REPORTS OF INTERNATIONAL ARBITRAL AWARDS

RECUEIL DES SENTENCES ARBITRALES

VOLUME IX

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REPORTS OF INTERNATIONAL ARBITRAL AWARDS

RECUEIL DES SENTENCES ARBITRALES

VOLUME IX

UNITED NATIONS — NATIONS UNIES

FOREWORD

The first eight volumes already published in this series contain awards rendered between 1920 and 1939.

The present volume, the ninth in the series, is the first of a number of volumes which will eventually cover the period between 1902 and 1920. It begins with the first award given by the Permanent Court of Arbitration on 14 October 1902 and contains awards rendered by this Court as well as certain awards rendered by *ad hoc* international tribunals between that date and 1904.

Only a part of the Venezuelan Arbitrations of 1903 are included, namely, those of the Mixed Claims Commission United States-Venezuela, the Mixed Claims Commission Belgium-Venezuela, and the Mixed Claims Commission Great Britain-Venezuela. The remaining part of the awards rendered in the Venezuelan Arbitrations of 1903 will be published in the next volume of this series.

The awards are presented in chronological order. In the case of the Venezuelan arbitrations, Ralston's *Venezuelan Arbitrations of 1903* [1], from which the texts have been taken, does not give the actual dates of the awards. These texts are therefore reproduced in this volume in the same order as in that publication.

As a general rule, the awards, together with the compromis or arbitration agreements, have been included in English or French, according to which is the original language.

Explanatory notes and bibliographical references have been added as appropriate. Footnotes which initially appeared in sources quoted herein have been supplemented and adapted when necessary for editing purposes.

This volume, like Volumes IV, V, VI, VII and VIII, was prepared by the Codification Division of the Office of Legal Affairs, Secretariat of the United Nations.

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[1] Washington: Government Printing Office (1904).

AVANT-PROPOS

Les huit volumes du Recueil publiés jusqu'ici contiennent des sentences rendues entre 1920 et 1939.

Le présent volume, le neuvième à paraître, inaugure une série qui couvrira la période 1902-1920. Il comprend, en plus de la première sentence rendue par la Cour permanente d'arbitrage le 14 octobre 1902, d'autres sentences prononcées entre cette date et 1904 par la même Cour ainsi que par des tribunaux internationaux *ad hoc*.

En ce qui concerne les arbitrages vénézuéliens de 1903, seules figurent dans le présent volume les sentences de la Commission mixte des réclamations Etats-Unis d'Amérique - Venezuela, de la Commission mixte des réclamations Belgique - Venezuela et de la Commission mixte des réclamations Grande-Bretagne - Venezuela. Les autres sentences rendues en 1903 à l'occasion des arbitrages vénézuéliens seront publiées dans le prochain volume.

Les sentences sont présentées dans l'ordre chronologique. Dans le cas des arbitrages vénézuéliens, l'ouvrage de Ralston intitulé *Venezuelan Arbitrations of 1903*[1], d'où les textes ont été tirés, n'indique pas de dates. L'ordre suivi ici est donc celui qu'a adopté cet auteur.

En principe, les sentences, ainsi que les compromis ou les accords d'arbitrage, sont reproduits dans la langue originale, en anglais ou en français selon le cas.

Des notes explicatives et des références bibliographiques ont été ajoutées. Les notes figurant dans les ouvrages cités ont parfois dû être complétées ou modifiées pour répondre aux exigences de la publication.

Le présent volume, comme les volumes IV, V, VI, VII et VIII, a été préparé par la Division de la codification du Service juridique du Secrétariat de l'Organisation des Nations Unies.

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[1] Washington: Government Printing Office (1904).

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SYLLABUS [1]

The case on trial was known as the " Pious Fund of the Californias ". It originated in donations made by Spanish subjects during the latter part of the seventeenth and the first half of the eighteenth centuries for the spread of the Roman Catholic faith in the Californias. These gifts, amounting approximately to $ 1,700,000, were made in trust to the Society of Jesus for the execution of the pious wish of the founders. The Jesuits accepted the trust and discharged its duties until they were disabled from its further administration by their expulsion in 1767 from the Spanish dominions by the King of Spain and by the suppression of the order by the Pope in 1773. The Crown of Spain took possession of and administered the trust for the uses declared by the donors until Mexico, after her independence was achieved, succeeded to the administration of the trust. Finally, in 1842, President Santa Anna ordered the properties to be sold, that the proceeds thereof be incorporated into the national treasury, and that six per cent annual interest on the capitalization of the property should be paid and devoted to the carrying out of the intention of the donors in the conversion and civilization of the savages.

Upper California having been ceded to the United States in 1848 by the treaty of Guadalupe Hidalgo, the Mexican Government refused to pay to the prelates of the Church in Upper California any share of the interest which accrued after the ratification of the treaty. The latter presented their claims therefor to the Department of State. A mixed commission for the settlement of the cross claims between the two Governments was formed under the Convention of July 4, 1868.[2] On the presentation and hearing of the claim the United States and Mexican commissioners divided in opinion.[3] The case was accordingly referred to the umpire, Sir Edward Thornton, who rendered an award [4] in favor of the United States for twenty-one annuities of $ 43,050.99 each, as the equitable proportion to which the prelates of Upper California were entitled of the interest accrued on the entire fund from the making of the treaty of peace down to February 2, 1869. The Mexican Government paid the award, but asserting that the claim was extinguished, refused to make any further payments of interest for the benefit of the Church in Upper California. Again the prelates appealed to the Department of State for support, and in 1898 active diplomatic discussions between the two Governments as to the merits of the claim were begun and carried forward until they culminated, on May 22, 1902, in a formal agreement to refer the case to the determination of the Hague tribunal to be composed of five members none of whom were to be natives or citizens of the contracting Parties. Only two issues were presented by the protocol, namely: 1. Is the case, as a consequence of the decision of Sir Edward Thornton, within the governing principle of *res judicata*? 2. If not, is the claim just? The tribunal was authorized to render whatever judgment might be found just and equitable.

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[1] *The Hague Court Reports*, edited by J. B. Scott, Carnegie Endowment for International Peace, New York, Oxford University Press, 1st series, 1916, pp. 1-2.

[2] *Ibid.*, pp. 12-17.

[3] *Ibid.*, pp. 16-48.

[4] *Ibid.*, pp. 48-54; see also Moore, *International Arbitrations*, vol. II, 1898, p. 1350.

As judges the United States selected Professor Martens of Russia and Sir Edward Fry of Great Britain; Mexico chose Dr. Asser and Jonkheer de Savornin Lohman of Holland; and these judges selected as president of the tribunal Dr. Matzen of Denmark. All were members of the Permanent Court of Arbitration. The sessions of the tribunal began September 15, 1902, and ended October 1, 1902.

The material part of the unanimous award of the tribunal in favor of the United States, rendered on October 14, 1902, was as follows:

1. That the said claim of the United States of America for the benefit of the Archbishop of San Francisco and of the Bishop of Monterey is governed by the principle of *res judicata* by virtue of the arbitral sentence of Sir Edward Thornton, of November 11, 1875; amended by him, October 24, 1876.[1]

2. That conformably to this arbitral sentence the Government of the Republic of the United Mexican States must pay to the Government of the United States of America the sum of $ 1,420,682.67 Mexican, in money having legal currency in Mexico, within the period fixed by Article 10 of the protocol of Washington of May 22, 1902.

This sum of $ 1,420,682.67 will totally extinguish the annuities accrued and not paid by the Government of the Mexican Republic -- that is to say, the annuity of $ 43,050.99 Mexican from February 2, 1869, to February 2, 1902.

3. The Government of the Republic of the United Mexican States shall pay to the Government of the United States of America on February 2, 1903, and each following year on the same date of February 2, perpetually, the annuity of $ 43,050.99 Mexican, in money having legal currency in Mexico.

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[1] *Ibid.*, pp. 48-54.

PROTOCOL OF AN AGREEMENT BETWEEN THE UNITED STATES OF AMERICA AND THE REPUBLIC OF MEXICO FOR THE ADJUSTMENT OF CERTAIN CONTENTIONS ARISING UNDER WHAT IS KNOWN AS THE " PIOUS FUND OF THE CALIFORNIAS " SIGNED AT WASHINGTON, 22 MAY 1902 [1]

Whereas, under and by virtue of the provisions of a convention entered into between the high contracting Parties above-named, of date July 4, 1868,[2] and subsequent conventions supplementary thereto, there was submitted to the mixed commission provided for by said convention a certain claim advanced by and on behalf of the prelates of the Roman Catholic Church of California against the Republic of Mexico for an annual interest upon a certain fund known as " The Pious Fund of the Californias ", which interest was said to have accrued between February 2, 1848, the date of the signature of the treaty of Guadalupe Hidalgo, and February 1, 1869, the date of the exchange of the ratifications of said convention above referred to; and

Whereas, said mixed commission, after considering said claim, the same being designated as No. 493 upon its docket, and entitled Thaddeus Amat, Roman Catholic Bishop of Monterey, a corporation sole, and Joseph S. Alemany, Roman Catholic Bishop of San Francisco, a corporation sole, against the Republic of Mexico, adjudged the same adversely to the Republic of Mexico and in favor of said claimants, and made an award thereon of nine hundred and four thousand, seven hundred and 99/100 (904,700.99) dollars; the same, as expressed in the findings of said court, being for twenty-one years' interest of the annual amount of forty-three thousand and eighty and 99/100 (43,080.99) dollars upon seven hundred and eighteen thousand and sixteen and 50/100 (718,016.50) dollars, said award being in Mexican gold dollars, and the said amount of nine hundred and four thousand, seven hundred and 99/100 (904,700.99) dollars having been fully paid and discharged in accordance with the terms of said conventions; and

Whereas, the United States of America on behalf of said Roman Catholic Bishops, above-named, and their successors, in title and interest, have since such award claimed from Mexico further instalments of said interest, and have insisted that the said claim was conclusively established, and its amount fixed as against Mexico and in favor of said original claimants and their successors in title and interest under the said first-mentioned convention of 1868 by force of the said award as *res judicata*; and have further contended that apart from such former award their claim against Mexico was just, both of which proposi-

[1] Bureau International de la Cour permanente d'Arbitrage, *Recueil des Actes et Protocoles concernant le litige du " Fonds Pieux des Californies " soumis au Tribunal d'Arbitrage constitué en vertu du Traité conclu à Washington le 22 mai 1902 entre les Etats-Unis d'Amérique et les Etats-Unis Mexicains*, La Haye, Van Langenhuysen Frères, 1902, p. 5. French translation: Descamps - Renault, *Recueil international des traités du XX^e siècle*, année 1902, p. 461

[2] *The Hague Court Reports*, edited by J. B. Scott, Carnegie Endowment for International Peace, New York, Oxford University Press, 1st series, 1916, p. 12; *U.S. Statutes at Large*, vol. 15, p. 679.

tions are controverted and denied by the Republic of Mexico, and the high contracting Parties hereto, animated by a strong desire that the dispute so arising may be amicably, satisfactorily and justly settled, have agreed to submit said controversy to the determination of arbitrators, who shall, unless otherwise herein expressed, be controlled by the provisions of the international Convention for the pacific settlement of international disputes, commonly known as the Hague Convention, and which arbitration shall have power to determine:

1. If said claim, as a consequence of the former decision is within the governing principle of *res judicata*; and

2. If not, whether the same be just.

And to render such judgment or award as may be meet and proper under all the circumstances of the case.

It is therefore agreed by and between the United States of America, through their representative, John Hay, Secretary of State of the United States of America, and the Republic of Mexico, through its representative, Manuel de Azpiroz, Ambassador Extraordinary and Plenipotentiary to the United States of America for the Republic of Mexico as follows:

1

That the said contentions be referred to the special tribunal hereinafter provided, for examination, determination and award.

2

The special tribunal hereby constituted shall consist of four arbitrators (two to be named by each of the high contracting Parties) and umpire to be selected in accordance with the provisions of the Hague Convention. The arbitrators to be named hereunder shall be signified by each of the high contracting Parties to the other within sixty days after the date of this protocol. None of those so named shall be a native or citizen of the parties hereto. Judgment may be rendered by a majority of said court.

All vacancies occurring among the members of said court because of death, retirement or disability from any cause before a decision shall be reached, shall be filled in accordance with the method of appointment of the member affected as provided by said Hague Convention, and if occurring after said court shall have first assembled, will authorize in the judgment of the court an extension of time for hearing or judgment, as the case may be, not exceeding thirty days.

3

All pleadings, testimony, proofs, arguments of counsel and findings or awards of commissioners or umpire, filed before or arrived at by the mixed commission above referred to, are to be placed in evidence before the court hereinbefore provided for, together with all correspondence between the two countries relating to the subject-matter involved in this arbitration; originals or copies thereof duly certified by the Departments of State of the high contracting Parties being presented to said new tribunal. Where printed books are referred to in evidence by either party, the party offering the same shall specify volume, edition and page of the portion desired to be read, and shall furnish the court in print the extracts relied upon; their accuracy being attested by affidavit. If the original work is not already on file as a portion of the record of the former mixed commission, the book itself shall be placed at the disposal of the opposite party in the respective offices of the Secretary of

State of the Mexican Ambassador in Washington, as the case may be, thirty days before the meeting of the tribunal herein provided for.

4

Either party may demand from the other the discovery of any fact or of any document deemed to be or to contain material evidence for the party asking it; the document desired to be described with sufficient accuracy for identification, and the demanded discovery shall be made by delivering a statement of the fact or by depositing a copy of such document (certified by its lawful custodian, if it be a public document, and verified as such by the possessor, if a private one), and the opposite party shall be given the opportunity to examine the original in the City of Washington at the Department of State, or at the office of the Mexican Ambassador, as the case may be. If notice of the desired discovery be given too late to be answered ten days before the tribunal herein provided for shall sit for hearing, then the answer desired thereto shall be filed with or documents produced before the court herein provided for as speedily as possible.

5

Any oral testimony additional to that in the record of the former arbitration may be taken by either party before any judge, or clerk of court of record, or any notary public, in the manner and with the precautions and conditions prescribed for that purpose in the rules of the joint commission of the United States of America, and the Republic of Mexico, as ordered and adopted by that tribunal August 10, 1869, and so far as the same may be applicable. The testimony when reduced to writing, signed by the witness, and authenticated by the officer before whom the same is taken, shall be sealed up, addressed to the court constituted hereby, and deposited so sealed up in the Department of State of the United States, or in the Department of Foreign Relations of Mexico to be delivered to the court herein provided for when the same shall convene.

6

Within sixty days from the date hereof the United States of America, through their agent or counsel, shall prepare and furnish to the Department of State aforesaid, a memorial in print of the origin and amount of their claim, accompanied by references to printed books, and to such portions of the proofs or parts of the record of the former arbitration, as they rely on in support of their claim, delivering copies of the same to the Embassy of the Republic of Mexico in Washington, for the use of the agent or counsel of Mexico.

7

Within forty days after the delivery thereof to the Mexican Embassy the agent or counsel for the Republic of Mexico shall deliver to the Department of State of the United States of America in the same manner and with like references a statement of its allegations and grounds of opposition to said claim.

8

The provisions of paragraphs 6 and 7 shall not operate to prevent the agents or counsel for the parties hereto from relying at the hearing or submission upon any documentary or other evidence which may have become open to their investigation and examination at a period subsequent to the times provided for service of memorial and answer.

9

The first meeting of the arbitral court hereinbefore provided for shall take place for the selection of an umpire on September 1, 1902, at The Hague, in

the quarters which may be provided for such purpose by the International Bureau at The Hague, constituted by virtue of the Hague Convention hereinbefore referred to, and for the commencement of its hearing September 15, 1902, is designated, or, if an umpire may not be selected by said date, then as soon as possible thereafter, and not later than October 15, 1902, at which time and place and at such other times as the court may set (and at Brussels if the court should determine not to sit at The Hague) explanations and arguments shall be heard or presented as the court may determine, and the cause be submitted. The submission of all arguments, statements of facts, and documents shall be concluded within thirty days after the time provided for the meeting of the court for hearing (unless the court shall order an extension of not to exceed thirty days) and its decision and award announced within thirty days after such conclusion, and certified copies thereof delivered to the agents or counsel of the respective parties and forwarded to the Secretary of State of the United States and the Mexican Ambassador at Washington, as well as filed with the Netherlands Minister for Foreign Affairs.

10

Should the decision and award of the tribunal be against the Republic of Mexico, the findings shall state the amount and in what currency the same shall be payable, and shall be for such amount as under the contentions and evidence may be just. Such final award, if any, shall be paid to the Secretary of State of the United States of America within eight months from the date of its making.

11

The agents and counsel for the respective parties may stipulate for the admission of any facts, and such stipulation, duly signed, shall be accepted as proof thereof.

12

Each of the parties hereto shall pay its own expenses, and one-half of the expenses of the arbitration, including the pay of the arbitrators; but such costs shall not constitute any part of the judgment.

13

Revision shall be permitted as provided in Article 55 of the Hague Convention, demand for revision being made within eight days after announcement of the award. Proofs upon such demand shall be submitted within the days after revision be allowed (revision only being granted, if at all, within five days after demand therefor) and counterproofs within the following ten days, unless further time be granted by the court. Arguments shall be submitted within ten days after the presentation of all proofs, and a judgment or award given within the days thereafter. All provisions applicable to the original judgment or award shall apply as far as possible to the judgment or award on revision. Provided, that all proceedings on revision shall be in the French language.

14

The award ultimately given hereunder shall be final and conclusive as to the matters presented for consideration.

Done in duplicate in English and Spanish at Washington, this 22nd day of May, A.D. 1902.

[SEAL] John HAY

[SEAL] M. DE AZPIROZ

SENTENCE ARBITRALE DU 14 OCTOBRE 1902 [1]

La réclamation des Etats-Unis d'Amérique dans l'Affaire connue sous le nom de « Fonds Pieux des Californies » est régie par le principe de la *res judicata* — Les règles de la prescription, étant exclusivement du domaine du droit civil, ne sauraient être appliquées au présent conflit entre les deux Etats en litige — Le paiement en or ne peut être exigé qu'en vertu d'une stipulation expresse — La question du mode de paiement ne concerne pas le fond du droit en litige mais seulement l'exécution de la sentence.

LE TRIBUNAL D'ARBITRAGE, constitué en vertu du Traité conclu à Washington, le 22 mai 1902, entre les Etats-Unis d'Amérique et les Etats-Unis Mexicains;

ATTENDU que, par un compromis, rédigé sous forme de *Protocole*, entre les Etats-Unis d'Amérique et les Etats-Unis Mexicains, signé à Washington le 22 mai 1902, il a été convenu et réglé que le différend, qui a surgi entre les Etats-Unis d'Amérique et les Etats-Unis Mexicains au sujet du « Fonds Pieux des Californies » dont les annuités étaient réclamées par les Etats-Unis d'Amérique, au profit de l'Archevêque de San Francisco et de l'Evêque de Monterey, au Gouvernement de la République Mexicaine, serait soumis à un Tribunal d'Arbitrage, constitué sur les bases de la *Convention pour le règlement pacifique des conflits internationaux*, signée à La Haye le 29 juillet 1899, qui serait composé de la manière suivante, savoir:

Le Président des Etats-Unis d'Amérique désignerait deux Arbitres non nationaux et le Président des Etats-Unis Mexicains également deux Arbitres non nationaux. Ces quatre Arbitres devraient se réunir le 1er septembre 1902 à La Haye afin de nommer le Surarbitre qui, en même temps, serait de droit le Président du Tribunal d'Arbitrage.

ATTENDU que le Président des Etats-Unis d'Amérique a nommé comme Arbitres:

Le très honorable Sir Edward Fry, Docteur en Droit, autrefois siégeant à la Cour d'Appel, Membre du Conseil Privé de Sa Majesté Britannique, Membre de la Cour permanente d'Arbitrage et

Son Excellence Monsieur de Martens, Docteur en Droit, Conseiller Privé, Membre du Conseil du Ministère Impérial des affaires Etrangères de Russie, Membre de l'Institut de France, Membre de la Cour permanente d'Arbitrage;

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[1] Texte original français: Bureau international de la Cour permanente d'Arbitrage, *Recueil des Actes et Protocoles concernant le litige du " Fonds Pieux des Californies " soumis au Tribunal d'Arbitrage constitué en vertu du Traité conclu à Washington le 22 mai 1902 entre les Etats-Unis d'Amérique et les Etats-Unis Mexicains*, La Haye, Van Langenhuysen Frères, 1902, p. 107. Traduction anglaise: *Report of Jackson H. Ralston, Agent of the United States and of Counsel in the matter of the Case of the Pious Fund of the Californias, etc.*, Part I, p. 13.

ATTENDU que le Président des Etats-Unis Mexicains a nommé comme Arbitres:

Monsieur T. M. C. Asser, Docteur en Droit, Membre du Conseil d'Etat des Pays-Bas, ancien Professeur à l'Université d'Amsterdam, Membre de la Cour permanente d'Arbitrage et

Monsieur le Jonkheer A. F. de Savornin Lohman, Docteur en Droit, ancien Ministre de l'Intérieur des Pays-Bas, ancien Professeur à l'Université libre d'Amsterdam, Membre de la Seconde Chambre des Etats-Généraux, Membre de la Cour permanente d'Arbitrage;

Lesquels Arbitres, dans leur réunion du 1er septembre 1902, ont élu, conformément aux Articles XXXII-XXXIV de la Convention de La Haye du 29 juillet 1899, comme Surarbitre et Président de droit du Tribunal d'Arbitrage;

Monsieur Henning Matzen, Docteur en Droit, Professeur à l'Université de Copenhague, Conseiller extraordinaire à la Cour Suprême, Président du Landsthing, Membre de la Cour permanente d'Arbitrage.

ET ATTENDU, qu'en vertu du Protocole de Washington du 22 mai 1902, les susnommés Arbitres, réunis en Tribunal d'Arbitrage, devraient décider:

1. Si ladite réclamation des Etats-Unis d'Amérique au profit de l'Archevêque de San Francisco et de l'Evêque de Monterey est régie par le principe de la *res judicata*, en vertu de la sentence arbitrale du 11 novembre 1875, prononcée par Sir Edward Thornton, en qualité de Surarbitre; [1]

2. Sinon, si la dite réclamation est juste, avec pouvoir de rendre tel jugement qui leur semblera juste et équitable;

ATTENDU que les susnommés Arbitres, ayant examiné avec impartialité et soin tous les documents et actes, présentés au Tribunal d'Arbitrage par les Agents des Etats-Unis d'Amérique et des Etats-Unis Mexicains, et ayant entendu avec la plus grande attention les plaidoiries orales, présentées devant le Tribunal par les Agents et les Conseils des deux Parties en litige;

CONSIDÉRANT que le litige, soumis à la décision du Tribunal d'Arbitrage, consiste dans un conflit entre les Etats-Unis d'Amérique et les Etats-Unis Mexicains qui ne saurait être réglé que sur la base des traités internationaux et des principes du droit international;

CONSIDÉRANT que les Traités internationaux, conclus depuis l'année 1848 jusqu'au compromis du 22 mai 1902, entre les deux Puissances en litige, constatent le caractère éminemment international de ce conflit;

CONSIDÉRANT que toutes les parties d'un jugement ou d'un arrêt concernant les points débattus au litige s'éclairent et se complètent mutuellement et qu'elles servent toutes à préciser le sens et la portée du dispositif, à déterminer les points sur lesquels il y a chose jugée et qui partant ne peuvent être remis en question;

CONSIDÉRANT que cette règle ne s'applique pas seulement aux jugements des tribunaux institués par l'Etat, mais également aux sentences arbitrales, rendues dans les limites de la compétence fixées par le compromis;

CONSIDÉRANT que ce même principe doit, à plus forte raison, être appliqué aux arbitrages internationaux;

CONSIDÉRANT que la Convention du 4 juillet 1868, conclue entre les deux Etats en litige, avait accordé aux Commissions Mixtes, nommées par ces Etats,

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[1] Cf. Moore, *International Arbitrations*, vol. II, 1898, p. 1350; *The Hague Court Reports*, edited by J. B. Scott, Carnegie Endowment for International Peace, New York, Oxford University Press, 1st Series, 1916, p. 48; pour le texte français, *ibid.*, éd. française, 1921, p. 50.

ainsi qu'au Surarbitre à désigner éventuellement, le droit de statuer sur leur propre compétence;

CONSIDÉRANT que dans le litige, soumis à la décision du Tribunal d'Arbitrage, en vertu du compromis du 22 mai 1902, il y a, non seulement identité des parties en litige, mais également identité de la matière, jugée par la sentence arbitrale de Sir Edward Thornton comme Surarbitre en 1875 et amendée par lui le 24 octobre 1876;

CONSIDÉRANT que le Gouvernement des Etats-Unis Mexicains a consciencieusement exécuté la sentence arbitrale de 1875 et 1876, en payant les annuités adjugées par le Surarbitre;

CONSIDÉRANT que, depuis 1869, trente-trois annuités n'ont pas été payées par le Gouvernement des Etats-Unis Mexicains au Gouvernement des Etats-Unis d'Amérique et que les règles de la prescription, étant exclusivement du domaine du droit civil, ne sauraient être appliquées au présent conflit entre les deux Etats en litige;

CONSIDÉRANT, en ce qui concerne la monnaie, dans laquelle le paiement de la rente annuelle doit avoir lieu, que le dollar d'argent, ayant cours légal au Mexique, le paiement en or ne peut être exigé qu'en vertu d'une stipulation expresse;

Que, dans l'espèce, telle stipulation n'existant pas, la Partie défenderesse a le droit de se libérer en argent;

Que, par rapport à ce point, la sentence de Sir Edward Thornton n'a pas autrement force de chose jugée que pour les vingt et une annuités à l'égard desquelles le Surarbitre a décidé que le paiement devait avoir lieu en dollars d'or Mexicains, puisque la question du mode de paiement ne concerne pas le fond du droit en litige mais seulement l'exécution de la sentence;

CONSIDÉRANT que, d'après l'Article X du Protocole de Washington du 22 mai 1902, le présent Tribunal d'Arbitrage aura à statuer, en cas de condamnation de la République du Mexique, dans quelle monnaie le paiement devra avoir lieu;

PAR CES MOTIFS le Tribunal d'Arbitrage décide et prononce à l'unanimité ce qui suit:

1° Que ladite réclamation des Etats-Unis d'Amérique au profit de l'Archevêque de San Francisco et de l'Evêque de Monterey est régie par le principe de la *res judicata*, en vertu de la sentence arbitrale de Sir Edward Thornton du 11 novembre 1875 amendée par lui le 24 octobre 1876;

2° Que, conformément à cette sentence arbitrale, le Gouvernement de la République des Etats-Unis Mexicains devra payer au Gouvernement des Etats-Unis d'Amérique la somme d'*un million quatre cent vingt mille six cent quatre-vingt-deux dollars du Mexique et soixante-sept cents* (1,420,682.67/100 *dollars du Mexique*) en monnaie ayant cours légal au Mexique, dans le délai fixé par l'Article X du Protocole de Washington du 22 mai 1902.

Cette somme d'un million quatre cent vingt mille six cent quatre-vingt-deux dollars et soixante-sept cents (1,420,682.67/100 dollars) constituera le versement total des annuités échues et non payées par le Gouvernement de la République Mexicaine, savoir de la rente annuelle de *quarante-trois mille cinquante dollars du Mexique et quatre-vingt-dix-neuf cents* (43,050.99/100 dollars du Mexique) depuis le 2 février 1869 jusqu'au 2 février 1902;

3° Le Gouvernement de la République des Etats-Unis Mexicains paiera au Gouvernement des Etats-Unis d'Amérique le 2 février 1903, et chaque année

suivante à cette même date du 2 février, à perpétuité la rente annuelle de *quarante-trois mille cinquante dollars du Mexique et quatre-vingt-dix-neuf cents* (43,050.99/100 dollars du Mexique) en monnaie ayant cours légal au Mexique.

FAIT à La Haye, dans l'Hotel de la Cour permanente d'Arbitrage, en triple original, le 14 octobre 1902.

(Signé) Henning MATZEN
(Signé) Edw. FRY
(Signé) MARTENS
(Signé) T. M. C. ASSER
(Signé) A. F. DE SAVORNIN LOHMAN

SAMOAN CLAIMS

PARTIES: Germany, Great Britain, United States of America.

COMPROMIS: Convention of 7 November, 1899.

ARBITRATOR: Oscar II, King of Sweden and Norway.

DECISION: 14 October, 1902.

Determination of the question whether the military action undertaken in Samoa by British and American officers was, or was not, unwarranted — And thus whether or not the British and United States Governments ought to be considered responsible for losses caused by that action — Questions resolved in the affirmative sense.

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Commentaries:

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[1] The texts of the Compromis and Decision reproduced below were drawn from that *Recueil*.

SYLLABUS [1]

In 1899 a treaty [2] was entered into between Germany, Great Britain and the United States of America providing for the neutrality and autonomous government of the Samoan Islands. Article I of this treaty provided that, in case of the death of the king, his " successor shall be duly elected according to the laws and customs of Samoa ". Article III, Section 6 provided that in case any dispute should thereafter arise " respecting the rightful election or appointment of King " such dispute shall not lead to war, but shall be left to and decided in writing, by the Chief Justice of Samoa, which decision shall be accepted by and binding on the signatory governments.

Malietoa Laupepa, King of Samoa, died August 22, 1898. Immediately following the ensuing election, a dispute arose as to whether one Mataafa or one Tammafili had been elected king, and, on submission of the issue, the Chief Justice of Samoa, an American citizen, on December 31, 1898, decided in favor of Tammafili. The Mataafa party rejected the decision and strife and confusion ensued, in which the people and officials of German origin were partisans on one side, and those of United States and British nationality partisans on the other. It seems that, between January 1899 and May of the same year, active operations were undertaken, in Samoa, by British and American officers. Out of these operations arose serious complaints on the part of residents of Samoa of several nationalities of losses and damages sustained by them, and claims for reparation.

The principal complainants against the acts of the British and American officers were Germans, and, as a result of representations made by them to their home government, a convention was entered into, on November 7, 1899, between Germany, Great Britain and the United States, whereby the three governments requested Oscar II, King of Sweden and Norway, to arbitrate " in conformity with the principles of international Law or consideration of equity ", the differences between them in regard to the claims growing out of these military operations.

The material part of the Decision of the Arbitrator rendered on October 14, 1902, was as follows:

> " We are of opinion:
>
> " That the military action in question, viz. the bringing back of the Malietoans and the distribution to them of arms and ammunition, the bombardment, the military operations on shore, and the stopping of the street traffic, cannot be considered as having been warranted;
>
> " And that, therefore, His Britannic Majesty's Government and the United States' Government are responsible under the Convention of the 7th of November 1899 for losses caused by said military action;

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[1] See Walter Scott Penfield, " The Settlement of Samoan Cases ", *American Journal of International Law*, vol. 7, 1913, p. 767.

[2] For this treaty, see Malloy, *Treaties, Conventions, International Acts, Protocols and Agreements between the United States and Other Powers*, 1776-1909, vol. II, p. 1576.

"While reserving for a future Decision the question as to the extent to which the two Governments, or each of them, may be considered responsible for such losses."

No decision was ever rendered on the reserved question, for the reason that, subsequently, the Governments of Great Britain and the United States reached a settlement with all the foreign governments whose citizens had been damaged, and together they paid, in equal moieties, $ 40,000.00 to Germany; [1] $ 6,782.26 to France; [2] $ 1,520.00 to Denmark; [3] $ 750.00 to Sweden; [4] and $ 450.00 to Norway. [5]

[1] See Senate Doc. No. 85, 59th Cong., 1st Sess. and H. Rep., No. 4414, 59th Cong., 1st Sess.
[2] See House of Rep. Doc. No. 612, 59th Cong., 1st Sess.
[3] See Senate Doc. No. 160, 59th Cong., 1st Sess.
[4] See Senate Doc. No. 864, 60th Cong., 1st Sess.
[5] See House of Rep. Doc. No. 1321, 61st Cong., 1st Sess.

CONVENTION BETWEEN UNITED STATES, GERMANY, AND GREAT BRITAIN RELATING TO SETTLEMENT OF SAMOAN CLAIMS, CONCLUDED 7 NOVEMBER 1899 [1]

Her Majesty the Queen of the United Kingdom of Great Britain and Ireland, His Majesty the German Emperor, King of Prussia, in the name of the German Empire, and the President of the United States of America, being desirous of effecting a prompt and satisfactory settlement of the claims of the subjects and citizens of their respective Countries resident in the Samoan Islands on account of recent military operations conducted there, and having resolved to conclude a Convention for the accomplishment of this end by means of Arbitration, have appointed as Their respective Plenipotentiaries:

Her Majesty the Queen of the United Kingdom of Great Britain and Ireland, Mr. Reginald Tower, Her Britannic Majesty's *Chargé d'Affaires ad interim*;

His Majesty the German Emperor, King of Prussia, His Minister in Extraordinary Mission, Dr. Jur. Mumm von Schwarzenstein, Privy Councillor of Legation; and

The President of the United States of America, the Honourable John Hay, Secretary of State of the United States;

Who, after having communicated to each other their full powers, which were found to be in due and proper form, have agreed to and concluded the following Articles:

Article I. — All claims put forward by British subjects or Germans, or American citizens respectively whether individuals or Companies, for compensation on account of losses which they allege that they have suffered in consequence of unwarranted military action, if this be shown to have occurred, on the part of British, German, or American officers between the first of January last, and the arrival of the Joint Commission in Samoa, shall be decided by Arbitration in conformity with the principles of international law or consideration of equity.

Article II. — The three Governments shall request His Majesty, the King of Sweden and Norway to accept the office of Arbitrator. It shall also be decided by this Arbitration whether, and eventually to what extent, either of the three Governments is bound, alone or jointly with the others, to make good these losses.

Article III. — Either of the three Governments may, with the consent of the others, previously obtained in every case, submit to the King for Arbitration, similar claims of persons not being natives, who are under the protection of that Government, and who are not included in the above-mentioned categories.

Article IV. — The present Convention shall be duly ratified by Her Majesty the Queen of the United Kingdom of Great Britain and Ireland and by His Majesty the German Emperor, King of Prussia, and by the President of the United States of America, by and with the advice and consent of the Senate thereof; and the ratifications shall be exchanged at Washington four months from the date hereof, or earlier if possible.

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[1] Descamps Renault, *Recueil international des traités du XX^e siècle*, année 1902, p. 636.

In faith whereof we, the respective Plenipotentiaries, have signed this Convention, and have hereunto affixed our seals.

Done in triplicate at Washington, the seventh day of November one thousand eight hundred and ninety nine.

(Signed) Reginald TOWER
(Signed) A. V. MUMM
(Signed) John HAY

DECISION GIVEN BY HIS MAJESTY OSCAR II, KING OF SWEDEN AND NORWAY, AS ARBITRATOR UNDER CONVENTION OF 7 NOVEMBER 1899, BETWEEN GERMANY, GREAT BRITAIN AND THE UNITED STATES OF AMERICA, RELATING TO CLAIMS ON ACCOUNT OF MILITARY OPERATIONS CONDUCTED IN SAMOA IN 1899, GIVEN AT STOCKHOLM, 14 OCTOBER 1902 [1]

WE, OSCAR, BY THE GRACE OF GOD KING OF SWEDEN AND NORWAY,

HAVING BEEN REQUESTED by His Majesty the German Emperor, King of Prussia, in the name of the German Empire, by Her Majesty the late Queen of the United Kingdom of Great Britain and Ireland, and by the President of the United States of America to act as Arbitrator in the differences existing between them with regard to certain claims of residents in the Samoan Islands on account of military operations conducted there in the year 1899, and having accepted the office of Arbitrator;

HAVING RECEIVED from the Imperial German Government, His Britannic Majesty's Government, and the Government of the United States of America their respective Cases accompanied by the documents, the official correspondence, and other evidence on which each Government relies, as well as, after due communication hereof, their respective Counter-Cases and additional documents, correspondence, and other evidence, and having thereupon received from the Imperial German Government their Reply to the Counter-Cases and additional documents, correspondence, and other evidence presented by the two other Governments;

HAVING SINCE fully taken into Our consideration the Convention concluded and signed at Washington the 7th of November 1899 for the settlement of the aforesaid claims by means of Arbitration, and also the Cases, Counter-Cases, Reply, and evidence presented by the respective Parties to the said Convention up to the 2nd of April 1902, and having impartially and carefully examined the same:

WHEREAS by Article I of the said Convention of the 7th of November 1899 His Majesty the German Emperor, Her Britannic Majesty, and the President of the United States of America have agreed that all claims put forward by Germans, or British subjects, or American citizens, respectively, for compensation on account of losses which they allege having suffered in consequence of unwarranted military action, if this be shown to have occurred, on the part of German, British, or American officers between the 1st of January 1899 and the 13th of May following, date of the arrival in Samoa of the Joint Commission of the Powers, should be decided by the present Arbitration in conformity with the principles of international law or consideration of equity;

AND WHEREAS by Article III of the said Convention it is provided that either of the three Governments may, with the consent of the others, previously obtained in every case, submit to the Arbitrator similar claims of persons not

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[1] Descamps-Renault, *Recueil des traités du XX^e siècle*, année 1902, p. 636.

being natives, who are under the protection of that Government, and who are not included in the above mentioned categories;

AND WHEREAS, by a subsequent arrangement made by the Signatory Powers, with Our sanction, the provisions of the Arbitration Convention have been extended to claims presented by other Powers on behalf of their subjects or citizens;

AND WHEREAS the German Government contend that the military action undertaken by British and American officers at the time aforesaid was wholly unwarranted and that, therefore, the British and United States Governments are responsible for losses caused by said military action to Germans and to persons under German protection;

AND WHEREAS, on the other hand, the British Government and the United States' Government argue that the military action in question was not unwarranted but, on the contrary, was in every respect necessary and justifiable, and that, therefore, no claims are entitled to consideration by the Arbitrator, and no further proceedings under the aforesaid Convention necessary or admissible, while reserving to themselves the right to examine in detail the particular claims, should it later on become necessary to do so;

AND WHEREAS under Article I of the said Convention no other claims are to be decided by the present Arbitration than those for losses suffered in consequence of unwarranted military action, and thus the primary question to be determined by Us is whether the military action undertaken in Samoa at the time aforesaid by British and American officers was, or was not, unwarranted;

AND WHEREAS it is proper to settle this preliminary point at the present stage, and thus determine generally whether or not the British and United States' Governments ought to be considered responsible for losses caused by that action, before ordering any proceedings with respect to the particular claims presented;

HAVE RESOLVED to confine Our attention, for the present, to those considerations only which have a distinct bearing on the said issue, and on that question have arrived at the following Decision:

WHEREAS, with respect to the military action complained of, it results from the declarations of the Parties and from all the documents of the case that on the 15th of March 1899 the U.S. ship *Philadelphia* and H.B.M. ships *Porpoise* and *Royalist* opened fire across the town of Apia and on the land situate in the rear of said town, the fire being directed against the forces of the High Chief Mataafa, that the greater part of the adherents of the newly appointed King of Samoa, Malietoa Tammafili, having in those days been brought to Apia from different parts of the Samoan Islands by the British and American Naval Commanders, landed at Mulinuu and supplied by them with arms and ammunition, active hostilities thereupon ensued between the Malietoans and the Mataafa party, that from the said 15th of March up to 25th of April following the said ships, in support of the Malietoa party, frequently proceeded to bombard the rear of Apia as well as various other localities on the Island of Upolu and to destroy villages by landing parties, assisted therein from the 24th of March by H.B.M. ship *Tauranga*, that from the said 15th of March up to the said 25th of April frequent expeditions into the interior took place by combined forces of sailors and marines from the ships of war and natives of the Malietoa party commanded by officers from the ships, for the purpose of fighting the Mataafans, or in order to procure food, and that in Apia a severe control of the street traffic was established by the British and American military authorities through the posting

of sentries with orders to allow only bearers of passports issued by said authorities to pass:

WHEREAS — with respect to the contention of the British and United States' Governments that, under the terms of the General Act signed at Berlin the 14th of June 1889,[1] any one of the Signatory Powers was fully authorized to enforce by every means the decision of the 31st of December 1898 of the Chief Justice of Samoa declaring Malietoa Tammafili King of Samoa, which decision had been rejected by the Mataafa party, and that, therefore, the military action, if taken for that purpose, was not unwarranted — We have found nothing in the said General Act, or any subsequent Agreement, which authorizes one of the Signatory Powers, or a majority of them, to take action to enforce the provisions of the Act, or the decisions of the Chief Justice binding on the Powers:

WHEREAS, on the contrary by Article I of the General Act it is expressly provided that " neither of the Powers shall exercise any separate control over the islands or the Government thereof " and, taking into consideration the nature and extent of the operations at the time aforesaid conducted in Samoa by the British and American military authorities, the military action in question undoubtedly had the character of a serious control over the Samoan Islands and the Government thereof:

AND WHEREAS, moreover, the Protocols of the Berlin Conference clearly show that, in framing the General Act, the Plenipotentiaries of the Powers wished to establish the principle that, in their dealings with Samoa, the Powers only could proceed by common accord, and as this very principle has been sanctioned by the Powers not only in subsequent Agreements supplementary to the General Act made between them in 1892 and 1896, by which it was agreed that under certain circumstances their ships of war might be used to support the Supreme Court of Samoa and ammunition served out to the Samoan Government, though in both cases only with the unanimous consent of the Representatives of the Powers, but also in the instructions issued for the Joint Commission sent to Samoa in 1899, the actions of which should be valid only if acceded to by all three Commissioners;

WHEREAS, furthermore, by proclamation issued on the 4th of January 1899, the Consular Representatives of the Treaty Powers in Samoa, owing to the then disturbed state of affairs and to the urgent necessity to establish a strong Provisional Government, recognized the Mataafa party represented by the High Chief Mataafa and thirteen of his Chiefs to be the Provisional Government of Samoa pending instructions from the three Treaty Powers and thus those Powers were bound upon principles of international good faith to maintain the situation thereby created until by common accord they had otherwise decided;

AND WHEREAS, that being so, the military action in question undertaken by the British and American military authorities before the arrival of the instructions mentioned in the proclamation, and tending to overthrow the Provisional Government thereby established, was contrary to the aforesaid obligation and cannot be justified on the plea neither of the invalidity *ab initio* of the said Provisional Government nor of its establishment under a species of *force majeure*;

WHEREAS — with respect to the objection of the British and United States' Governments to the refusal of the German Consul to sign the proclamation proposed by the other Consuls to be issued immediately after the Chief Justice had given his decision on the 31st of December 1898, and their contention that,

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[1] For the text of this Act, see de Martens, *Nouveau Recueil général de traités*, 2e série, t. XV, p. 571. *British and Foreign State Papers*, vol. LXXXI, p. 1058.

in determining the responsibility for the subsequent events, it should be taken into consideration that the attitude of the German Consul was a direct violation of the provisions of the Berlin General Act — it cannot be considered to have been the duty of the German Consul to take part in the issuing of said proclamation, and it has not been proved that with regard to said decision any steps were taken by him contrary to the General Act, and therefore no responsibility attaches for the attitude taken up by him in this respect;

WHEREAS — with respect to the contention of the British and United States' Governments that, whether or not there was authority to insist by force on the acceptance of the provisions of the Berlin General Act, the military action was not unwarranted, because it was necessary for the protection of lives and property which it was the duty of the British and American officers to safeguard, and because the opening of fire on the 15th of March was necessitated by the Mataafan warriors making a rush on the British and the United States' Consulates and by a threatened attack by several war canoes on Mulinuu, where a detachment from the British and American ships was stationed, — We have found nothing in the evidence before Us to show that the general condition of affairs was such as to render the military action necessary for the protection of lives and property, and, as to the said two attacks alleged to have taken place on the 15th of March, it results from all the facts relative thereto that the rush was not, and never was meant to be, an attack on the Consulates but simply was directed against some fleeing women of the Malietoa party, that no attack was intended on Mulinuu by the canoes, which by the garrison there were seen putting out from the opposite shore of the Vaiusu bay and which were ordered by Mataafa to go along the coast to the west and, in fact, were going in that direction and not towards Mulinuu when the firing began, and that, on account of the state of the tide, it was not even possible at the time to pass the bay in canoes;

AND WHEREAS it is established not only that, on the arrival of the *Philadelphia* on the 6th of March, the Malietoans were completely defeated, and deported to distant places, and deprived of their arms, and unable to offer any resistance whatever to the victorious Mataafans, but also that in the last days before the beginning of the bombardment Mataafa was ordered away from Mulinuu by the United States' Admiral, and that the Malietoans were brought back there by the British and United States' military authorities, that a considerable quantity of arms was returned to the Malietoans, which arms in the beginning of January 1899 had been surrendered by them to the Commander of the *Porpoise* when, defeated by the Mataafans, they had taken refuge under the guns of that ship, that ammunition was distributed to the Malietoans from the reserve stock which, according to the Arrangement in 1896 between the Treaty Powers, was to be kept for the use of the Samoan Government and served out to the natives only by the unanimous request of the three Consuls, and that such distribution was made by the British and American authorities without the consent of the German Consul;

AND WHEREAS it ought to have been foreseen that the said actions on the part of the British and American authorities, which cannot be considered to have been justified by any threatening attitude of the Mataafans, should exasperate these latter and greatly endanger the peace of the country and the situation created by the surrender of the Malietoans on the 2nd of January and by the establishment of the Provisional Government, and, therefore, the British and United States' authorities ought to have abstained from such proceedings;

WHEREAS, with respect to the stopping of the street traffic, the measures relative thereto were in themselves contrary, as far as Germans were concerned, to the provisions of the Berlin General Act guaranteeing them the same rights of residence, trade, and personal protection as subjects and citizens of the two other Powers, and as, at all events, those measures constituting only a detail of the military operations at the time, the question whether or not they were unwarranted under the circumstances depends on the same considerations as those which concern the military action in general;

WHEREAS the above considerations apply equally to all the claims before Us, whether presented under the Arbitration Convention itself or under the subsequent Arrangement;

FOR THESE REASONS,

WE ARE OF OPINION:

THAT the military action in question, viz. the bringing back of the Malietoans and the distribution to them of arms and ammunition, the bombardment, the military operations on shore, and the stopping of the street traffic, cannot be considered as having been warranted;

AND THAT, therefore, His Britannic Majesty's Government and the United States' Government are responsible under the Convention of the 7th of November 1899 for losses caused by said military action;

WHILE reserving for a future Decision the question as to the extent to which the two Governments, or each of them, may be considered responsible for such losses.

