition in this way it will be observed that we are assuming that the contracts are a lawful emanation of the power, although on careful analysis it will be perceived that, in the very conception of his authority, Mr. Camacho exceeded his power. His power was "to contract with *either* Dr. J. C. Beales or Colonel W. H. Nobles, or with both, or with any other person or company of acknowledged responsibility." He did neither or any of these things as far as the steamship contract is concerned. He entered into a contract, as we have before shown, with Beales and Nobles, not in behalf of themselves, but in behalf of a company yet to be organized. This was not a contract with either Beales or Nobles severally, or with both jointly, nor yet was it a contract with any other person or company of acknowledged responsibility. It was a contract in behalf of a company *in futuro,* the responsibility of which, of course, could not be ascertained, and whose very existence was speculative and conjectural. But waiving this, and recurring to the question as to whether the Paez government

had the right to grant the power to Camacho, it may be well enough to make one or two general observations on the subject of *de facto* governments.

There is a well-recognized distinction between a state and a government or the governing body. The state is a person in law, and when once admitted into the family of states, preserves its identity as an international person, until it is lost by absorption in some other state, or by the continuance of anarchy so prolonged as to render reconstitution impossible or, in a very high degree, improbable. (Halleck's International Law, p. 29.) As a person invested with a will which is exerted through the government as the organ or instrument of society, it follows as a necessary consequence that mere internal changes which result in the displacement of any particular organ for the expression of this will, and the substitution of another, can not alter the relations of the society to the other members of the family of states as long as the state itself retains its personality. The state remains, although the governments may change; and international relations, if they are to have any permanency or stability, can only be established between states, and would rest upon a shifting foundation of sand if accidental forms of government were substituted as their basis. *Idem enim est populus Romanus sub regibus, consulibus, imperatoribus*, says Grotius, as an argument for the continued responsibility of the state, although the particular character of responsibility he is speaking of is an obligation to respect treaties. (Grotius, I. II. chap, ix., v 8.) All leagues and treaties are national and will bind legal princes though made with usurpers. (Tindall on Law of Nations; 1 Phillimore, p. 174.) It is a clear position of the law of nations, says Kent, that treaties are not affected nor positive obligations of any kind with other powers or with creditors weakened by internal changes in the form of government. The body politic is the same although it may have a different organ of communication. (Kent, vol. 1, pp. 25–26.) A state is responsible for the wrongs done to the government or subjects of another state notwithstanding any intermediate change in the form of government or in the persons of its rulers. Treaties of amity, commerce, and real alliance remain in force; *public* debts, either to or from the state, are neither canceled nor affected. (Halleck, p. 77.)

A state subject to periodical changes in the form of its government or in the persons of its rulers has a deeper interest, perhaps, in the maintenance of this doctrine than another more securely rooted in the principles of social order, but it is absolutely necessary to the whole family of states, as the only possible condition of intercourse between nations. If it was not the duty of a state to respect its international obligations, notwithstanding domestic changes, either in the form of the government or in the persons who exercise the governing power, it would be impossible for nations to deal with each other with any assurance that their agreements would be carried into effect, and the consequences would be disastrous on the peace and well-being of the world. It may also be stated, with great confidence, that a government *de facto,* when once invested with the powers which are necessary to give it that character, can bind the state to the same extent and with the same legal effect as what is

styled a government *de jure*. Indeed, as Austin has pointed out, every government, properly so called, is a government *de facto*. A government *de jure* but not *de facto,* says he, is that which *was* a government, and which, according to the view of the speaker *ought* still to be a government, but, in point of fact, is not. (Austin, Juris, vol. 1, 336.)