IN TESTIMONY WHEREOF We have signed this present Decision and have ordered Our Royal Seal to be affixed hereunto. Done in triplicate at Our Royal Palace at Stockholm on the fourteenth day of October in the year of Our Lord one thousand nine hundred and two.

[L. S.] OSCAR

THE CORDILLERA OF THE ANDES BOUNDARY CASE

PARTIES: Argentina, Chile.

COMPROMIS: Agreement of 17 April, 1896.

ARBITRATOR: Edward VII, King of the United Kingdom of Great Britain and Ireland.

AWARD: 20 November, 1902.

REPORT OF THE TRIBUNAL, APPOINTED BY THE ARBITRATOR: 19 November, 1902.

ADDITIONAL DOCUMENTS: Treaty of 23 July, 1881, and Protocol of 1st May, 1893.

Delimitation of certain portions of the frontier-line between Argentina and Chile.

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Tratados, convenciones, protocolos y demás actos internacionales vigentes celebrados por la República Argentina, Buenos Aires, t. I, p. 386 [Spanish text of the Compromis]; p. 232 [Spanish text of the Protocol of 1 May 1893]; t. III, p. 57 [Spanish text of the Award and the Tribunal's Report].

Commentaries:

A. Alvarez, " Des occupations de territoires contestés à propos de la question de limites entre le Chili et la République argentine ", *Revue générale de Droit international public*, t. X, 1903, pp. 651-690.

José Arce, *Tradición Internacional Argentina El Arbitraje Amplio*, Academia de Ciencias Económicas, Buenos Aires, 1945, pp. 6-8.

Kenneth S. Carlston, *The Process of International Arbitration*, New York, 1946, pp. 51, 95-97.

N. Politis, *La justice internationale*, 2e éd., Paris, 1924, pp. 62-70.

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[1] The texts of the Award and the Tribunal's Report reproduced below were drawn from that *Recueil*.

[2] The text of the Compromis reproduced below was drawn from those *Papers*.

[3] The texts of the Treaty of 23 July 1881 and the Protocol of 1 May 1893 reproduced below were drawn from that publication.

SYLLABUS [1]

For many years there existed between the Argentine Republic and Chile a difference as to their common boundaries. In 1881, a treaty was made for its adjustment; but this treaty proved not to be final. In the first place, the Argentine Government claimed that the commissioners appointed to run the boundary under the treaty made an evident mistake in placing the landmark of San Francisco. Secondly, the two governments differed as to the principle on which the line from 26°52′45″ south latitude to the Straits of Magellan should be determined, whether it should, as the Chileans contended, follow the watershed, or, as the Argentines maintained, pass through the highest peaks of the Andes. Lastly, questions arose as to the line between 23° and 26°52′45″ south latitude, in the region known as the Puna de Atacama, which was occupied by the Chileans during the war with Bolivia, but which, as the Argentines claimed, had previously been admitted by Bolivia to belong to the Argentine Republic.

By a protocol signed at Santiago, April 17, 1896, provision was made for ending these disputes. As to Puna de Atacama, it was stipulated that the boundary should be traced with the co-operation of Bolivia. The landmark of San Francisco, as placed by the commissioners, was to be disregarded. As to the long line from 26°52′45″ south latitude to the Straits of Magellan, it was agreed that any differences that could not be adjusted by friendly negotiation should be settled by the arbitration of the British Government, who would apply strictly the dispositions of the treaty of 1881 and the protocol of 1893, after previous examination of the locality by a Commission to be named by the Arbitrator.

[1] See J. B. Moore, *History and Digest of the International Arbitration to which the United States has been a Party*, vol. V, Washington, 1898, p. 4854, N. Politis, *La justice internationale*, 2e éd., Paris, 1924, pp. 62-70.

AGREEMENT BETWEEN THE GOVERNMENTS OF CHILE AND THE ARGENTINE REPUBLIC, SIGNED AT SANTIAGO, 17 APRIL 1896 [1]

Señor Adolfo Guerrero, Minister for Foreign Affairs, and Señor Norberto Quirno Costa, Envoy Extraordinary and Minister Plenipotentiary of the Argentine Government in Chile, having met in the Office of the Ministry for Foreign Affairs in the city of Santiago of Chile on the 17th day of April, 1896, declared that the Governments of the Republic of Chile and of the Argentine Republic being desirous of facilitating the loyal execution of the existing Treaties, which fix a definite frontier between the two countries, of re-establishing confidence in peace and of avoiding every cause of conflict, pursuing always the aim of obtaining a solution by direct arrangement without prejudice to the other conciliatory measures which the Treaties themselves provide, have arrived at an Agreement which contains the following bases:

Article I. — The operations of frontier delimitation between the Republics of Chile and Argentina, which are to be performed in conformity to the Treaty of 1881 and to the Protocol of 1893 shall extend in the Cordillera of the Andes up to the 23° of south latitude, the dividing line having to pass between the above degree and the degree of 26°52′45″, both Governments, and also the Government of Bolivia, which shall be invited thereto, participating in the operation.

II. — Should disagreements occur between the experts in fixing in the Cordillera of the Andes the dividing boundary-marks to the south of the 26°52′45″, and should they be unable to settle the points in dispute by agreement between the two Governments they will be submitted for the adjudication of Her Britannic Majesty's Government, whom the Contracting Parties now appoint as Arbitrator to apply strictly in such cases the dispositions of the above Treaty and Protocol, after previous examination of the locality by a Commission to be named by the Arbitrator.

III. — The experts shall proceed to study the district in the region adjoining the 52nd degree of latitude south, referred to in the last part of Article II of the Protocol of 1893, and they shall propose the frontier-line, to be adopted there in the event of the case foreseen in the above-mentioned stipulation. Should there occur divergence of views in fixing the frontier-line it shall be also settled by the Arbitrator designated in the Agreements.

IV. — Sixty days after the occurrence of a disagreement in the cases referred to in the above bases, both Governments by common agreement, or either of them separately, shall be able to solicit the intervention of the Arbitrator.

V. — Both Governments agree that the location of the landmark of San Francisco, between the 26th and 27th degrees of latitude south, shall not be taken into consideration as a basis or obligatory precedent in fixing the frontier-line in that region, the operations and works effected there on various occasions

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[1] *British and Foreign State Papers*, vol. LXXXVIII, p. 553.

being considered as studies towards the definitive settlement of the line without prejudice to the other studies which the experts may wish to make.

VI. — The experts, on renewing their work next season, shall undertake the operations and studies referred to in Articles I and III of this Agreement.

VII. — Both Governments undertake to ratify the third Agreement of the deed of the 6th September, 1895, for the continuance of the work of demarcation in the event of disputes in order that the work as desired by the Contracting Parties may never be suspended.

VIII. — Within the period of sixty days from the signature of the present Agreement, the Diplomatic Representatives of the Chilean and Argentine Republics accredited to Her Britannic Majesty's Government shall conjointly beg from them the acceptance of the charge of Arbitrator conferred upon them, for which purpose the respective Governments will issue the necessary instructions.

IX. — The Governments of the Republics of Chile and Argentina will defray in equal shares the expenses incurred in the fulfilment of this Agreement.

The undersigned Ministers in the name of their respective Governments, and duly authorized, sign the present Agreement in two copies, and affix their seals.

[L. S.] Adolfo GUERRERO
[L. S.] N. QURNO COSTA

AWARD BY HIS MAJESTY KING EDWARD VII IN THE ARGENTINE-CHILE BOUNDARY CASE, 20 NOVEMBER 1902 [1]

WHEREAS, by an Agreement dated the 17th day of April 1896, the Argentine Republic and the Republic of Chile, by Their respective Representatives, determined:

THAT should differences arise between their experts as to the boundary-line to be traced between the two States in conformity with the Treaty of 1881 and the Protocol of 1893, and in case such differences could not be amicably settled by accord between the two Governments, they should be submitted to the decision of the Government of Her Britannic Majesty;

AND WHEREAS such differences did arise and were submitted to the Government of Her late Majesty Queen Victoria;

AND WHEREAS the Tribunal appointed to examine and consider the differences which had so arisen, has — after the ground has been examined by a Commission designated for that purpose — now reported to Us, and submitted to Us, after mature deliberation, their opinions and recommendations for Our consideration;

NOW, WE, EDWARD, by the grace of God, King 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, etc., etc., have arrived at the following decisions upon the questions in dispute, which have been referred to Our arbitration, viz.:

1. The region of the San Francisco Pass;

2. The Lake Lacar basin;

3. The region extending from the vicinity of Lake Nahuel Huapi to that of Lake Viedma; and

4. The region adjacent to the Last Hope Inlet.

Article I. — The boundary in the region of the San Francisco Pass shall be formed by the line of water-parting extending from the pillar already erected on that Pass to the summit of the mountain named Tres Cruces.

Article II. — The basin of Lake Lacar is awarded to Argentina.

Article III. — From Perez Rosales Pass near the north of Lake Nahuel Huapi, to the vicinity of Lake Viedma, the boundary shall pass by Mount Tronador, and thence to the River Palena by the lines of water-parting determined by certain obligatory points which We have fixed upon the Rivers Manso, Puelo, Fetaleufu, and Palena (or Carrenleufu); awarding to Argentina the upper basins of those rivers above the points which We have fixed, including the Valleys of Villegas, Nuevo, Cholila, Colonia de 16 Octubre, Frio, Huemules, and Corcovado; and to Chile the lower basins below those points.

From the fixed point on the River Palena, the boundary shall follow the River Encuentro to the peak called Virgen, and thence to the line which

[1] Descamps-Renault, *Recueil international des traités du XX^e siècle*, année 1902, p. 372.

We have fixed crossing Lake General Paz, and thence by the line of water-parting determined by the point which We have fixed upon the River Pico, from whence it shall ascend to the principal water-parting of the South American Continent at Loma Baguales, and follow that water-parting to a summit locally known as La Galera. From this point it shall follow certain tributaries of the River Simpson (or southern River Aisen), which We have fixed, and attain the peak called Ap Ywan, from whence it shall follow the water-parting determined by a point which We have fixed on a promontory from the northern shore of Lake Buenos Aires. The upper basin of the River Pico is thus awarded to Argentina, and the lower basin to Chile. The whole basin of the River Cisnes (or Frias) is awarded to Chile, and also the whole basin of the Aisen, with the exception of a tract at the head-waters of the southern branch including a Settlement called Koslowsky, which is awarded to Argentina.

The further continuation of the boundary is determined by lines which We have fixed across Lake Buenos Aires, Lake Pueyrredon (or Cochrane), and Lake San Martin, the effect of which is to assign the western portions of the basins of these lakes to Chile, and the eastern portions to Argentina, the dividing ranges carrying the lofty peaks known as Mounts San Lorenzo and Fitzroy.

From Mount Fitzroy to Mount Stokes the line of frontier has been already determined.

Article IV. — From the vicinity of Mount Stokes to the 52nd parallel of south latitude, the boundary shall at first follow the continental water-parting defined by the Sierra Baguales, diverging from the latter southwards across the River Vizcachas to Mount Cazador, at the south-eastern extremity of which range it crosses the River Guillermo, and rejoins the continental water-parting to the east of Mount Solitario, following it to the 52nd parallel of south latitude, from which point the remaining portion of the frontier has already been defined by mutual agreement between the respective States.

Article V. — A more detailed definition of the line of frontier will be found in the Report submitted to Us by Our Tribunal, and upon the maps furnished by the experts of the Republics of Argentina and Chile, upon which the boundary which We have decided upon has been delineated by the members of Our Tribunal, and approved by Us.

Given in triplicate under Our hand and seal, at Our Court of St. James', this twentieth day of November, one thousand nine hundred and two, in the Second Year of Our Reign.

(Signed) EDWARD R. AND I

REPORT OF THE TRIBUNAL APPOINTED BY THE ARBITRATOR, DATED 19 NOVEMBER 1902 [1]

1. May it please Your Majesty,

We, the Undersigned, members of the Tribunal appointed by Her late Majesty Queen Victoria to examine, consider, and report upon the differences which have arisen between the Governments of the Republics of Argentina and Chile, with regard to the delimitation of certain portions of the frontier-line between those two countries — which differences were referred (by a Protocol signed at Santiago (Chile) on the 17th April, 1896), to the Arbitration of Her Majesty's Government, beg humbly to submit the following report to Your Majesty:

2. We have studied the copies of the Treaties, Agreements, Protocols, and documents which have been furnished for the use of the Tribunal by the Ministers of the Republics of Argentina and of Chile in this country.

3. We have sat as a Tribunal at the Foreign Office on several occasions, and have heard oral statements and arguments.

4. We invited the Representatives of the respective Governments to furnish us with the fullest information upon their respective contentions, and with maps and topographical details of the territory in dispute, and we have been supplied with copious and exhaustive statements and arguments in many printed volumes, illustrated by maps and plans, and by large numbers of photographs indicating pictorially the topographical features of the country.

5. We desire to take this opportunity of acknowledging our indebtedness to the Representatives and the experts appointed by both Governments for their laborious researches, for the extensive surveys which they have executed in regions hitherto but little known, and for the historical and scientific information which they have laid before us relating to the controversy; and we wish to express our high appreciation, not only of their skill and devotion, but also of the very courteous and conciliatory manner in which they have approached subjects from their nature necessarily contentious.

6. After a preliminary consideration of this voluminous information, we arrived at the point at which it became advisable that an actual study of the ground — as provided for in the Agreement of 1896 — should be undertaken; and upon our suggestion Your Majesty's Government nominated one of our members, Colonel Sir Thomas Holdich of the Royal Engineers, a Vice-President of the Royal Geographical Society, to proceed as Commissioner to the disputed territory, accompanied by an experienced staff.

7. Sir Thomas Holdich and his officers were received with great cordiality and friendliness by the Presidents of the two Republics, and were given every assistance and facility by the officials and experts of both Governments.

8. The Technical Commission so appointed visited all the accessible points in the territory in dispute which were material to a solution of the question, and acquired a large stock of additional information upon questions which presented certain difficulties. Their Reports have been laid before the Tribunal, and the information contained in them, supplementing as it does that afforded

[1] Descamps-Renault, *Recueil des traités du XX^e siècle*, année 1902, p. 372.

by the respective Representatives, is in our opinion sufficient to enable us to make our recommendations.

9. Before setting forth the conclusions at which we have arrived, we shall briefly review the essential points upon which the two Governments were unable to arrive at an agreement.

10. The Argentine Government contended that the boundary contemplated was to be essentially an orographical frontier determined by the highest summits of the Cordillera of the Andes; while the Chilean Government maintained that the definition found in the Treaty and Protocols could only be satisfied by a hydrographical line forming the water-parting between the Atlantic and Pacific Oceans, leaving the basins of all rivers discharging into the former within the coast-line of Argentina, to Argentina; and the basins of all rivers discharging into the Pacific within the Chilean coast-line, to Chile.

11. We recognized at an early stage of our investigations that, in the abstract, a cardinal difference existed between these two contentions. An orographical boundary may be indeterminate if the individual summits along which it passes are not fully specified; whereas a hydrographical line, from the moment that the basins are indicated, admits of delimitation upon the ground.

12. That the orographical and hydrographical lines should have been accepted as coincident over such a long section of the frontier as that which extends from the San Francisco Pass to the Perez Rosales Pass (with the exception of the basin of Lake Lacar), may not improbably have given rise to the expectation that the same result would be attained without difficulty in the more southern part of the continent, which, at the date of the Treaty of 1881, was but imperfectly explored.

13. The explorations and surveys which have lately been carried out by Argentine and Chilean geographers have, however, demonstrated that the configuration of the Cordillera of the Andes between the latitudes of 41° south and 52° south, i.e., in the tract in which the divergencies of opinion have mainly arisen, does not present the same continuities of elevation, and coincidences of orographical and hydrographical lines, which characterize the more temperate and better known section.

14. In the southern region the number of prominent peaks is greater, they are more widely scattered, and transverse valleys through which rivers flow into the Pacific are numerous. The line of continental water-parting occasionally follows the high mountains, but frequently lies to the eastward of the highest summits of the Andes, and is often found at comparatively low elevations in the direction of the Argentine pampas.

15. In short, the orographical and hydrographical lines are frequently irreconcilable; neither fully conforms to the spirit of the Agreements which we are called upon to interpret. It has been made clear by the investigation carried out by our Technical Commission that the terms of the Treaty and Protocols are inapplicable to the geographical conditions of the country to which they refer. We are unanimous in considering the wording of the Agreements as ambiguous, and susceptible of the diverse and antagonistic interpretations placed upon them by the Representatives of the two Republics.

16. Confronted by these divergent contentions we have, after the most careful consideration, concluded that the question submitted to us is not simply that of deciding which of the two alternative lines is right or wrong, but rather to determine — within the limits defined by the extreme claims on both sides — the precise boundary-line which, in our opinion, would best interpret the intention of the diplomatic instruments submitted to our consideration.

17. We have abstained, therefore, from pronouncing judgment upon the respective contentions which have been laid before us with so much skill and earnestness, and we confine ourselves to the pronouncement of our opinions and recommendations on the delimitation of the boundary, adding that in our view the actual demarcation should be carried out in the presence of officers deputed for that purpose by the Arbitrating Power, in the ensuing summer season in South America.

18. There are four distinct subjects upon which we are called upon to make recommendations, viz.:

(1) The region of the San Francisco Pass in latitude 26°50′ S., appoximately,

(2) The Lake Lacar basin, in latitude 40°10′ S., approximately,

(3) The region extending from the Perez Rosales Pass, in latitude 41° S., approximately, to the vicinity of Lake Viedma,

(4) The region of Last Hope Inlet to the fifty-second parallel of south latitude.

19. Our recommendations upon these four subjects are as follows [1]:

The San Francisco Pass

20. The initial point of the boundary shall be the pillar already erected on the San Francisco Pass.

From that pillar the boundary shall follow the water-parting which conducts it to the highest peak of the mountain mass, called Tres Cruces, in latitude 27°3′45″ S.; longitude 68°49′5″ W.

Lake Lacar

21. From the point of bifurcation of the two lines claimed as boundaries respectively by Chile and Argentina, in latitude 40°2′0″ S., longitude 71°40′36″ W., the boundary shall follow the local water-parting southwards by Cerro Perihueico to its southern termination in the valley of the River Huahum.

From that point it shall cross the river in longitude 71°40′36″ W., and thenceforward shall follow the water-parting, leaving all the basin of the Huahum above that point, including Lake Lacar, to Argentina, and all below it to Chile, until it joins the boundary which has already been determined between the two Republics.

Perez Rosales Pass to Lake Viedma

22. The southern termination of the boundary already agreed upon between the two Republics, north of Lake Nahuel Huapi, is the Perez Rosales Pass connecting Lago de Todos los Santos with Laguna Fria. Here a pillar has been erected.

From this pillar the boundary shall continue to follow the water-parting southward to the highest peak of Mount Tronador. Thence it shall continue to follow the water-parting which separates the basins of the Rivers Blanco and Leones (or Leon) on the Pacific side from the upper basin of the Manso and its tributary lakes above a point in longitude 71°52′ W., where the general direction of the river course changes from north-west to south-west.

Crossing the river at that point, it shall continue to follow the water-parting dividing the basins of the Manso above the bend, and of the Puelo above Lago

[1] All co-ordinate values expressed in terms of latitude and longitude are approximate only, and refer to the Maps attached to this Report. Altitudes quoted in the text are in metres. Where the boundary follows a river the " thalweg " determines the line.

Inferior, from the basins of the lower courses of those rivers, until it touches a point midway between Lakes Puelo and Inferior, where it shall cross the River Puelo.

Thence it shall ascend to, and follow, the water-parting of the high snow-covered mountain mass dividing the basins of the Puelo above Lago Inferior, and of the Fetaleufu above a point in longitude 71°48′ W. from the lower basins of the same rivers.

Crossing the Fetaleufu River at this point, it shall follow the lofty water-parting separating the upper basins of the Fetaleufu and of the Palena (or Carrenleufu or Corcovado) above a point in longitude 71°47′ W., from the lower basins of the same rivers. This water-parting belongs to the Cordillera in which are situated Cerro Conico and Cerro Serrucho, and crosses the Cordon de las Tobas.

Crossing the Palena at this point, opposite the junction of the River Encuentro, it shall then follow the Encuentro along the course of its western branch to its source on the western slopes of Cerro Virgen. Ascending to that peak, it shall then follow the local water-parting southwards to the northern shore of Lago General Paz at a point where the Lake narrows, in longitude 71°41′30″ W.

The boundary shall then cross the Lake by the shortest line, and from the point where it touches the southern shore it shall follow the local water-parting southwards, which conducts it to the summit of the high mountain mass indicated by Cerro Botella Oeste (1,890 m.), and from that peak shall descend to the Rio Pico by the shortest local water-parting.

Crossing that river at the foot of the water-parting, in longitude 71°49′ W., it shall ascend again in a direction approximately south and continue to follow the high mountain water-parting separating the upper basin of the Rio Pico above the crossing from the lower basin of the same river, and from the entire basin of the Rio Frias, until it effects a junction with the continental water-parting about the position of Loma Baguales, in latitude 44°22′ S., longitude 71°24′ W.

From this point, it shall continue to follow the water-parting dividing the basins of the Frias and Aisen Rivers from that of the Senguerr until it reaches a point in latitude 45°44′ S., longitude 71°50′ W., called Cerro de la Galera in the Map, which marks the head of an affluent flowing south-eastwards into the main stream of the Rio Simpson or southern branch of the Aisen. It shall descend this affluent to its junction with the main stream, and from this junction shall follow the main stream upwards to its source under the mountain called Cerro Rojo (1,790 m.) in the Map. From the peak Cerro Rojo it shall pass by the local water-parting to the highest summit of the Cerro Ap Ywan (2,310 m.).

From Cerro Ap Ywan it shall follow the local water-parting determined by the promontory which juts southwards into Lago Buenos Aires in longitude 71°46′ W.

From the southern extremity of this headland the boundary shall pass in a straight line to the mouth of the largest channel of the River Jeinemeni, and thenceforward follow that river to a point in longitude 71°59′ W., which marks the foot of the water-parting between its two affluents, the Zeballos and the Quisoco. From this point it shall follow this water-parting to the summit of the high Cordon Nevada, and shall continue along the water-parting of that elevated cordon southwards, and thence follow the water-parting between the basins of the Tamango (or Chacabuco) and of the Gio, and ascend to the summit of a mountain known locally as Cerro Principio, in the Cordon Quebrado. From this peak it shall follow the water-parting which conducts it to the southern extremity of the headland jutting southward into Lago Pueyrredon (or Cochrane), in longitude 72°1′ W.

From this headland it shall cross the Lake passing direct to a point on the summit of the hill, in latitude 47°20′ S., longitude 72°4′ W., commanding the southern shore of the Lake. From this summit it shall follow the lofty snow-covered water-parting, which conducts it to the highest peak of Mount San Lorenzo (or Cochrane), (3,360 m.). From Mount San Lorenzo it shall pass southward along the elevated water-parting dividing the basin of the River Salto on the west from that of the River San Lorenzo on the east, to the highest peak of the Cerro Tres Hermanos.

From this peak it shall follow the water-parting between the basin of the Upper Mayer on the east, above the point where that river changes its course from north-west to south-west, in latitude 48°12′ S., and the basins of the Coligué or Bravo River and of the Lower Mayer, below the point already specified, on the west, striking the north-eastern arm of Lago San Martin at the mouth of the Mayer River.

From this point it shall follow the median line of the Lake southwards as far as a point opposite the spur which terminates on the southern shore of the Lake in longitude 72°47′ W., whence the boundary shall be drawn to the foot of this spur and ascend the local water-parting to Mount Fitzroy and thence to the continental water-parting to the north-west of Lago Viedma. Here the boundary is already determined between the two Republics.

Region of Last Hope Inlet

23. From the point of divergence of the two boundaries claimed by Chile and Argentina respectively in latitude 50°50′ S., the boundary shall follow the high crests of the Sierra Baguales to the southern spur which leads it to the source of the Zanja Honda stream. Thence it shall follow that stream until it reaches existing Settlements. From this point it shall be carried southward, having regard, as far as possible, to existing claims, crossing the River Vizcachas and ascending to the northern peak of Mount Cazador (948 m.). It shall then follow the crest-line of the Cerro Cazador southwards, and the southern spur which touches the Guillermo stream in longitude 72°17′30″ W. Crossing this stream, it shall ascend the spur which conducts it to the point marked 650 m. on the Map. This point is on the continental water-parting, which the boundary shall follow to its junction with the fifty-second parallel of south latitude.

24. All which we beg humbly to submit for Your Majesty's gracious consideration.

Signed, sealed, and delivered at the Foreign Office, in London, this nineteenth day of November, one thousand nine hundred and two.

(Signed) [L. S.] MACNAGHTEN,
Lord of Appeal in Ordinary, and a Member of Your Majesty's Most Honourable Privy Council

(Signed) [L. S.] John C. ARDAGH,
Major-General, and a Member of Council of the Royal Geographical Society

[L. S.] T. HUNGERFORD HOLDICH,
Colonel of the Royal Engineers, and a Vice-President of the Royal Geographical Society

[L. S.] E. H. HILLS,
Major of the Royal Engineers, head of the Topographical Section of the Intelligence Division, Secretary to the Arbitration Tribunal

SCHEDULE OF MAPS [1]

1. San Francisco Pass.
2. Lake Lacar.
3. Perez Rosales to Lake Buenos Aires.
4. Lake Buenos Aires to Mount Fitzroy.
5. Last Hope Inlet.

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[1] Not reproduced in this volume.

ADDITIONAL DOCUMENTS

a) Boundary Treaty signed in Buenos Ayres on the 23rd July 1881 [1]

In the name of Almighty God! The Governments of the Argentine Republic and of the Republic of Chili, animated by the purpose of resolving in a friendly and dignified manner the boundary-controversy that has existed between both countries, and in fulfilment of Article 39 of the Treaty of April 1856,[2] have decided to conclude a Boundary Treaty and named to that effect their plenipotentiaries, to wit:

His Excellency the President of the Argentine Republic Doctor Bernardo de Irigoyen, Minister and Secretary of State in the Department of Foreign Affairs, and His Excellency the President of the Republic of Chili Mr. Francisco de B. Echeverria, Consul General of said Republic.

Who, after having produced their full powers and finding them sufficient for the performance of this act have agreed upon the following articles:

Article 1. — The boundary between the Argentine Republic and Chili from North to South as far as the parallel of latitude 52° S., is the Cordillera of the Andes.—The frontier line shall run in that extent along the most elevated crests of said cordilleras that may divide the waters and shall pass between the slopes which descend one side and the other.—The difficulties that might arise from the existence of certain valleys formed by the bifurcation of the cordillera, and in which the watershed may not be apparent, shall be amicably settled by two experts, one to be named by each party. Should they not come to an understanding, a third expert, named by both governments, shall be called upon to decide. A record, in duplicate, of the operations carried out by them, embodying the points upon which they may have agreed, shall be drawn up and signed by the two experts, and besides by the third one as regards the points decided by him. This record, once signed by them, shall produce full effect and shall be held firm and valid without necessity of further formalities or proceedings. A copy of the record shall be presented to each of the two governments.

Article 2. — In the southern part of the continent, and to the north of the Straits of Magellan, the boundary between the two countries shall be a line, which starting from Point Dungeness, shall be prolonged overland as far as Mount Dinero; thence it shall continue westward, following the highest elevations of the chain of hills existing there, until it strikes the height of Mount Aymont. From this point the line shall be prolonged up to the intersection of meridian 70° W., with parallel 52° S. and thence it shall continue westward

[1] Emilio Lamarca, *Boundary Agreements in force between the Argentine Republic and Chili*, Buenos Aires, 1898, Index, p. 5.

[2] Art. XXXIX. — Both the contracting parties acknowledge as boundaries of their respective territories, those they possessed as such at the time of separating from the Spanish dominion in the year 1810, and agree to postpone the questions which may have arisen or may arise regarding this matter in order to discuss them later on in a peaceful and amicable manner, without ever resorting to violent measures, and in the event of not arriving at a complete arrangement, to submit the decision to the arbitration of a friendly nation.

coinciding with this latter parallel as far as the *divortium aquarum* of the Andes. The territories lying to the north of said line shall belong to the Argentine Republic, and to Chili those which extend to the south, without prejudice to the provisions of Art. 3d concerning Tierra del Fuego and the adjacent islands.

Article 3. — In Tierra del Fuego a line shall be traced which, starting from the point named Cape Espíritu Santo in latitude 52º, 40′ S., shall be prolonged southward coinciding with meridian 68º, 34′ W. Greenwich, until it strikes Beagle Channel.

Tierra del Fuego, divided in this manner, shall be Chilian on the western and Argentine on the eastern side. As regards the islands, Staten Island, the islets in close proximity to same, and the remaining island lying in the Atlantic to the east of Tierra del Fuego and of the eastern coasts of Patagonia, shall belong to the Argentine Republic; and all the islands south of Beagle Channel down to Cape Horn, as well as those lying to the west of Tierra del Fuego, shall belong to Chili.

Article 4. — The same experts referred to in Art. 1st shall fix on the ground the lines indicated in the two previous articles, and shall proceed in the same manner as therein established.

Article 5. — The Straits of Magellan are neutralized for perpetuity, and their free navigation is secured to the flags of all nations. With the view of securing said liberty and neutrality, no fortifications nor military defences which may thwart that purpose shall be erected on the coasts.

Article 6. — The governments of the Argentine Republic and of Chili shall exercise full dominion and for perpetuity over the territories which respectively belong to them according to the present arrangement. Any question which might unfortunately arise between the two countries, whether it be on account of this transaction, or owing to any other cause, shall be submitted to the decision of a friendly power, the boundary established in the present arrangement to remain at all events immovable between the two republics.

Article 7.[1] — The ratifications of this treaty shall be exchanged within the term of sixty days, or sooner if possible, and the exchange shall take place in the city of Buenos Aires or in that of Santiago, Chili.

In witness whereof the plenipotentiaries of the Argentine Republic and of the Republic of Chili signed and sealed with their respective seals, in duplicate, the present treaty in the city of Buenos Aires on the twenty third day of July in the year of our Lord 1881.

[L. S.] Bernardo DE IRIGOYEN

[L. S.] Francisco DE B. ECHEVERRIA

b) Additional and Explanatory Protocol of the Boundary Treaty of 1881 signed in Santiago on the 1st May 1893 [2]

In the city of Santiago, Chili, on the first of May 1893, Mr. Norberto Quirno Costa, Envoy Extraordinary and Minister Plenipotentiary of the Argentine Republic, and the Minister of War and Marine Mr. Isidoro Errázuriz in his character of Plenipotentiary *ad hoc*, having met in the Department of Foreign

[1] A Protocol was signed at Buenos Ayres on the 15th September 1881, extending for 30 days the limit of time fixed by Article VII for the exchange of the ratifications of this Treaty, such extension to date from the 22nd September 1886.

[2] Emilio Lamarca, *Boundary Agreements in force between the Argentine and Chili*, Buenos Aires, 1898, Index, p. 25.

Affairs, after having considered the present state of the work of the experts entrusted with the demarcation of the delimitation between the Argentine Republic and Chili, in accordance with the boundary treaty of 1881, and animated by the desire of removing the difficulties which have embarrassed or might embarrass them in the fulfilment of their commission, and of establishing between both States a complete and cordial understanding in harmony with the antecedents of brotherhood and glory common to both, and with the ardent wishes of public opinion on either side of the Andes, have agreed as follows:

FIRST — Whereas Article 1 of the treaty of 23 July 1881 provides that " the boundary between Chili and the Argentine Republic from north to south as far as parallel of latitude 52° S. is the Cordillera of the Andes " and that " the frontier line shall run along the most elevated crests of said Cordillera that may divide the waters, and shall pass between the slopes which descend one side and the other ", the experts and the subcommissions shall observe this principle as an invariable rule of their proceedings. Consequently all lands and all waters, to wit: lakes, lagoons, rivers and parts of rivers, streams, slopes situated to the east of the line of the most elevated crests of the Cordillera of the Andes that may divide the waters, shall be held in perpetuity to be the property and under the absolute dominion of the Argentine Republic; and all lands and all waters, to wit: lakes, lagoons, rivers and parts of rivers, streams, slopes situated to the west of the line of the most elevated crests of the Cordillera of the Andes to be the property and under the absolute dominion of Chili.

SECOND — The undersigned declare that, in the opinion of their respective governments, and according to the spirit of the boundary treaty, the Argentine Republic retains its dominion and sovereignty over all the territory that extends from the east of the principal chain of the Andes to the coast of the Atlantic, just as the Republic of Chili over the western territory to the coasts of the Pacific; it being understood that by the provisions of said treaty, the sovereignty of each State over the respective coast line is absolute, in such a manner that Chili cannot lay claim to any point toward the Atlantic, just as the Argentine Republic can lay no claim to any toward the Pacific. If in the peninsular part of the south, on nearing parallel 52° S. the Cordillera should be found penetrating into the channels of the Pacific there existing, the experts shall undertake the study of the ground in order to fix a boundary line leaving to Chili the coasts of said channels; in consideration of which study, both governments shall determine said line amicably.

THIRD — In the case foreseen in the second part of the first article of the treaty of 1881, where difficulties might arise " from the existence of certain valleys formed by the bifurcation of the Cordillera, and in which the watershed may not be apparent " the experts shall endeavour to settle them amicably, seeing that a search be made on the ground for this geographical condition of the demarcation. For that purpose, of joint accord, they shall draw up with the assistant engineers a map which may help them to resolve the difficulty.

FOURTH — The demarcation of Tierra del Fuego shall commence simultaneously with that of the Cordillera, and shall start from the point called Cape Espíritu Santo. At that point, visible from the sea, there are three heights or hills of medium elevation, of which the central or intermediary one, which is the highest, shall be taken as point of departure, and on its summit shall be placed the first landmark of the line of demarcation, which shall continue towards the south in the direction of the meridian.

FIFTH — The work of demarcation on the ground shall be undertaken next spring simultaneously in the Cordillera of the Andes and in Tierra del Fuego in the direction previously agreed upon by the experts, that is to say, starting from the northern region of the former, and from the point denominated Cape Espíritu Santo of the latter. To that effect the commissions of assistant engineers shall be ready to commence the work on the fifteenth next October. On that date the experts shall also have prepared and signed the instructions which the aforesaid commissions shall bear, according to article four of the convention of the twentieth August one thousand eight hundred and eighty eight. These instructions shall be framed in accordance with the agreements set forth in the present protocol.

SIXTH — For the purpose of demarcation, the experts, or in their stead the commissions of assistant engineers who act under the instructions given them by the former, shall seek on the ground the boundary line, and fix the demarcation by means of iron landmarks of the kind previously agreed upon, placing one in each pass or accessible point of the mountain which may be situated on the boundary line, and shall draw up a record of the operation, specifying the fundamental reasons of same, and the topographic indications for recognizing at all times the point fixed, although the landmark might have disappeared by the wear of time or atmospheric action.

SEVENTH — The experts shall direct the commissions of assistant engineers to collect all the necessary data to design on paper, of joint accord, and with all possible accuracy, the boundary line as they may demark it on the ground. To that effect, they shall indicate the changes of altitude and azimuth which the boundary line may suffer in its course, the beginning of the streams or quebradas that descend one side and the other, writing down the names of same whenever it were possible to know them, and shall distinctly fix the points on which the boundary landmarks are to be placed. These maps may contain other geographical accidents, which without being actually necessary in the demarcation of boundaries, such as the visible course of rivers when descending into the neighbouring valleys, and the high peaks that rise on one side and the other of the boundary line, are easily indicated in the places as signs of location. The experts in the instructions given to their assistant engineers shall point out such facts of a geographical character as it may be useful to collect, provided that this does not interrupt nor delay the demarcation of boundaries, which is the main object of the commission of experts, and upon which speedy and amicable operation both governments are intent.

EIGHTH — The Argentine expert having manifested that, in order to sign with full knowledge of the matter the record of 15th April 1892, by which a mixed Chilian-Argentine commission fixed on the ground the point of departure of the demarcation of boundaries in the Cordillera of the Andes, he considered it indispensable to make a fresh reconnaissance of the locality in order to verify or rectify said operation, adding that this reconnaissance would not delay the progress of the work, which could be simultaneously continued by another subcommission, and the Chilian expert having on his part manifested that, although he believed that the operation had been carried out in strict conformity with the treaty, he had no objection to acquiesce in the wishes of his colleague as a proof of the cordiality with which this work was being performed — the undersigned have agreed that a revision be made of what had been done, and that in the event of errors being found, the landmark shall be transferred to the point in which it should have been fixed according to the terms of the boundary treaty.

NINTH — With the desire of expediting the work of demarcation, and believing that this can be attained through the employment of three subcommissions instead of the two which up to the present have been working, without the need of increasing the number of assistant engineers, the undersigned agree that henceforward, as long as the creation of others should not be decided on, there shall be three subcommissions, each one composed of four persons, two on the part of the Argentine Republic and two on the part of Chili, and of the auxiliaries which by mutual agreement might be considered necessary.

TENTH — The tenor of the preceding stipulations does not in the least impair the spirit of the boundary treaty of 1881, and consequently it is hereby declared that the conciliatory means provided by Arts. 1 and 6 of same for obviating any difficulty subsist in full force.

ELEVENTH — The undersigned ministers understand and declare that, given the nature of some of the foregoing stipulations, and in order to invest with a permanent character the solutions arrived at, the present protocol shall be previously submitted to the consideration of the Congresses of both countries, which shall be done in the next ordinary sessions, keeping it reserved in the meanwhile.

The undersigned ministers, in the name of their respective Governments, and duly authorized, sign the present protocol in duplicate, one for each party and affix their seals to same.