As to what constitutes a government *de facto* is a question that must necessarily depend somewhat upon the facts and circumstances in the particular case to which it is proposed to apply the principle. Austin speaks of it as a government which presumably commands the habitual respect and obedience of the bulk of the people. Halleck, when speaking of the power of a *de facto* government to dispose of the public domain or other property, describes it as a government submitted to by the *great* body of the people and *recognized* by other states. Both these conditions are essential to the lawful cession of the public domain of a state under the control of a *de facto* government. (Halleck, p. 127.) Sir Matthew Hale only consented to act as judge under a government established and *recognized* by other governments and in full possession, *de facto,* of the records and power of the kingdom, after Cromwell had declared he would rule by red gowns rather than by red coats. (Hale's Hist. Com. Law, p. 14.) It has been held in England, that the courts of that country will not take notice of a foreign government not recognized by the Government of Great Britain. (City of Berne *v.* The Bank of England, 9 Ves. 347.) The Supreme Court of the United States in noting the features by which a government *de facto* is to be discriminated, mentions as one of these recognition by a foreign power. (Thorington, *v.* Smith, 8 Wal. p. 9.) So by the same court it was held that a foreign government, in possession of a portion of the territory of the United States, over which it exercised undisputed dominion for the time being, was a government *de facto* as far as the place occupied was concerned, and entitled to demand and receive from the inhabitants local allegiance. (U. S. *v.* Price, 4 Wheat, p. 253.) A government *de facto,* said Justice Nelson, delivering the opinion of the court, is a government in the possession of the supreme power of the district of country over which its jurisdiction extends. (Mauran *v.* Ins. Co. 6 W p. 137.) And this power has been elsewhere styled "the ruling," the "supreme power" of the country. (Nesbitt *v.* Lushington, 4 Term. 763).

While it has been uniformly held by all the writers upon this subject that the substitution of one form of government for another, or a mere change in the person of the ruling power, will not affect the validity of state action, the application of this rule seems to have been confined in the main to the maintenance of treaty obligations, and responsibility for wrongs and injuries, or torts, and where it has been extended to claims contractual in their character, appears to have been limited to public debts owing by one state to the citizens of another. It has been the uniform practice of the United States almost without exception to refuse intervention in behalf of its citizens claiming for breach of contract against the government of a foreign power, and wherever it has interfered, to restrict the character of its interference to good offices, which

were defined by Secretary Fish as mere personal unofficial recommendations. (2 Whar. 233, p. 664.) While this has been the practice of Great Britain in similar cases, the Government of Her Majesty has been careful to maintain that the refusal to intervene has been largely governed by considerations of a domestic character, and not upon any notion that a breach of contract between a subject of that country and a foreign power, was not a wrong which might be redressed by diplomatic intervention whenever the government in its discretion saw fit to interfere. (Lord Palmerston's circular to British representatives in 1848. Hall's Note, p. 257.)

It would be difficult, if not impossible, to assign a good reason why, on principles of abstract right and justice, an injury to a citizen arising out of a refusal of a foreign power to keep its contractual engagements, did not impose an obligation upon the government of his allegiance to seek redress from the offending country, quite as binding as its recognized duty to interfere in cases involving wrongs to person and property. (Hall, p. 257.) The reasons assigned by our Secretaries of State for refusing any relief, except the mere tender of personal good offices, in cases of breach of contract, seem with some exceptions to be placed upon the broad ground that the government has no *right* to compel another power to perform its contracts made with citizens of the United States. (See Mr. Adams's instructions, April 29, 1823, cited 2 Whar. p. 644.) Mr. Fish, as late as 1870, declares that the reason of this policy is that claims based on contract are supposed to stand upon a very different footing from those which arise from injuries to person and property. (Whar. 2, p. 656.)

But however this question may stand on principle it can not be doubted that if the present claim was valid in other respects it would be the duty of this commission, under the convention between the United States and Venezuela, to make an allowance of damages sufficient to compensate for the wrong, notwithstanding the fact that it originated in a breach of private contract between a citizen of one state and the government of another.

Conceding now that a *de facto* government can bind the state in a matter of private contract between it and the citizens of another state, and that good faith as between nations binds the state as a personality to fulfill the terms of its private contracts, or pay damages for their non-fulfillment, notwithstanding any subsequent change in the ruling powers, the question first to be determined here is whether the government of Paez was such a government. Before answering the question, however, it is proper that we should state some of the provisions of the second contract relating to the colonization scheme and executed by Camacho under the same power given by Paez. By this contract Camacho cedes to the contracting parties, their associates and assigns, those public lands which until now have not been ceded, in the parts of the republic which they may select and in the quantities hereinafter explained. The second article provides that "the cession shall be made of 1,000 English acres for each person in them during the first year of the cession, the contractors being obliged to have for each 1,000 acres two persons in the second year, three in

the third, four in the fourth, and so successively one person for each year up to the number of ten in the space of ten years, so that for each 1,000 acres there shall be ten persons within ten years from this date" (date of contract 5th of May 1863). To enable the contractors to carry out this provision they are given "the right every year to select in the part of the republic where they may see fit 100,000 square acres of land, either in one parcel or in divided portions . . . provided that within two years from the date of such selection of lands the contractors shall have placed two colonists for each 1,000 square acres."

By the tenth article it is stipulated that the mines which may be found in the lands ceded to this colonization enterprise shall belong in fee to the contractors, and in the generic term mines are to be included, not only those of metal but also those of petroleum, asphaltum, marble, coal, and others. Lawful possession of the lands occupied is provided for, and provision is also made for the selected lands. "The titles shall be given in favor of the contractors the day the colonists arrive at a Venezuelan port," while the colonists, who are to acquire in no case more than fifty acres each, must wait a year before they receive a conveyance of title. If at the end of ten years the contractors shall not have introduced the required number of colonists to entitle them to the number of acres of land as to which they have already received the initial right of selection, the privilege of purchasing the vacant lands within the limits of the cession, at the rate of fifty cents an acre, is granted, on the single condition that the contractors pay the expenses of the survey.

The eleventh article further provided that if within the limits ceded to the colony, and before the introduction of the colonists in the number and manner stipulated, the contractors desire to buy the vacant lands, "they shall have the choice to do so, being previously measured by the surveyors of the government, paying half a dollar Venezuelan currency per acre, the expense of the measurements of the lands to be paid by the contractors." By this contract then there was a deed of cession of a large portion of the territory of Venezuela, to be increased indefinitely, at the rate of 100 acres for every immigrant, good, bad, or indifferent, introduced into the country, along with the conveyance, of what is usually reserved in such donations, of a fee-simple title to all the mines within the limits of the cession, including therein everything of value that attaches to or is found in the soil, with no obligation whatever on the contractors to supply a single immigrant, and with the right to purchase vacant lands within the limits of the cession at fifty cents per acre.

Drawn up in solemn form, acknowledged before a notary, and sealed, too, this instrument has all the exterior legal requisites, both at the civil and common law, to protect it from criticism and assault for want of consideration, but it is in fact no contract mutually binding upon the parties; but the concession of a privilege by Venezuela to be availed of or not, and when or never, as Messrs. Beales and Nobles in their discretion saw fit.

Such being the character of this immigration contract, it is to be observed that the commissioner, Mr. Camacho, exceeded his power in this case as well

as in the execution of the steamship contract. Under the power he had authority to contract for the establishment of a *constant current* of immigration into Venezuela, and he had no right to contract for anything else. For the first year of the cession it will be remembered that the planting of one colonist entitled the contractors to one thousand acres of land for the first colonist settled, two thousand for the second, and so on. If at the end of two years they had succeeded in planting two colonists they were then entitled to select one hundred thousand acres of land, mines, and all as defined by the contract; and if at the end of ten years, they had not furnished ten emigrants, but only the half of that number they were at liberty to buy, at the rate of fifty cents an acre, the excess of land remaining over and above the number of emigrants agreed to be supplied. Not only so, but if they saw fit to introduce no emigrants at all; if they believed that the purchase of all the lands within the limits ceded to the colony at a half dollar an acre in Venezuelan currency, would pay them better than the turning of a "constant stream of immigration" into Venezuela, they were at liberty to abandon the colonization scheme altogether, and turn the contract into a land speculation pure and simple.

It is obvious from this statement that the contract did not *provide* for *a constant current* of immigration, and even if that result had been an accidental consequence of what was provided for the terms of the power would not have been gratified.

It was not its intention to leave anything to accident or to a choice between two lines of conduct, as the one or the other might seem best designed to promote the interests of the contractors, but to impose upon Camacho an imperative and absolute obligation, to exact compliance with this condition, as the sole and paramount object of the power. Failure in this, whatever else may have been accomplished, is failure in everything.