[L. S.] N. QUIRNO COSTA

[L. S.] Isidoro ERRÁZURIZ

AFFAIRE DES NAVIRES *CAPE HORN PIGEON, JAMES HAMILTON LEWIS, C. H. WHITE ET KATE AND ANNA*

PARTIES: Etats-Unis d'Amérique *contre* **Russie.**

COMPROMIS: Déclarations échangées entre le Gouvernement des Etats-Unis et le Gouvernement impérial de Russie, le 26 août/ 8 septembre, 1900.

ARBITRE: T.-M.-C. Asser, Membre du Conseil d'Etat des Pays-Bas

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SENTENCE PRÉPARATOIRE: 19 octobre, 1901.

SENTENCES DÉFINITIVES: 29 novembre, 1902.

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APERÇU

Des croiseurs russes ayant saisi dans la mer de Behring un certain nombre de navires américains, le Gouvernement des Etats-Unis et le Gouvernement Impérial de Russie ont constitué comme arbitre, pour trancher le différend résultant de cette saisie, T.-M.-C. Asser, Membre du Conseil d'Etat des Pays-Bas. D'après le Compromis d'arbitrage du 26 août/8 septembre 1900, l'Arbitre devait « . . . dans sa sentence . . ., en se réglant sur les principes généraux du droit des gens et sur l'esprit des Accords internationaux applicables en la matière . . . décider à l'égard de chaque réclamation formulée à la charge du Gouvernement Impérial de Russie si elle est bien fondée, et, dans l'affirmative, si les faits sur lesquels chacune de ces réclamations est basée sont prouvées . . . Il est bien entendu que cette stipulation n'aura aucune force rétroactive, et que l'Arbitre appliquera aux cas en litige les principes du droit des gens et les traités internationaux qui étaient en vigueur et obligatoires pour les Parties impliquées dans ce litige, au moment où la saisie des navires . . . a eu lieu. »

Le Compromis prévoyait, en outre, qu'il appartenait à l'Arbitre de statuer sur toutes les questions qui pourraient surgir relativement à la procédure dans le cours de l'arbitrage. Une divergence de vues s'étant manifestée entre les Parties au sujet de la nature et des conséquences juridiques de la nomination de l'Agent et Conseil désigné par la Partie demanderesse pour la représenter dans l'arbitrage, l'Arbitre rendit, en date du 19 octobre 1901, une sentence préparatoire portant sur cette question de procédure.

Le 29 novembre 1902, l'Arbitre prononça, à titre définitif et quant au fond, une sentence à propos de chacune des affaires faisant l'objet du litige.[1] Dans l'affaire du navire baleinier *Cape Horn Pigeon* ainsi que dans celle du schooner *Kate and Anna*, la Russie ayant reconnu sa responsabilité, la tâche de l'Arbitre ne consista qu'à fixer le montant de l'indemnité. Dans les deux autres affaires concernant les schooners *James Hamilton Lewis* et *C. H. White*, l'Arbitre, après avoir considéré comme des actes illégaux la saisie et la confiscation de ces navires, fixa le montant de l'indemnité à payer par la Partie défenderesse à la Partie demanderesse pour le compte des réclamations présentées par les ayants droit.

[1] Les sentences réglant ce litige furent rendues à La Haye dans l'Hôtel de la Cour permanente d'Arbitrage. En général, ce litige n'est pas considéré comme ayant été tranché par ladite Cour, parce que le compromis était antérieur à la mise en vigueur de la Convention de La Haye pour le règlement pacifique des conflits internationaux. Toutefois, l'Arbitre avait été autorisé, conformément à l'Article 26 de cette convention, à disposer des locaux de la Cour aux fins de la procédure arbitrale (voir: M. J. P. A. François, « La Cour permanente d'Arbitrage, . . . », *Recueil des Cours*, 1955, I, p. 479).

DÉCLARATIONS ÉCHANGÉES ENTRE LE GOUVERNEMENT DES ETATS-UNIS D'AMÉRIQUE ET LE GOUVERNEMENT IMPÉRIAL DE RUSSIE, A SAINT-PÉTERSBOURG, LE 26 AOÛT/8 SEPTEMBRE 1900 [1]

Le Gouvernement des Etats-Unis d'Amérique et le Gouvernement Impérial de Russie, s'étant mis d'accord pour inviter M. Asser, Membre du Conseil d'Etat des Pays-Bas, à prononcer comme Arbitre dans le différend relatif aux affaires des schooners *James Hamilton Lewis*, *C. H. White*, *Kate and Anna*, leurs armateurs, propriétaires, officiers et équipages, arrêtés ou saisis par des croiseurs Russes sous prévention de s'être livrés à la chasse illicite des phoques à fourrure, et à l'affaire du navire baleinier *Cape Horn Pigeon*, ses armateurs, propriétaires, officiers et équipage, arrêté ou saisi par un vaisseau Russe, le Soussigné, Chargé d'Affaires des Etats-Unis d'Amérique, dûment autorisé à cet effet, a l'honneur par la présente Note de déclarer ce qui suit, en échange d'une Déclaration identique du Gouvernement Impérial de Russie.

L'Arbitre aura à prendre connaissance des réclamations d'indemnité qui ont été présentées au Gouvernement Impérial de Russie par le Gouvernement des Etats-Unis d'Amérique au nom des ayants droit.

Il est bien entendu que cette clause doit être interprétée comme admettant la présentation, de part et d'autre, dans le témoignage soumis à l'Arbitre, de toute preuve qui a déjà été présentée ou qui a paru dans la correspondance entre les représentants officiels des deux Hautes Puissances Contractantes, aussi bien que toute évidence se rapportant aux questions en litige.

La Partie demanderesse remettra à l'Arbitre dans un délai de trois mois à partir de l'échange de la présente Note, contre une Note identique du Gouvernement Impérial de Russie, un Mémorandum à l'appui de sa demande, et en fera parvenir immédiatement une copie à la Partie défenderesse.

Dans un délai de trois mois après la réception de ladite copie, la Partie défenderesse remettra à l'Arbitre un Contre-Mémorandum dont elle fera parvenir immédiatement une copie à la Partie demanderesse.

Endéans trois mois après la réception du Contre-Mémorandum susmentionné, la Partie demanderesse pourra, si elle le juge utile, remettre à l'Arbitre un nouveau Mémorandum, dont elle fera parvenir immédiatement une copie à la Partie défenderesse, laquelle pourra également, endéans trois mois après la réception de cette copie, remettre à l'Arbitre un nouveau Contre-Mémorandum, dont elle fera parvenir immédiatement une copie à la Partie demanderesse.

L'Arbitre est autorisé à accorder à chacune des Parties qui le demanderait une prolongation de trente jours au maximum par rapport à tous les délais mentionnés plus haut.

Après l'échange des Mémorandums susindiqués, aucune communication ni écrite, ni verbale ne pourra être adressée à l'Arbitre, à moins que celui-ci ne s'adresse lui-même aux Parties ou à l'une d'entre elles pour obtenir des renseignements supplémentaires par écrit.

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[1] Texte original français dans *Papers relating to the Foreign Relations of the United States*, 1900, p. 883. Traduction anglaise: *ibid.*, p. 885.

La Partie qui donnera un renseignement à l'Arbitre fera parvenir immédiatement copie de sa communication à l'autre Partie, et celle-ci pourra, si bon lui semble, endéans un mois après la réception de cette copie, transmettre par écrit à l'Arbitre des observations au sujet du contenu de cette communication; ces observations seront immédiatement communiquées en copie à la Partie adverse.

Il appartiendra à l'Arbitre de statuer sur toutes les questions qui pourraient surgir relativement à la procédure dans le cours de l'Arbitrage.

L'Arbitre rendra sa Sentence dans toutes les causes de l'Arbitrage dans un délai de six mois à partir de la réception du dernier Mémorandum ou Contre-Mémorandum mentionné dans ce Protocole.

Dans sa Sentence qui sera communiquée par lui aux deux Gouvernements intéressés, l'Arbitre, en se réglant sur les principes généraux du droit des gens et sur l'esprit des Accords internationaux applicables à la matière, devra décider à l'égard de chaque réclamation formulée à la charge du Gouvernement Impérial de Russie, si elle est bien fondée, et, dans l'affirmative, si les faits sur lesquels chacune de ces réclamations est basée sont prouvés.

Il est bien entendu que cette stipulation n'aura aucune force rétroactive, et que l'Arbitre appliquera aux cas en litige les principes du droit des gens et les traités internationaux qui étaient en vigueur et obligatoires pour les Parties impliquées dans ce litige, au moment où la saisie des navires susmentionnés a eu lieu.

Dans ce cas l'Arbitre fixera la somme de l'indemnité qui serait due par le Gouvernement Russe pour le compte des réclamations présentées par les ayants droit.

Sans préjudice de l'obligation incombant à la Partie demanderesse de justifier les dommages soufferts, l'Arbitre pourra, s'il le juge opportun, inviter chaque Gouvernement à désigner un expert commercial pour l'aider, en sa dite qualité, à fixer le montant de l'indemnité.

Le Gouvernement des Etats-Unis se déclare prêt, en échange d'un engagement semblable du Gouvernement Impérial de Russie, à prendre à son compte toutes les dépenses qui seraient faites ou auraient été faites pour soutenir son point de vue dans cette affaire, à payer la moitié de la compensation à l'Arbitre pour ses offices, de même qu'à accepter comme jugement en dernier ressort la décision prononcée par l'Arbitre dans les limites du présent Accord et à s'y soumettre sans aucune réserve.

Toute somme décrétée par l'Arbitre aux réclamants, ou à l'un d'entre eux, sera payée par le Gouvernement Impérial Russe au Gouvernement des Etats-Unis dans un délai d'un an à partir de la date du décret.

La langue française étant reconnue comme la langue officielle de l'Arbitrage, la Sentence Arbitrale devra être rendue dans cette langue.

Fait en quatre exemplaires à Saint-Pétersbourg, le 26 août (8 septembre) mil neuf cent.

Herbert H. D. PEIRCE

LAMSDORFF

SENTENCE ARBITRALE PRÉPARATOIRE SUR UN INCIDENT DE PROCÉDURE, RENDUE PAR M. T.-M.-C. ASSER DANS L'AFFAIRE DES NAVIRES *CAPE HORN PIGEON*, *JAMES HAMILTON LEWIS*, *C. H. WHITE* ET *KATE AND ANNA*, EN DATE DU 19 OCTOBRE 1901 [1]

Droit de chaque partie de déléguer un agent chargé de la représenter — Validité des communications émanant de cet agent — Droit de la partie adverse de communiquer directement avec le mandant.

The right of each party to appoint an agent to represent him — The validity of communications emanating from this agent — Right of the opposing party to communicate directly with the agent.

LE SOUSSIGNÉ, Tobie-Michel-Charles ASSER, Membre du Conseil d'Etat des Pays-Bas, exerçant les fonctions d'Arbitre qu'il a eu l'honneur de se voir conférées par le Gouvernement des Etats-Unis d'Amérique et par le Gouvernement Impérial de Russie, pour juger les différends relatifs aux affaires des schooners *James Hamilton Lewis*, *C. H. White*, *Kate and Anna*, et du navire baleinier *Cape Horn Pigeon*, a rendu, en ladite qualité, le jugement suivant:

L'ARBITRE,

ATTENDU que dans les Déclarations échangées entre les deux Gouvernements précités, à Saint-Pétersbourg, le 26 août/8 septembre 1900, l'Arbitre a été chargé de statuer sur toutes les questions qui pouvaient surgir entre les Hautes Parties dans le cours de l'Arbitrage, relativement à la procédure;

ATTENDU qu'il est constant en fait que le Gouvernement des Etats-Unis d'Amérique, Partie demanderesse dans les différends indiqués ci-dessus, a nommé M. Herbert H. D. Peirce, Premier Secrétaire de l'Ambassade de Saint-Pétersbourg, Son Agent et Conseil dans la procédure arbitrale, et a notifié cette nomination à la Partie adverse;

ATTENDU qu'une divergence de vues s'étant manifestée entre les Parties par rapport à la nature et aux conséquences juridiques de cette nomination, la Partie demanderesse a présenté à l'Arbitre, sous la date du 18 juin 1901, un Mémorandum dans lequel elle soumet à sa décision les trois questions suivantes:

1°) La Partie défenderesse ne doit-elle pas reconnaître l'Agent et Conseil nommé par la Partie demanderesse pour la représenter dans l'Arbitrage?

2°) La Partie défenderesse ne doit-elle pas accepter comme officielles les communications émanant de l'Agent et Conseil de la Partie demanderesse, et, de même, ne doit-elle pas transmettre ses réponses à ce dit Agent?

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[1] Descamps - Renault, *Recueil international des traités du XX^e siècle*, année 1901, p. 624.

3°) La Partie défenderesse ne doit-elle pas accepter de l'Agent et Conseil de la Partie demanderesse, comme officiellement livrées, les copies des Mémorandums ou des autres documents transmis à l'Arbitre et livrer de même directement à l'Agent et Conseil de la Partie demanderesse ses copies officielles des réponses aux Mémorandums ou des autres documents qu'elle transmettra à l'Arbitre?

Questions auxquelles la Partie demanderesse donne une réponse affirmative;

ATTENDU que la Partie défenderesse, dans un contre-Mémorandum adressé à l'Arbitre sous la date du 12/25 juillet 1901, en réponse au Mémorandum de la Partie demanderesse, après avoir combattu le système exposé dans ce Mémorandum, déclare se remettre à l'Arbitre de décider si, à l'avenir, copie des contre-Mémorandums russes devra être envoyée au Gouvernement américain par l'intermédiaire de l'Ambassadeur de Russie à Washington, ou bien devra être remise au Conseil et Agent du Gouvernement des Etats-Unis;

ATTENDU que, par une lettre du 13 septembre 1901, la Partie demanderesse a fait savoir à l'Arbitre qu'elle n'avait plus de pièces à lui soumettre et qu'elle le priait de rendre sa Sentence sur l'incident:

ATTENDU que, dans une procédure arbitrale, chaque Partie a incontestablement le droit de nommer un Agent ou Conseil, chargé de la représenter au procès, à moins que cela n'ait été expressément défendu par le Compromis, ce qui n'est pas le cas dans l'Arbitrage actuel;

Qu'un tel Agent ou Conseil devant être considéré comme le mandataire spécial de la Partie qui l'a nommé, les actes accomplis par lui dans les limites de son mandat ne sont pas moins valables que s'ils avaient été accomplis par le mandant;

Que, par conséquent, dans l'espèce, des Mémoires et autres documents, transmis par ou à l'Agent de la Partie demanderesse, doivent être censés transmis par ou à cette Partie même;

Que, toutefois, ces conséquences légales de la nomination d'un mandataire, ni prévue, ni réglée par le Compromis, n'ôtent pas à la Partie adverse la faculté de transmettre à la Partie même, qui a nommé l'Agent, — *in casu* le Gouvernement des Etats-Unis d'Amérique, — les Mémoires et documents dont il s'agit (conformément à ce qui a été stipulé dans la Convention précitée du 26 août/8 septembre 1900), ou, en général, de s'adresser directement à cette Partie et non à son mandataire spécial;

Qu'à l'appui de l'opinion contraire, la Partie demanderesse invoque la terminologie diplomatique, d'après laquelle les Représentants ordinaires et permanents des Gouvernements (Ambassadeurs, Ministres, Chargés d'Affaires) sont indiqués par l'expression: « Agents diplomatiques »;

Que, toutefois, on ne saurait déduire de cette terminologie que les Agents, nommés pour représenter une des Parties dans une procédure Arbitrale, doivent être assimilés aux Agents diplomatiques, tandis que, même si tel était le cas, il n'en résulterait pas que la Partie adverse n'aurait pas le droit de s'adresser directement au Gouvernement qui a nommé l'Agent;

Que la Partie demanderesse a encore invoqué, à l'appui de son système, l'Article 37 de la Convention de La Haye du 29 juillet 1899 pour le règlement pacifique des conflits internationaux,[1] qui donne aux Parties litigantes le droit de nommer auprès du Tribunal Arbitral des Délégués ou Agents spéciaux, avec la mission de servir d'intermédiaires entre elles et le Tribunal, et qui en outre autorise les Parties à charger de la défense de leurs droits et intérêts devant le Tribunal des Conseils ou Avocats nommés par elles à cet effet;

[1] Pour ce texte voir De Clerq, *Recueil des traités de la France*, t. XXI, p. 703.

Que, toutefois, en admettant même que, d'après cet Article, la nomination d'un Agent puisse avoir toutes les conséquences indiquées par la Partie demanderesse, on ne saurait appliquer les dispositions de la Convention du 29 juillet 1899 à l'Arbitrage actuel, qui a été réglé par un Compromis spécial antérieurement à la mise en vigueur de ladite Convention;

PAR CES MOTIFS, faisant droit sur l'incident;

DÉCLARE:

1°) La Partie défenderesse est tenue de reconnaître l'Agent et Conseil nommé par la Partie demanderesse pour la représenter dans l'Arbitrage.

2°) La Partie défenderesse doit accepter comme officielles les communications émanant de l'Agent et Conseil de la Partie demanderesse, mais elle n'est pas tenue de transmettre ses réponses à ce dit Agent.

3°) La Partie défenderesse doit accepter de l'Agent et Conseil de la Partie demanderesse, comme officiellement livrées, les copies des Mémorandum et des autres documents transmis à l'Arbitre, mais elle n'est pas tenue de livrer de même directement à cet Agent et Conseil ses copies officielles des réponses aux Mémorandums ou des autres documents qu'elle transmettra à l'Arbitre.

AINSI JUGÉ à La Haye, le 19 octobre 1901.

(Signé) T.-M.-C. ASSER

SENTENCES ARBITRALES RENDUES PAR M.T.-M.-C.ASSER DANS L'AFFAIRE DES NAVIRES *CAPE HORN PIGEON*, *JAMES HAMILTON LEWIS*, *C. H. WHITE* ET *KATE AND ANNA*, EN DATE DU 29 NOVEMBRE 1902 [1]

I

AFFAIRE DU *Cape Horn Pigeon*

Saisie et confiscation, dans la mer d'Ochotsk, sur la haute mer, du navire baleinier américain *Cape Horn Pigeon* par un croiseur russe — Réclamation du Gouvernement des Etats-Unis d'Amérique pour le compte de ses ressortissants lésés — Fixation du montant de l'indemnité à payer par la Partie défenderesse, reconnaissant sa responsabilité, à la Partie demanderesse pour le compte des ayants droits — Application au litige du principe général du droit civil d'après lequel les dommages-intérêts doivent contenir une indemnité non seulement pour le dommage qu'on a souffert, mais aussi pour le gain dont on a été privé — Caractère *direct* et non *indirect* du dommage dont le montant doit faire l'objet d'une évaluation.

Seizure and confiscation, in the Sea of Ochotsk, on the high seas, of the American whaling vessel *Cape Horn Pigeon* by a Russian cruiser — Claim by the Government of the United States of America on behalf of its injured nationals — Assessment of the amount of the damages to be paid by the Defendant, recognising its responsibility therefor, to the Plaintiff on behalf of the persons entitled — Application to the dispute of the general principle of civil law whereby the damages must cover not only damage actually suffered, but also any loss of profits — *Direct* and *indirect* nature of the damages of which an assessment has to be made.

LE SOUSSIGNÉ, Tobie-Michel-Charles ASSER, Membre du Conseil d'Etat des Pays-Bas, exerçant les fonctions d'Arbitre, qu'il a eu l'honneur de se voir conférer par le Gouvernement des Etats-Unis d'Amérique et par le Gouvernement Impérial de Russie, pour juger le différend relatif à l'affaire du navire *Cape Horn Pigeon;*

ATTENDU qu'en vertu des Déclarations échangées entre les deux Gouvernements précités à Saint-Pétersbourg le 26 août/8 septembre 1900, l'Arbitre doit prendre connaissance des réclamations d'indemnité pour l'arrêt ou la saisie de certains navires américains par des croiseurs russes, présentées au Gouverne-

[1] Texte original français dans *Papers relating to the Foreign Relations of the United States*, 1902. Appendix I, p. 469. Traduction anglaise: *ibid.*, p. 451.

ment Impérial de Russie par le Gouvernement des Etats-Unis d'Amérique, au nom des ayants droit;

Que d'après ces déclarations l'Arbitre, en se réglant dans sa Sentence sur les principes généraux du droit des gens et sur l'esprit des accords internationaux applicables à la matière, doit décider à l'égard de chaque réclamation formulée à la charge du Gouvernement Impérial de Russie, si elle est bien fondée et, dans l'affirmative, si les faits, sur lesquels elle est basée, sont prouvés;

Qu'ensuite il a été reconnu que cette stipulation n'aura aucune force rétroactive et que l'Arbitre appliquera aux cas en litige les principes du droit des gens et les traités internationaux qui étaient en vigueur et obligatoires pour les Parties impliquées dans ce litige, au moment où la saisie des navires a eu lieu;

Qu'enfin l'Arbitre doit éventuellement fixer la somme de l'indemnité qui serait due par le Gouvernement Russe pour le compte de réclamations présentées par les ayants droit;

ATTENDU qu'après un examen minutieux des Mémorandums et contre-Mémorandums échangés entre les Hautes Parties, ainsi que de toutes les pièces produites de part et d'autre, l'Arbitre, profitant de la faculté qui lui avait été accordée par lesdites Déclarations de Saint-Pétersbourg, a invité les deux Gouvernements à désigner des experts commerciaux pour l'aider à fixer le montant de l'indemnité qui serait éventuellement due et, qu'en s'adressant à cet effet aux deux Hautes Parties, l'Arbitre les a en même temps priées de lui fournir des renseignements supplémentaires à l'égard des points de droit, indiqués par lui;

ATTENDU que dans les séances tenues par l'Arbitre à La Haye dans l'Hôtel de la Cour Permanente d'Arbitrage, depuis le 27 juin jusqu'au 4 juillet 1902, il a entendu les dépositions des experts en présence des Agents des deux Hautes Parties, qui à cette occasion ont fourni les renseignements supplémentaires demandés par l'Arbitre;

ATTENDU qu'à l'appui de la réclamation relative à l'arrêt et la saisie de la barque baleinière américaine *Cape Horn Pigeon* par un vaisseau armé du Gouvernement Impérial de Russie, la Partie demanderesse a allégué les faits suivants;

La barque *Cape Horn Pigeon*, construite pour la pêche de la baleine, ayant fait voile de San Francisco le 7 décembre 1891, avec un équipage de trente personnes hors le capitaine (nommé Scullun ou Scullan) pour un voyage dans les mers du Japon et d'Ochotsk, se trouvait le 10 septembre 1892 dans la mer d'Ochotsk, sur la haute mer, occupée de la pêche de la baleine, lorsqu'elle fut arrêtée et saisie par le commandant d'un navire de la marine russe (croiseur) et conduite à Vladivostok, où elle fut détenue par les autorités russes jusqu'au 1er octobre 1892. Après la saisie de la barque, son équipage fut placé à bord du schooner russe *Maria* (qui, d'après la déclaration de la Partie défenderesse, avait été saisi par le croiseur russe pour chasse illicite aux phoques) et forcé de le conduire dans le port de Vladivostok. Dans cette ville, après qu'on leur eut dit qu'ils seraient logés dans la maison de garde, cet abri contre le froid et la faim leur fut refusé et le capitaine se vit forcé de leur trouver un logement dans un hangar. Ils furent retenus de jour en jour sans qu'on leur en dît la raison et enfin le 1er octobre 1892 ils furent renvoyés à leur navire;

ATTENDU que la Partie défenderesse, a reconnu que dans ce cas il s'est produit une erreur regrettable, puisque c'est à tort que l'officier de marine (le lieutenant von Cube) avait soupçonné le *Cape Horn Pigeon* de s'être livré à une chasse illicite et que par conséquent le Gouvernement Impérial, reconnaissant sa responsabilité, a offert de payer une indemnité pécuniaire pour les pertes réelles causées aux ressortissants étrangers par les actes de ses organes gouvernementaux;

ATTENDU que la tâche de l'Arbitre dans cette affaire consiste donc à fixer le montant de l'indemnité à payer par la Partie défenderesse;

ATTENDU que la réclamation de la Partie demanderesse s'élève à un montant de $ 80 700, avec les intérêts à 6 % par an depuis le 10 septembre 1892 et que la Partie défenderesse a offert de payer $ 2 500, également avec les intérêts à 6 % par an;

ATTENDU que la Partie défenderesse estime que le premier article de la réclamation, s'élevant à $ 3 040 pour dépenses du propriétaire du *Cape Horn Pigeon* en conséquence de la saisie, devrait être réduit à $ 1 040 et qu'en effet, le montant réclamé n'étant pas suffisamment justifié, il y a lieu de le réduire conformément aux conclusions de la Partie défenderesse;

ATTENDU que pour les services de l'équipage du *Cape Horn Pigeon* pour avoir conduit le schooner russe à Vladivostok, la somme de $ 1 000 offerte par la Partie défenderesse, au lieu de la somme de $ 1 200 réclamée par la Partie demanderesse, semble suffisante;

ATTENDU que la Partie défenderesse admet comme justifiées les réclamations pour provisions consommées $ 200, pour logement de l'équipage $ 210, pour dépenses du capitaine Scullun $ 50, ensemble $ 460;

ATTENDU que la Partie demanderesse réclame $ 45 000 pour perte de prises de pêche pendant le temps qui s'est écoulé entre la saisie du navire et le jour où il a pu reprendre la pêche de la baleine;

Que la Partie défenderesse conteste en principe le bien fondé de cette partie de la demande, en alléguant qu'il s'agit ici du gain d'une entreprise soumise à des risques et qui peut toujours se terminer par des pertes, et en invoquant, à l'appui de son assertion, la Sentence du Tribunal d'Arbitrage de 1872 dans l'affaire de l'Alabama, par laquelle les demandes d'indemnisation pour dommages indirects ont été écartées; [1]

CONSIDÉRANT que le principe général du droit civil, d'après lequel les dommages-intérêts doivent contenir une indemnité non seulement pour le dommage qu'on a souffert, mais aussi pour le gain dont on a été privé, est également applicable aux litiges internationaux et que, pour pouvoir l'appliquer, il n'est pas nécessaire que le montant du gain dont on se voit privé puisse être fixé avec certitude, mais qu'il suffit de démontrer que dans l'ordre naturel des choses on aurait pu faire un gain dont on se voit privé par le fait qui donne lieu à la réclamation;

CONSIDÉRANT qu'il n'est pas question en ce cas d'un dommage *indirect*, mais d'un dommage *direct*, dont le montant doit faire l'objet d'une évaluation;

CONSIDÉRANT quant au montant de cette partie de la réclamation, que la Partie demanderesse prend pour point de départ la moyenne du nombre de baleines prises dans une saison, qu'elle évalue à huit et dont elle déduit le nombre de deux que le capitaine Scullun avait déjà prises, ce qui donne six comme le nombre probable des baleines qui auraient encore été prises par lui, si le navire n'avait pas été arrêté et saisi;

CONSIDÉRANT, toutefois, que d'après la déclaration du capitaine Scullun lui-même, il avait pris vingt-huit baleines dans quatre saisons, ce qui fait sept par saison, et qu'il est donc plus sûr de prendre le chiffre sept comme indiquant pour le baleinier *Cape Horn Pigeon* la moyenne de la prise par saison, ce qui, après déduction des deux baleines prises, donne un nombre de cinq pour le restant probable de la prise;

[1] Voir déclaration du Président, Comte Sclopis, au nom de tous les Arbitres, du 19 juin 1872: Moore, *International Arbitration*, t. I., p. 646.

CONSIDÉRANT en ce qui concerne la valeur approximative d'une baleine à l'époque où le produit de la pêche du *Cape Horn Pigeon* en 1892 aurait pu être vendu, qu'il résulte de l'enquête qui a eu lieu dans ce litige et des renseignements fournis à l'Arbitre, qu'on peut évaluer le poids moyen des os à obtenir d'une baleine à 1 200 livres, et le prix moyen d'une livre à $ 4; la quantité moyenne de l'huile à 100 barriques et le prix moyen d'une barrique à $ 12, ce qui fait un total de $ 6 000 par baleine et de $ 30 000 pour cinq baleines, ou, après déduction de $ 1 500, au lieu des $ 1 800 déduits par le capitaine Scullun $ 28 500;

CONSIDÉRANT par rapport à l'indemnité réclamée pour l'enrôlement à $ 1 000 par homme, soit $ 31 000, qu'il n'est pas prouvé qu'ont ait fait subir aux membres de l'équipage les mauvais traitements dont ils se plaignent; mais que, d'un autre côté, le fait même qu'ils ont été retenus contre leur gré à Vladivostok pendant environ trois semaines, comme conséquence de la saisie illégale de leur navire, leur donne droit à une indemnité, indépendamment de ce qui leur est dû pour avoir été forcés de conduire un navire russe à Vladivostok, et que le montant de cette indemnité doit être fixé à $ 7 750 ou en moyenne $ 250 par personne;

Que, par conséquent, le total des dommages-intérêts dus par la Partie défenderesse à la Partie demanderesse comme suite de l'arrêt et de la saisie du *Cape Horn Pigeon*, s'élève à $ 38 750;

CONSIDÉRANT que la Partie défenderesse reconnaît comme parfaitement régulière l'adjonction des intérêts à 6 % par an;

PAR CES MOTIFS,

L'ARBITRE décide et prononce ce qui suit:

La Partie défenderesse payera à la Partie demanderesse pour le compte des réclamations présentées par les ayants droit dans l'affaire du *Cape Horn Pigeon*, la somme de 38 750 dollars des Etats-Unis d'Amérique, avec les intérêts de cette somme à 6 % par an depuis le 9 septembre 1892 jusqu'au jour du payement intégral.

FAIT à La Haye, le 29 novembre 1902.

T.-M.-C. ASSER

II

AFFAIRE DU *James Hamilton Lewis*

Saisie et confiscation, en dehors de la mer territoriale de la Russie, du schooner américain *James Hamilton Lewis* par un croiseur russe — Réclamation du Gouvernement des Etats-Unis d'Amérique pour le compte de ses ressortissants lésés — Allégation que le navire saisi se serait rendu coupable de chasse illicite aux phoques dans la mer territoriale russe — Invocation du droit de poursuite — Règlement du litige d'après les principes généraux du droit des gens et l'esprit des accords internationaux en vigueur et obligatoires pour les Parties en cause au moment de la saisie du navire — Etendue du droit de juridiction de l'Etat — Revendications motivées par l'intérêt de la préservation de la race des phoques et de la répression de la chasse illicite — Invocation du litige entre les Etats-Unis d'Amérique et la Grande-Bretagne devant le Tribunal d'Arbitrage constitué en vertu du Traité conclu à Washington le 29 février 1892 — Fixation du montant de l'indemnité.

Seizure and confiscation, beyond the territorial waters of Russia, of the American schooner *James Hamilton Lewis* by a Russian cruiser — Claim of the Government of the United States of America on behalf of its injured nationals — Allegation that the seized vessel had been engaged in illegal seal-hunting in the territorial waters of Russia — Plea of the right of pursuit — Settlement of the dispute according to the principles of general international law and the spirit of international agreements in force and binding upon the Parties at the time of the seizure of the vessel — Extent of the jurisdiction of a State — Claims based on an interest in the preservation of the stock of seals and in the repression of illegal hunting — Citation of the dispute between the U.S.A. and Great Britain before the arbitral tribunal established under the treaty concluded at Washington on 29 February, 1892 — Determination of the amount of the damages.

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LE SOUSSIGNÉ Tobie-Michel-Charles ASSER, Membre du Conseil d'Etat des Pays-Bas, exerçant les fonctions d'arbitre, qu'il a eu l'honneur de se voir conférer par le Gouvernement des Etats-Unis d'Amérique et par le Gouvernement Impérial de Russie, pour juger le différend relatif à l'affaire du schooner *James Hamilton Lewis*;

ATTENDU qu'en vertu des Déclarations échangées entre les deux Gouvernements précités, à Saint-Pétersbourg le 26 août/8 septembre 1900, l'Arbitre doit prendre connaissance des réclamations d'indemnité pour l'arrêt ou la saisie de certains navires américains par des croiseurs russes, présentées au Gouvernement Impérial de Russie par le Gouvernement des Etats-Unis d'Amérique, au nom des ayants droit;

Que d'après ces Déclarations l'Arbitre, en se réglant dans sa Sentence sur les principes généraux du droit des gens et sur l'esprit des accords internationaux applicables à la matière, doit décider à l'égard de chaque réclamation formulée à la charge du Gouvernement Impérial de Russie, si elle est fondée et, dans l'affirmative, si les faits sur lesquels elle est basée sont prouvés;

Qu'ensuite il a été reconnu que cette stipulation n'aura aucune force rétroactive et que l'Arbitre appliquera aux cas en litige les principes du droit des gens et les traités internationaux qui étaient en vigueur et obligatoires pour les Parties impliquées dans ce litige, au moment où la saisie des navires a eu lieu;

Qu'enfin l'Arbitre doit éventuellement fixer la somme de l'indemnité qui serait due par le Gouvernement Russe pour le compte des réclamations présentées par les ayants droit;

ATTENDU qu'après un examen minutieux des Mémorandums et contre-Mémorandums échangés entre les Hautes Parties, ainsi que de toutes les pièces produites de part et d'autre, l'Arbitre, profitant de la faculté qui lui avait été accordée par lesdites Déclarations de Saint-Pétersbourg, a invité les deux Gouvernements à désigner des experts commerciaux pour l'aider à fixer le montant de l'indemnité, qui serait éventuellement due et, qu'en s'adressant à cet effet aux deux Hautes Parties, l'Arbitre les a en même temps priées de lui fournir des renseignements supplémentaires à l'égard des points de droit indiqués par lui;

ATTENDU que dans les séances tenues par l'Arbitre à La Haye, dans l'Hôtel de la Cour Permanente d'Arbitrage, depuis le 27 juin jusqu'au 4 juillet 1902, il a entendu les dépositions des experts, en présence des Agents des deux Hautes Parties, qui à cette occasion ont fourni les renseignements supplémentaires demandés par l'Arbitre;

ATTENDU qu'à l'appui de la réclamation relative à la saisie et la confiscation du schooner *James Hamilton Lewis*, la Partie demanderesse a allégué les faits suivants:

Ledit schooner ayant fait voile de San Francisco le 7 mars 1891, destiné à un voyage dans l'Océan Pacifique du Nord, pour une expédition de pêche et de chasse, avec Alexandre McLean comme capitaine, se trouvait le 2 août 1891 à environ 20 milles de distance à l'est de l'île de Cuivre (latitude 55°35′ Nord, longitude 169°21′ Est), quand il fut saisi de très bonne heure par le croiseur russe *Aléoute*. Le capitaine du schooner avait jugé nécessaire d'atterrir afin de vérifier son chronomètre et pour cette raison il s'était dirigé sur l'île de Cuivre. A l'endroit mentionné son navire fut obligé de mettre en panne par un coup de canon tiré dudit croiseur et une chaloupe de ce croiseur s'étant approchée du schooner, un officier de la marine russe monta de la chaloupe à bord du schooner, requit le livre de navire. Bientôt il revint avec quelques hommes armés et ordonna au capitaine McLean de quitter son navire et de se constituer prisonnier à bord de l'*Aléoute*, avec tout son équipage excepté sept hommes. Le capitaine McLean ayant refusé d'obéir à cet ordre, fit reprendre au schooner son cours Est: alors le commandant du croiseur commença une poursuite et, tournant le *James Hamilton Lewis*, le captura par la force des armes: le capitaine et les membres de l'équipage furent faits prisonniers. Le 3 août 1891 le schooner et son équipage furent conduits à Vladivostok; le navire, avec sa cargaison, son armement et la propriété personnelle du capitaine fut confisqué; son capitaine, ses officiers et son équipage furent retenus prisonniers et soumis à un traitement indigne et rigoureux; après avoir été relâchés ils ont été abandonnés à leur sort pour rentrer chez eux comme ils le pourraient;

ATTENDU que les dommages-intérêts réclamés par la Partie demanderesse pour le compte des ayants droit, pour la saisie et la confiscation du navire et l'emprisonnement du capitaine et de l'équipage, s'élèvent à un montant de $ 101 336, avec les intérêts à 6 % par an;

ATTENDU que la Partie défenderesse, répondant aux allégations de la Partie demanderesse, a soutenu que lorsque le *James Hamilton Lewis* fut remarqué par le croiseur, il ne se trouvait qu'à une distance de 5 milles au plus de l'île Medny (ou île de Cuivre) et que l'arrêt a eu lieu à une distance de 12 (ou 11) milles de la côte; qu'en outre il résulterait d'une série de faits relevés par la Partie défenderesse, que le *James Hamilton Lewis* doit être présumé s'être rendu coupable d'une chasse illicite aux phoques dans les eaux territoriales russes; que par conséquent les organes du Gouvernement Impérial étaient en droit de poursuivre le schooner même en dehors de ces eaux, de le saisir et de le confisquer avec sa cargaison; que l'emprisonnement de l'équipage a eu lieu à cause de leur résistance à l'arrêt et à la saisie du navire;

ATTENDU que la Partie défenderesse, s'appuyant sur ces allégations, et en contestant subsidiairement les chiffres de la demande, a requis que les réclamations de la Partie demanderesse fussent rejetées;

ATTENDU que l'honorable Agent de la Partie demanderesse, M. Herbert H. D. Peirce a fait, dans la séance du 4 juillet 1902, au nom du Gouvernement des Etats-Unis d'Amérique, la déclaration suivante:

" Declaration made to the honorable Arbitrator Mr. T.-M.-C. Asser, July 4, 1902, by the Party claimant in the Arbitration between the United States and Russia, in reply to the question asked by the Arbitrator relative to the extent of jurisdiction claimed by the United States over the bordering waters of the Behring Sea. The Delegate of the United States makes this

declaration under the specific authority received by him from the Secretary of State of the United States on July 3, 1902, to wit:

" The Government of the United States claims, neither in Behring Sea nor in its other bordering waters, an extent of jurisdiction greater than a marine league from its shores, but bases its claims to such jurisdiction upon the following principle:

" The Government of the United States claims and admits the jurisdiction of any State over its territorial waters only to the extent of a marine league unless a different rule is fixed by treaty between two States; even then the treaty States are alone affected by the agreement ";

CONSIDÉRANT que l'Arbitre doit décider:

I. Si la saisie et la confiscation du schooner *James Hamilton Lewis* et de sa cargaison, ainsi que l'emprisonnement de l'équipage, doivent être considérés comme des actes illégaux;

II. Dans l'affirmative, quel est le montant de l'indemnité due par la Partie défenderesse?

Ad. I. Considérant que cette question doit être résolue d'après les principes généraux du droit des gens et l'esprit des accords internationaux en vigueur et obligatoires pour les deux Hautes Parties au moment de la saisie du navire;

Qu'à ce moment il n'existait point de Convention entre les deux Parties, contenant pour la matière spéciale de la chasse aux phoques une dérogation aux principes généraux du droit des gens par rapport à l'étendue de la mer territoriale;

Que la Partie défenderesse a fait ressortir que dans le litige entre les Etats-Unis d'Amérique et la Grande-Bretagne devant le Tribunal d'Arbitrage, constitué en vertu du Traité conclu à Washington le 29 février 1892,[1] le Gouvernement des Etats-Unis a fait valoir par rapport au droit de juridiction dans la mer de Behring, vis-à-vis du Gouvernement Britannique, des revendications qui s'étendaient à des limites bien autrement considérables que celles qui sont admises d'après les principes généraux du droit des gens; que ces revendications étaient motivées par l'intérêt de la préservation de la race des phoques et de la répression de la chasse illicite, et que, bien que le Gouvernement des Etats-Unis d'Amérique se soit loyalement soumis à la Décision du Tribunal Arbitral de 1893,[2] qui n'a pas adopté son système, ce système peut néanmoins lui être opposé pour combattre la demande formulée par ce Gouvernement dans le litige actuel;

CONSIDÉRANT que, quelle que soit la valeur du système dont il s'agit comme base d'une entente entre les Etats intéressés, il ne saurait être obligatoire, sans une telle entente, même pour un Gouvernement qui à une autre occasion l'aurait défendu, mais sans succès, devant un Tribunal Arbitral;

CONSIDÉRANT que les accords qui seraient intervenus entre les Parties après la date de la saisie et de la confiscation du *James Hamilton Lewis*, ne sauraient modifier les conséquences résultant des principes de droit généralement reconnus à l'époque de ces actes;

CONSIDÉRANT que la saisie du schooner a eu lieu, d'après la Partie demanderesse, à une distance d'environ 20, d'après la Partie défenderesse à une distance

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[1] Pour ce texte, voir de Martens, *Nouveau Recueil général de traités*, 2e série, t. XVIII, p. 587, et t. XXI, p. 293.

[2] Pour ce texte, en date du 15 août 1893, voir de Martens, *op. cit.*, t. XXI, p. 439; La Fontaine, *Pasicrisie internationale, Histoire documentaire des arbitrages internationaux*, Berne, 1902, p. 426.

d'environ 11 à 12 milles du territoire russe et que, même si la dernière version est la vraie, il en résulte que l'acte s'est accompli en dehors des eaux territoriales de la Russie, ce qui du reste est admis par les deux Parties;

CONSIDÉRANT que le système de la Partie défenderesse d'après lequel il serait permis aux navires du guerre d'un Etat de poursuivre même en dehors de la mer territoriale un navire dont l'équipage se serait rendu coupable d'un acte illicite dans les eaux territoriales ou sur le territoire de cet Etat, ne saurait être reconnu comme conforme au droit des gens, puisque la juridiction d'un Etat ne s'étend pas au delà des limites de la mer territoriale, à moins qu'il n'ait été dérogé à cette règle par une Convention expresse;

CONSIDÉRANT qu'il n'est donc pas nécessaire d'examiner si les présomptions alléguées par la Partie défenderesse sont assez graves pour faire admettre que l'équipage du *James Hamilton Lewis* se soit rendu coupable de la chasse illicite aux phoques dans les eaux territoriales ou sur le territoire de la Russie;

CONSIDÉRANT que la saisie et la confiscation du *James Hamilton Lewis* et de sa cargaison, ainsi que l'emprisonnement de l'équipage, devant par conséquent être considérés comme des actes illégaux, il ne reste qu'à fixer le montant de l'indemnité due du chef de ces actes par la Partie défenderesse;

Ad. II. Considérant que la Partie demanderesse réclame en premier lieu $ 25 000 pour la confiscation du navire, mais que cette réclamation est exagérée; qu'en se basant sur les chiffres qu'on trouve dans des publications américaines communiquées à l'Arbitre par la Partie demanderesse (Report of fur-seal investigations, 1899, Part III, p. 228) et plus spécialement sur la valeur indiquée pour les navires ayant environ le même ou un plus grand tonnage que le *James Hamilton Lewis* et en tenant compte d'une part du fait que ce schooner se trouvait dans un excellent état, d'autre part de la circonstance qu'ayant pris la mer le 7 mars 1891, il avait déjà consommé presque cinq mois de ses provisions le jour où il a été arrêté (2 août 1891), on ne saurait attribuer à ce navire avec ses chaloupes, son armement et ses provisions, une valeur dépassant le chiffre de $ 9 000;

CONSIDÉRANT que la Partie demanderesse réclame pour les 424 peaux de phoques, confisquées avec le navire, $ 14 par peau, soit un total de $ 5 936, mais qu'il résulte d'un examen minutieux des différents documents produits, ainsi que de dépositions d'experts, que le prix d'une peau ne saurait être estimé à plus de $ 12, ce qui fait un total de $ 5 088 pour les 424 peaux;

CONSIDÉRANT que la Partie demanderesse réclame $ 36 400 pour perte de prise probable de 2600 peaux, soit $ 14 par peau, mais que, tout en admettant qu'en principe la perte de prise pendant la partie de la saison qui devait encore s'écouler après la saisie du navire, peut être réclamée comme un élément de dommages-intérêts, le chiffre de 2 600 peaux n'est nullement justifié et paraît très exagéré; qu'il résulte des statistiques produites au litige, qu'en tenant compte du nombre des phoques déjà pris et du temps qui devait encore s'écouler jusqu'à la fin de la saison, on peut admettre que le produit de la chasse n'aurait pas excédé le nombre de 500 phoques; ce qui, à raison de $ 12 par peau, donne un total de $ 6 000;

CONSIDÉRANT qu'en dernier lieu la Partie demanderesse réclame, au profit de l'équipage du *James Hamilton Lewis*, pour son emprisonnement, ses souffrances physiques et morales, etc., $ 2 000 pour chacun des 17 hommes, soit $ 34 000; que la Partie défenderesse nie énergiquement que les plaintes formulées par l'équipage au sujet d'actes de violence et de mauvais traitements qu'ils auraient subis soient fondées et qu'en effet la preuve de ces allégations n'est pas fournie; que toutefois le fait même de l'emprisonnement illégal donne aux intéressés

le droit de réclamer une indemnité dont le montant peut, d'après une évaluation équitable, être fixé à $ 8 500, ou en moyenne $ 500 par personne;

Que, par conséquent, le total des dommages-intérêts dus par la Partie défenderesse à la Partie demanderesse comme suite de la saisie et la confiscation du *James Hamilton Lewis*, s'élève à $ 28 588;

CONSIDÉRANT que la Partie défenderesse accepte d'ajouter les intérêts à 6 % par an aux sommes qu'elle aurait à payer; que, puisqu'une indemnité est accordée pour la perte de prise pendant le reste de la saison de 1891, il est juste que les intérêts ne commencent à courir que le 1er janvier 1892;

PAR CES MOTIFS,

L'ARBITRE DÉCIDE ET PRONONCE CE QUI SUIT:

La Partie défenderesse payera à la Partie demanderesse pour le compte des réclamations présentées par les ayants droit dans l'affaire du *James Hamilton Lewis*, la somme de 28 588 dollars des Etats-Unis d'Amérique avec les intérêts de cette somme à 6 % par an depuis le 1er janvier 1892, jusqu'au jour du payement intégral.

FAIT à La Haye, le 29 novembre 1902.

T.-M.-C. ASSER.

III

AFFAIRE DU *C. H. White*

Saisie et confiscation, en dehors de la mer territoriale de la Russie du schooner américain *C. H. White* par un croiseur russe. — Réclamation du Gouvernement des Etats-Unis d'Amérique pour le compte de ses ressortissants lésés — Allégation que le *C. H. White* se serait rendu coupable de chasse illicite aux phoques dans les eaux territoriales russes — Invocation du droit de poursuite — Solution du litige d'après les principes généraux du droit des gens et l'esprit des accords internationaux en vigueur et obligatoires pour les Parties en cause au moment de la saisie du navire — Etendue du droit de juridiction de l'Etat — Revendications motivées par l'intérêt de la préservation de la race des phoques et de la répression de la chasse illicite — Invocation du litige entre les Etats-Unis et la Grande-Bretagne devant le Tribunal d'Arbitrage, constitué en vertu du Traité conclu à Washington le 29 février 1892 — Fixation du montant de l'indemnité.

Seizure and confiscation, beyond the territorial waters of Russia, of the American schooner *C. H. White* by a Russian cruiser — Claim of the Government of the United States of America on behalf of its injured nationals — Allegation that the seized vessel had been engaged in illegal seal-hunting in the territorial waters of Russia — Plea of the right of pursuit — Settlement of the dispute according to the principles of general international law and the spirit of international agreements in force and binding upon the Parties at the time of the seizure of the vessel — Extent of the jurisdiction of a State — Claims based on an interest in the preservation of the stock of seals and in the repression of illegal hunting — Citation of the dispute between the U.S.A. and Great Britain before the arbitral tribunal established under the treaty concluded at Washington on 29 February, 1892 — Determination of the amount of the damages.

LE SOUSSIGNÉ Tobie-Michel-Charles ASSER, Membre du Conseil d'Etat des Pays-Bas, exerçant les fonctions d'Arbitre, qu'il a eu l'honneur de se voir conférer par le Gouvernement des Etats-Unis d'Amérique et par le Gouvernement Impérial de Russie, pour juger le différend relatif à l'affaire du schooner *C. H. White;*

ATTENDU qu'en vertu des Déclarations échangées entre les deux Gouvernements précités, à Saint-Pétersbourg le 26 août/8 septembre 1900, l'Arbitre doit prendre connaissance des réclamations d'indemnité pour l'arrêt ou la saisie de certains navires américains par des croiseurs russes, présentées au Gouvernement Impérial de Russie par le Gouvernement des Etats-Unis d'Amérique, au nom des ayants droit;

Que d'après ces Déclarations l'Arbitre, en se réglant dans sa Sentence sur les principes généraux du droit des gens et sur l'esprit des accords internationaux applicables à la matière, doit décider à l'égard de chaque réclamation formulée à la charge du Gouvernement Impérial de Russie, si elle est fondée et, dans l'affirmative, si les faits sur lesquels elle est basée sont prouvés;

Qu'ensuite il a été reconnu que cette stipulation n'aura aucune force rétroactive et que l'Arbitre appliquera aux cas en litige les principes du droit des gens et les traités internationaux qui étaient en vigueur et obligatoires pour les Parties impliquées dans ce litige, au moment où la saisie des navires a eu lieu;

Qu'enfin l'Arbitre doit éventuellement fixer la somme de l'indemnité qui serait due par le Gouvernement Russe pour le compte des réclamations présentées par les ayants droit;

ATTENDU qu'après un examen minutieux des Mémorandums et contre-Mémorandums échangés entre les Hautes Parties, ainsi que de toutes les pièces produites de part et d'autre, l'Arbitre, profitant de la faculté qui lui avait été accordée par lesdites Déclarations de Saint-Pétersbourg, a invité les deux Gouvernements à désigner des experts commerciaux pour l'aider à fixer le montant de l'indemnité, qui serait éventuellement due et, qu'en s'adressant à cet effet aux deux Hautes Parties, l'Arbitre les a en même temps priées de lui fournir des renseignements supplémentaires à l'égard des points de droit indiqués par lui;

ATTENDU que dans les séances tenues par l'Arbitre à La Haye, dans l'Hôtel de la Cour Permanente d'Arbitrage, depuis le 27 juin jusqu'au 4 juillet 1902, il a entendu les dépositions des experts, en présence des Agents des deux Hautes Parties, qui à cette occasion ont fourni les renseignements supplémentaires demandés par l'Arbitre;

ATTENDU qu'à l'appui de la réclamation relative à la saisie et la confiscation du schooner *C. H. White* la Partie demanderesse a allégué les faits suivants:

Ledit schooner ayant fait voile de San Francisco le 7 mai 1892 pour un voyage de pêche et de chasse dans l'Océan Pacifique du Nord ou ailleurs, avec Lawrence M. Furman comme capitaine, se trouvait le 12 juillet 1892 à une distance d'environ 40 milles au Sud de l'île Agattou, une des îles Aléoutiennes, et environ le même jour le capitaine mit à voile pour les îles Kuriles, ayant l'intention d'y pêcher à une distance de la côte. Le capitaine dévia de sa course vers les îles Kuriles dans la direction de l'île de Cuivre ou l'île de Behring, pour y régler son chronomètre. Le 15 juillet 1892, le navire ayant atteint la latitude de 54°18′ Nord par longitude 167°19′ Est (c'est évidemment par erreur qu'à quelques endroits du Mémorandum de la Partie demanderesse on trouve indiqué comme longitude 167°19′ *Ouest*) a été abordé par le croiseur de guerre russe le *Zabiaca* et il fut ordonné au capitaine du *C. H. White* de venir à bord de ce croiseur avec tous ses papiers de bord; le commandant du croiseur ayant

examiné ces papiers, fit arrêter le capitaine du schooner et transporter tout son équipage, excepté le lieutenant en premier, à bord du croiseur, comme prisonniers: le capitaine fut gardé à vue. Le schooner (avec la cargaison composée de 20 peaux de phoques, 8 barriques de maquereaux et 1 tonneau de morue) fut saisi et remorqué jusqu'à la baie de Nikolsky (île de Behring) d'où il fut conduit à Petropavlovsk; plus tard il fut confisqué et approprié à l'usage du Gouvernement Impérial de Russie. Le capitaine et l'équipage du schooner furent emmenés comme prisonniers jusqu'à Petropavlovsk, où ils arrivèrent le 20 juillet 1892. Le 8 août de la même année, l'équipage fut conduit à bord du navire américain *Majestic* pour être rapatrié. Le capitaine et les autres membres de l'équipage prétendent avoir beaucoup souffert des mauvais traitements qui leur auraient été infligés pendant leur emprisonnement. En outre le capitaine, le lieutenant en premier Andrew Ronning et le chasseur Neils Wolfgang prétendent avoir perdu des objets qui leur appartenaient et qu'on ne leur a pas restitués;

ATTENDU que les dommages-intérêts réclamés par la Partie demanderesse pour le compte des ayants droit, du chef des faits mentionnés, s'élèvent à un montant de 150 720 dollars, avec les intérêts à 6 % par an;

ATTENDU que la Partie défenderesse, répondant aux allégations de la Partie demanderesse, soutient que la saisie du *C. H. White* a eu lieu non pas sous 54°18′, mais sous 54°10′ de latitude Nord, soit à une distance d'environ 23 milles seulement de la côte russe la plus voisine; qu'en outre d'une série de circonstances relevées par la Partie défenderesse résultait la présomption que le *C. H. White* se serait rendu coupable de chasse illicite aux phoques dans les eaux territoriales russes;

Que par suite les organes du Gouvernement Impérial étaient en droit de poursuivre le schooner, même en dehors de ces eaux, de le saisir et de le confisquer avec sa cargaison;

Que la Partie défenderesse oppose aux plaintes de l'équipage concernant de mauvais traitements qu'il aurait subis, une dénégation énergique, en faisant observer que ce dont on se plaint n'était que la conséquence inévitable des circonstances locales de l'endroit où l'équipage a été conduit et qu'enfin le fait que des objets appartenant au capitaine et à deux autres personnes ne leur auraient pas été rendus, n'est pas suffisamment prouvé;

ATTENDU que la Partie défenderesse, s'appuyant sur ces allégations, et en contestant subsidiairement les chiffres de la demande, a requis que les réclamations de la Partie demanderesse fussent rejetées;

ATTENDU que l'honorable Agent de la Partie demanderesse, Mr. Herbert H. D. Peirce, a fait, dans la séance du 4 juillet 1902, au nom du Gouvernement des Etats-Unis d'Amérique, la déclaration suivante:

" Declaration made to the honorable Arbitrator Mr. T.-M.-C. Asser, July 4, 1902, by the Party claimant in the Arbitration between the United States and Russia, in reply to the question asked by the Arbitrator relative to the extent of jurisdiction claimed by the United States over the bordering waters of the Behring Sea. The Delegate of the United States makes this declaration under the specific authority received by him from the Secretary of State of the United States on July 3, 1902, to wit:

" The Government of the United States claims, neither in Behring Sea nor in its other bordering waters, an extent of jurisdiction greater than a marine league from its shores, but bases its claims to such jurisdiction upon the following principle:

" The Government of the United States claims and admits the jurisdiction of any State over its territorial waters only to the extent of a marine league unless a different rule is fixed by treaty between two States; even then the treaty States are alone affected by the agreement ";

CONSIDÉRANT que l'Arbitre doit décider:

I. Si la saisie et la confiscation du schooner *C. H. White* et de sa cargaison, ainsi que l'emprisonnement de l'équipage, doivent être considérés comme des actes illégaux;

II. Dans l'affirmative, quel est le montant de l'indemnité due par la Partie défenderesse?

Ad. I. Considérant que cette question doit être résolue d'après les principes généraux du droit des gens et l'esprit des accords internationaux en vigueur et obligatoires pour les deux Hautes Parties au moment de la saisie du navire;

Qu'à ce moment il n'existait point de convention entre les deux Parties contenant pour la matière spéciale de la chasse aux phoques une dérogation aux principes généraux du droit des gens par rapport à l'étendue de la mer territoriale;

Que la Partie défenderesse a fait ressortir que dans le litige entre les Etats-Unis d'Amérique et la Grande-Bretagne devant le Tribunal d'Arbitrage, constitué en vertu du Traité conclu à Washington le 29 février 1892, le Gouvernement des Etats-Unis a fait valoir par rapport au droit de juridiction dans la mer de Behring, vis-à-vis du Gouvernement Britannique, des revendications qui s'étendaient à des limites bien autrement considérables que celles qui sont admises d'après les principes généraux du droit des gens; que ces revendications étaient motivées par l'intérêt de la préservation de la race des phoques et de la répression de la chasse illicite, et que, bien que le Gouvernement des Etats-Unis d'Amérique se soit loyalement soumis à la Décision du Tribunal Arbitral de 1893, qui n'a pas adopté son système, ce système peut néanmoins lui être opposé pour combattre la demande formulée par ce Gouvernement dans le litige actuel;

CONSIDÉRANT que, quelle que soit la valeur du système dont il s'agit comme base d'une entente entre les Etats intéressés, il ne saurait être obligatoire sans une telle entente, même pour un Gouvernement qui à une autre occasion l'aurait défendu, mais sans succès, devant un Tribunal Arbitral;

CONSIDÉRANT que les Accords qui seraient intervenus entre les Parties après la date de la saisie et de la confiscation du *C. H. White*, ne sauraient modifier les conséquences résultant des principes de droit généralement reconnus à l'époque de ces actes;

CONSIDÉRANT que la saisie du schooner a eu lieu, d'après la Partie demanderesse, à une distance d'environ 20, d'après la Partie défenderesse à une distance d'environ 11 à 12 milles du territoire russe et que, même si la dernière version est la vraie, il en résulte que l'acte s'est accompli en dehors des eaux territoriales de la Russie, ce qui du reste est admis par les deux Parties;

CONSIDÉRANT que le système de la Partie défenderesse d'après lequel il serait permis aux navires de guerre d'un Etat de poursuivre même en dehors de la mer territoriale un navire dont l'équipage se serait rendu coupable d'un acte illicite dans les eaux territoriales ou sur le territoire de cet Etat, ne saurait être reconnu comme conforme au droit des gens, puisque la juridiction d'un Etat ne s'étend pas au delà des limites de la mer territoriale, à moins qu'il n'ait été dérogé à cette règle par une convention expresse;

CONSIDÉRANT qu'il n'est donc pas nécessaire d'examiner si les présomptions alléguées par la Partie défenderesse sont assez graves pour faire admettre que

l'équipage du *C. H. White* se serait rendu coupable de la chasse illicite aux phoques dans les eaux territoriales ou sur le territoire de la Russie;

CONSIDÉRANT que la saisie et la confiscation du *C. H. White* et de sa cargaison, ainsi que l'emprisonnement de l'équipage, devant par conséquent être considérés comme des actes illégaux, il ne reste qu'à fixer le montant de l'indemnité due du chef de ces actes par la Partie défenderesse;

Ad. II. Considérant que la Partie demanderesse réclame en premier lieu $ 35 000 pour la confiscation du navire, mais que cette réclamation est exagérée; qu'en se basant sur les chiffres qu'on trouve dans des publications américaines, comme les rapports des enquêtes concernant les phoques à fourrure (Report of fur-seal investigation) communiqués à l'Arbitre par la Partie demanderesse (Part III, p. 228) et plus spécialement sur la valeur indiquée pour des navires ayant environ le même ou un plus grand tonnage que le *C. H. White*, on ne saurait attribuer à ce schooner, avec ses chaloupes, son armement et ses provisions, une valeur plus grande que $ 10 000.

CONSIDÉRANT que la Partie demanderesse réclame pour la cargaison, confisquée avec le navire, ce qui suit: *a.* pour les 20 peaux de phoques une somme de $ 14 par peau, soit en total $ 280; mais qu'il résulte d'un examen minutieux des différents documents produits ainsi que des dépositions des experts, que le prix d'une peau ne saurait être estimé à plus de $ 12, ce qui fait un total de $ 240 pour les 20 peaux; *b.* pour 8 barriques de maquereaux $ 160 et pour un tonneau de morue $ 260; mais que la Partie défenderesse ayant soutenu que la valeur des 8 barriques de maquereaux ne peut avoir excédé la somme de $ 80 et celle du tonneau de morue la somme de $ 124, la Partie demanderesse a réduit sa réclamation pour cette partie de la cargaison à une somme de 204, ce qui avec les $ 240 pour les 20 peaux de phoques, fait un total de $ 444;

CONSIDÉRANT que la Partie demanderesse réclame: *a.* $ 34 720 pour perte de prise probable de 2,480 peaux de phoques à $ 14 et: *b.* $ 10 300 pour perte de prise probable de poissons;

CONSIDÉRANT que tout en admettant en principe que la perte de prise pour la partie de la saison qui devait encore s'écouler après la saisie du navire peut être réclamée comme un élement des dommages-intérêts, les sommes réclamées ne sont nullement justifiées et paraissent très exagérées;

CONSIDÉRANT: ad. *a*, qu'il résulte des statistiques produites au litige qu'on peut admettre que le produit de la chasse aux phoques, après le jour de la saisie du navire n'aurait certainement pas excédé le nombre de 1000 phoques, ce qui, à raison de $ 12 par peau, donne un total de $ 12 000;

Ad. *b.* Que pour la perte de prise probable de poissons, une somme de $ 1 000 semble une indemnité suffisante;

CONSIDÉRANT, à l'égard des réclamations personnelles du capitaine Furman ($ 25 000), d'Andrew Ronning ($ 15 000) et de Neils Wolfgang ($ 10 000) pour perte d'objets qui leur appartenaient, pour emprisonnement, outrages et privations, — que la perte des objets n'est pas prouvée, les déclarations des intéressés seuls ne pouvant être admises comme une preuve suffisante; que la Partie défenderesse nie énergiquement qu'on ait eu l'intention d'infliger au capitaine et à l'équipage du schooner un traitement inhumain, en ajoutant que si leur logement et leur nourriture laissaient à désirer, ceci s'explique par l'insuffisance des ressources locales;

CONSIDÉRANT que cette explication ne suffit pas pour dégager la responsabilité de la Partie défenderesse, puisque étant responsable de l'emprisonnement, elle l'est aussi des conséquences de cet acte illégal;

Que toutefois le montant de l'indemnité réclamée de ce chef est exagéré et doit être réduit pour le capitaine Furman à $ 3 000, pour Andrew Ronning à $ 2 000, pour Neils Wolfgang à $ 1 000;

CONSIDÉRANT que la réclamation de l'équipage pour son emprisonnement peut être admise pour un montant de $ 300 par personne, soit $ 3 000 pour les dix membres de l'équipage;

Que, par conséquant, le total des dommages-intérêts dus par la Partie défenderesse à la Partie demanderesse comme suite de la saisie et la confiscation du *C. H. White*, s'élève à $ 32 444;

CONSIDÉRANT que la Partie défenderesse accepte d'ajouter les intérêts à 6 % par an aux sommes qu'elle aurait à payer; que puisqu'une indemnité est accordée pour la perte de prise pendant le reste de la saison de 1892, il est juste que les intérêts ne commencent à courir que le 1er janvier 1893;

PAR CES MOTIFS,

L'ARBITRE DÉCIDE ET PRONONCE CE QUI SUIT:

La Partie défenderesse payera à la Partie demanderesse pour le compte des réclamations présentées par les ayants droit dans l'affaire du *C. H. White*, la somme de 32 444 dollars des Etats-Uhis d'Amérique, avec les intérêts de cette somme à 6 % par an depuis le 1er janvier 1893; jusqu'au jour du payement intégral.

FAIT à La Haye, le 29 novembre 1902.

T.-M.-C. ASSER

IV

AFFAIRE DU *Kate and Anna*

Saisie, sur la haute mer, du schooner américain *Kate and Anna* par un croiseur russe — Réclamation du Gouvernement des Etats-Unis pour le compte de ses ressortissants lésés — Fixation du montant de l'indemnité à payer à la Partie demanderesse par la Partie défenderesse, celle-ci s'étant reconnue obligée de verser une indemnité pour les pertes réelles causées par la saisie du navire américain.

Seizure, on the high seas, of the American schooner *Kate and Anna* by the Russian cruiser *Zabiaca* — Claim of the Government of the United States of America on behalf of its injured nationals — Determination of the amount of damages to be paid to the Plaintiff by the Defendant, the latter being declared responsible for the seizure of the American vessel.

LE SOUSSIGNÉ, Tobie-Michel-Charles ASSER, Membre du Conseil d'Etat des Pays-Bas, exerçant les fonctions d'Arbitre, qu'il a eu l'honneur de se voir conférer par le Gouvernement des Etats-Unis d'Amérique et par le Gouvernement Impérial de Russie, pour juger le différend relatif à l'affaire du navire *Kate and Anna;*

ATTENDU qu'en vertu des Déclarations échangées entre les deux Gouvernements précités à Saint-Pétersbourg le 26 août/8 septembre 1900, l'Arbitre doit prendre connaissance des réclamations d'indemnité pour l'arrêt ou la saisie de certains navires américains par des croiseurs russes, présentées au Gouverne-

ment Impérial de Russie par le Gouvernement des Etats-Unis d'Amérique, au nom des ayants droit;

Que d'après ces Déclarations l'Arbitre, en se réglant dans sa Sentence sur les principes généraux du droit des gens et sur l'esprit des accords internationaux applicables à la matière, doit décider à l'égard de chaque réclamation formulée à la charge du Gouvernement Impérial de Russie, si elle est bien fondée et, dans l'affirmative, si les faits, sur lesquels elle est basée, sont prouvés;

Qu'ensuite il a été reconnu que cette stipulation n'aura aucune force rétroactive et que l'Arbitre appliquera aux cas en litige les principes du droit des gens et les Traités internationaux qui étaient en vigueur et obligatoires pour les Parties impliquées dans ce litige, au moment où la saisie des navires a eu lieu;

Qu'enfin l'Arbitre doit éventuellement fixer la somme de l'indemnité qui serait due par le Gouvernement Russe pour le compte des réclamations présentées par les ayants droit;

ATTENDU qu'après un examen minutieux des Mémorandums et contre-Mémorandums échangés entre les Hautes Parties, ainsi que de toutes les pièces produites de part et d'autre, l'Arbitre, profitant de la faculté qui lui avait été accordée par lesdites Déclarations de Saint-Pétersbourg, a invité les deux Gouvernements à désigner des experts commerciaux pour l'aider à fixer le montant de l'indemnité qui serait éventuellement due et, qu'en s'adressant à cet effet aux deux Hautes Parties, l'Arbitre les a en même temps priées de lui fournir des renseignements supplémentaires à l'égard des points de droit, indiqués par lui;

ATTENDU que dans les séances tenues par l'Arbitre à La Haye, dans l'Hôtel de la Cour Permanente d'Arbitrage, depuis le 27 juin jusqu'au 4 juillet 1902, il a entendu les dépositions des experts en présence des Agents des deux Hautes Parties, qui à cette occasion ont fourni les renseignements supplémentaires demandés par l'Arbitre;

ATTENDU qu'à l'appui de la réclamation relative au schooner *Kate and Anna* et à la confiscation des peaux de phoques, trouvées à bord de ce navire, la Partie demanderesse a allégué les faits suivants:

Le 12 août 1892, lorsque ledit schooner, qui avait pour capitaine Claus Lutjens, se trouvait sur la haute mer en dehors de la juridiction et des eaux territoriales de toutes nations, et à une distance de plus de 30 milles de la terre russe la plus proche, et tandis qu'aucun membre de l'équipage ne chassait, ou ne pêchait, ledit schooner ayant été contraint par un croiseur de la marine russe le *Zabiaca* de mettre en panne, fut abordé par le *Zabiaca* dont le commandant ordonna au capitaine Lutjens de venir à bord du croiseur et d'apporter avec lui tous les documents du schooner, ce qui fut fait par le capitaine Lutjens, qui délivra tous ses documents au commandant du croiseur russe. Celui-ci ordonna ensuite que les 124 peaux de phoques qui se trouvaient à bord du schooner lui fussent délivrées et il les déclara confisquées, le capitaine du schooner étant présumé s'être livré à la chasse aux phoques dans les eaux territoriales russes. Le capitaine Lutjens, renvoyé à son navire, qu'on laissa libre de continuer sa marche, résolut de cesser la chasse aux phoques et de se rendre immédiatement à San Francisco. Le commandant du croiseur russe, avant de laisser partir le capitaine du schooner, lui avait donné un avertissement, par lequel, d'après le capitaine Lutjens, on lui ordonna de cesser la chasse aux phoques et de rentrer chez lui, tandis que, d'après la Partie défenderesse, l'avertissement ne contenait que la défence de chasser dans les eaux territoriales russes;

ATTENDU que la Partie défenderesse a reconnu que, bien que dans les conditions où a été rencontré le schooner *Kate and Anna* et après la vérification de ses papiers de bord, le commandant du croiseur russe ait eu des raisons sérieuses

de considérer le bâtiment américain comme très suspect et même de conclure qu'une partie au moins du produit de sa chasse avait été obtenue d'une manière illicite dans les eaux territoriales de la Russie, cependant la mise en liberté du bâtiment lui-même, après la saisie du chargement qui le rendit suspect, témoigne d'un manque de conséquence dans les décisions du croiseur, à expliquer en partie par l'absence de preuves positives de la culpabilité du capitaine Lutjens; et par conséquent la Partie défenderesse, conformément à son désir de maintenir en toute occasion ses relations amicales avec le Gouvernement américain, s'est déclarée prête à se reconnaître obligée de donner une indemnité pour les pertes réelles qui ont été causées par le fait regrettable relatif au schooner *Kate and Anna;*

ATTENDU toutefois que la Partie défenderesse soutient que le montant des dommages-intérêts qu'on est en droit de réclamer ne s'élève qu'au montant de $ 1 240 (pour les 124 peaux de phoques à $ 10), avec les intérêts à 6 % par an depuis le 12 août 1892;

CONSIDÉRANT que la Partie demanderesse prétend qu'elle est en droit de réclamer, non seulement le montant du prix des 124 peaux de phoques illégalement confisquées, mais également la perte de prise probable de 625 peaux, en se basant sur ce fait qu'après que le schooner *Kate and Anna* avait été arrêté, le capitaine a résolu de ne pas continuer la chasse mais de retourner immédiatement à San Francisco et que cette résolution aurait été la conséquence de l'avertissement que le commandant du croiseur russe lui avait donné;

CONSIDÉRANT que, quelle qu'ait été la teneur de cet avertissement, il ne pouvait avoir pour effet d'empêcher le capitaine du schooner *Kate and Anna* de continuer la chasse aux phoques et que, par conséquent, si ledit capitaine a néanmoins résolu de retourner directement à San Francisco, la Partie défenderesse n'est pas responsable de la perte de gain qui en est résultée pour le schooner;

CONSIDÉRANT, par rapport à l'indemnité due pour la confiscation des 124 peaux de phoques, que la Partie demanderesse réclame $ 14 par peau, que la Partie défenderesse offre $ 10 par peau, mais qu'il est juste de fixer l'indemnité à $ 12 par peau, soit $ 1 488 pour les 124 peaux;

PAR CES MOTIFS,

L'ARBITRE DÉCIDE ET PRONONCE CE QUI SUIT:

La Partie défenderesse payera à la Partie demanderesse, pour le compte des réclamations présentées par les ayants droit dans l'affaire du *Kate and Anna,* la somme de 1 488 dollars des Etats-Unis d'Amérique, avec les intérêts de cette somme à 6 % par an, depuis le 12 août 1892 jusqu'au jour du payement intégral.

FAIT à La Haye, le 29 novembre 1902.

T.-M.-C. ASSER

AFFAIRE RELATIVE A L'INTERPRÉTATION DE L'ARTICLE 18 [1] DU TRAITÉ D'AMITIÉ ET DE COMMERCE CONCLU ENTRE L'ITALIE ET LE PÉROU LE 23 DÉCEMBRE 1874

PARTIES: Italie, Pérou.

COMPROMIS: Compromis d'arbitrage du 22 novembre, 1900.

ARBITRE: Winkler, Président du Tribunal Fédéral Suisse.

SENTENCE: 19 septembre, 1903.

La juridiction compétente en matière de contrats — Exécution des jugements étrangers — Droit applicable en matière d'appréciation de la compétence du juge qui a rendu le jugement — Droit applicable aux obligations conventionnelles — L'ordre public de l'Etat ou son droit public.

[1] Le texte complet du compromis et celui de l'article 18 du traité du 23 décembre 1874 étant cités dans le corps même de la sentence, il n'a pas été jugé utile de les reproduire séparément sous une rubrique spéciale.

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A. M. Stuyt, *Survey of International Arbitrations, 1794-1938*, The Hague, 1939, p. 249.

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Baron Descamps et Louis Renault, *Recueil international des traités du XX^e^ siècle*, année 1903, p. 340 [texte français du compromis, de l'article 18 du 23 décembre 1874 et de la sentence].

SENTENCE ARBITRALE DE M. WINKLER, CONCERNANT L'INTERPRÉTATION DE L'ARTICLE 18 DU TRAITÉ D'AMITIÉ ET DE COMMERCE CONCLU ENTRE L'ITALIE ET LE PÉROU LE 23 DÉCEMBRE 1874, RENDUE A BERNE LE 19 SEPTEMBRE 1903 [1]

The competent jurisdiction in matters of contract — Execution of foreign judgments — The law applicable to determine the competence of the judge giving the judgment — The law applicable to contractual obligations. Public policy (*ordre public*) and the public law of the State.

I. — Exposé sommaire des faits

A

Les faits qui ont donné lieu au présent Arbitrage sont en résumé les suivants:

En 1881, Constantin Anselmo, à Savone, avait ouvert un crédit en compte courant à la Société en nom collectif G. B. Anselmo et Cie, à Lima, qui se composait, d'Augustin-Frédéric Ferraro et de Jean-Baptiste (Giovanni Battista) Anselmo, fils du prénommé Constantin Anselmo; c'est ce qui a été constaté par les Tribunaux italiens qui ont statué en la cause, et d'ailleurs ce n'est pas dénié.

Constantin Anselmo mourut en 1891. Plus tard, soit le 1er mars 1892, la maison A.-F. Ferraro et Cie, à Lima, fit savoir par circulaire que la Société G.-B. Anselmo et Cie s'était dissoute, que J.-B. Anselmo se retirait des affaires et qu'une nouvelle Société s'était fondée, qui avait comme chef A.-F. Ferrato et pour commanditaire Etienne Ferrando, à Callas, et qui, sous la raison sociale A.-F. Ferraro et Cie, à Lima, continuait les opérations de l'ancienne Société G.-B. Anselmo et Cie, dont elle avait repris l'actif et le passif. — Comme l'a établi, dan ses 8e et 9e considérants, l'arrêt de la Cour supérieure de Lima, dont il sera question ci-après, la Société A.-F. Ferraro et Cie a été inscrite au registre du commerce de Lima le 21 juin 1892, tandis que la maison G.-B. Anselmo et Cie ne fut dissoute par acte notarié et ne fut radiée qu'à la date du 13 février 1894.

Les frères Anselmo, soit Dominique-Ernest (représenté par la masse de sa faillite) et Silvio (pour lequel, après son décès, agirent ses hoirs), en leur qualité d'enfants et d'héritiers de Constantin Anselmo, intentèrent, au mois de mars 1892, une action en payement de leurs parts respectives dans le solde dû à leur père défunt en vertu du compte courant susmentionné, contre A.-F. Ferraro, comme représentant de la Société A.-F. Ferraro et Cie et associé de l'ancienne maison G.-B. Anselmo, de même contre J.-B. Anselmo, comme associé de cette maison, lequel fut, en outre, l'objet d'une autre réclamation personnelle de la part des demandeurs prénommés. C'est le Tribunal de Savone qui fut saisi de l'affaire.

[1] Descamps-Renault, *Recueil international des traités du XXe siècle*, année 1903, p. 340.

L'assignation fut notifiée personnellement à Ferraro le 10 mars 1892, et à Anselmo le 15 du même mois, dans les villes de Gênes et de Savone, où les défendeurs séjournaient alors.

Ferraro et Anselmo déclinèrent, par voie d'exception, la compétence du juge saisi, alléguant que l'ancienne et la nouvelle Société avaient été constituées à Lima, qu'elles y avaient leur domicile, qu'eux-mêmes, les défendeurs, étaient domiciliés personnellement dans cette ville, que, dès lors, ils ne pouvaient être actionnés qu'à Lima.

Le Tribunal de Savone rejeta cette exception d'incompétence par son jugement du 24 octobre 1892, qui fut confirmé par arrêt de la Cour d'appel de Gênes, en date du 22 juillet 1893. Ces décisions sont fondées, à l'égard d'Anselmo, sur le fait de son domicile, qu'il n'avait pas cessé d'avoir à Savone, son lieu d'origine, et qu'il avait d'ailleurs élu en cette ville, et, à l'égard de Ferraro, sur les dispositions des Articles 105 et 106 du Code de procédure civile italien, Ferraro, qui est étranger, ayant pu être atteint par la citation sur le territoire du Royaume d'Italie. Mais les autorités judiciaires susdésignées ont invoqué, en ce qui concerne les deux défendeurs, principalement l'Article 91 dudit Code, qui admet pour les actions personnelles, à côté du for du domicile du défendeur, celui de la formation du contrat ou celui de l'exécution de l'obligation. La Cour d'appel de Gênes, en particulier, a reconnu que les faits d'où est résulté le litige avaient pris naissance à Savone, que c'était là que Constantin Anselmo avait ouvert le crédit en compte courant à la raison sociale G.-B. Anselmo et Cie, que c'était là que les traités avaient été négociés, les marchandises livrées et les payements effectués, que, par conséquent, le Tribunal de Savone était compétent aux termes de l'Article 91 précité.

Le déclinatoire vidé, la procédure au fond suivit son cours et, après examen des preuves écrites, notamment des livres de C. Anselmo par un Arbitre-Conciliateur, elle aboutit à un jugement du Tribunal de Savone, en date du 22 avril 1896, qui condamna les défendeurs solidairement à payer à chacun des trois demandeurs la somme de 24.758 lires et 20 cent., avec l'intérêt aut aux du commerce dès le 1er janvier 1895; Jean-Baptiste Anselmo fut, en outre, condamné personnellement à payer à chaque demandeur le montant de 6.715 lires et 10 cent., dont à déduire 4.515 lires, également avec l'intérêt au taux du commerce dès le 1er janvier 1895. Les frais du procès furent mis à la charge des défendeurs.

La Cour d'appel de Gênes a confirmé purement et simplement le premier jugement, par arrêt du 17 août 1896.

Il est à remarquer que les demandeurs comme les défendeurs ont été représentés par des avocats de leur choix, aussi bien pour l'incident relatif au déclinatoire que dans la procédure au fond.

B

A la date du 8 mars 1897, Dominique Anselmo présente à la Cour supérieure de Lima une requête tendant à faire déclarer exécutoire l'arrêt de la Cour d'appel de Gênes, du 17 août 1896. A.-F. Ferraro s'opposa à cette demande tant en son nom personnel que pour la Société A.-F. Ferraro et Cie (J.-B. Anselmo paraît bien avoir reçu communication de la requête, mais il ne semble pas y avoir répondu). Or, par arrêt du 9 août 1897, la Cour de Lima a refusé l'exequatur demandé; mais le dispositif de cet arrêt ne concerne que A.-F. Ferraro, personnellement et en sa qualité de représentant de ladite Société: il ne fait pas mention de J.-B. Anselmo. Le refus de l'exequatur est motivé par la considération que, en vertu de la règle qui consacre le for du domicile et qui est en vigueur au Pérou, les Tribunaux de ce Pays étaient compétents pour connaître de l'action des frères Anselmo tandis que les Tribunaux italiens

ne l'auraient pas été; que d'ailleurs, en cas de doute, il faudrait plutôt admettre la compétence des juges péruviens.

L'exposé qui précède sous les lettres A et B, tout en étant un peu plus circonstancié que celui des Mémoires des Parties, concorde cependant avec leurs allégués essentiels.

C

A la suite de l'intervention du Gouvernement Italien en faveur des frères Anselmo déboutés de leur demande d'exécution, il a été passé entre ce Gouvernement et celui de la République du Pérou un Compromis, rédigé en italien et en espagnol, et dont la traduction en langue française a la teneur suivante:

« COMPROMIS

« Le Gouvernement de S. M. le Roi d'Italie et le Gouvernement de la République du Pérou, désirant mettre fin amiablement au différend qui a surgi entre eux au sujet de l'interprétation de l'Article 18 du Traité d'amitié et de commerce, en date du 23 décembre 1874, [1] en vigueur entre les deux Pays, ont résolu d'un commun accord de faire trancher cette contestation par un Arbitrage international; à cet effet, les Soussignés, au nom de leurs Gouvernements respectifs, sont convenus de ce qui suit:

« ARTICLE PREMIER — Les Hautes Parties Contractantes s'obligent à soumettre au jugement d'un Arbitre la question litigieuse de savoir: « si, aux termes du Traité du 23 décembre 1874 conclu entre l'Italie et le Pérou, les Autorités judiciaires respectives des deux Pays peuvent refuser l'exequatur aux sentences prononcées par une Autorité judiciaire compétente suivant les lois de l'Etat où le jugement a été rendu, lorsqu'il se présente que, d'après les lois de l'Etat où l'exequatur est demandé, les Autorités judiciaires de ce même Etat seraient compétentes pour connaître de la cause ».

« ARTICLE 2. — Les Hautes Parties Contractantes prieront, dans le délai de trois mois à partir de la signature du présent acte, le Président de la Confédération Helvétique de désigner la personne qui remplira les fonctions d'Arbitre. Cette personne ne sera ressortissante d'aucun des deux Etats et ne pourra être domiciliée ou résider sur leurs territoires, ni avoir un intérêt personnel quelconque dans la question qui doit faire l'objet du jugement arbitral.

« Si, pour un motif quelconque, l'Arbitre ne pouvait accepter ou remplir la mission à laquelle il a été appelé, il sera pourvu à son remplacement d'après le mode de procéder suivi pour le faire nommer.

« ARTICLE 3. — Les Parties s'engagent à présenter à l'Arbitre, dans les six mois de sa nomination, chacune un Mémoire exposant la question comme elle l'entend. Les Mémoires produits seront communiqués par l'Arbitre respectivement aux Parties, et après la Réplique qui sera faite par chacune d'elles dans les quatre mois de la communication des premiers Mémoires, l'Arbitre pourra rendre sa Sentence; il lui sera toutefois loisible, s'il le juge opportun, de requérir de nouvelles explications et des informations complémentaires, et il résoudra toute difficulté qui pourrait se présenter dans l'accomplissement de sa mission.

« Les Parties s'obligent à mettre à sa disposition tous les moyens d'instruction qui dépendent d'elles. Elles pourront désigner un mandataire qui les représentera pour tout ce qui concerne le jugement arbitral.

[1] Pour ce texte, voir de Martens, *Nouveau Recueil général de traités*, 2e série, t. VI, p. 660.

« On se servira de la langue française pour les actes relatifs à la procédure arbitrale.

« ARTICLE 4. — La Sentence sera rédigée en deux originaux et sera notifiée à chacune des Parties, soit directement, soit par l'intermédiaire des Représentants dont il est question à l'Article 3.

« ARTICLE 5. — La Sentence tranchera sans appel la contestation divisant les Parties, qui renoncent à toute exception de nullité, ainsi qu'à toute demande de revision pour quelle cause que ce soit.

« ARTICLE 6. — Chaque Partie supportera ses propres frais et la moitié des frais généraux du jugement.

« En foi de quoi les Soussignés, l'un, Envoyé Extraordinaire et Ministre Plénipotentiaire de S. M. le Roi d'Italie, et l'autre, Ministre des Affaires Etrangères du Pérou, ont signé le présent Compromis dressé en deux originaux, à Lima, le vingt-deux du mois de novembre de l'an mil neuf cent.

« G. PIRRONE »

« Felipe DE PENA »

D

Le Président de la Confédération, à cette époque M. Brenner, prié par les Hauts Gouvernements Italien et Péruvien de nommer un Arbitre et autorisé à cet effet par Arrêté du Conseil Fédéral en date du 7 mai 1901, a procédé à cette nomination le 20 du même mois, en désignant comme Arbitre le Soussigné, alors Président du Tribunal Fédéral Suisse.