Recurring now to the question of the lawfulness of the power it may be more than doubted whether Paez, if he had been supreme chief, both *de facto* and *de jure,* could have granted such a power. It appears that the constitution of the 31st of December 1858, was in force when he assumed this character. Title IX of this constitution concerns the power of *congress,* and among these powers, as prescribed in article 64, is the power to decree what may be convenient for the administration, preservation, and alienation of national property, to assist in the immigration and colonization of foreigners, and to encourage by means of legislation and by contracts the navigation and canalization of rivers, the opening of roads, and other works, provided they be of national utility (sections 13, 16, 30). This is a clear devolution of the authority exercised by Paez upon the legislative department of the government, and unless we assume that the supreme chief for the time being in the possession of the capital and of the province of Caracas, had supplanted completely the constitution, and could exercise in his own person the functions of the executive as well as the legislative department, it is very clear that the authority granted to Camacho was an excess of power in itself as to both contracts.

We have already, in a general way, referred to the distracted condition of affairs at the time he assumed control of the government, and now as a matter of more historical than legal interest, perhaps, it may not be out of place to quote the preamble of the decree of the 10th of September 1861, under which he took possession of the government as supreme chief of Venezuela:

> The people of *Caracas,* to whom entire liberty was left to deliberate in the use of their sovereignty, spontaneously ratified this vote (that of the defenders of society within the *province* of Caracas), and appointed me civil and military chief of the republic, with full power to pacify and reconstruct it under the popular republican form. At La Victoria I was met by the commission sent to present me the vote of the capital (Caracas) and to request my acceptance. But I feel satisfied, fully satisfied, with the uniformity of the vote of Caracas and of this province (Caracas). I am still ignorant of the will of the republic. National opinion is, and has always been, the guide of my conduct.

Venezuela at that time was composed of twenty-one provinces, Caracas, of course, being the principal one, as the seat of the capital, but there is no inference to be drawn from the mere possession of the capital as to the established character of a government *de facto* claiming to be such. One faction may have possession of the capital to-day, another to-morrow, while the authority of neither is recognized and established as the supreme power of the country over which its jurisdiction extends, or rather over the district [over which] each is attempting to extend its jurisdiction. This government lasted about twenty months, and was succeeded by the Falcon administration, which was also in possession of the capital when the contracts were annulled. How much of the habitual respect of the bulk of the people outside of the province of Caracas it managed to acquire before its overthrow we have no means of knowing, but, if the preamble of the decree just quoted affords any reliable evidence of the condition of affairs at that time, there is not much ground for believing that the Paez government was founded on any tenure more reliable than the ability to maintain its authority for a limited period within a circumscribed district of the country.

Such being the internal condition of the country and the war of factions with varying success, the United States, while maintaining relations of intercourse with the state itself, through whatever organ of government might, for the time being, have the ascendancy and occupy the capital, refused to recognize the government of Paez as the *de facto* government of the state, rebuked its minister for attempting to do so, and promptly repudiated his act. This treatment of the Paez government was in strict accordance with the settled policy of the United States from the organization of the government. All questions, said President Jackson, relative to the government of foreign nations, whether of the Old or New World, have been treated by the United States as questions of *fact* only, and they have continuously abstained from deciding on them until the clearest evidence was in their possession to enable them to decide correctly.

(Message to Congress, 21st December, 1836. Repeated by Mr. Forsyth in his answer to the Texan Envoy in 1837.)

It is a rule of our courts that the judicial department of the government in such cases is bound by the action of the political or executive department, the same rule which was laid down by the Lord Chancellor of Great Britain in the case of the City of Berne *v.* The Bank of England, before cited. When a civil war, says Chief Justice Marshall, rages in a foreign nation, one part of which separates itself from the old established government, the courts of the Union must view such newly constituted government as it is viewed by the legislative and executive departments of the Government of the United States. (U S. *v.* Palmer, 3 Wheat, p. 644, Rose v. Himely, 4 C. p. 272.) Besides the case of the City of Berne, this doctrine has been recognized in England in several cases directly growing out of transactions with the South American republics. In the case of Jones *v.* Garcia del Rio, where a bill had been filed by subscribers to a Peruvian loan for an account, the answer to which admitted that no such government as the Peruvian Government had been recognized by His Majesty's government, Lord Eldon said, "What right have I as the king's judge to interfere upon the subject of a contract with a country which he does not recognize?" (Turn, and Rus. 1, p. 299; Taylor *v.* Barclay, 2 Sim. p. 213; The Colombian Government *v.* Rothschild, 1 Sim. p. 100; 3 Bing. p. 432.)