Dans le courant de février 1902, soit dans le premier délai prolongé de trois mois par l'Arbitre sur le désir qui lui en avait été exprimé, les deux Hauts Gouvernements intéressés, agissant par leurs Envoyés Extraordinaires et Ministres Plénipotentiaires en Suisse, ont présenté leurs premiers Mémoires; puis, avant la fin de juin même année, ils ont produit leurs Répliques.

Par décision du 9 février 1903, qu'il était autorisé à prendre en vertu de l'Article 3 du Compromis, l'Arbitre a accordé aux Parties la faculté de présenter une seconde Réplique. M. le Représentant du Gouvernement Italien a, en conséquence, fourni un deuxième Mémoire de Réplique à la date du 26 juin 1903, tandis que M. le Représentant du Gouvernement péruvien a, par missive, du même jour, déclaré pouvoir renoncer à la production d'un pareil Mémoire, renvoyant toutefois à certains passages indiqués d'une étude de M. le Professeur Melli, intitulée: *Reflexionen über die Exekution auswartiger Zivilurteile*, Zurich, 1902.

Au cours de la procédure, les actes ci-après ont été produits:

Par M. le Représentant du Pérou:

1° L'arrêt de la Cour supérieure *(Corte superior)* de Lima, en date du 9 août 1897, refusant l'exequatur sollicité, et

2° Un volume renfermant le Code de procédure civile péruvien.

Par M. le Représentant de l'Italie (sur la demande de l'Arbitre)

1° Le jugement du Tribunal de Savone, du 24 octobre 1892;

2° L'arrêt de la Cour d'appel de Gênes, du 22 juillet 1893;

3° Le jugement du Tribunal de Savone, du 22 avril 1896, et

4° L'arrêt de la Cour d'appel de Gênes, du 17 août 1896.

E

Quant au Traité d'amitié et de commerce, en date du 23 décembre 1874, les Parties ont répondu, à une question de l'Arbitre concernant la teneur de

cet acte diplomatique, qu'elles reconnaissaient comme exact le texte reproduit dans le *Nouveau Recueil général de traités et autres actes relatifs au droit international* (2e série, t. VI, p. 660 à 665), du moins en tant qu'il s'agissait des passages qui ont de l'importance en la cause.

Ledit Traité figure dans le Nouveau Recueil général en langue italienne, et son Article 18, traduit en français, a la teneur suivante:

« *Article 18.* — Les sentences et ordonnances en matière civile et commerciale, émanées des Tribunaux d'une des Parties Contractantes, qui sont dûment légalisées, auront, à la requête de ces mêmes Tribunaux, dans les Etats de l'autre Partie, la même force que celles émanées des Tribunaux locaux; elles seront exécutées réciproquement et produiront les mêmes effets hypothécaires sur les biens susceptibles d'être hypothéqués d'après les lois du Pays; seront observées les dispositions de ces mêmes lois en ce qui concerne l'inscription et les autres formalités.

« Pour que ces sentences et ordonnances puissent être exécutées, elles devront préalablement être déclarées exécutoires par le Tribunal supérieur du ressort ou territoire où doit avoir lieu l'exécution, lequel rendra le jugement d'exécution, les Parties sommairement entendues et après avoir examiné:

« 1° Si la sentence a été prononcée par une Autorité judiciaire compétente;

« 2° Si la sentence a été prononcée, les Parties ayant été régulièrement citées;

« 3° Si les Parties ont été légalement représentées, ou défaillantes aux termes de la loi;

« 4° Si la sentence contient des dispositions contraires à l'ordre public de l'Etat ou à son droit public.

« La force exécutoire de la sentence pourra être requise par voie diplomatique ou directement par la Partie intéressée. Si la Partie intéressée n'a pas constitué en temps utile un fondé de pouvoir, il en sera nommé un d'office par le Tribunal qui doit statuer sur la demande d'exécution.

« La Partie requérante devra payer au fondé de pouvoir nommé d'office tous ses frais et honoraires légalement dus. »

F

Dans ses Mémoires, M. le Représentant du Pérou raisonne en substance comme suit: — La compétence dont parle l'Article 18, 1er alinéa, du Traité de 1874 doit être appréciée « dans la sphère internationale », et, dès lors, quand l'exécution d'un jugement rendu dans l'un des Etats Contractants est demandée dans l'autre, les Autorités requises ont à examiner si, en principe, un droit de juridiction compétait à l'Etat où le jugement a été prononcé. Pour que l'exécution d'une sentence étrangère soit possible, il faut que le Tribunal qui l'a rendue ait été compétent aussi d'après la loi de l'Etat requis (double compétence). En l'espèce l'Italie n'avait aucune juridiction, attendu que le Code de procédure civile péruvien consacre, en ses Articles 116 et 118, la règle du for du domicile, et qu'en tout cas un droit quelconque de juridiction faisait défaut à l'Italie à l'égard de la Société A.-F. Ferraro et Cie, soit à l'égard de A.-F. Ferraro personnellement. La question de savoir si le juge dont émane la sentence était compétent à teneur de *sa* propre loi pourrait à la rigueur rester irrésolue, le juge requis n'ayant pas d'intérêt à connaître de quelle manière le juge qui a rendu la sentence comprend et interprète les dispositions de la loi de son pays sur la compétence.[1] Quand le Traité est muet, il faut, en cas de doute, admettre

[1] Cependant, à la page 27, le premier Mémoire péruvien discute et conteste la compétence des tribunaux italiens d'après la loi de l'Italie.

pour chacun des Contractants l'obligation la moins étendue, surtout s'il s'agit de renonciation à des droits de souveraineté.

Les Mémoires de l'Italie soutiennent la thèse que, d'après le sens de l'Article 18 du Traité, le juge saisi de la demande d'exécution doit, pour examiner la compétence de l'Autorité judiciaire dont émane le jugement, prendre en considération uniquement la loi de l'Etat auquel cette Autorité appartient; que, dans le cas particulier, les Tribunaux qui ont statué sur l'action des frères Anselmo étaient indubitablement compétents au regard de la législation italienne; qu'en conséquence, leur jugement doit recevoir son exécution à Lima, d'autant plus que (comme il est allégué dans la première Réplique) le Code de procédure civile péruvien, à l'Article 132, admet le for du contrat.

Dans son premier Mémoire, M. le Représentant de l'Italie avait cru devoir traiter la question litigieuse comme elle est posée dans le Compromis même, c'est-à-dire seulement d'une manière abstraite et sans avoir aucun égard au procès Anselmo-Ferraro. Mais, le premier Mémoire du Pérou ayant relaté les faits principaux de cette affaire, M. le Représentant de l'Italie a suivi cet exemple dans sa première Réplique, et il a déclaré dans sa seconde Réplique que, en ce qui concernait le rapport pouvant exister entre le procès qui avait donné lieu à l'Arbitrage et la Sentence Arbitrale à rendre, il appartenait à l'Arbitre d'interpréter le Compromis pour déterminer l'étendue de sa juridiction et les limites de son jugement.

Les Parties reconnaissent dans leurs exposés que le Traité ne définit pas la compétence exigée à l'Article 18, et que les documents des deux Etats concernant ladite Convention ne fournissent aucune indication interprétative sur ce point. C'est pourquoi leurs arguments sont tirés de la doctrine, de la législation et de la jurisprudence de différents Pays, dont les Mémoires font d'abondantes citations, en les commentant longuement. Il ne paraît guère possible, ni nécessaire, de reproduire ici ces citations et commentaires, dont certains points cependant seront relevés dans les considérants qui suivent.

II. — Discussion de droit

A. — *En général*

1. Dans la *doctrine*, la compétence du juge étranger dont émane la sentence est envisagée comme la première et la plus importante des conditions sous lesquelles cette sentence peut être reconnue et exécutée. C'est ainsi que s'exprime, par exemple, la publication la plus récente sur la matière, soit l'étude de von Bar sur le Droit international privé, qui a paru dans l'*Encyclopédie du Droit (Encyklopaedie der Rechtswissenschaft)* de Holtzendorff, refondue et éditée par Kohler (1903, 8e et 9e livraisons) et qui précise encore cette « compétence du juge étranger » en la définissant: « la juridiction, en principe, du pouvoir judiciaire de l'Etat étranger » (« Die Zustaendigkeit des auswartigen States ueberhaupt »). Au point de vue doctrinal, von Bar, sans bien entendu rejeter la compétence volontairement acceptée, pose comme règle, « qu'il faut reconnaître compétents les Tribunaux de l'Etat dont la loi régit au fond le rapport de droit faisant l'objet direct du litige » (voir p. 42). Cette manière de voir avait déjà été consacrée en principe par les résolutions de l'Institut de Droit international reproduites dans la Réplique du Pérou (p. 26). Quant à savoir quelle loi est applicable au fond, dans une espèce donnée, il faut, selon von Bar (p. 10), rechercher le but législatif qu'implique la règle de droit qui concerne le cas et voir si ce but exige l'application de la loi nationale ou d'une disposition de la loi étrangère. « On n'admettra pas facilement, ajoute cet auteur, que le législateur a voulu soumettre les intéressés à une loi dont ils n'auraient en aucune

manière pu prévoir l'application ». Ces propositions, qui concordent dans leur essence avec les idées déjà émises par von Bar dans son ouvrage: *Theorie und Praxis des internationalen Privatrechts* (2e éd., IIe vol., p. 427), se rattachent à la théorie de Savigny, suivant laquelle il faut chercher, à propos de chaque fait juridique, quelle loi le régit à raison de sa nature même.

Conforme à cette manière de voir est aussi la proposition de Roguin relative au droit international des obligations et citée par Meili dans son ouvrage: *Das internationale Zivil und Handelsrecht* (vol. II, p. 22 et suiv.); en effet, l'Article 5 de cette proposition porte textuellement:

> « Dans la mesure où il n'est en contradiction avec aucune disposition impérative, ni prohibitive, le fond du contrat est soumis à la loi choisie expressément ou implicitement par les Contractants.
>
> « Si les Contractants n'ont en aucune façon montré quelle était leur volonté à cet égard, le juge, examinant toutes les circonstances de l'espèce, recherchera à quelle législation ils se seraient le plus probablement référés, si leur attention s'était portée sur ce point.
>
> « Le juge examinera, entre autres, quel a été le lieu de la conclusion du contrat, et quel est celui de son exécution. »

En ce qui touche spécialement le droit applicable aux obligations conventionnelles, von Bar (p. 27) relève que, suivant l'opinion encore dominante en principe dans les Pays autres que l'Allemagne, où elle est plus ou moins abandonnée, c'est la loi du lieu où le contrat s'est formé qui est déterminante, tandis qu'en Allemagne on applique, depuis Savigny, plutôt la loi du lieu de l'exécution, qui est admise notamment par le Tribunal de l'Empire. Personnellement, von Bar se prononce pour le système qui se base essentiellement sur la loi du domicile du débiteur, tout en reconnaissant qu'il peut comporter de nombreuses et d'importantes exceptions; « c'est ainsi, explique cet auteur, que maintes dispositions du Droit commercial reposent sur des considérations d'ordre purement local; dans ce cas, il ne faut pas soumettre à la loi du domicile des affaires conclues à l'étranger et qui doivent se réaliser ailleurs: en outre, la bonne foi, si importante dans les relations du commerce international, peut exiger pour des actes juridiques qui s'accomplissent seulement à l'étranger l'application d'une autre loi que celle du domicile du débiteur, etc. ».

Pour ce qui a trait aux rapports contractuels qui ont existé entre Anselmo et Ferraro, il faut considérer Savone, en Italie, comme ayant été le lieu de la formation du contrat et celui de l'exécution. C'est ce que les Tribunaux italiens ont établi et c'est d'ailleurs conforme à la nature des choses.

La maison G.-B. Anselmo et Cie fut en effet fondée à Lima, en 1881, et, dans le courant de la même année, elle s'était fait ouvrir un compte courant à Savone, ce qui n'a jamais été contesté. Jean-Baptiste Anselmo, avant de se rendre de Savone à Lima, en tout cas alors qu'il se trouvait à Savone, aurait obtenu de son père Constantin son consentement à l'ouverture du crédit. C'est la seule hypothèse naturelle et rien ne fait supposer le contraire. Les payements, surtout le règlement des effets de change, devaient s'effectuer à Savone, d'après la nature des relations qui existaient entre les Parties. Bien plus, J.-B. Anselmo, par lettre écrite de Nice, le 19 janvier 1890, a donné à son père l'assurance formelle d'aller à Savone afin de tout régler avant son prochain départ pour Lima. En outre, les opérations se faisaient en monnaie italienne, en lires. La réclamation des frères Anselmo parle de lires, de même le jugement, et, ainsi qu'il appert des actes, les défendeurs n'ont jamais objecté qu'il fallait compter en une autre monnaie qu'en lires. Enfin, il conviendrait de rappeler que le Compromis, à en juger par ses termes mêmes, présuppose que les Tribunaux italiens étaient compétents au regard de la législation

de l'Italie; or, ces Tribunaux ayant fondé leur compétence essentiellement sur l'Article 91 du Code de procédure civile italien, qui consacre le for du contrat et de l'exécution, on pourrait admettre que, par les termes du Compromis, il a été indirectement reconnu que le juge italien était en réalité compétent, d'après la loi italienne, comme juge du for du contrat et de l'exécution. — Le Pérou ne critique que d'une façon peu claire et peu précise l'opinion que le lieu de la formation du contrat a été en Italie (voir premier Mémoire, p. 27-28), et l'argumentation qui est à la base de son système dans le différend actuel tend surtout à démontrer que le for du contrat et de l'exécution ne saurait, dans l'affaire internationale dont il s'agit, prévaloir contre le for péruvien du domicile.

Il n'est pas douteux que les Parties elles-mêmes (Anselmo et Ferraro) ont envisagé le Droit italien comme régissant leur contrat, ou, du moins, qu'elles se seraient prononcées pour le Droit italien si leur attention avait été appelée sur la question de savoir à quelle loi elles entendaient se soumettre. Et, si les débiteurs avaient, au cours de leurs relations avec le créancier, exigé l'application du Droit péruvien, au lieu du Droit italien, aux rapports créés par le compte courant, cette prétention aurait été peu compatible avec la bonne foi qui, suivant von Bar, doit jouer un rôle si important dans les relations du commerce international, comme d'ailleurs, dirons-nous, dans toutes les autres affaires.

Des développements qui précèdent, il résulte, pour le moins, que, d'après les principes généraux consacrés par la doctrine et la jurisprudence, il existe de très sérieux motifs pour admettre, en l'espèce, plutôt la compétence des Tribunaux italiens, attendu que, ainsi que l'explique von Bar, la compétence la plus naturelle est celle des Tribunaux de l'Etat dont la loi régit au fond le rapport de droit en litige, et cet Etat était *in casu* l'Italie.

2. Les *dispositions légales* ou coutumières qui régissent actuellement dans les divers Etats l'exécution des jugements étrangers offrent un tableau extrêmement varié. Plusieurs Etats accordent aux jugements étrangers, moyennant certaines conditions de forme, la même force exécutoire qu'aux sentences émanées des juges nationaux; p. ex., l'Italie, en vertu de l'Article 941 de son Code de procédure civile, combiné avec l'Article 10 du titre préliminaire de son Code civil. D'autres Pays exigent comme principale condition de l'exequatur la réciprocité; ainsi, l'Empire Allemand, à l'Article 328, § 5, de son Code de procédure civile, dont le même Article, sous § 1, requiert, en outre, que le Tribunal étranger soit aussi compétent d'après les lois allemandes. Dans d'autres Pays encore, l'exécution, en l'absence de Conventions internationales, est refusée en principe aux jugements étrangers, qui cependant y sont reconnus comme titres publics; ce serait le cas du Pérou (comp. Wach, *Handbuch des Zivilprozessrechts*, p. 244, et Meili, *Reflexionen über die Exekution auswaertiger Zivilurteile*, p. 26; cette dernière étude, aux pages 21 à 32, donne en outre un aperçu des systèmes en vigueur dans les divers Etats).

Pour le cas qui nous occupe, il convient de faire remarquer l'Article 941 du Code de procédure civile italien, qui a la même teneur que l'Article 18 du Traité conclu entre l'Italie et le Pérou; en effet, sous n° 1, il exige aussi que le jugement étranger ait été rendu par une Autorité judiciaire compétente *(da una Autorita giudiziaria competente)*, sans indiquer, toutefois, d'après quelles règles il faut déterminer cette compétence. Dans les Mémoires du Pérou, il est allégué à cet égard que les Tribunaux italiens ont toujours refusé l'exécution aux jugements étrangers lorsque la compétence du juge dont émanait la sentence n'était pas fondée suivant la loi *italienne*; que cette jurisprudence est d'ailleurs conforme à l'opinion de la grande majorité des auteurs italiens, dont un seul (Mattirolo) adopterait l'avis contraire; que dès lors, si l'Italie, invoquant

une disposition légale semblable à celle de l'Article 18 du Traité, requiert comme condition de l'exequatur la compétence d'après son propre droit, elle doit aussi reconnaître que cette condition est de règle dans ses rapports avec le Pérou.

A cette argumentation, les Mémoires de l'Italie objectent que les décisions des Tribunaux italiens refusant l'exequatur concernent, une seule exceptée, des jugements rendus par des Tribunaux français en application de l'Article 14 du Code civil français (disposition dont il sera encore parlé plus bas), et que même de pareils jugements ont été déclarés exécutoires par quelques Tribunaux italiens. Le premier des cas allégués, soit celui indiquant à quels jugements étrangers l'Italie n'accorde généralement pas l'exequatur, n'est pas contesté par le Pérou, qui en a plutôt admis l'exactitude.

3. L'exécution des jugements civils étrangers a, dans une série d'Etats (parmi lesquels ne figurent ni l'Angleterre, ni l'Empire Allemand), fait l'objet de *Traités internationaux*, qui ont sur certains points modifié la législation interne de ces pays. Meili, dans son étude précitée (p. 32 à 38), donne un aperçu de ces Conventions. Il distingue:

a) Les Traités qui spécifient les fors, et parmi lesquels il faut mentionner la Convention de 1869 entre la France et la Suisse; [1]

b) Les Traités qui établissent au moins quelques fors (Convention de 1846 entre la France et le Grand-Duché de Bade); [2]

c) Les Traités qui, sans fixer de for, assurent cependant l'exécution des jugements.

A ce dernier groupe appartient le Traité de 1760, entre la France et la Sardaigne,[3] interpreté par la Déclaration passée entre la France et l'Italie en 1860,[4] ainsi que le Traité entre l'Italie et le Pérou, qui fait l'objet du litige actuel.

Ces trois catégories de Conventions prévoient une procédure à suivre pour obtenir l'exequatur, mais excluent toute revision du fond.

d) Le Traité de 1838, modifié en 1856, entre l'Autriche et le Grand-Duché de Bade,[5] qui n'établit aucun for et qui stipule que les jugements rendus dans l'un des Etats seront sans aucune condition exécutés dans l'autre.

e) Les Traités qui exigent uniquement la réciprocité.

Si, maintenant, on passe à l'interprétation du Traité conclu entre l'Italie et le Pérou, on arrive à la même conclusion que celle qui nous a paru se dégager de l'examen de la doctrine. En effet:

L'Article 18 de cette Convention stipule que les jugements civils des Tribunaux de l'un des Etats Contractants seront exécutés dans l'autre comme ceux qui ont été rendus par les juges nationaux. Le Tribunal saisi de la demande d'exécution ne doit examiner que quatre points, dont le premier est de savoir si le jugement émane d'une Autorité judiciaire compétente. D'après la loi de *quel* Etat faut-il que le Tribunal qui a prononcé le jugement ait été compétent? C'est sur cette question que porte essentiellement le différend. A ne considérer que le simple texte de l'Article 18, il ne semble pas qu'il puisse régner un doute

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[1] Pour ce texte du 15 juin 1869, voir de Clercq, *Recueil des traités de la France*, t. X, p. 289.

[2] Pour ce texte du 16 avril 1846, voir de Martens, *Nouveau Recueil général de traités*, t. IX, p. 125.

[3] Pour ce texte du 24 mars 1760, voir Dalloz, *Répertoire de législation et de jurisprudence*, V^e^ *Traité international*, t. XLII, 1^re^ partie, p. 512.

[4] Pour ce texte du 11 septembre - 15 novembre 1860, voir *Moniteur universel*, 16 novembre 1860; Dalloz, *op.* et *loc. cit.*, t. XLII, 1^re^ partie, p. 512, n^o^ 73.

[5] Voir Neumann et Plason, *Recueil des traités et conventions conclus par l'Autriche*, nouvelle suite, t. I, p. 126.

à cet égard. En lisant sous le nº 1 de cet Article que la sentence doit avoir été prononcée par une Autorité judiciaire compétente, personne, en effet, ne pensera à une autre compétence qu'à celle de cette Autorité telle qu'elle est déterminée par la législation qui fait règle pour ladite Autorité. C'est d'ailleurs ce que reconnaît le rédacteur lui-même du premier Mémoire péruvien lorsqu'il dit à la page 18: « Le silence de la loi sur la manière d'apprécier la compétence du Tribunal étranger paraîtrait indiquer qu'elle devrait être jugée en conformité avec (*lisez:* de) la loi du juge qui a rendu le jugement. » Effectivement, chaque Etat règle dans sa loi de procédure les compétences de ses propres Tribunaux, et, dès lors, quand surgit une question relative à la compétence d'un Tribunal, on ne saurait en chercher la solution dans la loi d'un Pays étranger. D'autre part, de même que la disposition sous nº 1 de l'Article précité, qui a trait à la compétence, celles sous nºs 2 et 3, qui ont pour objet l'assignation et la représentation du défendeur, concernent l'Autorité judiciaire dont émane la sentence et sont régies par la loi de cette Autorité. Ainsi, l'interprétation, aussi bien grammaticale que logique de l'Article 18, nº 1, du Traité, fait admettre que cette disposition exige que l'Autorité judiciaire soit compétente d'après *sa propre* loi.

4. Les Mémoires du Pérou ont, il est vrai, allégué que la doctrine avait reconnu, au sujet de l'exécution des jugements étrangers et des questions de compétence y relatives, qu'il fallait apprécier la compétence « dans la sphère internationale », c'est-à-dire que la compétence devait aussi exister au regard de la loi de l'Etat saisi de la demande d'exequatur (cf., p. ex., le premier Mémoire péruvien, p. 10). Mais il est évident qu'une pareille théorie, qui n'est d'ailleurs pas généralement partagée et qui est sujette à controverse, ne saurait l'emporter sur la règle d'un Traité international aussi positif que la Convention italo-péruvienne de 1874.[1]

La notion de la compétence, les termes de « tribunal compétent » sont généralement connus, et le sens en est certain. Or, ce n'est que la *compétence* qui est posée comme condition dans l'Article 18, nº 1, du Traité. Si l'on avait voulu exiger davantage, comme « la compétence dans la sphère internationale », etc., il aurait fallu le dire. C'est ce qu'ont fait le Code de procédure civile allemand (comme on l'a déjà relaté), la loi danoise et les anciennes lois du Grand-Duché de Bade et de la Hesse (voir premier Mémoire péruvien, p. 16), ainsi que le Traité de 1881 entre l'Autriche et la Serbie [2] (voir Réplique du Pérou, p. 6; ce dernier Traité n'est pas mentionné dans l'étude de Meili: *Reflexionen*, etc., voir p. 32 à 38), et, de même, le Traité conclu en 1889, à Montevideo, entre les Etats-Unis d'Amérique du Sud [3] (voir premier Mémoire péruvien). Mais rien de pareil n'est énoncé dans le Traité conclu entre l'Italie et le Pérou, et il n'est pas permis d'ajouter à son texte une semblable disposition, d'autant moins que la tendance fondamentale de cette Convention est de favoriser et non d'empêcher l'exécution des jugements de l'un des Etats dans l'autre. Il

[1] D'ailleurs, il est rare que les auteurs élèvent la prétention de traiter le droit créé par les conventions internationales; ils les réservent plutôt; ainsi, dans l'ouvrage de Holtzendorff sur le Droit international *(Handbuch des Volkerrechts)*, Lammasch dit à la page 413: « La question de savoir d'après quelles règles il faut examiner la compétence du Tribunal étranger dont le jugement doit être exécuté dans un autre Pays, appartient aux plus anciennes controverses du Droit international de procédure et rentre, dès lors, dans la catégorie des difficultés qu'il y a nécessité urgente de résoudre par la voie des Traités internationaux. »

[2] Pour ce texte du 6 mai 1881, voir de Martens, *Nouveau Recueil général de traités*, 2e série, t. VIII, p. 360.

[3] V. ce texte du 11 janvier 1889: de Martens, *Nouveau Recueil général de traités*, 2e série, t. XVIII, p. 414.

faudrait s'en tenir aux termes du Traité, même s'il était démontré qu'en application de l'Article 941, n° 1, du Code de procédure civile italien, dont la teneur est semblable à celle de cette Convention, les Tribunaux de l'Italie refusent d'ordinaire l'exécution dans les cas où le juge étranger n'était pas aussi compétent d'après le Droit italien; une telle jurisprudence ne serait, en effet, pas conforme à *la loi italienne*, et, d'ailleurs, ce ne sont point les Tribunaux qui ont conclu *le Traité*. Mais la preuve qu'une telle pratique serait suivie en Italie n'a pas été rapportée, comme on l'a vu plus haut, et, à en croire des auteurs considérables dans ce Pays, ainsi Norsa et non seulement Mattirolo, le principe que la compétence est régie par la loi du Tribunal dont émane la sentence serait absolu au regard du Droit italien (voir première Réplique de l'Italie, p. 8).

D'autre part, l'examen de la question de savoir si le Tribunal dont émane le jugement était compétent d'après *sa propre* loi n'est pas du tout inutile, mais peut avoir de l'importance; c'est si évident qu'il serait superflu d'en faire la démonstration (cf. la première Réplique italienne, p. 6 et 7, ainsi que, p. ex., Weiss, *Manuel de Droit international privé*, p. 638).

5. Mais, est-il prétendu dans les Mémoires du Pérou, suivant la *législation de ce pays*, les Tribunaux péruviens sont *exclusivement* compétents pour juger les procès comme l'affaire Anselmo-Ferraro, et si, ce nonobstant, le Pérou voulait exécuter le jugement rendu dans cette cause par l'Autorité judiciaire italienne, il ne pourrait le faire sans renoncer à l'un de ses droits de souveraineté (voir premier Mémoire péruvien, p. 12), et, dans sa Réplique (p. 6), cet Etat invoque à l'appui de sa manière de voir un arrêt du Tribunal Fédéral Suisse, prononcé le 9 février 1899 dans la cause Espanet contre Sève.

Au sujet de cet arrêt, il importe de relever ce qui suit:

Le Tribunal Fédéral avait à statuer sur la demande d'exécution d'un jugement français en Suisse, formée à teneur de l'Article 16 de la Convention de 1869 entre la Suisse et la France. Le procès au fond avait été intenté à un Français domicilié en Suisse. Le Tribunal (de commerce de Marseille) dont émanait le jugement s'était déclaré compétent en vertu de l'Article 15 du Code civil français, aux termes duquel un Français peut être traduit devant un Tribunal de France pour des obligations par lui contractées en Pays étranger. D'autre part, l'Article 17 de la susdite Convention exige pour l'admissibilité de l'exécution essentiellement les mêmes conditions que l'Article 18 du Traité italo-péruvien. Or, dans son arrêt, le Tribunal Fédéral a reconnu que la Convention franco-suisse ne renferme pas de dispositions obligatoires indiquant d'après quelles règles de droit il faut examiner la compétence du Tribunal dont émane le jugement, lorsque l'exécution d'une sentence rendue dans l'un des Etats est poursuivie dans l'autre à teneur de ce Traité; le Tribunal Fédéral ajoute, il est vrai: « Cela étant, on ne saurait défendre aux Autorités suisses d'examiner la question de compétence selon les principes admis dans leur Pays en matière de juridiction et de for, et de refuser l'exécution d'un jugement français dans les cas où, suivant le Droit public suisse, l'affaire était de la compétence exclusive des Tribunaux suisses. » Le point essentiel de cette argumentation se trouve dans la seconde partie du passage cité. En effet, aux termes de l'Article 59 de la Constitution Fédérale Suisse, le débiteur solvable ne peut être recherché qu'au lieu de son domicile, et les jugements prononcés au mépris de cette disposition ne sont pas exécutoires en Suisse, même si, la sentence ayant été rendue dans un Canton, l'exécution en est poursuivie dans un autre. Et ailleurs l'arrêt rappelle que la disposition de l'Article 59 de la Constitution Fédérale n'est pas seulement une règle de droit objectif, établissant un for, mais qu'elle confère aux citoyens un droit subjectif, constitutionnel, qui, comme tel, relève du Droit public.

Or, si un pareil principe était consacré par le Droit public du Pérou, il n'est pas douteux qu'on ne pourrait pas exiger de cet Etat l'exécution de la sentence prononcée en Italie dans le litige Anselmo-Ferraro, car, dans cette hypothèse, on se trouverait en présence d'une cause de refus basée sur l'Article 18, nº 4, du Traité. Mais, d'après les actes, le Droit public péruvien ne renferme pas le principe en question.

6. Au contraire, suivant l'Article 132 du Code de procédure civile péruvien, le demandeur a la faculté de porter son action, soit devant le juge du lieu où le défendeur a la plus grande partie de ses biens, soit devant le juge du lieu *où il s'est obligé*. C'est ce qui a été allégué à la page 12 de la première Réplique italienne, et cette allégation n'ayant pas été contestée par M. le Représentant du Pérou, qui a eu l'occasion de le faire, il est censé en avoir admis l'exactitude; d'ailleurs, dans le Code qu'a produit ce Représentant, l'Article 132 a la teneur indiquée par le Mémoire italien, et comme il est imprimé, non pas en italique, mais en caractères ordinaires, il doit être en vigueur, selon une note qui figure au commencement de ce Code. (Il est à remarquer que le Code de procédure civile du Pérou offre, en ses Articles 116 à 133, une grande variété de fors.) Maintenant, il n'est pas contestable ni contesté que le Tribunal de Lima, s'il avait été saisi de l'affaire Anselmo, aurait été *aussi* compétent pour en connaître; mais le for de cette Autorité n'aurait pas eu un caractère exclusif, car le Tribunal qui a rendu le jugement était, lui aussi, compétent, même au regard du Droit péruvien: il y avait donc *in casu* double compétence ou compétence concurrente.

Il y a lieu de signaler le fait que l'arrêt rendu par la Cour Suprême de Lima le 9 août 1897 ne prend pas l'Article 132 en considération.

B. — *Examen de quelques points particuliers*

1. La conclusion du Traité de 1874, tel qu'il est interprété ici, n'implique point de la part des Etats Contractants une renonciation inadmissible et non obligatoire à leurs droits de souveraineté. D'autres Pays, qui n'ont jamais abdiqué une parcelle de leur souveraineté, ont passé des Conventions de ce genre. Les restrictions auxquelles l'Etat se soumet en consentant un pareil Traité sont compensées par l'effet accordé aux actes de ses organes à l'égard des ressortissants de l'autre Pays. Le Tribunal Fédéral Suisse, dans son arrêt précité, a reconnu qu'il est admissible d'apporter, par des Conventions internationales, des restrictions, même au principe constitutionnel proclamé par l'Article 59. L'assurance réciproque que se donnent deux Etats d'exécuter dans leur territoires respectifs les jugements émanés des Tribunaux du Pays cocontractant n'a jamais été envisagée comme une atteinte portée à la souveraineté de ces Etats, mais plutôt comme une mise en pratique de la courtoisie internationale (*comitas gentium*).

2. Aux termes de l'Article 14 du Code civil français, l'étranger, même non résidant en France, peut être cité devant les Tribunaux français pour exécution des obligations par lui contractées envers un Français. La compétence établie par cette disposition paraît avoir été repoussée presque partout hors de France, aussi bien par la doctrine que par la jurisprudence, même dans les Pays qui ont conclu avec la France des Traités semblables à celui qui est intervenu entre l'Italie et le Pérou. Des auteurs ont même critiqué très sévèrement le for en question, ainsi, par exemple, von Bar (*Theorie und Praxis des internationalen Privatrechts*, p. 425, note 29), Ricci, dont l'opinion est reproduite par Meili (dans son étude *Reflexionen*, etc., p. 36, note 2), de même que Garsonnet, qui, dans son *Traité théorique et pratique de procédure*, dit textuellement (vol. I, § CLXXV): « L'Article 14 du Code civil, qui contient une nouvelle exception aux principes généraux de la compétence, est une disposition justement critiquée:

elle est contraire à l'ancienne jurisprudence, aux principes du Droit international privé et à la plupart des lois européennes. » (Voir, en outre, Vicent et Pénaud, *Dictionnaire de Droit international privé*, p. 234.) La compétence que l'Article 14 précité confère aux Tribunaux français est certainement excessive. Le ressortissant d'un Etat qui a contracté hors de France avec un Français peut parfaitement avoir ignoré la nationalité de ce dernier ainsi que l'existence de l'Article 14 du Code civil français, et il devrait inopinément être assigné devant un Tribunal de France! Ce procédé irait à l'encontre de tous les principes admis en Droit international privé. Et l'on peut dire d'une manière générale qu'il faut refuser la sanction internationale à tout for qui n'est pas fondé sur un fait extérieur quelconque permettant de présumer la soumission du défendeur à la législation et à la juridiction de l'Etat qui a établi telle ou telle compétence. Cet élément manque complètement au for de l'Article 14, tandis qu'il existe, sous une forme ou sous une autre, pour les autres fors que se présentent dans les relations internationales, pour le for de la formation du contrat et celui du lieu de l'exécution (sur le rapport étroit qu'il y a entre ces deux derniers fors, voir von Bar, *Theorie und Praxis des internationalen Privatrechts*, pp. 439 à 442, note 46). Qu'on applique en France l'Article 14, à cela il n'y a rien à objecter, c'est du ressort de l'administration judiciaire de ce Pays. Mais, à l'égard des ressortissants des autres Etats, l'application de cet Article constituerait un acte arbitraire, portant, dès lors, atteinte au droit public, et on pourrait s'y opposer même en se plaçant sur le terrain des Traités internationaux. D'ailleurs, on ne voit pas que les Autorités françaises aient exigé d'autres Pays la reconnaissance du for établi par l'Article 14. En tout cas, et ceci soit dit en réponse à un argument de la Réplique péruvienne (p. 28), on ne saurait absolument pas mettre sur la même ligne la prétention actuelle de l'Italie et la prétention de faire exécuter hors de France le jugement d'un Tribunal français qui se serait déclaré compétent en vertu de la disposition susmentionnée.

3. La Réplique du Pérou, à la page 27, soutient encore que les Tribunaux italiens étaient incompétents en l'espèce, même d'après leur propre loi. Cette objection ne saurait être entendue, le Compromis, qui lie l'Arbitre, présupposant que les Tribunaux des deux Etats étaient compétents à teneur de leurs lois respectives. Au surplus, la manière de voir du Pérou ne serait pas fondée. On invoque à l'appui le troisième alinéa de l'Article 90 du Code de procédure civile italien, qui porte que l'action dirigée contre une Société sera intentée au siège de l'administration ou d'une succursale. Mais cette disposition détermine uniquement le for du domicile des Sociétés, l'Article 90 où elle se trouve ayant pour objet de régler le for du domicile dans tous ses détails. Or, au cas particulier, il s'agit, non pas du for du domicile, mais du for du contrat, prévu par l'Article 91, qui ne distingue pas entre les Sociétés et les simples personnes. Elles sont les unes et les autres soumises de la même manière au for du contrat, pourvu que les conditions de son admissibilité se trouvent réunies, et c'est le cas pour les Sociétés lorsqu'elles se sont valablement engagées. Qu'en l'espèce, la Société G.-B. Anselmo et Cie. ait pu s'obliger par les actes de J.-B. Anselmo, c'est ce qui n'a jamais été contesté.

4. Dans son étude déjà plusieurs fois citée, von Bar indique, (p. 42), au point de vue doctrinal, comme seconde condition essentielle de l'admissibilité de l'exécution, la confiance méritée dans la justice du Pays étranger. Il n'est pas nécessaire d'insister sur ce point dans les cas où l'on se trouve en présence d'un Traité pareil à celui qui est intervenu entre l'Italie et le Pérou. Une telle Convention implique une confiance réciproque de la part des Etats qui l'ont conclue. Et les jugements prononcés dans l'affaire Anselmo-Ferraro donnent

effectivement la ferme impression que la matière du procès a été examinée et la sentence rendue avec tout le soin désirable.

5. L'Article 91 du Code de procédure civile italien ne reconnaît le for du contrat ou du lieu de l'exécution qu'à la condition que le défendeur ait été assigné en personne à l'endroit où se trouve le for, sauf dans les affaires commerciales, pour lesquelles cette formalité n'est pas requise. Or, les Tribunaux italiens ont admis que la cause Anselmo-Ferraro était de nature commerciale. D'ailleurs, cela importe peu quant à l'application de l'Article 91 en l'espèce, car la formalité qu'il prescrit pour les affaires non commerciales, et à laquelle von Bar (*op. cit.*, p. 42) attache un si grand poids, a été observée à l'égard de J.-B. Anselmo et de A.-F. Ferraro, qui ont reçu personnellement la citation. Ils se sont, en outre, fait régulièrement représenter devant les Tribunaux italiens. Par là il a été satisfait aussi aux conditions prévues sous les nos 2 et 3 de l'Article 18 du Traité de 1874, ce qui, au surplus, n'est pas dénié.

6. Quant à la proposition de M. le Représentant du Pérou, que le différend, en cas de doute, soit tranché dans le sens de l'obligation la moins étendue, cette proposition ne saurait être accueillie, l'Arbitre estimant qu'il n'y a pas de doute en l'espèce.

7. Pour terminer, on peut faire l'observation que le for du contrat admis par la législation de nombreux Etats, notamment par celle de l'Italie et du Pérou, est envisagé dans la doctrine comme satisfaisant le mieux aux exigences des relations commerciales pourvu qu'il réponde aux intentions présumées des Parties, condition qui se trouve pleinement réalisée *in casu*. Qu'il suffise de renvoyer à l'étude que fait von Bar du for du contrat dans son ouvrage *Theorie und Praxis des internationalen Privatrechts* (vol. II, pp. 438 à 446) ; cet auteur dit en particulier, à la page 438: « Si une obligation doit être exécutée là même où elle a été contractée, le for du contrat sera aussi fondé dans ce lieu, où toute l'affaire suivra son cours. » *(Wenn eine Obligation an demselben Orte, wo sie eingegangen ist, auch erfüllt, werden soll, so wird an diesem Orte, an Welchen also die gesammte Abwickelung des Iseschoefts fallen soll, auch das Forum contractus begründet sein.)*

C. — *Résumé de l'argumentation*

Les considérations qui précèdent peuvent se résumer comme suit:

1. D'après une saine interprétation du Traité italo-péruvien, la compétence doit être examinée et exister en principe, au regard de la loi de l'Etat où le jugement a été rendu.

2. Le Tribunal italien s'est déclaré compétent en vertu de l'Article 91 du Code de procédure civile italien, comme étant le for de la formation du contrat.

3. Le lieu de la formation du contrat était effectivement en Italie, de même que le lieu de l'exécution.

4. Le Tribunal qui a prononcé le jugement avait ainsi la compétence exigée par l'Article 18, n° 1, du Traité.

5. Les conditions posées à l'Article 18, sous nos 2 et 3, ont été remplies, ce qui n'est pas contesté.

6. La reconnaissance du for du contrat de la part du Tribunal italien n'implique aucune atteinte à l'ordre public ni au Droit public du Pérou (voir Art. 18, n° 4, du Traité).

7. Au contraire, le for du contrat est aussi reconnu par la loi de procédure du Pérou.

8. Il s'en suit que le jugement italien, toutes les conditions prévues par le Traité étant réunies, doit recevoir son exécution au Pérou.

III. — Dispositif

A. — *Observation préalable*

L'Arbitre croit, en formulant le dispositif de son jugement, devoir s'en tenir strictement à la question litigieuse, conçue d'une manière abstraite; mais il rend sa Sentence en ayant égard spécialement au cas concret, tout en reconnaissant que les Autorités judiciaires de l'Etat où l'exequatur est demandé seraient *aussi* compétentes (voir la finale de la question), que, toutefois, cette compétence n'est pas exclusive, et qu'en tout cas le fait de reconnaître la compétence du Tribunal de l'Etat où le jugement a été prononcé n'implique rien de contraire au Droit public ou constitutionnel du Pérou. Si, par hypothèse, le for du domicile avait dans ce Pays un caractère exclusif, non pas, comme en Suisse, à teneur de la Constitution même, mais simplement aux termes de la loi de procédure, il ne serait, dans ce cas, probablement guère possible de faire reconnaître au Pérou, en vertu du Traité, le for italien, attendu que la loi de procédure fait partie du Droit public. Mais il n'est pas nécessaire de résoudre ici cette question.

B. — *Teneur du dispositif*

Se référant à ce qui prècéde, l'Arbitre tranche comme suit la question litigieuse soumise à sa décision par les Hauts Gouvernements du Royaume d'Italie et de la République du Pérou:

« Aux termes du Traité du 23 décembre 1874, conclu entre l'Italie et le Pérou, les Autorités respectives des deux Pays ne peuvent pas refuser l'exequatur aux sentences prononcées par une Autorité judiciaire compétente suivant les lois de l'Etat où le jugement a été rendu, lorsqu'il se présente que, d'après les lois de l'Etat où l'exequatur est demandé, les Autorités judiciaires de ce même Etat seraient compétentes pour connaître de la cause. »

Donné à Berne, le dix-neuf (19) septembre mil neuf cent trois (1903).

L'Arbitre:

Winkler

Ex-Président du Tribunal fédéral suisse

THE VENEZUELAN PREFERENTIAL CASE

PARTIES: Germany, Great Britain, Italy, Venezuela et al.

COMPROMIS: Protocols signed at Washington, 7 May, 1903.

ARBITRATORS: Permanent Court of Arbitration: N. Mourawieff, H. Lammasch, Fr. Martens.

AWARD: 22 February, 1904.

Right to preferential treatment in the matter of claims held by certain Powers against Venezuela — Jurisdiction of the Tribunal — Good faith — Acquired rights

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SYLLABUS [1]

The arbitration had its origin in a controversy which arose over certain pecuniary claims of the subjects of Great Britain, Germany and Italy against the Republic of Venezuela. A solution not having been reached by the diplomatic negotiations, the controversy culminated on December 11, 1902, in the ordering by Great Britain of a blockade of the ports of Venezuela. Two days afterward Venezuela offered to submit the controversy to arbitration. This offer was ignored and seven days later the blockade of the Venezuelan ports was declared by the British, German and Italian Governments.

At the same time the United States, Mexico, Spain, France, Belgium, the Netherlands, and Sweden and Norway also held claims against Venezuela, which had been the subject of diplomatic negotiations, but no forcible measures had been employed by these Governments to secure the adjustment of their claims.

After the blockade had been put into effect, Venezuela sent a representative to Washington with full powers to negotiate with the representatives of the creditor Powers a settlement of all the matters in controversy. The negotiations took place during the winter and spring of 1903. In the course of the negotiations the Venezuelan representative proposed that the claims of all the countries above-mentioned against Venezuela be paid out of the customs receipts of the ports of La Guaira and Puerto Cabello, thirty per cent of the receipts of which would be set aside each month for that purpose. The proposal was accepted by the claimant nations and an assignment of the revenues mentioned was made in their favor; but Great Britain, Germany and Italy, the blockading Powers, took the position that their claims should not rank with the claims of the other Powers for compensation, but should be given priority of payment. Venezuela declined to accept this view and the question was submitted by agreements signed May 7, 1903, for determination by the Hague tribunal. The other creditor Powers were joined as parties to the arbitration.[2]

Pursuant to the provisions of the protocols the Czar of Russia named three members of the panel of the Permanent Court of Arbitration as arbitrators, no one of whom was a citizen or subject of any of the signatory or creditor Powers, as follows: Nicolas V. Mourawieff, and Fr. Martens of Russia, and Heinrich Lammasch of Austria-Hungary. The sessions of the tribunal began October 1, 1903, and ended November 13, 1903. The decision, which was rendered on February 22, 1904, held that:

1. Germany, Great Britain and Italy have a right to preferential treatment for the payment of their claims against Venezuela;

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[1] *The Hague Court Report*, edited by J. B. Scott, Carnegie Endowment for International Peace, New York, 1st Series, 1916, p. 55.

[2] The respective claims of all the creditor Powers were submitted to mixed commissions consisting of one national each of Venezuela and the claimant nation, with a neutral as umpire, which met at Caracas and subsequently reported their awards (see *infra*, p. 155).

2. Venezuela having consented to put aside thirty per cent of the revenues of the customs of La Guaíra and Puerto Cabello for the payment of the claims of all nations against Venezuela, the three above-named Powers have a right to preference in the payment of their claims by means of these thirty per cent of the receipts of the two Venezuelan ports above mentioned;

3. Each party to the litigation shall bear its own costs and an equal share of the costs of the tribunal.

PROTOCOL BETWEEN GERMANY AND VENEZUELA FOR THE REFERENCE OF CERTAIN QUESTIONS TO THE PERMANENT COURT OF ARBITRATION AT THE HAGUE. SIGNED AT WASHINGTON, MAY 7, 1903 [1, 2]

WHEREAS Protocols have been signed between Germany, Great Britain, Italy, the United States of America, France, Spain, Belgium, The Netherlands, Sweden and Norway, and Mexico on the one hand, and Venezuela on the other hand, containing certain conditions agreed upon for the settlement of claims against the Venezuelan Government;

AND WHEREAS certain further questions arising out of the action taken by the Governments of Germany, Great Britain and Italy, in connection with the settlement of their claims, have not proved to be susceptible of settlement by ordinary diplomatic methods;

AND WHEREAS the Powers interested are resolved to determine these questions by reference to arbitration in accordance with the provisions of the Convention for the Pacific Settlement of International Disputes, signed at The Hague on the 29 July, 1899;

Venezuela and Germany have, with a view to carry out that Resolution, authorized their Representatives, that is to say:

Mr. Herbert W. Bowen as plenipotentiary of the Government of Venezuela, and

The Imperial German Minister. Baron Speck von Sternburg, as representative of the Imperial German Government to conclude the following Agreement:

ARTICLE I

The question as to whether or not Germany, Great Britain, and Italy are entitled to preferential or separate treatment in the payment of their claims against Venezuela shall be submitted for final decision to the Tribunal at The Hague.

Venezuela having agreed to set aside thirty per cent of the Customs Revenues of La Guayra and Puerto Cabello for the payment of the claims of all nations against Venezuela, the Tribunal at The Hague shall decide how the said revenues shall be divided between the Blockading Powers, on the one hand, and the other Creditor Powers, on the other hand, and its decision shall be final.

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[1] Bureau international de la Cour Permanente d'Arbitrage, *Recueil des Actes et protocoles concernant le litige entre l'Allemagne, l'Angleterre et l'Italie d'une part et le Vénézuela d'autre part. Tribunal d'Arbitrage constitué en vertu des protocoles signés à Washington, le 7 mai 1903, entre les Puissances susmentionnées*, La Haye, Van Langenhuysen Frères, 1904, p. 17.

[2] Identical protocols were signed on the same date by Venezuela with Great Britain and Italy respectively. Belgium, Mexico, the Netherlands, Sweden and Norway, and the United States signed as adherents. Spain, though not signatory, also adhered and was represented by Counsel before the Tribunal (see *The Hague Court Report*, edited by J. B. Scott, etc., pp. 62-64; W. M. Malloy, *Treaties, Conventions, International Acts, Protocols and Agreements between the United States of America and other Powers*, 1776-1909, Vol. II, p. 1876).

If preferential or separate treatment is not given to the Blockading Powers, the Tribunal shall decide how the said revenue shall be distributed among all the Creditor Powers, and the parties hereto agree that the Tribunal, in that case, shall consider, in connection with the payment of the claims out of the 30 per cent., any preference or pledges of revenue enjoyed by any of the Creditor Powers, and shall accordingly decide the question of distribution, so that no Power shall obtain preferential treatment, and its decision shall be final.

ARTICLE II

The facts on which shall depend the decision of the questions stated in Article I shall be ascertained in such manner as the Tribunal may determine.

ARTICLE III

The Emperor of Russia shall be invited to name and appoint from the Members of the Permanent Court of The Hague three arbitrators to constitute the Tribunal which is to determine and settle the questions submitted to it under and by virtue of this Agreement.

None of the Arbitrators so appointed shall be a subject or citizen of any of the Signatory or Creditor Powers.

This Tribunal shall meet on the first day of September, 1903, and shall render its decision within six months thereafter.

ARTICLE IV

The proceedings shall be carried on in the English language, but arguments may, with the permission of the Tribunal, be made in any other language also.

Except as herein otherwise stipulated, the procedure shall be regulated by the Convention of The Hague of July 29th, 1899.

ARTICLE V

The Tribunal shall, subject to the general provision laid down in Article 57 of the International Convention of July 29th, 1899, also decide how, when, and by whom the costs of this arbitration shall be paid.

ARTICLE VI

Any nation having claims against Venezuela may join as a party in the Arbitration provided for by this Agreement.

DONE in duplicate at Washington, this seventh day of May, one thousand nine hundred and three.

(Signed) Herbert W. BOWEN

(Signed) STERNBURG

AWARD OF THE TRIBUNAL OF ARBITRATION CONSTITUTED IN VIRTUE OF THE PROTOCOLS SIGNED AT WASHINGTON ON 7 MAY 1903 BETWEEN GERMANY, GREAT BRITAIN, AND ITALY ON THE ONE HAND AND VENEZUELA ON THE OTHER HAND, DONE AT THE HAGUE, IN THE PERMANENT COURT OF ARBITRATION, 22 FEBRUARY 1904 [1]

THE TRIBUNAL OF ARBITRATION, constituted in virtue of the Protocols signed at Washington on May 7th 1903 between Germany, Great Britain and Italy on the one hand and Venezuela on the other hand;

WHEREAS other Protocols were signed to the same effect by Belgium, France, Mexico, the Netherlands, Spain, Sweden and Norway and the United States of America on the one hand and Venezuela on the other hand;

WHEREAS all these Protocols declare the agreement of all the contracting Parties with reference to the settlement of the claims against the Venezuelan Government;

WHEREAS certain further questions, arising out of the action of the Governments of Germany, Great Britain and Italy concerning the settlement of their claims, were not susceptible of solution by the ordinary diplomatic methods;

WHEREAS the Powers interested decided to solve these questions by submitting them to arbitration, in conformity with the dispositions of the Convention, signed at The Hague on July 29th 1899, for the pacific settlement of international disputes;

WHEREAS in virtue of Article III of the Protocols of Washington of May 7th 1903, His Majesty the Emperor of Russia was requested by all the interested Powers to name and appoint from among the members of the Permanent Court of Arbitration of The Hague three Arbitrators who shall form the Tribunal of Arbitration charged with the solution and settlement of the questions which shall be submitted to it in virtue of the above named Protocols;

WHEREAS none of the Arbitrators thus named could be a citizen or subject of any one of the signatory or creditor Powers and whereas the Tribunal was to meet at The Hague on September 1st 1903 and render its award within a term of six months;

His Majesty the Emperor of Russia, conforming to the request of all the signatory Powers of the above-named Protocols of Washington of May 7th 1903, graciously named as Arbitrators the following members of the Permanent Court of Arbitration:

His Excellency Mr. N. V. Mourawieff, Secretary of State of His Majesty the Emperor of Russia, Actual Privy Councillor, Minister of Justice and Procurator General of the Russian Empire,

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[1] Bureau international de la Cour Permanente d'Arbitrage, *Recueil des Actes et protocoles concernant le litige entre l'Allemagne, l'Angleterre et l'Italie d'une part et le Vénézuela d'autre part. Tribunal d'Arbitrage constitué en vertu des protocoles signés à Washington, le 7 mai 1903, entre les Puissances susmentionnées*, La Haye, Van Langenhuysen Frères, 1904, p. 122.

Mr. H. Lammasch, Professor of Criminal and of International Law at the University of Vienna, Member of the Upper House of the Austrian Parliament, and

His Excellency Mr. F. de Martens, Doctor of Law, Privy Councillor, Permanent Member of the Council of the Russian Ministry of Foreign Affairs, Member of the " Institut de France ";

WHEREAS by unforeseen circumstances the Tribunal of Arbitration could not be definitely constituted till October 1st 1903, the Arbitrators, at their first meeting on that day proceeding in conformity with Article XXXIV of the Convention of July 29th 1899 to the nomination of the President of the Tribunal, elected as such His Excellency Mr. Mourawieff, Minister of Justice;

AND WHEREAS in virtue of the Protocols of Washington of May 7th 1903, the above named Arbitrators, forming the legally constituted Tribunal of Arbitration, had to decide, in conformity with Article I of the Protocols of Washington of May 7th 1903, the following points: " The question as to whether or not Germany, Great Britain and Italy are entitled to preferential or separate treatment of their claims against Venezuela, and its decision shall be final.

" Venezuela having agreed to set aside 30 per cent of the Customs Revenues of La Guayra and Puerto Cabello for the payment of the claims of all nations against Venezuela, the Tribunal at The Hague shall decide how the said revenues shall be divided between the Blockading Powers on the one hand and the other Creditor Powers on the other hand, and its decision shall be final.

" If preferential or separate treatment is not given to the Blockading Powers, the Tribunal shall decide how the said revenue shall be distributed among all the Creditor Powers, and the Parties hereto agree that the Tribunal, in that case, shall consider, in connection with the payment of the claims out of the 30 per cent, any preference or pledges of revenues enjoyed by any of the Creditor Powers, and shall accordingly decide the question of distribution, so that no Power shall obtain preferential treatment, and its decision shall be final. "

WHEREAS the above named Arbitrators, having examined with impartiality and care all the documents and acts presented to the Tribunal of Arbitration by the Agents of the Powers interested in this litigation, and having listened with the greatest attention to the oral pleadings delivered before the Tribunal by the Agents and Counsel of the Parties to the litigation;

WHEREAS the Tribunal, in its examination of the present litigation, had to be guided by the principles of International Law and the maxims of justice;

WHEREAS the various Protocols signed at Washington since February 13th 1903 and particularly the Protocols of May 7th 1903, the obligatory force of which is beyond all doubt, form the legal basis for the arbitral award;

WHEREAS the Tribunal has no competence at all either to contest the jurisdiction of the Mixed Commissions of Arbitration established at Caracas, nor to judge their action;

WHEREAS the Tribunal considers itself absolutely incompetent to give a decision as to the character or the nature of the military operations undertaken by Germany, Great Britain and Italy against Venezuela;

WHEREAS also the Tribunal of Arbitration was not called upon to decide whether the three Blockading Powers had exhausted all pacific methods in their dispute with Venezuela in order to prevent the employment of force;

And it can only state the fact that since 1901 the Government of Venezuela categorically refused to submit its dispute with Germany and Great Britain to

arbitration which was proposed several times and especially by the Note of the German Government of July 16th 1901.[1]

WHEREAS after the war between Germany, Great Britain and Italy on the one hand and Venezuela on the other hand no formal treaty of peace was concluded between the belligerent Powers;

WHEREAS the Protocols, signed at Washington on February 13th 1903, had not settled all the questions in dispute between the belligerent Parties, leaving open in particular the question of the distribution of the receipts of the Customs of La Guayra and Puerto Cabello;

WHEREAS the belligerent Powers in submitting the question of preferential treatment in the matter of these receipts to the judgment of the Tribunal of Arbitration, agreed that the arbitral award should serve to fill up this void and to ensure the definite re-establishment of peace between them;

WHEREAS on the other hand the warlike operations of the three great European Powers against Venezuela ceased before they had received satisfaction on all their claims, and on the other hand the question of preferential treatment was submitted to arbitration, the Tribunal must recognize in these facts precious evidence in favour of the great principle of arbitration in all phases of international disputes;

WHEREAS the Blockading Powers, in admitting the adhesion to the stipulations of the Protocols of February 13th 1903 of the other Powers which had claims against Venezuela, could evidently not have the intention of renouncing either their acquired rights or their actual privileged position;

WHEREAS the Government of Venezuela in the Protocols of February 13th 1903 (Article I) itself recognizes " in principle the justice of the claims " presented to it by the Governments of Germany, Great Britain and Italy;

WHILE in the Protocol signed between Venezuela and the so-called neutral or pacific Powers the justice of the claims of these latter was not recognized in principle;

WHEREAS the Government of Venezuela until the end of January 1903 in nº way protested against the pretention of the Blockading Powers to insist on special securities for the settlement of their claims;

WHEREAS Venezuela itself during the diplomatic negotiations always made a formal distinction between " the allied Powers " and " the neutral or pacific Powers ";

WHEREAS the neutral Powers, who now claim before the Tribunal of Arbitration equality in the distribution of the 30 per cent of the Customs receipts of La Guayra and Puerto Cabello, did not protest against the pretentions of the Blockading Powers to a preferential treatment either at the moment of the cessation of the war against Venezuela or immediately after the signature of the Protocols of February 13th 1903;

WHEREAS it appears from the negotiations which resulted in the signature of the Protocols of February 13th and May 7th 1903 that the German and British Governments constantly insisted on their being given guarantees for " a sufficient and punctual discharge of the obligations " (British Memorandum of December 23rd 1902, communicated to the Government of the United States of America);[2]

WHEREAS the plenipotentiary of the Government of Venezuela accepted this reservation on the part of the allied Powers without the least protest;

[1] *Ibid.*, Annex II, p. 155.
[2] *Ibid.*, Annex III, p. 157.

WHEREAS the Government of Venezuela engaged, with respect to the allied Powers alone, to offer special guarantees for the accomplishment of its engagements;

WHEREAS the good faith which ought to govern international relations imposes the duty of stating that the words " all claims " used by the Representative of the Government of Venezuela in his conferences with the Representatives of the allied Powers (Statement left in the hands of Sir Michael Herbert by Mr. H. Bowen of January 23rd 1903),[1] could only mean the claims of these atter and could only refer to them;

WHEREAS the neutral Powers, having taken no part in the warlike operations against Venezuela, could in some respects profit by the circumstances created by those operations, but without acquiring any new rights;

WHEREAS the rights acquired by the neutral or pacific Powers with regard to Venezuela remain in the future absolutely intact and guaranteed by respective international arrangements;

WHEREAS in virtue of Article V of the Protocols of May 7th 1903, signed at Washington, the Tribunal " shall also decide, subject to the general provisions laid down in Article LVII of the International Convention of July 29th 1899, how, when and by whom the costs of this arbitration shall be paid ";

FOR THESE REASONS, the Tribunal of Arbitration decides and pronounces unanimously that:

1. Germany, Great Britain and Italy have a right to preferential treatment for the payment of their claims against Venezuela;

2. Venezuela having consented to put aside 30 per cent of the revenues of the Customs of La Guayra and Puerto Cabello for the payment of the claims of all nations against Venezuela, the three above named Powers have a right to preference in the payment of their claims by means of these 30 per cent of the receipts of the two Venezuelan Ports above mentioned;

3. Each Party to the litigation shall bear its own costs and an equal share of the costs of the Tribunal.

The Government of the United States of America is charged with seeing to the execution of this latter clause within a term of three months.

DONE at The Hague, in the Permanent Court of Arbitration, February 22nd 1904.

(Signed) N. MOURAWIEFF
(Signed) H. LAMMASCH
(Signed) MARTENS

[1] *Ibid.*, Annex IV, p. 159

VENEZUELAN ARBITRATIONS, 1903-1905 [1]

[1] Ten Mixed Commissions appointed to adjudicate claims of several nations (Belgium, Germany, Great Britain, France, Italy, Mexico, Netherlands, Spain, Sweden and Norway, United States of America) against Venezuela, and also the commissioners of an eleventh (French) Commission (see *supra*, the Venezuelan Preferential Case, Syllabus, p. 103) met at Caracas in the summer of 1903. The awards of these Commissions, which were reported between 1903 and 1905, together with the concurring or dissenting opinions expressed by the commissioners, will appear in the remaining part of the present volume and in the next volume of this series. The decisions will be reproduced in the same order as they were originally reported (see the Foreword to this volume), with the same headnotes.

MIXED CLAIMS COMMISSION
UNITED STATES - VENEZUELA
CONSTITUTED UNDER THE PROTOCOL OF
17 FEBRUARY 1903

REPORT: Jackson H. Ralston—W. T. Shermrn Doyle, *Venezuelan Arbitrations of 1903,* **including Protocols, personnel and Rules of Commission, Opinions, and Summary of Awards, etc. published as Senate Document No. 316, Fifty-eighth Congress, second session, Washington, Government Printing Office, 1904, pp, 1-259.**

PROTOCOL OF AN AGREEMENT OF 17 FEBRUARY 1903 BETWEEN THE SECRETARY OF STATE OF THE UNITED STATES OF AMERICA AND THE PLENIPOTENTIARY OF THE REPUBLIC OF VENEZUELA FOR SUBMISSION TO ARBITRATION OF ALL UNSETTLED CLAIMS OF CITIZENS OF THE UNITED STATES OF AMERICA AGAINST THE REPUBLIC OF VENEZUELA [1]

The United States of America and the Republic of Venezuela, through their representatives, John Hay, Secretary of State of the United States of America, and Herbert W. Bowen, the Plenipotentiary of the Republic of Venezuela, have agreed upon and signed the following protocol.

ARTICLE I

All claims owned by citizens of the United States of America against the Republic of Venezuela which have not been settled by diplomatic agreement or by arbitration between the two Governments, and which shall have been presented to the commission hereinafter named by the Department of State of the United States or its Legation at Caracas, shall be examined and decided by a Mixed Commission, which shall sit at Caracas, and which shall consist of two members, one of whom is to be appointed by the President of the United States and the other by the President of Venezuela.

It is agreed that an umpire may be named by the Queen of the Netherlands. If either of said commissioners or the umpire should fail or cease to act, his successor shall be appointed forthwith in the same manner as his predecessor. Said commissioners and umpire are to be appointed before the first day of May, 1903.

The commissioners and the umpire shall meet in the city of Caracas on the first day of June, 1903. The umpire shall preside over their deliberations, and shall be competent to decide any question on which the commissioners disagree. Before assuming the functions of their office the commissioners and the umpire shall take solemn oath carefully to examine and impartially decide, according to justice and the provisions of this convention, all claims submitted to them, and such oaths shall be entered on the record of their proceedings. The commissioners, or, in case of their disagreement, the umpire, shall decide all claims upon a basis of absolute equity, without regard to objections of a technical nature, or of the provisions of local legislation.

The decisions of the commission, and in the event of their disagreement, those of the umpire, shall be final and conclusive. They shall be in writing.

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[1] For the Spanish text see the original Report referred to as preceding page. For a French translation see: Descamps - Renault, *Recueil international des traités du XX^e siècle*, année 1903, p. 554.

The English text of the Protocol may also be found in: *British and Foreign State Papers*, Vol. 101, p. 646; W. M. Malloy, *Treaties, Conventions, International Acts, Protocols and Agreements between the United States of America and other Powers*, Vol. 2 p. 1870; De Martens, *Nouveau Recueil général de traités*, 3^e série, vol. 4, p. 69.

All awards shall be made payable in United States gold, or its equivalent in silver.

ARTICLE II

The commissioners, or umpire, as the case may be, shall investigate and decide such claims upon such evidence or information only as shall be furnished by or on behalf of the respective Governments. They shall be bound to receive and consider all written documents or statements which may be presented to them by or on behalf of the respective Governments in support of or in answer to any claim, and to hear oral or written arguments made by the agent of each Government on every claim. In case of their failure to agree in opinion upon any individual claim, the umpire shall decide.

Every claim shall be formally presented to the commissioners within thirty days from the day of their first meeting, unless the commissioners or the umpire in any case extend the period for presenting the claim not exceeding three months longer. The commissioners shall be bound to examine and decide upon every claim within six months from the day of its first formal presentation, and in case of their disagreement, the umpire shall examine and decide within a corresponding period from the date of such disagreement.

ARTICLE III

The commissioners and the umpire shall keep an accurate record of their proceedings. For that purpose, each commissioner shall appoint a secretary versed in the language of both countries, to assist them in the transaction of the business of the commission. Except as herein stipulated, all questions of procedure shall be left to the determination of the commission, or in case of their disagreement, to the umpire.

ARTICLE IV

Reasonable compensation to the commissioners and to the umpire for their services and expenses, and the other expenses of said arbitration, are to be paid in equal moieties by the contracting parties.

ARTICLE V

In order to pay the total amount of the claims to be adjudicated as aforesaid, and other claims of citizens or subjects of other nations, the Government of Venezuela shall set apart for this purpose, and alienate to no other purpose, beginning with the month of March, 1903, thirty per cent, in monthly payments of the customs revenues of La Guaira and Puerto Cabello, and the payments thus set aside shall be divided and distributed in conformity with the decision of the Hague Tribunal.

In case of the failure to carry out the above agreement, Belgian officials shall be placed in charge of the customs of the two ports, and shall administer them until the liabilities of the Venezuelan Government in respect to the above claims shall have been discharged. The reference of the question above stated to the Hague Tribunal will be the subject of a separate protocol.

ARTICLE VI

All existing and unsatisfied awards in favor of citizens of the United States shall be promptly paid, according to the terms of the respective awards.

Washington, D. C. February 17, 1903

[SEAL] John HAY

[SEAL] Herbert W. BOWEN.

PERSONNEL OF AMERICAN - VENEZUELAN COMMISSION

Umpire. — Charles Augustinus Henri Barge, of Holland.
American Commissioner. — William E. Bainbridge, of Council Bluffs, Iowa.
Venezuelan Commissioner. — José de J. Paúl. (Resigned October 16, 1903.)
Carlos F. Grisanti. (Appointed October 16, 1903.)
American Agent. — Robert C. Morris, of New York.
Assistant American Agent. — W. T. Sherman Doyle, of Washington, D. C.
Venezuelan Agent. — F. Arroyo-Parejo.
American Secretary. — Rudolf Dolge, of Caracas.
Venezuelan Secretary. — J. Padrón-Ustáriz. (Resigned October 16, 1903.)
Eduardo Calcaño-Sanavria. (Appointed October 16, 1903.)

RULES OF AMERICAN - VENEZUELAN COMMISSION

I

The secretaries shall keep a docket and enter thereon a list of all claims as soon as they shall be formally filed with the Commission. They shall endorse the date of filing upon each paper presented to the Commission, and enter a minute thereof in the docket. The claims shall be numbered consecutively, beginning with the claim first presented as No. 1.

The caption of each case shall be:

THE UNITED STATES OF AMERICA,
on behalf of ——— ———, claimant,
v.
THE REPUBLIC OF VENEZUELA. } No. ——.

The secretaries shall keep duplicate records of the proceedings had before the Commission, and of the docket of claims filed with the Commission, both in English and Spanish, so that one copy of each shall be supplied to each Government.

II

All claims must be formally presented to the Commission within thirty days from the 1st day of June, 1903, unless the commissioners or the umpire grant a further extension in accordance with the provisions of paragraph 2, Article II, of the protocol.

III

A claim shall be deemed to be formally filed with the Commission upon the presentation of the written documents or statements in connection therewith to the secretaries of the Commission by the agent of the United States.

IV

The Government of the United States by its agent shall have the right to file with each claim at the time of presentation a brief in support thereof.

It shall not be necessary for the Republic of Venezuela in any case to deny the allegations of the claim or the validity thereof; but a general denial shall be entered of record by the secretaries, as of course, and thereby all the material allegations of the petition shall be considered as put in issue.

The Republic of Venezuela, however, by its agent shall have the right to make specific answer to each claim within fifteen days after the date of filing thereof, and if it elects to answer, at or before the time of making said answer by its agent, present to the Commission all evidence which it intends to produce in opposition to the claim. The Government of the United States shall have the right to present evidence in rebuttal within the period in this rule provided for the filing of a replication.

The filing of a brief on behalf of the claimant Government and the filing of a brief on behalf of the respondent Government, or the failure to specifically answer any claim within the time allowed, as above provided, shall be deemed to close the proceedings before the Commission in regard to the claim in question unless the agent of the United States, within two days of the filing of a brief by the respondent Government shall formally request the Commission in writing a further period of five days in which to file a replication; in which event the Republic of Venezuela shall, upon the like request of its agent, have a like period within which to put in a rejoinder, which replication and rejoinder shall finally close the proceedings.

V

The petition or answer may be amended at any time before the final submission of any claim as provided in the preceding rules upon leave granted by the Commission.

VI

No documents or statements or written or oral argument will be received except such as shall be furnished by or through the agents of the respective Governments.

VII

The secretaries shall each keep a record of the proceedings of the Commission for each day of its session in both English and Spanish in books provided for the purpose, which shall be read at its next meeting, and if no objection be made, or when corrected, if correction be needed, shall be approved and subscribed by the umpire and commissioners and counter subscribed by the secretaries.

They shall keep a notice book in which entries may be made by the agent for either Government, and when made shall be notice to the opposing agent and all concerned.

They shall provide duplicate books of printed forms under the direction of the Commission in which shall be recorded its several awards or decisions signed by the commissioners or, in the case of their disagreement, by the umpire, and verified by the secretaries.

They shall be the custodians of the papers, documents, and books of the Commission under its direction, and shall keep the same safe and in methodical order. While affording every reasonable opportunity and facility to the agents of the respective Governments to inspect and make extracts from papers and records, they shall permit none to be withdrawn from the files of the Commission, except by its direction duly entered of record.

VIII

When an original paper on file in the archives of either Government can not be conveniently withdrawn, a duly certified copy may be received in evidence in lieu thereof.

OPINIONS IN THE AMERICAN - VENEZUELAN COMMISSION

DIX CASE [1]

The acts of a revolution becoming successful are to be regarded as the acts of a de facto government.

Taking of neutral property for the use or service of successful revolutionary armies by functionaries thereunto authorized gives a right to the owner to demand compensation from the government exercising such authority.

Governments, like individuals, are responsible only for the proximate and natural consequences of their acts.

BAINBRIDGE, *Commissioner* (for the Commission):

The facts upon which this claim is based are substantially as follows:

In September, 1899, at the beginning of the revolution led by General Castro against the Government of President Andrade, Ford Dix, a native-born citizen of the United States, was engaged in the cattle business in Venezuela, having leased pastures near Valencia and Miranda, upon which he alleges he had at the time mentioned about 800 head of beef, 21 milch cows, 16 yearling calves, 6 saddle horses, and 1 mule. Dix claims that he had, on July 3, previous, entered into a contract with the firm of Salmon & Woodrow, of Havana, Cuba, by which he agreed to deliver said firm between September 15 and October 7, 1899, 750 to 800 head of cattle to weigh 750 to 900 pounds each, for which said firm was to pay him $ 50 per head.

On September 15, a battle occurred at Tocuyito, between the Government forces and the revolutionists, in which the Government army was completely routed. The revolutionary army remained in that section of the country for several months, and at various times between September 15 and December 31 1899, Dix's cattle were confiscated for the use of the army. Dix alleges that they took from him 409 beeves, 16 milch cows, 16 calves, 4 saddle horses, and 1 mule; that to avoid losing the remaining 388 head he sold them to Braschi & Sons, of Valencia, at a sacrifice, viz, $ 19 per head Venezuelan; that by reason of the above, and to the fact that there was no communication with the seacoast, he was prevented from complying with his contract with Salmon & Woodrow, and was obliged to pay said firm $ 1,875 damages on account of his failure to deliver the cattle as required by the terms of said contract. Dix succeeded in obtaining from the revolutionary authorities evidence of the taking of 252 head of cattle, and subsequently, upon personal request of Dix to be paid for his cattle, General Castro, after assuming the office of President, caused to be issued to Dix a Government warrant for the value of 102 head.

No documentary evidence is submitted in support of the claimant's allegation of the taking of the other 55 beeves, 16 cows, 16 calves, 3 horses, and 1 mule. The taking of 1 horse is proven by an original telegram signed by General Castro.

Mr. Dix also makes a claim for expenses which the above circumstances caused him to incur in traveling expenses, railroad fares, hotel bills, etc.

As submitted to this Commission the claim of Mr. Dix may be summarized as follows:

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[1] For a French translation see: Descamps - Renault, 1903, p. 836.

		Venezuelan
Loss of 354 head of beef cattle, at $ 30		$ 10,620.00
Loss of 388 head of beef cattle, at $ 11, difference between price obtained by Dix and value stated in vouchers given		4,268.00
Loss of 55 head of beef cattle for which no vouchers were obtained, at $ 30 per head		1,650.00
Other cattle and ranch animals as follows:		
1 saddle horse	$ 150.00	
1 saddle horse	100.00	
1 saddle horse	200.00	
1 saddle mare	50.00	
1 saddle mule	250.00	
16 milch cows, at $ 35 per head	560.00	
16 calves, at $ 10 per head	160.00	
		1,470.00
Amount paid for nonfulfillment of contract with Salmon & Woodrow		2,437.50
Expenses		1,000.00
Total		21,445.50

The revolution of 1899, led by General Cipriano Castro, proved successful, and its acts, under a well-established rule of international law, are to be regarded as the acts of a de facto government. Its administrative and military officers were engaged in carrying out the policy of that Government under the control of its executive. The same liability attaches for encroachments upon the rights of neutrals in the case of a successful revolutionary government, as in the case of any other de facto government. What that liability is has been clearly stated in the case of Shrigley *v.* Chile, decided by the United States and Chilean Claims Commission of 1892, as follows:

> Neutral property taken for the use or service of armies or functionaries thereunto authorized gives a right to the owner to demand compensation from the government exercising such authority.[1]

In the case before us, so far as the 354 head of cattle are concerned, the taking of which by the revolutionary army is in various forms evidenced, the liability of Venezuela to compensate Mr. Dix is determined by the rule above quoted. And this liability may fairly be extended to include compensation for the other stock, either taken by the revolutionary troops or lost as the direct result of the depredations of the army in the stampeding of the herd, the destruction of fences, etc. That Dix's cattle were taken under authorization of the military officers is proved by the receipts given by Generals Lovera, Martinez, and Lima, and the Government warrant given by President Castro. Dix states that General Hernandez told him that he would exempt his cattle as far as possible, but that " he did not propose to face defeat for the want of something to eat for his troops."

The value of the cattle taken, as stated in the receipts and the Government warrant given by General Castro, is $ 30 (Venezuelan) per head. As to the cattle for which Dix could not obtain receipts, but whose loss he established by other documentary evidence, their value is stated by Dix and other witnesses as " at not less than 120 bolivars per head in this market " ($ 30 Venezuelan). The value of the 409 beeves taken from or lost by Dix was, therefore, $ 12,270 (Venezuelan). To this must be added the value of the mule, saddle horses, cows, and calves, also taken from him, amounting to $ 1,470 (Venezuelan). Thus the total value of Mr. Dix's stock, confiscated or lost, amounted to $ 13,740 (Venezuelan).

[1] Moore's Arbitrations, 3712.

On December 18, 1899, Mr. Dix sold and delivered at Los Guayos to the firm of A. Braschi & Sons 388 beeves at $ 19 (Venezuelan money) per head. He says: " I made a sale — that is, I sacrificed them to save something." He makes a claim against the Venezuelan Government for $ 4,268, the difference between the sum received by him from Braschi & Sons, and the alleged actual value of the cattle (to wit, $ 30 per head) which he sold to them.

Governments like individuals are responsible only for the proximate and natural consequences of their acts. International as well as municipal law denies compensation for remote consequences, in the absence of evidence of deliberate intention to injure. In my judgment the loss complained of in this item of Dix's claim is too remote to entitle him to compensation. The military authorities, under the exigencies of war, took part of his cattle, and he is justly entitled to compensation for their actual value. But there is in the record no evidence of any duress or constraint on the part of the military authorities to compel him to sell his remaining cattle to third parties at an inadequate price. Neither is there any special animus shown against Mr. Dix, nor any deliberate intention to injure him because of his nationality. He refers himself to the estimation in which he was held by General Castro. If the disturbed state of the country impelled Mr. Dix to sacrifice his property, he thereby suffered only one of those losses due to the existence of war for which there is, unfortunately, no redress.

Upon similar grounds the claim of Mr. Dix to be reimbursed by the Venezuelan Government for the amount alleged to have been paid by him to the Havana firm as damages for the nonfulfillment of his contract must be disallowed. Interruption of the ordinary course of business is an invariable and inevitable result of a state of war. But incidental losses incurred by individuals, whether citizens or aliens, by reason of such interruption are too remote and consequential for compensation by the Government within whose territory the war exists.

Moreover it is very probable that Mr. Dix could not have complied with his contract, even had the revolutionists left him in undisturbed possession of his cattle, for the reason that the port of Puerto Cabello was closed for several weeks. Dix says: " I realize, and realized, that had I had undisturbed possession of my cattle I could not have shipped them within the allotted time on account of the revolution." Had Mr. Dix been able to complete his contract he would have made a large profit; instead, he appears to have suffered a loss. " I would not have gone to that country," he says, " to encounter the known difficulties, not to mention the unknown, for just a reasonable profit. I went after the fancy profits which I ascertained were to be made." He must, however, be held to have been willing to accept the risks as well as the advantages of his domicile in a country in a state of civil war.

These principles also dispose of Mr. Dix's claim for expenses. It is doubtless true that he was subjected to considerable inconvenience and expense; but his rights and immunities in that regard are not different from those of other inhabitants of the country, and

no government compensates its subjects for losses or injuries suffered in the course of civil commotions. (Hall, 4th edition, p. 232.)

In view of the foregoing an allowance is made in this claim in the sum of $ 13,740 (Venezuelan), with interest at 3 per cent per annum from January 1, 1900 to December 31, 1903, the latter being the anticipated date of the final award by this Commission. The total sum allowed is, therefore, $ 15,388.80 (Venezuelan), equivalent to the sum of $11,837.53 in gold coin of the United States.

NOTE. — Wherever in this opinion the words " Venezuelan dollars " are used the meaning thereof is " Venezuelan pesos " of the value of 4 bolivars each. (W. E. B.)

DE GARMENDÍA CASE

Damages awarded for the destruction of property for the public benefit by order of the legitimate authorities.

Interest can not justly be charged against the Government except from the date of the demand for compensation, unless the delay in presenting the claim is satisfactorily explained.[1]

BAINBRIDGE, *Commissioner* (for the Commission):

The United States of America on behalf of Corinne B. de Garmendía, as sole legatee under the will of Carlos G. de Garmendía, deceased, presents a claim against the Government of Venezuela for the sum of $ 111,274.63, said claim being based upon the following statement of facts:

First. That on July 7, 1877, Carlos G. de Garmendía, a naturalized citizen of the United States, made with the Government of Venezuela, through its minister of the interior, a contract to establish steam-vessel communication between New York City and the ports of La Guaira and Puerto Cabello, the Government of Venezuela, in consideration of the advantages to accrue to the entire country from such communication, binding itself to aid the enterprise with a monthly subsidy of $ 4,000 (Venezuelan). The contract was to " remain in full force and power for the term of two years."

The enterprise commenced operations December 15, 1877, and from that date the Government of Venezuela paid punctually the monthly subsidy of $ 4,000 (Venezuelan) until January 15, 1879. In March, 1879, the Government gave notice to de Garmendía's agents that it would no longer continue paying the subsidy, there being then due and unpaid one-half the monthly subsidy for January and the whole of that for February. De Garmendía continued the steamship service until May, 1879, at which time it was discontinued on account of the nonpayment of the subsidy. For this breach of contract a claim is made for the unpaid subsidy from January 15, to December 15, 1879, in the sum of $ 44,000 (Venezuelan), with interest at 3 per cent per annum.

Second. That in 1874 one H. de Garmendía made a contract with the Government of Venezuela to establish a permanent factory for the manufacture of ice in the city of Caracas, with branches at La Guaira and Puerto Cabello. In order to establish the depot, a frame house, with all the machinery and requirements of the enterprise, was imported from the United States into Venezuela. In 1879, on account of the stoppage of the payment of the subsidy to the steamship line operated by Carlos G. de Garmendía, and the consequent discontinuance of the steamers, the ice enterprise could no longer be carried on, and in payment of advances made by Carlos G. de Garmendía, the house and ice plant were conveyed to him by the said H. de Garmendía. In April, 1879, General Guzmán Blanco ordered the destruction of the house containing the ice plant. That said house had been imported and placed in La Guaira at a cost of $ 10,000 (Venezuelan), and was at that time rented for the sum of $ 150 (Venezuelan) per month. A claim is made for $ 10,000 (Venezuelan) the value of the house, with legal interest from the date of its destruction, and also for the deprivation of the rent.

In the month of December, 1889, de Garmendía presented his claim to the Venezuelan Government and urged its payment. It is insisted before this Commission that de Garmendía's claim was recognized and acknowledged by the Government of Venezuela in the following record in the ministry of the treasury:

[1] On subject of interest see Italian - Venezuelan Commission (Cervetti Case), and German - Venezuelan Commission (Christern Case), in Volume X of these *Reports*.

[Translation]

COMMITTEE OF EXAMINING ACKNOWLEDGMENT OF DEBTS

Caracas, February 27, 1890.

The claim of Mr. Carlos G. de Garmendía, amounting to 431,500 bolivars, having been examined by this committee, the President of the Republic orders that 40,000 bolivars be paid on account; let the corresponding order for payment be taken to the Sala de Centralización. The word " Perforate " follows, altered to the words " pay it," without being removed; and file this record.

The President, JOSÉ M. LARES

The above-named sum of 40,000 bolivars was paid to de Garmendía, in acknowledgment of which he gave the following receipt:

CARACAS, *February 26, 1891.*

I have received from the Government of the United States of Venezuela the sum of 40,000 bolivars, as follows:

Four thousand bolivars in money and 36,000 bolivars in titles of 1 per cent monthly, on account of two claims I have presented, and which have been accepted and recognized in this form:

	Venezuelan
Value of ice plant in La Guaira destroyed and material thrown away in April, 1879.	$ 10,000
Interest to date for 10 years and 10 months, at 3 per cent annual	3,708
For the rent of ten years, at $ 1,800	18,000
Subsidy on the balance of contract for steamers between New York and Venezuela, 11 months, at $ 4,000	44,000
Interest at 3 per cent per year for 11 years and 1 month	15,059
Total	90,767

Received on account $ 10,000 described as above.

Carlos G. DE GARMENDÍA

Between the lines the word " been ".
Correct.

C. G. DE G.

The meaning and effect of the record above quoted are open to some doubt. Under date of July 3, 1891, de Garmendía made a request of the ministry of the treasury for a certified copy of this record. Whereupon the director of finance of the department of hacienda, in compliance with the foregoing, states that the record to which the preceding representation of Señor Carlos G. de Garmendía refers, is to the following effect:

Carlos G. de Garmendía claims 431,500 bolivars as principal and interest for damages suffered under the contract which he had with the Government for a steamship line and an ice plant. As Señor de Garmendía does not verify this claim except upon his statement the junta believe the claim inadmissible. Continuing, there is a note which appears to be in the writing of Dr. Juan S. Rojas Paúl, which states as follows: " Let there be paid on account of this claim $ 10,000 in notes."

On the other hand, in a letter to de Garmendía, dated August 21, 1893, José M. Lares, who signed the record in question as president of the board of inquiry, and recognition of debts, says in explanation of the wording of said instrument:

In perforating or canceling the accounts that were paid that word was undoubtedly put upon yours without noticing that it had not been paid in full, but that part of the amount of your claim was carried on *account*, which indicates clearly that your claim was acknowledged by the President and that it still remained pending but for the balance.

For reasons hereinafter made apparent, the Commission is not disposed to determine the claim upon any technical construction of this disputed acknowledgment. Upon its merits, the claim is clear enough. The subsidy contract was executed on the part of Venezuela by Dr. Laureano Villanueva, who is described in the instrument as " minister of state in the home office (of the Federal Executive of the United States of Venezuela) fully authorized by the national Executive."

Article 9 of the contract provides as follows:

> The Government of Venezuela in consideration of the advantages which the official service and the entire country will have from this way of communication, binds itself to aid the enterprise with a monthly subsidy of 4,000 Venezolanos which will be handed in Caracas to Messrs. Nevett & Co., the consignee of the steamers.