But if it be replied to this that the question of a *de facto* government in its relations to recognition by other governments is a large question to be determined on considerations of grave public policy, and without straining analogy can not be associated with the narrower question of private contractual obligations, entered into by a government purporting to be such, as they come for adjudication before an international tribunal like this, which is not bound by the rule of policy referred to, it may nevertheless be answered, that the question of fact involved in the determination of the lawfulness of such a government when its authority is disputed, is a question absolutely necessary to be established before a correct judgment as to the law can be pronounced. While the failure or refusal of the United States to recognize the government of Paez is not binding upon us as a court in determining the question whether that government was a government *de facto* or not, the necessity of determining that question, in someway as an essential prerequisite absolutely vital to the correct determination of the main issue involved, is just as binding and imperative, as it would be upon any other tribunal empowered to adjudicate the question. In the absence of presumptions, which, in the condition the country was at the time, can not be made in favor of the lawfulness of the government, resort must be had to evidence to establish its true character, as any other fact in doubt is required to be proved, and on this question of *fact* the failure of the United States to recognize the Paez government is a fact which can not be ignored.

The argument of the learned counsel for the United States and the claimants was addressed largely to establishing the proposition that a government

de facto was invested with the same authority to conclude binding contracts as a government *de jure,* and having succeeded in this, then proceeded upon the pure assumption of the petition that the Government of Venezuela was a government *de facto*, when this power was granted; but this, it is not necessary to say, is not only the very question at issue, but the duty of establishing the affirmative rests upon the petitioner. Ordinarily the authority of the ruling power in a state, when the instrument of evidence is once duly authenticated, would not be drawn in question for the reason, as already given, that states are immortal, and in the course of time, according to varying degrees of stability, acquire a fixed personal status like that of an individual, with a capability of binding themselves with a like freedom from question and suspicion. No one would question an authority given under the great seal of Great Britain or the United States, and no one would question the lawfulness of a power emanating from the United States of Venezuela under the happier conditions of government which now prevail in that country. But in a case like this, where no assistance can be derived from presumptions, the petition must be treated as if it had averred in terms that the power, in virtue of which these contracts were executed, was itself a deed, not only duly authenticated, as an instrument passing from the hands of its apparent maker, but also as the medium through which the undisputed authority of the state was conveyed, and by which it was bound. A man claiming under a deed must prove it, and if there is any question as to the power of the grantor to do the deed he must establish that also. The mere fact of execution is a matter of formal evidence, but the right to do the act, of which the paper instrument usually called the deed supplies the proof, is the essential issue in controversies of this character. Treating this petition, then, as setting up not merely the paper power to Camacho, but as asserting the actual authority of Paez to issue such a power, as the foundation stone on which this claim is erected, we are confronted by the general denial which Venezuela has interposed to the petition, and which, under our rules, puts in issue every essential constituent of the petitioner's claim. The question is thus raised whether, conceding that a *de facto* government, according to Austin's definition, has the same authority to bind the state as a government d*e jure,* the Paez government can lay claim to such a character, and on this question the burden of proof is on the claimants.

It would be enough to say that they have not discharged this obligation, but from the references we have made to the origin and character of this government it would seem reasonably clear that if the claimants had assumed to carry such a burden they must have failed in the undertaking.