The steamship enterprise commenced operations on the 15th day of December, 1877. The Government of Venezuela paid the monthly subsidy until January 15, 1879. It then stopped payments and in March following notified the agents of de Garmendía, Messrs. Nevett & Co., that it would pay them no longer.

Article II povides: " This contract will be in full force for the period of two years."

The contract was executed July 7, 1877. It expired by limitation, therefore, on July 7, 1879. From January 15, 1879, the contract had five months and twenty-two days to run. Its breach entitled de Garmendía to the amount of the subsidy for this unexpired term.

> In every case of breach of contract the plaintiff's loss is measured by the benefit to him of having the contract performed; and this is therefore the measure of his damages. (Sedgwick on Damages, sec. 609.)
>
> The amount which would have been received if the contract had been kept, is the measure of damages if the contract is broken. (Alder *v.* Keighley, 15 M. and W., 117.)

On January 9, 1880, Messrs. Hellmund & Co., the agents of Mr. de Garmendía at La Guaira, were served with the following notice:

[Translation]

Caracas, January 9, 1880.

Messrs. G. HELLMUND & Co., *La Guaira.*

Under date of yesterday the citizen minister of hacienda says to this office what follows: " The illustrious American having been informed that the frame house used as an ice depot in the port of La Guaira greatly prevents the employees of the custom-house from duly watching that port, he has thought it indispensable to destroy it, in order to leave that place open; and he has ordered me to address myself to you to please indicate the means conducive to the fulfilling of the indicated proposal, advice which I have the honor of participating to you as the guardians of said house, that you may order its evacuation as soon as possible, and to inform this office what day this will be carried out."

P. ARNAL

The ice house was, therefore, not destroyed until sometime in January, 1880, and its destruction was deemed necessary as an act of public utility. De Garmendía was entitled to compensation for the actual value of the property and interest thereon for the time payment was wrongfully delayed. But he was clearly not entitled also to the rent which forms so large an item of his claim, and which is included in the amount alleged to have been acknowledged. After the destruction of the ice house by the Venezuelan authorities, de Garmendía could have no claim for being kept out of the use of the property, but only one for the equivalent value of the property in money and interest

thereon for the time he was without fault of his own kept out of the use of that sum. (Sedgwick on Damages, sec. 316.)

As indicated above, this claim originated in the years 1879 and 1880. Mr. de Garmendía, however, made no demand upon the Venezuelan Government for its adjustment until the month of December, 1889. Can Venezuela be justly charged with interest during this long interval? I think not. The delay in presenting the claim is not satisfactorily explained, and the Government was not in default until it at least had proper notice that Mr. de Garmendía was asserting his right to compensation.

The following payments have been made upon this claim: On February 6, 1891, the sum of $ 10,000, as evidenced by Mr. de Garmendía's receipt of that date; on or about May 9, 1896, the sum of $ 1,000; and on or about January 15, 1898, the sum of $ 1,600 gold, the last two payments having been made to the claimant herein, as evidenced by her letter to Senator McComas.

In view of the foregoing, allowance will be made: (1) For the unpaid balance of subsidy, the sum of $ 22,933.31 (Venezuelan).

(2) For the ice house at La Guaria the sum of $ 10,000 (Venezuelan).

The principal sum of $ 32,923.31 (Venezuelan) will bear interest at the rate of 3 per cent per annum from December 2, 1889, deducting the amounts paid. On this basis the balance due on December 31, 1903, the anticipated date of the final award by this Commission, is the sum of $ 30,538.19 (Venezuelan), equivalent to the sum of $ 29,363.64 in gold coin of the United States.

HENY CASE

(By the Umpire:)

The deficiency of an instrument for want of recording so as to make it invalid as against third parties cannot be invoked by a trespasser or tort feasor to nullify it, and damages will be allowed a party whose interest is evidenced by such an instrument.

Damages will not be allowed for the interruption of the ordinary course of business in the territory where war exists, since it is an inevitable result of a state of war.[1]

BAINBRIDGE, *Commissioner* (claim referred to umpire):

Emerich Heny, the claimant herein, was born in Germany in 1846 and emigrated to the United States in 1867, where he was naturalized as a citizen thereof in the superior court of the city of New York on October 15, 1872. Two years later he removed to Venezuela where he has since resided. In 1883 he was married to Bertha Benitz, of Caracas, one of the children and heirs of Carlos Benitz, deceased. The Benitz heirs were the owners of an estate situated at Las Tejerías, near Caracas, said estate being known as " La Fundación." Upon his marriage Heny undertook the management and cultivation of the estate, and he also rented an adjoining plantation known as " El Palmar," which he cultivated on his own account.

In the months of September and October, 1892, a revolution called the " Legalista " was in progress in Venezuela, which ultimately proved successful, resulting in the overthrow of the then existing government. During this revolution the contending forces passed over " La Fundación " and destroyed the crops, seized the horses, cattle, and other property, and exacting from the owners of the estate loans of money and supplies for the troops, inflicting a loss, as claimed, aggregating 143,098 bolivars, equivalent to $ 27,617.91 in United States gold.

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[1] See Dix Case, *supra*, p. 119.

On March 7, 1893, Gen. Antonio Fernandez, who was " chief of the army of the center during the ' Legalista ' revolution," signed a document setting forth " the pro rata supplies furnished the army of the revolution by the plantation called ' La Fundación,' situated at Las Tejerías, the property of the heirs of Señor C. Benitz whose general agent and representative is Señor E. Heny," enumerating said supplies and giving the total value thereof as 143,098 bolivars.

On March 15, 1893, Mr. Heny addressed to the minister of the treasury and public credit the following communication:

E. Heny, a merchant and resident of this city as representative and authorized agent of the heirs of Señor C. Benitz respectfully represents to you:

The said heirs are creditors of the Government for the sum of 143,098 bolivars for supplies furnished to the revolution in the district of Ricaurte, State of Miranda, and as shown by the annexed proofs on stamped paper certified by Gen. Antonio Fernandez, which I present to you by virtue of the Executive resolution of November 25th, last.

Caracas, March 15, 1893. E. HENY

An offer was made by the Government to pay 40 per cent of the amount of the claim in the form of a special revolutionary note issue which, it is alleged, was worth only 15 per cent of its par value; so that the offer was in effect to pay 6 per cent of the amount claimed: The offer was rejected and the claim was withdrawn from the ministry of the treasury and public credit.

During the months of November and December, 1899, another revolution was going on in Venezuela, in which the military forces, both of the Government and the revolutionists, passed over " La Fundación," and cut down and seized for forage a large quantity of growing sugar cane. A battle occurred in the vicinity on November 29, 1899, and the sugar cane was in part destroyed by the passage and repassage of the troops. The total value of the sugar cane taken or destroyed in this manner and at this time was the sum of 12,000 bolivars.

The United States of America on behalf of Emerich Heny now presents to this Commission a claim, inclusive of the two claims designated above, amounting in the aggregate with interest to $ 38,714.30.

Article 1 of the protocol constituting the Commission confers jurisdiction over —

" all claims owned by citizens of the United States of America against the Republic of Venezuela which have not been settled by diplomatic agreement or by arbitration between the two Governments, and which shall have been presented to the Commission hereinafter named by the Department of State of the United States or its legation at Caracas. "

It is evident from the record that Heny never became the real owner of " La Fundación." Subsequent to his marriage he assumed the management of the estate and became in all matters pertaining to it the general agent and representative of the Benitz heirs. It seems at that time the plantation was run down and out of repair. Heny says:

Upon my marriage I entered into a contract with the said heirs by which I undertook the management and cultivation of the said plantation on my own account and with my individual capital. From that time until 1892, when the events hereinafter related occurred, I invested, in addition to my labor and services, the sum of $ 12,606.80 of my own money in improving and developing said plantation.

An instrument is put in evidence bearing date May 1, 1892, which reads as follows (translation):

We, Emilia B. de Benitz, a widow; Matilda Benitz, Adolf Benitz, Emilia Benitz, Gustavo Benitz, unmarried, residing in this city, of more than 21 years of age, and

sole heirs — conjointly with Bertha Benitz de Heny, wife of E. Heny — of Mr. Carlos Benitz, declare that, owing as we do Mr. E. Heny the sum of 12,606 pesos sencillos and 80 centesimals, besides other sums that we owe to sundry other creditors of our estate " La Fundación," to the amount of 26,833 pesos and 33 centesimals, for money supplied by said Heny for the improvement, maintenance, and cultivation of our sugar-cane estate called " La Fundación," situate at Las Tejerías jurisdiction, of the municipality of Consejo, district of Ricaurte, of the State of Miranda, the boundaries of which are in conformity with the title of property which, as heirs to our principal, Mr. Carlos Benitz, is in our possession and is registered under Nos. 38 and 41 of the first and second protocols, of the first quarter, under date of March 11, 1878, we hereby assign, cede, and transfer, in favor of the said Mr. E. Heny, all of the rights and actions that correspond to us or may to us correspond in future in said property " La Fundación," as a guarantee to said Heny for any loss he may sustain in the capital he has invested in said estate, Heny remaining bound to answer for the other debts incurred by said estate, which he is to pay off when we make, as we now make, formal cession in his favor of our credits in said estate. To the accomplishment of what is herein agreed to we bind our present and future property, in accordance with the law.

I, E. Heny, of over 21 years of age, wedded to Bertha Benitz, residing in this city, do accept the above transfer and bind myself to carry out my share of this agreement.

Caracas, May 1, 1892.

Emilia B. DE BENITZ
Matilda BENITZ
Adolf BENITZ
Emilia BENITZ
Gustavo BENITZ
E. HENY

This contract between the Benitz heirs and Heny is neither a mortgage nor a sale of the estate. Somewhat deficient in form, the contract is in substance that known to the civil law as an antichresis, whereby a creditor acquires the posession and right of reaping the fruits and other revenues of real property given him in pledge as security for a debt. The creditor does not become the proprietor of the immovables pledged, but he may take the profits of the estate, crediting annually the same to the interest and the surplus to the principal of the debt, and being bound to keep the estate in repair and pay the taxes. It is analogous to the vadium vivum of the early English law and the Welsh mortgage, which has now gone entirely out of use in common-law countries. Under the civil law the antichresis gives the creditor, not the title to but a possessory interest in, the real property pledged. (4 Kent's Com., 138n; Livingston *v.* Story, 11 Pet., 351; Walton's Civil Law in Spanish-America, art. 1881.)

A pledge or pawn (Pfandrecht) in the modern Roman law, according to Bar's definition, is a real, or possessory, right to follow a thing in the hands of third parties for the satisfaction of a personal claim. * * *

A whole estate may be thus pledged and in such cases the pledge covers not only what is on the estate at the time, but what may afterwards be added to it, even though the parties at the time have no knowledge of such addition. (Wharton, Conflict of Laws, sec. 314, citing Savigny, VIII, sec. 366.)

By the common Roman law a person can hypothecate his entire estate as an aggregate — i. e., all things which he has in bonis at the particular time and those he will possess in future. (*Ibid.*, sec. 320.)

We have here the measure and extent of Heny's individual interest. Up to May 1, 1892, he had advanced the Benitz heirs out of his own capital the sum of 12,606.80 pesos. Clearly the purpose and intent of this contract was to secure Heny for the advances made and to be made by him on account of the estate. To provide this security, the heirs of Carlos Benitz pledged to Heny the estate

of " La Fundación " and its appurtenances. Thereafter Mr. Heny, though not the holder of the legal title to the estate, did have a real or possessory right therein, which entitled him to compensation against third parties who, by their wrongful acts, might impair his security, to the extent at least of his actual interest in the property.

Anyone having an interest in land is liable to suffer injury with respect to this right; and accordingly, if his right, however limited it be, is injured, he may recover compensation equal to his individual loss. The general rule may be said to be that the extent of the injury to the plaintiff's proprietary right, whatever it may be, furnishes the measure of damages. (Sedgwick on Damages, sec. 69.)

In the contract with the heirs, Mr. Heny agreed to pay the other debts of the estate; but there is in the record no allegation or proof that he did so. They can not be considered, therefore, as included in the advances made by Heny to the estate.

General Fernandez certifies that the pro rata supplies furnished to his army by the plantation called " La Fundación," amounted to 143,098 bolivars. These supplies consisted of crops, horses, cattle, lumber, merchandise, tools, and money. All of this property as appurtenances of the estate was in Heny's possession under the contract with the Benitz heirs, constituting part of his security for the 12,606.80 pesos invested by him in the property. It represented the " fruits and other revenues " of the estate which he had the right to apply to the satisfaction of his claim. The property taken or destroyed exceeded in value the amount of his lien. If the Government of Venezuela is liable for the taking and destruction of this property, Mr. Heny is entitled to an award for an amount equal to his individual loss. To this should be added, as involved in the claim, compensation for the proportionate loss sustained by his wife, Bertha Benitz Heny, one of the Benitz heirs, who is by virtue of her marriage a citizen of the United States.

The " Legalista " revolution of September, 1892, ultimately proved successful in establishing itself as the de facto Government of Venezuela. The same liability attaches for encroachment upon the rights of neutrals in the case of a successful revolutionary government, as in the case of any other de facto government.

The validity of its acts, both against the parent State and its citizens or subjects, depends entirely upon its ultimate success. If it fail to establish itself permanently, all such acts perish with it. If it succeed and become recognized, its acts from the commencement of its existence are upheld as those of an independent nation. (Williams *v.* Bruffy, 96 U. S., 176.)

The liability of a government for encroachment upon neutral property has been clearly stated in Shrigley *v.* Chile decided by the United States and Chilean Commission of 1892, as follows:

Neutral property taken for the use or services of armies or functionaries thereunto authorized gives a right to the owner to demand compensation from the government exercising such authority.[1]

This rule has been followed in the case of Ford Dix decided by this Commission[2].

The certificate of General Fernandez is sufficient evidence that the property taken from " La Fundación " was under the authorization of the military authorities for the use and services of the revolutionary army.

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[1] Moore's Arbitrations, 3712.

[2] *Supra*, p. 119.

The learned counsel for Venezuela urges that the contract between Heny and the Benitz heirs is void because it consisted in the transfer of rights to real property for which record in the registry is an indispensable requisite in Venezuela. (Civil Code, art. 1888.) But this position is believed to be untenable. Certainly the contract was valid as between the parties, whether recorded or not. And whatever may be the requirement and effect of a registration law as affecting the rights of innocent third parties, it can have no possible bearing to excuse the acts of a mere trespasser or tort feasor.

The foregoing renders unnecessary any discussion of the second claim. But it may be remarked that the evidence shows that at the time of its destruction the property lay in the track of actual war.

An award should be made in this case for the sum of $ 10,085.40 (being the equivalent of 12,606.80 pesos) and the further sum of $ 1,753.25 (the proportionate loss sustained by Bertha Benitz Heny) in all the sum of $ 11,838.65 in United States gold, with interest thereon at 3 per cent per annum from March 15, 1893, the date of the presentation of the claim to the Venezuelan Government to December 31, 1903, the anticipated date of the final award by this Commission.

In so far as any claim or claims of the heirs of Carlos Benitz other than Bertha Benitz Heny are involved herein, they should be dismissed for want of jurisdiction, without prejudice to their prosecution in a proper forum.

PAÚL, *Commissioner* (claim referred to umpire):

The United States of America, on behalf of Emerich Heny, presents to this Commission a claim for the sum of $ 38,714.30. interest inclusive.

E. Heny, claimant, was born in Germany in 1846, emigrated to the United States in 1867, was naturalized as an American citizen in 1872, and two years later moved to Venezuela, where he has since resided. In 1883 he married in Caracas Miss Bertha Benitz, daughter and heir of Carlos Benitz, then deceased. The heirs of the latter acquired by inheritance from their father a rural property situated in " Las Tejerías ", and called " La Fundación." After his marriage Heny became the manager of this estate.

The claim is based upon the following grounds:

First. During the months of September and October 1892, the so-called " Legalista " revolution, which afterwards became the regular government, destroyed the plantations of the estate of " La Fundación," confiscated horses, cattle, and other valuable property, and obtained sums of money as loans, the total of these items amounting, as it is affirmed, to the sum of 143,098 bolivars. General Antonio Fernandez, on March 7, 1893, signed a document, in his character of " chief of the army of the center during the ' Legalista ' revolution," declaring that " the total sum of the advances made to the revolutionary army by the estate called ' La Fundación, ' property of Mr. Benitz's heirs and managed by Mr. E. Heny, amounted to the sum of 143,098 bolivars." This document appears to be legally executed by its signer.

Second. During the months of November and December 1899, forces of the " Revolución Restauradora," then already constituted as government, passed and repassed over the estate " La Fundación," cutting large quantities of sugar cane under cultivation for forage, a battle actually taking place upon the property causing damages to the said plantation. The amount claimed on this account is 12,000 bolivars.

Third. The honorable agent for the United States presents as proof that his claim belongs to the American citizen, Mr. E. Heny, a private document executed by the widow and children of Carlos Benitz, his heirs, dated in Caracas on May 1, 1892, in which it appears that there being due to Mr.

E. Heny the sum of 12,606.80 pesos venezolanos, and to other creditors of the same estate " La Fundación," the sum of $ 26,833, for advances made by said Heny for the improvement, maintenance, and cultivation of the said plantation, they assigned and transferred to E. Heny all rights and interests that correspond or might thereafter correspond to them in the said estate " La Fundación " as a guaranty against any loss that Heny might sustain of the capital invested by him in the estate; Heny being also bound to respond for all other claims against the estate, which he undertook to pay in consideration of the transfer made to him of all the rights and interests in the said property.

Fourth. E. Heny addressed on March 15, 1893, the minister of finance and public credit, as follows:

> E. Heny, merchant and resident of this city, on behalf and as representative of the heirs of Mr. C. Benitz, beg to state respectfully that said heirs are creditors of the Government for the sum of 143,098 bolivars for advances made to the revolution in the district Ricaurte, State of Miranda, as is proven by the annexed voucher consisting of 1 folio, signed by Gen. Antonio Fernandez, which I present to you in accordance with the Executive resolution of 28th of November last.

When this claim was presented to the board of public credit it was admitted in favor of Benitz heirs for one-half of the total amount claimed, and the Government offered in payment bonds of " Deuda de la Revolución," which the claimants declined to accept for reason of its depreciated price in the market. Subsequently E. Heny addressed the Department of State at Washington on May 9, 1901, presenting in his own name and for his account two claims which had arisen as the results of the acts committed by the revolutionary forces in the estate " La Fundación " in 1892 and 1899, and other damages suffered.

The petitioner in that document styles himself owner of the plantation " La Fundación."

The honorable Acting Secretary of State, David J. Hill, in his note of April 29, 1901, addressed to Mr. Heny's attorney, Charles A. Hansmann, in answer to the claim presented by said attorney against the Government of Venezuela for damages caused by the destruction, occupation, and confiscation of Heny's property by military forces of the Venezuelan Government and by revolutionary troops, determined and specified that Mr. Heny should produce the contract made with Benitz heirs by virtue of which he was managing the plantation, or any other proof that the property taken and destroyed belonged to him. To comply with this requirement the claimant has presented to the Commission the private agreement executed on May 1, 1892, by the widow and children of Mr. Benitz, deceased.

The honorable agent for the Venezuelan Government objects to the efficacy of this contract or private document as establishing the proof of ownership in favor of Heny, of property rights in the estate " La Fundación " as to third parties, inasmuch as said document lacks official certification as to the exactness of the date and has not been authenticated and recorded in the public register's office of the district where the estate is situated, in conformity with the law. In proof of his assertion the honorable agent has produced two deeds marked " A " and " B ;" the first of which, dated March 8, 1878, refers to the purchase of the estate " La Fundación " by Mr. Carlos Benitz, and the second, dated November 28, 1898, in which it appears that Mr. E. Heny, acting as attorney for Juan Remsted, on July 2, 1896, by deed duly recorded in the city of La Victoria in the public register's office, bought, for said Remsted, from the widow and children of Mr. Benitz, the plantation called " La Fundación " for the sum of 80,000 bolivars, with an agreement of resale for the same amount to Messrs. Benitz within a stipulated term. It also appears from the last-

mentioned deed that the Benitz heirs, after having availed themselves of the privilege of repurchasing the estate " La Fundación " by paying to Remsted the sum of 80,000 bolivars, and thus having reacquired the ownership of said estate, the same heirs of Benitz, and among them Bertha Benitz, acting under the authorization of her husband, E. Heny, made a new sale to Mrs. Altagracia H. de Ortega Martinez, of the same plantation, free of all incumbrances for the sum of 36,000 bolivars, reserving to them the privilege of repurchasing within the term of one year, and Messrs. Benitz remaining as tenants of the plantation. This deed, signed by E. Heny, as attorney for J. Remsted, is authenticated before the mercantile court of first instance of the Federal district on the 28th of November, 1898, and was recorded in the public register's office of the district Ricaurte, on December 2 of the same year.

It appears from the foregoing that the question of the rights that Mr. Heny alleges to have acquired in the real property, " La Fundación," prior to the dates on which the acts committed by the Government and revolutionary forces took place, and which rights he claims as arising from the private contract between himself and Benitz heirs, is in itself a question which treats of the rights acquired in a real property situated within the territory of the Republic. All questions relating to real property are necessarily governed by the local law of the place where the property is situated, lex loci rei sitæ:

> As everything relating to the tenure, title, and transfer of real property (immobilia) is regulated by the local law, so also the proceedings in courts of justice relating to that species of property, such as the rules of evidence and of prescription the forms of action and pleadings, must necessarily be governed by the same law.
>
> Thus real property is considered as not depending altogether upon the will of private individuals, but as having certain qualities impressed upon it by the laws of that country where it is situated, and which qualities remain indelible, whatever the laws of another State or the private dispositions of its citizens may provide to the contrary. That State where this real property is situated can not suffer its own laws in this respect to be changed by these dispositions without great confusion and prejudice to its own interest. Hence it follows as a general rule that the law of the place where real property is situated governs as the tenure, title, and descent of such property. (Lawrence's Wheaton's Elements of International Law, pp. 196, 116, Part II, Chap. II.)

The contract made between the heirs of Benitz and Heny, in May 1892, is not a contract of sale by which the dominion of the real estate is transferred in conformity with the laws that govern such contracts, because in order to be so considered required the explicit statement that the real estate was given in sale for a stated price; and furthermore, the local law required that in order to be valid as to third parties the document must be recorded at the register's office of the district where the said real estate is situated. Neither is it a mortgage contract, because, although the word guarantee is employed, it lacked one of the two essential legal conditions that characterize the mortgage, and that is the publicity which is obtained according to the law by employing the essential formality of registering in the proper office of the place where the real estate is situated. From the terms of the said contract the only inference which might be drawn is that it was the intention of the parties to celebrate an antichresis, giving to the creditor the right of reaping the fruits of the estate delivered to him, with the obligation of annually crediting the value thereof against the interest, if any was due to him, and any remaining balance against the principal standing to his credit; but besides the terms, which characterize a contract of antichresis, being imperfectly defined in the said contract, because there is no stipulation that the creditor acquired the right to reap the fruits, with the obligation of crediting the value thereof against the interest and prin-

cipal due him, in order that this contract of antichresis might be valid against third parties, it was necessary that the formality of registry should likewise be complied with as being essential for its effectiveness.

The said document, such as it is, only established a subsidiary guaranty between the debtor and the creditor, which did not cancel Heny's credit against the Benitz heirs, neither transferred to Heny any actual right in the real estate belonging to said Benitz heirs, because that transfer to make it effective against third parties would have had to be made public and made in accordance with the law governing the tenure, the title, and the transfer of the real property in the place of its situation. The law in such cases, demands as an essential requisite for the transfer of rights in real estate, to produce effect against third parties, the recording thereof in the office of the public register in the respective district.

The Benitz heirs, owners of the estate " La Fundación," in 1892, became direct creditors of the Government of Venezuela, by reason of the acts damaging said estate and committed by the forces of the " Revolución Legalista," and the said heirs, as regards their relations to the Venezuelan Government, being as they were, the only owners of the estate called " La Fundación " as per public title, duly recorded, and it was in virtue of this ownership only that General Fernandez executed to the Benitz heirs an acknowledgment of their credit against the Government of Venezuela, and it was for the same reason that E. Heny, presented to the minister of finances and public credit, as attorney of the Benitz heirs, and on behalf of said heirs, owners of the estate " La Fundación " against the said Government, the claim for the amount of this credit.

This opinion is confirmed by the remarkable circumstance that four years after the celebration of the private agreement between the Benitz heirs and Heny, the Benitz heirs appear on record as signing a deed of sale of the estate " La Fundación " in favor of Mr. Juan Remsted, and the same Mr. Heny accepted the said sale as attorney for Remsted without making any reservation as to the rights which he had acquired in the income and value of the estate, as security for the payment of his personal credit against the Benitz heirs. This acceptance of the transfer of the real estate to a third party given by Heny implies one of two conclusions: Either Mr. Heny had been paid by the Benitz heirs on or before that date the amount personally due to him or by such act he released his rights against the estate " La Fundación " which the Benitz heirs had accorded him as a guaranty for any loss that he might incur because of his prior investments in the said estate. In either case all legal rights or privileges established by the private contract of 1892, in reference to the estate " La Fundación," even considering said contract as antichresis, became null and void, and without effect whatsoever.

It appearing proven by the public deed presented by the honorable agent of Venezuela, dated November 28, 1898, that the estate " La Fundación " was again sold to Mrs. A. H. de Ortega Martinez, by the same heirs of Benitz as owners, this evidence destroys Heny's pretension to the payment of the damages caused to the real estate " La Fundación " in 1899, which constituted the second part of his claim, because on that date the said estate did not belong to him.

The circumstance which is argued that the estate " La Fundación " was cultivated and developed with Mr. Heny's money does not establish any juridical bonds between him and the Venezuelan Government, as relating to the damages caused to the property by Government or revolutionary troops, as such damages can only be claimed of the Venezuelan Government by such parties who by duly registered and authenticated titles appear as the legitimate owners of the damaged property. To admit as competent for recognition as a claimant before this Commission, anyone who may advance money for the

cultivation and development of estates or property belonging to Venezuelan citizens, would be equivalent to bringing before this Commission all foreigners who make a business of advancing money to the owners of real property either by private contracts or by virtue of contracts in which a mortgage on the property so benefited is given, a common practice between the foreign merchants established in this country and Venezuelan proprietors and agriculturists.

In consequence, my opinion is that this claim should be disallowed.

BARGE, *Umpire:*

A difference of opinion arising between the Commissioners for the United States of America and the United States of Venezuela this case was duly referred to the umpire.

The umpire having fully taken into consideration the protocol, documents, evidence, and arguments, and likewise all other communications made by the two parties, and having carefully and impartially examined the same, has arrived at the decision embodied in the present award.

As to the first claim of the claimant:

Whereas it is clearly proven that in the months of September and October 1892, during the so-called " Legalista " revolution, at the hacienda " La Fundación," the plantations of that estate were partially destroyed; horses, cattle, and other valubale property confiscated, and sums of money obtained as loans by the troops of the revolutionary party for the use and service of the revolutionary army under the authorization of the military chiefs;

And whereas the revolution proved ultimately successful in establishing itself as the de facto Government so that the liability of the Venezuelan Government for these acts can not be denied;

And whereas Emerich Heny, who has proved himself a citizen of the United States of America, claims that the sum owed by the Venezuelan Government as restitution for the above-mentioned acts is due to him, and as proof of his rights in the above-mentioned damages, confiscated properties and loaned moneys produces an instrument bearing date of May 1, 1892, and containing a contract between himself and the heirs of Carlos Benitz, who, according to the evidence produced before the Commission, were on the date of the above-stated facts the owners of the said estate " La Fundación."

Whereas, therefore, it has to be considered to what extent this contract gives the claimant any right to the claim in question.

Whereas this contract reads as follows (translation):

We, Emilia B. de Benitz, a widow; Matilda Benitz, Adolfe Benitz, Emilia Benitz, Gustavo Benitz, unmarried, residing in this city, of more than twenty-one years of age, and sole heirs, conjointly with Bertha Benitz de Heny, wife of E. Heny, of Mr. Carlos Benitz; declare that owing as we do to Mr. E. Heny, the sum of $ 12,606 pesos sencillos and 80 centesimals, besides other sums that we owe to sundry other creditors of our estate " La Fundación," to the amount of 26,833 pesos and 33 centesimals, for money supplied by E. Heny, for the improvement, maintenance, and cultivation of our sugar-cane estate called " La Fundación," situated at Las Tajerías, jurisdiction of the municipality of Consejo, district of Ricaurte, of the State of Miranda, the boundaries of which are in conformity with the title of property which, as heirs of our principal, Mr. Carlos Benitz, is in our possession and is registered under Nos. 38 and 41, of the first and second protocols, of the first quarter, under date of March 11, 1878 (1878), we hereby assign, cede, and transfer in favor of the said Mr. E. Heny, all the rights and actions that correspond to us or may to us correspond in future in said property, " La Fundación," as a guaranty to said Heny for any loss he may sustain in the capital he has invested in said estate, Heny remaining bound to answer for the other debts incurred by said estate, which he is to pay off when we make, as we do now make, formal cession in his favor of our credits in said estate; to the accomplish-

ment of what is herein agreed to, we bind our present and future property, in accordance with the law.

E. Heny, over 21 years of age, wedded to Bertha Benitz, residing in this city, do accept the above transfer and bind myself to carry out my share of the agreement.

Caracas, May 1, 1892.

Emilia B. DE BENITZ
Matilda BENITZ
(And others in interest)

And whereas it is clear that in this contract, stating that they owe the claimant Heny the sum of 12,606 pesos sencillos and 80 centesimals, as invested by him in the estate " La Fundación," and that they owe besides 26,833 pesos and 33 centesimals to sundry others whom they call " creditors of our estate La Fundación," thereby indicating that this sum as well was invested in said estate, the heirs of Carlos Benitz wanted to give a guaranty to Heny for any capital invested by him in that estate and at the same time wished to be freed from the other debts incurred by said estate, and therefore transferred to him, Heny, their credits in that estate, whilst he agreed to answer for all the debts;

Whereas, certainly this contract is neither a mortgage nor a sale of the estate and, lacking the characteristic stipulations of an antichresis, can not properly be counted to that species of contracts, to which, in substance, it seems to bear most resemblance;

Whereas, however — whatever may be the technical deficiencies of the instrument — whilst interpreting contracts upon a basis of absolute equity, what the parties clearly intended to do must primarily be considered;

And whereas, it was clearly the intention of parties that no one but the claimant should have a right to expropriate anything belonging to this estate, nor to profit by the revenues, at all events so long as his interest in the estate should last, which interest the heirs wished to guarantee; and whereas this interest existed as well in the sum invested by him in the estate as in the debts he assumed and which he might pay out of the estate, the credits and debits of which were equally transferred to him by the owners; whereas, therefore, according to this contract at the moment the facts which obliged the Venezuelan Government to restitution took place, the only person who directly suffered the " detrimentum " that had to be repaired was the claimant E. Heny;

Whereas, it being true that according to the principles of law generally adopted by all nations and also by the civil law of Venezuela; contracts of this kind only obtain their value against third parties by being made public in accordance with the local law — in this claim before the Commission, bound by the Protocol, to decide all claims upon a basis of absolute equity, without regard to objections of a technical nature or of the provisions of local legislation, this principle can not be an objection, and even when made this objection may be disregarded without impairing the great legal maxim, locus regit actum, as equity demands, that he should be indemnified who directly suffered the losses, and it not being the question here who owned the estate " La Fundación," but who had the free disposition over and the benefit and loss of the values for which restitution must be made, and who, therefore, in equity, owns the claim for that restitution against the Venezuelan Government.

Whereas then, it being stated that the American citizen E. Heny owns a claim against the Government of the United States of Venezuela for the partial destruction of the plantations, the confiscation of horses, cattle, and other valuables, and the imposing of loans upon the estate " La Fundación " during the " Legalista " revolution in 1892, it now remains to state, what sum may in equity be claimed on this ground;

And whereas the claimant, to prove the correctness of the sum, produces an official certificate of Gen. Antonio Fernandez, civil and military chief of the State of Zulia, and chief of the second division of the army of the center during the " Legalista " revolution, which certificate was thereafter recognized by said General Fernandez, and the correctness of its contents affirmed before the court of the first instance in civil and commercial matters of the Federal district, by him as well as by two other sworn witnesses; and whereas this certificate reads as follows:

CIVIL AND MILITARY HEADQUARTERS OF THE STATE OF ZULIA,
Maracaibo, March 7, 1893.

Citizen Gen. Antonio Fernandez, civil and military chief of the State of Zulia, and chief of the second division of the army of the center during the Legalista revolution certifies: That the statement at the foot of this document sets forth the pro rata supplies furnished the army of the revolution by the plantation called " La Fundación," situated at Las Tejerías, the property of the heirs of Señor Carlos Benitz, whose general agent and representative is Señor E. Heny.

Twenty-four tablons [1] of sugar cane, at 2,000 bolivars each, 48,000 bolivars; 12 tablons malojo, at 800 bolivars, 9,600 bolivars; 4 saddle horses, at 800 bolivars each, 3,200 bolivars; 1 tablon maize, at 600 bolivars; 2 cart horses, at 800 bolivars each, 1,600 bolivars; 1 breeding mare, 400 bolivars; 1 mare with her colt, 480 bolivars; 11 yoke of oxen, 8,800 bolivars; 1 single ox, 400 bolivars; lumber prepared for building and other uses, 1,200 bolivars; 3 kilometers of fences with their posts destroyed, 1,600 bolivars; in money, forced loans of 1,458 bolivars; and from the business house at " Las Tejerías," 33 cattle, each 120 bolivars, 3,960 bolivars; merchandise and tools from same store, 8,000 bolivars; for loss of time in consequence of the war, 48,000 bolivars; chief steward paid for Antonio Fernandez at the rate of 600 bolivars for eight months, 4,800 bolivars; sum total, 92,498 bolivars.

And whereas by this certificate evidence is given of the facts therein mentioned;

And whereas the estimation of the therein-mentioned values has to be recognized as just, being the authentic estimate of the authority that expropriated said values for the benefit of the army;

And whereas it is thus stated that claimant furnished to the army:

	Bolivars
24 tablons of sugar cane, at 2,000 bolivars each	48,000
12 tablons malojo, at 800 bolivars each	9,600
1 tablon maize	600
4 saddle horses, at 800 bolivars each	3,200
2 cart horses, at 800 bolivars each	1,600
1 breeding mare	400
1 mare with her colt	480
11 yoke of oxen	8,800
1 single ox	400
Lumber prepared for building and other uses	1,200
In money, forced loan	1,458
And from the business house in Las Tejerías on the estate " La Fundación ":	
33 cattle, each 120 bolivars	3,960
Merchandise and tools from same store	8,000
Chief steward paid for Antonio Fernandez, at the rate of 600 bolivars per month for eight months	4,800
Total	92,498

This sum has to be paid as a restitution to the claimant by the Venezuelan Government, and to it should be added the value of 3 kilometers of fences and posts destroyed by the military authority and estimated by that authority at 1,600 bolivars, making altogether 94,098 bolivars;

[1] One tablon = about 10,000 square varas.

Whereas the claimant further claims 48,000 bolivars for loss of time in consequence of the war, which sum is also mentioned in the above-cited certificate;

And whereas this certificate, although being evidence of the facts therein stated, which were the cause of the debits incurred by the Government, and containing the estimate by the proper authorities of the values claimant was deprived of, it is, however, not in itself a causa, and does not create a debit where the causa is wanting;

And whereas the interruption of the ordinary course of business is an invariable and inevitable result of a state of war under which all inhabitants, whether citizens or aliens, have to suffer; and whereas losses incurred by reason of such interruption are not subject to compensation by the Government within whose territory the war exists;

Whereas, therefore, loss of time in consequence of the war, is not a loss whereupon compensation can be equitably demanded; this part of the claim has to be disallowed.

In view of the foregoing an allowance is made in this claim for the sum of 94,098 bolivars, or, with interest thereon at 3 per cent per annum from March 15, 1893, the date of the presentation of the claim to the Venezuelan Government, to December 31, 1903, the anticipated date of the final award by this Commission.

And as to the second claim:

Whereas claimant claims 12,000 bolivars for 4½ tablons of growing sugar cane, confiscated and set aside for the food of the soldiers and taken and destroyed on the estate " La Fundación " during the months of November and December 1899; and whereas the Venezuelan Government produced a deed authenticated before the mercantile court of first instance of the Federal district, on the 28th of November, 1898, and recorded in the public register's office of the district of Ricaurte, on December 2 of the same year; and whereas in this instrument it is stated that on the 25th of November, 1898, the heirs of Carlos Benitz and among them Bertha Benitz, acting under the authorization of her husband E. Heny, made a sale to Mrs. Altagracia H. de Ortega Martinez, of the same estate, " La Fundación," free of all incumbrances, for the sum of 36,000 bolivars, with an agreement of resale within the term of one year.

And whereas it is proven thereby that on the 28th of November, 1898, the claimant Heny, without reserve as to any of his own rights authorized his wife, Bertha Benitz, to partake in a sale of the said estate free of all incumbrances and that this sale was effected; whereas, therefore, on that date Heny lost or abandoned whatever rights he might have had in this estate or its appurtenances and revenues;

And whereas no proof is given that the claimant acquired or recovered any right in the estate or its appurtenances and revenues later than this 28th of November, 1898; whereas, therefore, it is not proven that the claims against the Government of Venezuela for restitution for losses suffered on the estate " La Fundación " during the months of November and December 1899, is owned by the claimant, this claim ought to be disregarded.

BOULTON, BLISS & DALLETT CASE

Equitable demands may be received under the protocol as " claims."

An award will be made in favor of parties who under an implied contract have rendered services to the Government.

PAÚL, *Commissioner* (for the Commission):

The United States presents the claim of Boulton, Bliss & Dallett, against the Government of Venezuela, for the sum of 257,027.02 bolivars, for services rendered.

The claimants are the owners of the " Red D " line which runs between New York and several ports of the Republic of Venezuela.

The claim is founded on services rendered to the Government of the Republic, for carrying the mail from the Venezuelan ports to New York from April 1, 1897, to December 31, 1902, and also on the interest of the stated sums in which such services are annually estimated.

The claimants acknowledge that no espress contract exists fixing a rate of compensation, but that the mail has been carried by their steamship line, at the request of employees of the Government of the Republic, and under the promise that they should be paid a just and reasonable compensation.

The agents of Boulton, Bliss & Dallet, in Caracas, have presented, from time to time, memorials, to the Government of Venezuela, indicating the weight of the bags that were carried; and in a letter dated March 9, 1899, the said agents complained that until such date negotiations have not been entered upon, with a view to arriving, at a contract.

In view of the facts, as they appear from the documents submitted with the claim, it is necessary, owing to the special nature of the same, to determine if they really consitute a proper basis for presenting a claim to be examined and decided by this Commission.

In accordance with Article I of the protocol of Washington, it is incumbent upon this Commission to examine and decide —

All claims owned by citizens of the United States of America against the Republic of Venezuela, which have not been settled by diplomatic agreement or by arbitration between the two Governments. (See p. 000).

It is not opportune to make any comments with regard to the limitations and pertinancy that enter as elements for the qualification of the claims submitted to the jurisdiction of the Commission as established by the terms of said article of the protocol; but it is necessary to fix the meaning of the word "claim" so as to be able to infer if the demand presented, in the name of Boulton, Bliss & Dallett, properly constitutes a claim.

The word " claim," in its most general meaning and in its juridic sense is equivalent to a pretension to obtain the recognition or protection of a right, or that there should be given or done that which is just and due.

In the meaning of the word " claim " there is therefore included any kind or character of demand which involves a principle of justice and equity, and this in the abstract applies to the jurisdictional faculties of this Commission and the circumstances, which in accordance with the especial terms of Article I of the protocol limits that jurisdiction. The amplitude of the phrase " all claims " makes it possible that even the demands which are unforeseen by the law, or which, by the absence of proper agreements lack juridical foundation entitling them to be examined and confirmed under the proceedings of an ordinary court, must be considered by this Tribunal of exceptional jurisdiction which has to decide them upon their merits and upon a basis of absolute equity.

In accordance with the reasoning, the claim presented by the honorable agent of the United States, in the name of Boulton, Bliss & Dallett, possesses the necessary qualification to be examined and decided by this Commission under the principles of justice and equity which should guide its judgments.

The rendering of services, is the fundamental fact of the claim in question. These services consist in the carrying of the mail by the steamships of the " Red D " line from April 1, 1897, to December 31, 1902. The special nature of this service required, in order to establish the juridical bond, which creates obligations and rights between the two parties, the existence of an agreement or mutual understanding which will establish the precise price which must

be paid. The efficacy of the convention or agreement is of primary consideration in this kind of operation. Without it the claim for services does not exist but is only a gratuitous service. This last position was the one that Boulton, Bliss & Dallett maintained before the Government of Venezuela for near half a century, from the date that the vessels, between New York and the Venezuelan ports began their running, until the 2nd of March, 1897, on which date the minister of fomento was notified to the effect that from 1 April of that year they would charge the Venezuelan Government for the carrying of mail bags, not only to the ports of Venezuela that the steamers visit, but to Curaçao, United States and Europe, the following set prices: Eight bolivars per gross kilogram of letters and cards, and 0.50 of bolivar per gross kilogram of printed matter.

The agents of the line indicated in the same letter of March 2, 1897, that the bags should be weighed, on board of the steamers, before the agents of the Government and the agents of the line in each port, advising the weights to the respective post-office for its record.

On January 15, 1898, the ministry of fomento issued, under No. 2281, a resolution ordering the La Guaira post-office master, to give to the agents of the " Red D " line a note of the weight of the bags sent by the American steamers, and on March 6, 1899, and December 10, 1900, the same ministry, on the petition of Messrs. Boulton & Co,, repeated its instructions in order to give the said agents, through the corresponding post employees, the note of the weight of the bags embarked on board the steamers of the line.