But, passing this, it is further to be observed that the clause in both of the contracts providing for arbitration at Caracas clearly shows that neither of them, on any pretest, was ever to be made cause for an international claim. It is true that it has been urged in answer to this, that both contracts were struck down by the decrees annuling them, and that the arbitral clause fell with them. But that argument is more specious than real. It is conceded, of course, that

one party to a contract can not break it at his pleasure and without the consent of the other, but when both parties agree, as in this case, that any doubts, differences, difficulties, or misunderstandings of any class or nature whatever that may arise from, or have any connection with, or in any manner relate to the contract shall be referred to arbitration, and one of the parties declares that he is not bound by the contract and attempts to annul it, then the attempt to revoke, of necessity, if language has any meaning, being a "difficulty" relative to the contract, must be one of the questions agreed to be submitted. If these contracts had been good and valid in other respects, and the Messrs. Beales and Nobles had demanded that the "difficulty" growing out of their annulment should be referred to arbitration as provided, and the government at Caracas had refused its assent to the submission, then a question might have arisen whether there was not such a denial of justice on the part of that government as would have warranted the interposition of the good offices of the United States in behalf of the injured parties. No such demand appears to have been made, but the case was submitted to the old commission under the convention of 1866, and was decided by the umpire upon the assumption just stated, that the decrees annulled the provision as to arbitration, and thus produced the very result of converting into cause for an international claim a difficulty relating to the contract which by its terms expressed in the most solemn manner was never to be made such on any *pretext* whatever. A distinction was made in argument between a reference of differences or misunderstandings arising out of the construction of the contracts, and a difficulty as to the existence of the contract itself, it being admitted that a controversy of the first kind was legitimate matter for arbitration, but the second was not, or rather could not be made so, because when the contract was annulled there was no longer any provision for arbitration. But that assumes the right to annul without making the revocation a subject of arbitral decision, and such assumption can not be made without the further assumption that a difficulty *relative* to the contract does not and was not intended to include a question as to whether there was such a contract. The case seems to us too clear for doubt, and on this ground alone, if there was no other, we should reject the claim.

1. On the whole our conclusions are that by the constitution of Venezuela the lawful and undisputed government of that country could not, by its executive department alone, have granted the power in question, and therefore the grant by Paez was without lawful authority, even if the *de facto* character of his government had been established, as to which there is not only a failure of proof but the evidence seems the other way.

2. That both the contracts purporting to have been made in pursuance of the power contain provisions and stipulations clearly in excess of its terms, and where drawn within the limitations of the power have failed to conform to the prescribed requirements as to the parties with whom the contracts were authorized.

3. That the contracts provide a mode of settlement by arbitration for any differences or difficulties that may arise as to their legal validity which is inconsistent with any attempt to make them cause for an international claim on any pretext whatever.

4. That there is no evidence satisfactory to us that the petitioners' testator was interested to the extent of one-third of the claim for the damages alleged to have been suffered by the annulment of the said contracts, or that he ever expended any money or incurred any liability, or did anything in execution of the said contracts; and, treating the petitioners representing their testator as original claimants, we can discover no ground on which to base an award in their favor.

5. That the evidence seems to indicate very strongly that the petitioners' testator came into possession of a single certificate, which was found among his papers, by purchase, hypothecation, or some other channel than his interest in the original claim, and if the petitioners are to be regarded as claiming derivatively in the right of *bona fide* holders for value under the 9th section of the treaty, the claim must be rejected, because for the reasons stated the original claim itself is without merit, and falls therefore within the purview of the first article of the supplementary convention. The claim is accordingly disallowed, and the petition dismissed.

Cases of Amelia de Brissot, Ralph Rawdon, Joseph Stackpole and Narcisa de Hammer *v.* Venezuela (the steamer *Apure* case), opinions of the Commissioners*

Affaires concernant Amelia de Brissot, Ralph Rawdon, Joseph Stackpole et Narcisa de Hammer c. Venezuela (cas du vapeur *Apure*), opinions des Commissaires**

First Commissioner

State responsibility—obligation of Venezuela to protect the life and property of the citizens of the United States—international responsibility of governments for the acts of their officers—extent of the responsibility varies according to whether acts emanated from agents appointed by the government or from officers who are not under its immediate direction and control—obligation to indemnify damages caused to another State or its citizens by persons under its dependence and for whom it is accountable.

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* Reprinted from John Bassett Moore (ed.), *History and Digest of the International Arbitrations to Which the United States has been a Party,* vol. III, Washington, 1898, Government Printing Office, p. 2949.

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