Two elements tend to define the relations established between Messrs. Boulton, Bliss & Dallett and the Venezuelan Government, with reference to the transportation of the mail, as it appears from the notes exchanged between the two parties, since March 1897. The first is that Boulton, Bliss & Dallett should charge the Government, from April 1 of the same year, 8 bolivars per gross kilogram of letters and cards, and 0.50 of bolivar per kilogram of printed matter and samples; and the second, that the Government virtually accepted the said tariff from the moment that it ordered its post-office employees to take the weight of the bags and send it each time to Boulton & Co., as it was requested by them, in order to make the liquidation of the amount which the Government should have to pay for the service. These two elements are enough to deduce in justice the following conclusion: The Government of Venezuela owes to Boulton, Bliss & Dallet, for carrying the mail on the steamers of the " Red D " line, from April 1 1899, to December 31, 1902, the resulting sum of the two factors agreed by both parties, gross weight in kilograms of letters and cards, and gross weight in kilograms of printed matter and samples, and the sum of 8 bolivars per kilogram for letters and cards, and 0.50 of bolivar per kilogram of printed matter and samples.

This could be a simple arithmetical calculation which would not embarrass the Commission, but one of the factors is lacking, namely, the separate weight of the letters, and printed matter, as the bags which the post-office employees weighed contained, indiscriminately, letters, cards, printed matter, and samples, and has been taken by Messrs. Boulton & Co. to establish their account with the Covernment, making an arbitrary distribution of a sixth part for letters and cards and five-sixths part for printed matter and samples. There has not been presented before this Commission any proof or information which may establish that such distribution is equitable and well founded, and in consequence the real weight of letters and cards, and that of printed matter and samples, remains undetermined in the total sum which the gross weight of the bags represents in the period of five years and nine months comprised in their claim.

It is opportune to point out the difference exhibited by the first letter of Boulton & Co., date of June 14, 1898, which gives as gross weight of the bags which were carried by the steamers during a year from April 1, 1897, to March 31, 1898, the sum of 62,661.149 grams, in comparison to that of May 9, 1899, corresponding to the preceding year, which makes the weight of the bags to be 24,091.076 grams, a less weight in one year of quite the two-thirds. There must exist a grave error in the first calculation, since from April 1, 1898, to April 1, 1899, the business conditions of the country were the same as those of the preceding year, without the existence of any special motive to which such extraordinary diminution of volume and weight of the United States and Europe's mail could be attributed. This observation is conformed by the facts belonging to the following years, which have a reasonable proportion as it is proven by the following figures:

	Grams
From April 1, 1898, to April 1, 1899	24,091.076
From April 1, 1899, to April 1, 1900	18,398.396
(Time of war.)	
From April 1, 1900, to December 31, 1900	15,070.630
From December 31, 1900, to December 31, 1901	15,479.608
From December 31, 1901, to December 31, 1902	14,176.231
(Period of war.)	

As the Commission has no means of ascertaining the precise data which establish clearly the gross weight of the two classes in which the different kinds of mail were proposed to be divided, as accepted by the Venezuelan Government, and considering also that the figures given for the gross weight of the bags of the year 1897 to 1898 are not in proportion with the weight of the following years and the absence of any document to prove the exactness thereof; and furthermore, as this claim has to be decided only on the proofs and information presented by both parties on the basis of absolute equity; and taking also in consideration that Messrs. Boulton & Co., agents, in this city, of the "Red D" line, have several times made proposals to the Venezuelan Government to execute a contract fixing an annual sum for the carrying of the mail, it is my opinion that it is necessary to estimate the average of the accounts as made up by the agents of Boulton, Bliss & Dallett for the last five years. That average gives the sum of 29,474 bolivars, which I consider admits of a reduction to the sum of 25,000 bolivars, as the natural rebate which all debtors are entitled to, when the creditor fixes the price for services rendered, especially when they amount to a considerable sum extending over a period of years.

Having thus determined the annual price for carrying of the mail and calculating the time elapsed from April 1, 1897, to December 31, 1902, or five years and nine months, the value of the service comes to the sum of 143,750 bolivars.

With reference to the interest the circumstances set forth in this opinion makes it apparent that the claim is presented under conditions which do not justify the allowance of interest.

Therefore, an award is hereby made in favor of Boulton, Bliss & Dallett for the sum of 143,750 bolivars, equivalent in American gold, at the average rate of exchange, to $ 27,644.23.

The Alliance Case

The registry or other custom-house document is only prima facie evidence as to the ownership of a vessel in some cases, but conclusive in none. Property in a ship is a matter to be proved like any other fact by competent testimony.

A vessel driven by stress of weather into a port other than that for which she is destined is not subject to the application of local laws which would render it liable to penalties or unnecessary detention, and damages for its unreasonable detention will be allowed.

Interest allowed on claim from date of its presentation.

BAINBRIDGE, *Commissioner* (for the Commission):

The steamer *Alliance* was built at Curaçao in 1895 for Leonard B. Smith, a native citizen of the United States then domiciled in that island. She was 59 feet 4 inches in length, 12 feet 10 inches in breadth and 5 feet in depth, with a capacity of 41 tons, and cost the sum of $ 12,030.03. Smith registered the *Alliance* as a Dutch ship, and she carried the Dutch flag until February 1897. He then made arrangements to use the ship in the trade between Santo Domingo and Curaçao, but found that it would be necessary to register her as a Dominican ship in order to be permitted to trade along the Dominican coast. The memorialist says:

To comply with said laws still further the papers were taken out in the name of Carlos A. Mota, a citizen of Santo Domingo, who, however, never acquired any real interest in the *Alliance*, his title being purely nominal, and the vessel continued to be still the property of myself solely.

The Dominican registry, given February 20, 1897, is, in part, as follows:

The President of the Republic to all to whom these presents may come, greeting: The citizen Carlos A. Mota, having proved that he is the lawful owner of the Dominican steamer *Alliance*, its captain being at present the citizen, Martin Senior, and said owner, C. A. Mota, having furnished the bond required by law, I, therefore, grant him this letter of marque, etc.

On June 15, 1897, the *Alliance* sailed from Santo Domingo under the Dominican flag with clearance for Curaçao.

On the morning of the 20th she was discovered on the shoals of the bar at Maracaibo flying a signal of distress. Epitasio Ríos, one of the pilots of the port, thus describes her condition at the time:

We descried from San Carlos a vessel with the flag hoisted, asking for assistance, on the shoals of the bar, near the place where the bark *Bremen* lies a wreck. I immediately left to send her the proper assistance, reached where she was at about 8 o'clock in the morning, and at once observed that the vessel, as well as her crew, was running the greatest risk. The vessel is a small steamship, bearing the name *Alliance*; she had the Dominican colors hoisted; her fuel being exhausted it was necessary to break the windows to the cabin, 1 cask and some cots, with which, and even empty bags, her engine could get up 40 pounds of steam, which enabled us to arrive at San Carlos, where the commander of that fortress supplied her with firewood, provisions, and water, of all which elements the vessel was absolutely in want, and with which we could come that very day to Maracaibo. The steamship was at that moment leaking in consequence of the blows she had sustained by touching on the shoals of the bar.

Upon the arrival of the *Alliance* at Maracaibo, she was seized by the collector of the port on suspicion of unlawful traffic in fraud of the revenues of Venezuela. Proceedings were had before the captain of the port and the national court of finance of Maracaibo, which court on August 14, 1897, after a full investigation,

decreed that the *Alliance* and her cargo were freed from sequestration and to be returned to the owners. An appeal from this decree was taken by the Government to the high court at Caracas, which on November 12, confirmed the decree of the lower court. The high court held that " an uncontrollable force drove the *Alliance* into the harbor and that nothing had been adduced to show that there was the slightest intention to violate any of the laws of the Republic or defraud the revenues." This decree of the high court was published in Caracas on December 1, 1897. The *Alliance* was restored to the agent of Mr. Smith on January 11, 1898. In the court proceedings the value of the ship and cargo is stated to be 28,472.40 bolivars, equivalent to $ 5,475.46 United States gold.

On April 15, 1898, a claim was presented to the Government of Venezuela by the United States, through its legation at Caracas, on behalf of Leonard B. Smith as owner of the *Alliance*. The claim was summarized as follows:

Expenses incurred by reason of the seizure and detention of the *Alliance*	$ 3,439.32
Damages to the steamer resulting from detention	2,000.00
Interest on investment at 1 per cent per month during detention . . .	800.00
Total	6,239.32

Leonard B. Smith died intestate at Curaçao December 16, 1898, leaving him surviving his widow, Clara M. Smith, and three sons, Arthur B. Smith, Leonard G. Smith, and Ralph G. Smith, as his only heirs and next of kin, in whose behalf the claim is now presented to this Commission. In addition to the original demand, the sum of $ 1,007 is asked for accrued interest.

Replying on April 26, 1898, to the diplomatic note of the United States legation presenting this claim, the minister of foreign relations of Venezuela interposed two grounds of non-liability:

First. That the *Alliance* was proved to be a Dominican ship, a nationality other than that of the claimant.

Second. That the action taken by the Venezuelan authorities in the seizure and detention of the vessel was in line of the strict performance of their duties under the law of Venezuela for the protection of the revenues, and that no claim can be sustained growing out of the necessary observance of the local law.

The honorable agent for Venezuela refers the Commission to the diplomatic note of the minister of foreign relations as his own answer to the claim.

The first objection is rather suggested than urged by the Venezuelan Government. Nevertheless as touching the jurisdiction of the Commission over the claim, it must be fully considered. The record shows that upon her arrival at Maracaibo, the *Alliance* was carrying the Dominican flag; that she had a Dominican registry, based upon a showing that Carlos A. Mota, a citizen of Santo Domingo, had proved that he was the lawful owner of the Dominican steamer *Alliance*, and as such owner had furnished the bond required by law; that this registry had been obtained with the knowledge and by the connivance of Smith through his agent and representative at Santo Domingo, Jáime Mota. But whatever may have been the morality of this proceeding, it is not conclusive against the American ownership of the vessel:

> The registry or enrollment or other custom-house document is prima facie evidence only as to the ownership of a ship in some cases, but conclusive in none. The law even concedes the possibility of the registry or enrollment existing in the name of one person, whilst the property is really in another, Property in a ship is a matter in pais, to be proved as fact by competent testimony like any other fact. (Wharton, Int. L. Dig., sec. 410, citing U. S. *v.* Pirates, 5 Wheat., 184. U. S. *v.* Amedy, 11 Wheat., 409, and other cases.)

If as a matter of fact the *Alliance* was owned by a citizen of the United States, she was American property and possessed of all the general rights of any property of an American. (*Ibid.*)

The evidence of ownership is to the effect that the *Alliance* was built for L. B. Smith at Curaçao by Felipe Santiago, as shown by the builder's certificate; that the Dominican registry was secured in order to enable the vessel to trade along the Dominican coast; that Carlos A. Mota never acquired any real interest in the ship, his title being purely nominal; that the vessel actually continued to be the sole property of L. B. Smith, and that at the close of the investigation by the Venezuelan court she was returned to Mr. Smith's possession.

The second objection interposed by the Government of Venezuela to this claim is succinctly stated in the following paragraph of the reply of the minister of foreign relations:

> The steamer *Alliance* was detained by the captain of the port in accordance with a provision of the fiscal code which the authorities deemed applicable to the case in view of the manner in which the ship arrived. A ship which enters the waters where a State has jurisdiction, can not, if it is a merchant ship, be exempt from the disposition and rules in regard to Territorial jurisdiction. Fiore recognizes this in his celebrated work (Nouveau Droit International Public, 815), and Calvo is explicit on this point, 451. F. de Martens in his recent treatise on International Law is even more categoric, when he states (Vol. II, 56) that the merchant ships anchored in a port or the waters of a foreign State are subject to the laws and local authorities. The steamer *Alliance*, even though it may have arrived in distress, entered the territory where Venezuelan legislation was in force.

The minister argues that the authorities of the port would have been grossly derelict in their duty if they had not instituted the process and detained the vessel; and that no claim can be sustained for losses growing out of the necessary and proper observance of the local law.

With due respect, however, the vital question presented here is whether the *Alliance*, although within Venezuelan waters, was, under all the circumstances, subject to the laws and local authorities. There can hardly be any doubt that the ship arrived at the bar of Maracaibo in great distress. Her condition at the time is graphically described in the testimony of the pilot, Epitasio Ríos, quoted herein. Furthermore, she bore with her upon her arrival in port the following pass from the commander of the fortress of San Carlos:

> June 21, 1897.
>
> Allowed to go to Maracaibo, having made forcible arrival on account of lack of coal and provisions.
>
> The Commander in chief of the port. Manuel PAREJO

Under these conditions, the exemption of the *Alliance* from Territorial jurisdiction is clear. The identical question here involved was considered in the case of the brig *Enterprise*, decided by the American and British Claims Commission of 1855. The Commissioners, although disagreeing on other grounds, were unanimous upon the proposition that, as a general rule:

> A vessel driven by a stress of weather into a foreign port is not subject to the application of the local laws, so as to render the vessel liable to penalties which would be incurred by having voluntarily come within the local jurisdiction. The reason of this rule is obvious. It would be a manifest injustice to punish foreigners for a breach of certain local laws, unintentionally committed by them, and by reason of circumstances over which they had no control. (Moore, p. 4363.)

In the case of *The Gertrude* (3 Story's Rep., 68), Mr. Justice Ware says:

It can only be a people, who have made but little progress in civilization, that would not permit foreign vessels in distress, to seek safety in their ports, except under the charge of paying import duties on their cargoes, or under penalty of confiscation, where the cargo consisted of prohibited goods * * *.

Nor did the laws of Venezuela impose upon the authorities of the port any duty contrary to the principles of civilized jurisprudence or the dictates of humanity and hospitality. Law XXIV of the Finance Code in force at the date of the arrival of the *Alliance*, and which is the same as Law XXV of the existing code, provides in its first article that:

the formalities prescribed by the law for the entrance of vessels coming from a foreign country into the ports of the republic shall not be enforced in the cases of forcible arrivals, which are the following: Damages on board, sickness of the crew, whether contagious or not, and acts of God absolutely preventing it from proceeding on the voyage.

Articles 2, 7 and 8 of the same law prescribe the formalities that must be pursued by the administrative authorities of the port to obtain the proofs of the real causes of the arrival, and to assist the vessel, passengers, and cargo with all necessary means of protection and security during the enforced stay of the ship in port on account of repairs or other reasons in connection with the forcible arrival. Article 16 orders that —

the motives of the forcible arrival having terminated the administrator of the custom-house shall deliver the license of navigation and other papers to the captain, giving him two hours to sail out.

And article 17 provides that —

in cases where the cause of forcible arrival is not proved any ship coming from a foreign port and found to be anchored, without any justifiable reasons, in a port for which it was not cleared shall be liable to the penalties prescribed by Law XX of said code.

Only in the cases *where the cause of forcible arrival is not proved* and a ship is found to be anchored in a port *without any justifiable reasons* is it the duty of the administrator of the custom-house, in conformity with article 17 above quoted, to pass all documents to the judge of finance in order to initiate the corresponding trial.

In view of the evidence of the pilot Ríos, the wording of the pass given by the commander of San Carlos, the disabled condition of the vessel, and the testimony of the crew, which must have been taken by the captain of the port as required by law, can it be said that the cause of the forcible arrival of the *Alliance* was not proved, or that she was anchored in the port of Maracaibo without any justifiable reasons? And if not, there was no probable cause under the law of the country for the action of the port authorities and the subsequent judicial proceedings. The liability of the Government of Venezuela for the ascertainable loss or injuries resulting from the seizure and detention of the *Alliance* is, both upon reason and authority, established.

The claim is believed to be considerably exaggerated. The board of survey which examined the steamer upon her arrival at Curaçao on January 15, 1898, estimated " the complete repairs of said boat at the amount of two thousand dollars, so as to make her seaworthy." But it is to be remembered that the *Alliance* arrived in port at Maracaibo in a battered and disabled condition. Large sums of money are alleged to have been expended by claimants' intestate because of the seizure, but no vouchers therefor are put in evidence, although the claim was made within two months after the return of the ship to her owner

An award will be made in this claim for the sum of $ 2,500, United States gold, with interest at 3 per cent per annum from April 15, 1898, the date of the presentation of the claim to the Venezuelan Government, to December 31, 1903, the anticipated date of the final award by this Commission.

THE MARK GRAY CASE

Claim disallowed for damages caused by the unavoidable detention of a vessel because of the want of facilities for towage from the harbor when the government had granted a monopoly to a company to perform this service and had subsequently appropriated the only vessel in possession of the company to its own use.

BAINBRIDGE, *Commissioner* (for the Commission):

The United States presents the claim of J. S. Emery & Co., managing owners of the American schooner *Mark Gray*, against the Republic of Venezuela in the sum of $ 1,537.50, and interest amounting to $ 338.25.

The *Mark Gray*, W. A. Sawyer, master, was chartered on October 15, 1895, by Messrs. Kunhardt & Co., to carry a cargo of railroad material from New York to Maracaibo, Venezuela. The charterers agreed to pay all vessel's port charges at Maracaibo, including pilotage, lighterage, consul's fees, interpreter's fees, etc., and towage over the bar, and demurrage, beyond the lay days for loading and discharging cargo, at the rate of $ 30 per day for every day's detention by default of the charterers.

The schooner arrived at Maracaibo on December 11, 1895, finished discharging her cargo on the 28th, and could have left port two days later had she been able to obtain towage; but in the absence of any towboat in the port the vessel was delayed at Maracaibo until February 17, 1896, when she finally got to sea by resorting to the unusual custom of sailing over the bar. When Captain Sawyer, after discharging cargo, inquired of the consignees and the towing agents for a tug, he was informed that the towboat was away in the service of the Government and that no definite information could be given as to when she would return.

On January 18, 1896, the captain wrote to Mr. A. Boncayolo, the charterers' agent at Maracaibo, as follows:

SIR: I beg to call your attention to the fact that for several days past the schooner *Mark Gray*, under my command, has been ready for sea but has been unable to leave for lack of towage. I must appeal to you as consignee of said vessel in this port and as agent of the charterers, Messrs. Kunhardt & Co., of New York, to furnish me with towage as provided for in my charter party. The agreement respecting towage in the charter party is as binding as that providing for the payment of freight or any other consideration specified in that document and the charterers of the vessel are not to be considered as having complied with their obligations until said vessel shall have been towed over the bar. I beg to call your attention, as charterers' agent, to these facts, protesting at the same time against the injury to the vessel's interests caused by this delay.

W. A. SAWYER
Master American Schooner Mark Gray

On January 27, 1896, Captain Sawyer made formal protest before the United States consul at Maracaibo —

against the charterers, Messrs. Kunhardt & Co., of New York, against the contractor for towage at Maracaibo, against the Government of Venezuela, and against all and every person and persons whom it may or doth concern, and against all and every accident, matter, and thing, had and met with as aforesaid, whereby and by reason whereof, the said schooner, or her interests, shall appear to have suffered or sustained damage or injury.

It appears from the record that the Venezuelan Government had granted a monopoly of the business of towing vessels across the bar at Maracaibo, and that the grantee of the privilege used in that business but one tugboat, which, at the time its services were required by the *Mark Gray,* was employed in the service of the Government itself.

The learned counsel for the United States urges on behalf of the claimants, that the Venezuelan Government has made itself directly responsible for the demurrage and loss in this case, by granting the towage monopoly and then preventing the towage company from rendering the service by taking for the Government's own use the single tugboat operated by the company.

But the right of the Government of Venezuela to grant the franchise in question, by virtue of its proprietary interest in and exclusive jurisdiction over its territorial waters, is indisputable. And it is difficult to perceive wherein the Government, by making the grant, assumed any liability for the acts or omissions of the grantee. If such liability arises from the terms of the grant, that fact does not appear in evidence before the Commission. The protest of Captain Sawyer states:

> That according to the agreement made by the contractor for towage with the Government of Venezuela, the said contractor is bound to keep tugs constantly ready for service at the Maracaibo bar.

A showing that the contractor did not keep tugs constantly at the bar is rather proof of his failure to observe his agreement with the Government than of the Government's liability to those who may have suffered from such failure, which is the claim made here.

Nor does the fact that the Government was employing in its service the only tugboat used by the contractor for towage fix a liability upon Venezuela for losses sustained by those who were unable, because of its employment by the Government, to secure the service of the tug. That circumstance may, indeed, have occasioned a loss to the claimants; but if so, it was not injuriously brought about by any violation of their legal rights and is damnum absque injuria.

The claim must be disallowed.

AMERICAN ELECTRIC AND MANUFACTURING CO. CASE

Owner is entitled to compensation for the seizure by the Government of property which it appropriates to its own use during a revolution for military purposes, and which is damaged while in its possession.

Claim for damages suffered by reason of the bombardment of a city, the bombardment being the necessary consequence of a legitimate act of war on the part of the Government, disallowed.

PAÚL, *Commissioner* (for the Commission):

The claim of the American Electric and Manufacturing Company against the Venezuelan Government is based on two distinct groups of facts. The first is the taking possession of by the Government of the State of Bolívar on May 26, 1901, of the telephone office and service of the line for the use and convenience of the military operations during the battle, which took place in Ciudad Bolívar, until the 29th of said month, against revolutionary troops, and the damages which the property so occupied suffered in consequence thereof, owing to acts of destruction performed by the revolutionists. The amount claimed for such damages is the sum of $ 4,000.

The second group of facts consists in the damages suffered by the telephonic line in August 1902, during the bombardment of Ciudad Bolívar by the vessels of the Venezuelan Government, the claim on this account being for $ 2,000.

By the documentary evidence presented it is proven that when the loyal troops of the Government were fighting the rebels of Ciudad Bolívar, Gen. Julio Sarria, constitutional President of the State, ordered the absolute interruption of all the telephonic service with the exception of the instruments which connected the house of said general with the military commander; the administrator of the custom-house; the marine custom's office; the police inspector's office; the telegraph office, and such other places as are stated in the note which he sent to Mr. Eugenio Barletta, manager of the company, dated May 26, 1901, and ordered also the occupation of the central office of the company, and stationed near the machinery an armed guard, which remained there until the town was evacuated by the Government troops.

It is also proven that the revolutionary forces destroyed the posts and wires of the lines and caused damages in the central office, destroying the switch boards and forcing the employees to abandon the office.

The general principles of international law which establish the nonresponsibility of the Government for damages suffered by neutral property owing to imperious necessities of military operations within the radius of said operations, or as a consequence of the damages of a battle, incidentally caused by the means of destruction employed in the war which are not disapproved by the law of nations, are well known.

Nevertheless, the said principles likewise have their limitations according to circumstances established by international law, as a source of responsibility, when the destruction of the neutral property is due to the previous and deliberate occupation by the Government for public benefit or as being essential for the success of military operations. Then the neutral property has been destroyed or damaged by the enemy because it was occupied by the Government troops, and for that reason only.

It is the seizure of private property for the public use and its loss or destruction while so employed, whether by the enemy of the Government, that entitles the owner to payment. Even if it be morally certain that the enemy would himself take the property and use it, depriving the owner of it forever, still, its destruction by the Government entitles the party to compensation. (See Grant's case, 1 Ct. Claims, p. 41; and observations of Ch. J. Taney in Mitchell *v.* Harmony, 13 Howard, 115.) We must hold, even in such case, that the public has received the value of the property, by embarrassing its enemy by its destruction, and is bound to make just compensation. It can never be just that the loss should fall exclusively on one man, where the property has been lawfully used or destroyed for the benefit of all. (Putegnat's Heirs *v.* Mexico, 4 Moore Int. Arb., 3720.)

The seizure of the office and telephonic apparatus by the Government at Ciudad Bolívar, required as an element for the successful operations against the enemy, the damages suffered and done by the revolutionists as a consequence of such seizure, gives to the American Electric and Manufacturing Company the right to a just compensation for the damages suffered on account of the Government's action.

The claimant company, exhibiting evidence of witnesses, pretends that the damages caused amount to the sum of $ 4,000, but it must be taken into consideration that the witnesses and the company itself refer to all the damages suffered by the telephonic enterprise from the commencement of the battle which began on the 23d of May, whilst the seizure of the telephonic line by the Government which is the motive justifying the recognition of the damages, only took place on the 26th, which reduces in a notable manner the amount

for damages which has to be paid by the Government and therefore the damage is held to be estimated in the sum of $ 2,000.

With reference to the second section of the claim for the sum of $ 2,000 for damages suffered by the telephonic company during the bombardment of Ciudad Bolívar in August, 1902, these being the incidental and necessary consequences of a legitimate act of war on the part of the Government's men-of-war, it is therefore disallowed.

No interest is allowed for the reason that the claim was never officially presented to the Venezuelan Government.

In consequence thereof an award is made in favor of the American Electric and Manufacturing Company for its claim against the Venezuelan Government in the sum of $ 2,000 American gold.

LASRY CASE

Under the interpretation of the protocol the Commission not limited in adjudication of claims to such evidence only as may be competent under technical rules of common law. Evidence taken under sanction of an oath administered by competent authority will be accorded greater weight than unsworn statements, informal declarations, etc.[1]

BAINBRIDGE, *Commissioner* (for the Commission):

This claim is submitted upon the following documents:

First. Two letters of claimant, both dated May 16, 1901, addressed to the Department of State, in which he sets forth that he is a naturalized citizen of the United States, domiciled in Venezuela; that on November 11, 1899, the troops of General Colmenares, a detachment of General Castro's army, entered Belen, where claimant resided and was engaged in business as a merchant and farmer, took away his cattle and horses, and looted the better part of the goods and provisions in his business establishment; and he summarizes his alleged losses as follows:

	Gold
29 head of cattle, at $ 20 per head	$ 580
Merchandise	15,000
2 saddle horses, at $ 125 each	250
Cash	50
Total	15,880

Second. A statement signed by various parties claiming to be residents of Belen before the jefe civil of the parish to the effect that on the 11th day of November, 1899, the cattle Mr. Lasry had in his pasture were taken by the forces of General Colmenares and that the better part of the goods stored in his establishment was looted by said forces; and furthermore that Mr. Lasry had always attended to his business without mixing himself in the politics of the country, or in anything else which could affect his condition as a neutral tradesman.

Third. A statement signed on October 3, 1901, by J. Benody and J. A. Parmente in the presence of the secretary of the United States legation at Caracas to the effect that Isaac J. Lasry was, during the revolution existing in Venezuela in November 1899, practically ruined by the sackage of his

[1] See the German - Venezuelan Commission (Faber Case) in Volume X of these *Reports*.

mercantile house established at Belen, a village in the State of Carabobo, and the confiscation of all his material goods — such as money, beasts, cattle — by the forces of the Government of Venezuela.

Fourth. Copy of certificate of naturalization of Isaac J. Lasry in the court of common pleas for the city and county of New York, on October 26, 1893; and copy of passport issued to Isaac J. Lasry on March 22, 1898, by the United States legation at Caracas.

It is to be observed that no legally competent evidence under the rules of municipal law is here presented, either as to the fact or amount of the alleged loss. The learned counsel for Venezuela urges that the facts upon which the claim is founded are not proved as the common law requires, and that it should therefore be disallowed.

Article II of the protocol constituting this Commission provides:

> The commissioners, or umpire, as the case may be, shall investigate and decide said claims upon such evidence or information only as shall be furnished by or on behalf of the respective Governments.

The Commission, then, is not limited in the adjudication of the claims submitted to it to only such evidence as may be competent under the technical rules of the common law, but may also investigate and decide claims upon information furnished by or on behalf of the respective Governments. It has indeed been found impossible in proceedings of this character to adhere to strict judicial rules of evidence. Legal testimony presented under the sanction of an oath administered by competent authority will undoubtedly be accorded greater weight than unsworn statements contained in letters, informal declarations, etc., but the latter are under the protocol entitled to admission and such consideration as they may seem to deserve.

The information furnished as to this particular claim is both meager and unsatisfactory. The statement of the claimant that the suffered some loss, and the manner thereof is corroborated by the declarations of various residents of Belen, but none of the latter gives an estimate of the amount of the loss sustained by Mr. Lasry. Belen is referred to by the declarants as a little town or village in the State of Carabobo. Lasry states that " the better part " of his stock of merchandise was taken by the soldiery, and he gives the value of the part taken as $ 15,000 gold, manifestly an exaggeration.

The Commissioners regarding the fact as shown that Lasry sustained some loss, but unable to accept his uncorroborated estimate of the value of the property taken, have agreed to make an allowance in this claim of the sum of $ 2,000, without interest, as being under all the cricumstances the nearest approach possible to an equitable determination.

Flutie Cases

Recitations in the record of naturalization proceedings are binding only upon parties to the proceedings and their privies. The Government of the United States and that of Venezuela are not parties, and such recitations are not conclusive upon either of these governments.

International tribunals competent to decide their own jurisdiction.

Certificate of naturalization an element of proof subject to be examined according to the principle of locus regit actum. Certificates of naturalization made in due form presumed to be true, but when it becomes evident that statements therein contained are incorrect this presumption must yield to the truth.

Certificate of naturalization decided to have been granted by fraud or mistake

because evidence showed that claimant did not " reside " in the United States for the statutory period immediately preceding issuance of such certificate, and claim dismissed without prejudice.

BAINBRIDGE, *Commissioner* (for the Commission):

For reasons hereinafter made apparent, it is deemed advisable to consider these two claims together.

The memorial of Elias Assad Flutie, subscribed and sworn to on March 7, 1903, before William J. Marshall, a notary public in and for the county of Middlesex, State of Massachusetts, states:

1. That the said Elias A. Flutie is a native of Syria, 27 years of age; that he came to the United States in the year 1892, and was naturalized a citizen of the United States on the 2d day of July in the year 1900, in the district court of the United States of America for the eastern district of New York, sitting in the city of Brooklyn, in proof whereof said claimant produces with his memorial a certified copy of said certificate of naturalization, marked " Exhibit A," and that claimant is now a citizen of the United States, and a resident of the city of Wilkesbarre, State of Pennsylvania.

2. That about the year 1899 claimant went temporarily to the city of Yrapa, in the Republic of Venezuela, to establish a business as a general merchant, returning shortly afterwards to the United States, leaving said business in charge of his brothers; that said business was conducted for the period of one year without interruption, resulting in a large profit to the claimant; that claimant returned to Venezuela from time to time to supervise the conduct of said business; that he was at all times the sole person interested in said business; that his stock in trade was worth about $ 30,000; that all of claimant's books of account and records of what stock he had were destroyed, but that he is able to state from memory what amount of stock there was on hand and he attaches an inventory thereof marked " Exhibit B; " that he employed as clerks to assist him in said business his two brothers, Julian and Abraham Flutie, and also two other persons named Victor Ferralle and José R. Romero.

3. That the claimant returned from the United States in August 1900, and from that time claimed citizenship in the United States and the protection of the United States Government; that prior to his return to Venezuela, a revolution broke out in that Republic; that at various times after his return, between September 1900, and March 1902, he was the victim of forced loans, destruction of property, false arrests, and illtreatment in connection therewith, received partially at the hands of the Government officials and troops, and partially at the hands of the insurgents; that his store was raided on repeated occasions, he himself was repeatedly arrested and lodged in jail, and kept for indefinite periods, and released only upon his consenting to make the demanded forced loans, or when the officers of the Government had in the meantime obtained from his store such goods and money as they demanded. The memorial states seventeen specific instances of such alleged illegal acts on the part of the officers of the Government, and seven similar unlawful acts on the part of the revolutionists; that because of said acts of violence all of claimant's property to the value of $ 30,000 in United States gold was confiscated, lost, or destroyed; and that on June 7, 1901, the claimant, together with his wife and children, was forced to leave the country.

4. Claimant demands from the Government of Venezuela as a just recompense for the injuries he has suffered, for loss of property, the sum of $ 30,000,

and for illtreatment the sum of $ 50,000; in all the sum of $ 80,000 in United States gold coin.

The memorial of Emilia Alsous Flutie, subscribed and sworn to on March 31, 1903, before Arthur L. Turner, a notary public in and for Luzerne County, State of Pennsylvania, states:

1. That the said Emilia Alsous Flutie is a native of Syria, 25 years of age; that in the city of Carúpano, in the Republic of Venezuela, on the 22d day of July, 1897, she was married to Elias Assad Flutie, according to the rites of the Roman Catholic Church, having previously, to wit, on the 25th of April, 1896, been married by the civil authorities of said Republic to said Elias A. Flutie; that her husband was naturalized a citizen of the United States of America on the 2d day of July, 1900, in the district court of the United States for the eastern district of New York, sitting in the city of Brooklyn; that a duplicate of his certificate of naturalization is attached to her memorial marked " Exhibit A;" that by virtue of the naturalization of Elias Assad Flutie, as a citizen of the United States, claimant is a citizen thereof, and that she is now a resident of the city of Wilkesbarre, State of Pennsylvania.

2. That from the month of September, 1900, to the month of June, 1901, claimant was with her husband in the city of Yrapa, Venezuela; that apart from her husband's business and in her own name, for her own separate benefit, claimant used to carry on a small trade in toilet articles, etc.: that her stock in trade was worth $ 1,500; that claimant was unable to preserve any documents showing her actual stock, but is able to state from memory what amount of stock she had on hand, and attaches to her memorial an inventory thereof marked " Exhibit B " which sets forth the amount and cost value of the articles; and that she was the sole person interested in said business.

3. That during the year 1900 and 1901, there was a revolution in progress in Venezuela, in the course of which she was subjected, at various times, to such illtreatment, at the hands of both the Government officials and the insurgents, that she became ill; that as a result of such illtreatment her health has been permanently impaired; that toward the close of December, 1900, certain Government officials arrested and imprisoned claimant's husband, and in his enforced absence, said officials tried to criminally assault claimant, and were driven off by the claimant at the point of a pistol; that they took possession of all goods which belonged to claimant, and after having destroyed some, took the remainder away with them, said property being of the value of $ 1,500 gold; and that on June 7th, the claimant, together with her husband and children, was forced to leave the country, sailing from Yrapa at night during a heavy tropical tempest in a small sailboat of about 5 tons burden, which afforded absolutely no shelter, and that after four days of such exposure they at length reached the island of Trinidad.

4. Claimant demands as a just recompense for her loss of property the sum of $1,500, and for the illtreatment she has suffered the sum of $ 20,000, in all the sum of $ 21,500 in United States gold coin.

The two claims aggregate the sum of $ 101,500 gold.

The only testimony introduced is that of the claimants themselves and of Abraham and Julian Flutie, brothers of Elias A. Flutie.

It appears from the evidence that the claimants were suspected by the Venezuelan authorities of unlawful traffic in fraud of the revenues, but the charges of smuggling are denied by the claimants and the arrests are alleged to have been without just foundation. It is a fact, not without significance, however, that although the alleged outrages extended over a period of nearly a year, the evidence does not show that during that time any notice of them

was brought to the attention of the consular officers or diplomatic representative of the United States in Venezuela.

But, in view of the position taken by the Commission relative to these claims, a further discussion of their merits is unnecessary.

Article I of the protocol constituting this Commission confers jurisdiction over —

all claims owned by citizens of the United States of America against the Republic of Venezuela which have not been settled by diplomatic agreement or by arbitration, between the two Governments.

This Commission has no jurisdiction over any claims other than those owned by citizens of the United States of America. The American citizenship of a claimant must be satisfactorily established as a primary requisite to the examination and decision of his claim. Hence the Commission, as the sole judge of its jurisdiction, must in each case determine for itself the question of such citizenship upon the evidence submitted in that behalf.

The citizenship of claimants is as fully a question of judicial determination for the Commission in respect to the relevancy and weight of the evidence and the rules of jurisprudence by which it is to be determined as any other question presented to this Tribunal, subject only to the provisions of Article II of the protocol that the commissioners, or umpire, as the case may be, shall investigate and decide claims upon such evidence or information only as shall be furnished by or on behalf of the respective Governments.

The jurisdiction of the Commission over both of these claims depends upon the American citizenship of Elias A. Flutie. The evidence of Flutie's citizenship in each case is a copy of the record of his naturalization on July 2, 1900, in the district court of the United States for the eastern district of New York. The record recites that Flutie had produced to the court such evidence and made such declaration and renunciation as are required by the naturalization laws of the United States, and that he was accordingly admitted to be a citizen thereof.

This certificate of naturalization, as the record of a judgment of a high court, is prima facie evidence that Elias A. Flutie is a citizen of the United States. It is not, however, conclusive upon the United States, or upon this Tribunal.

In the case of Moses Stern (13 Op. Atty. Gen., 376) the Attorney-General of the United States, Mr. Akerman, said:

Recitations in the record (i. e., of naturalization) of matters of fact are binding only upon parties to the proceedings and their privies. The Government of the United States was no party, and stands in privity with no party to these proceedings. And it is not in the power of Mr. Stern, by erroneous recitations in ex parte proceedings, to conclude the Government as to matters of fact.

In the circular of Mr. Fish, Secretary of State, dated May 2, 1871, he says:

It is material to observe that according to the opinion of the Attorney-General in the case above mentioned, the recitations contained in the record of naturalization, as to residence, etc., are not conclusive upon either this or a foreign Government; but that when such recitals are shown, by clear evidence, to be erroneous, they are to be disregarded. (Foreign Relations, 1871, p. 25.)

Such is still the position taken by the Department of State.

As for the naturalization laws to which you allude, they are of direct concern to this Department only so far as they affect the international status of those who become naturalized. As you are aware, the Department's regulations require every naturalized citizen when he applies for a passport to make a sworn statement concerning his own or his parents' emigration, residence, and naturalization; and when-

ever the naturalization appears to have been improperly or improvidently granted, it is not recognized under the Department's rules. (Mr. Hay, Secretary of State, to Mr. Sampson, June 21, 1902. Foreign Relations, 1902, p. 389.)

The record of a judgment rendered in another State may be contradicted as to the facts necessary to give the court jurisdiction; and if it be shown that such facts did not exist, the record will be a nullity, notwithstanding it may recite that they did exist. (Thompson *v.* Whitman, 18 Wall. U. S., 457.)

In Pennywit *v.* Foote (27 Ohio St., 600), the court said that a judgment offered in evidence —

may be contradicted as to the facts necessary to give the court jurisdiction, and if it be shown that such facts did not exist, the record will be a nullity, notwithstanding it may recite that they did exist, and this is true either as to the subject-matter or the person, or in proceedings in rem as to the thing.

The functions and authority of an international court of arbitration are clearly expressed by Mr. Evarts, Secretary of State, in a communication relative to the United States and Spanish Commission of 1871, which Mr. Evarts declared to be —

an independent judicial tribunal possessed of all the powers and endowed with all the properties which should distinguish a court of high international jurisdiction, alike competent, in the jurisdiction conferred upon it, to bring under judgment the decisions of the local courts of both nations, and beyond the competence of either Government to interfere with, direct, or obstruct its deliberation. (Moore's Arbitrations, p. 2599.)

He says, furthermore, that the tribunal had authority —

to fix, not only the general scope of evidence and argument it will entertain in the discussion both of the merits of each claim and of the claimant's American citizenship, but to pass upon every offer of evidence bearing upon either issue that may be made before it. (Moore's Arbitrations, p. 2600.)

In Medina's case, decided by the United States and Costa Rican Commission of 1860, Bertinatti, umpire, says:

An act of naturalization, be it made by a judge ex parte in the exercise of his voluntario jurisdictio, or be it the result of a decree of a king bearing an administrative character; in either case its value, on the point of evidence, before an international commission, can only be that of an element of proof, subject to be examined according to the principle locus regit actum, both intrinsically and extrinsically, in order to be admitted or rejected according to the general principles in such a matter. * * *

The certificates exhibited by them (the claimants) being made in due form, have for themselves the presumption of truth; but when it becomes evident that the statements therein contained are incorrect, the presumption of truth must yield to truth itself. (Moore's Arbitrations, 2587.)

Whatever may be the conclusive force of judgments of naturalization under the municipal laws of the country in which they are granted, international tribunals, such as this Commission, have claimed and exercised the right to determine for themselves the citizenship of claimants from all the facts presented.

(Medina's case, *supra*; Laurent's case, Moore's Arbitrations, 2671; Lizardi's case, *ibid.*, 2589; Kuhnagel's case, *ibid.*, 2647; Angarica's case, *ibid.*, 2621; Criado's case, *ibid.*, 2624.)

The present Commission is charged with the duty of examining and deciding all claims owned by citizens of the United States against the Republic of Venezuela. It is absolutely essential to its jurisdiction over any claim presented to it to determine at the outset the American citizenship of the claimant. And

the fact of such citizenship, like any other fact must be proved to the satisfaction of the Commission or jurisdiction must be held wanting.

Notwithstanding the certificates of naturalization introduced in evidence here, the Commission is not satisfied that Elias Assad Flutie is a citizen of the United States, or that it has under the protocol any jurisdiction over these two claims.

Section 2170 of the Revised Statutes of the United States provides that:

> No alien shall be admitted to become a citizen who has not for the continued term of five years next preceding his admission resided within the United States.

This law is not construed to require the uninterrupted presence within the United States of the candidate for citizenship during the entire probationary period. Transient absence for pleasure or business with the intention of returning does not interrupt the statutory period or preclude a lawful naturalization at the expiration thereof. But the law does require the candidate to " reside " within the United States for the continued term of five years next preceding his admission.

No alien who is domiciled in a foreign country immediately prior to and at the time he applies to be admitted to citizenship can be lawfully naturalized a citizen of the United States.

Domicile is residence at a particular place accompanied with an intention to remain there; it is a residence accepted as a final abode. (Webster.) Domicile in Venezuela during a certain period precludes for the same period residence in the United States within the meaning and intent of the statutes of naturalization.

A man's domicile, as involving intent, is often difficult of ascertainment. But publicists and courts regard certain criteria as establishing the fact.

> If a person goes to a country with the intention of setting up in business he acquires a domicile as soon as he establishes himself, because the conduct of a fixed business necessarily implies an intention to stay permanently. (Hall, Int. Law, 517.)
>
> If a person places his wife and family and " household gods " * * * in a particular place, the presumption of the abandonment of a former domicile and of the acquisition of a new one is very strong. (4 Phillimore's Int. Law, 173.)
>
> If a married man has his family fixed in one place and he does business in another, the former is considered the place of his domicile. (Story, Conflict of Laws, Ch. III, sec. 46.)
>
> The residence of a man, says Judge Daly, is the place where he abides with his family, or abides himself, making it the chief seat of his affairs and interests. (Quoted in Medina's case, supra.)
>
> The apparent or avowed intention of constant residence, not the manner of it, constitutes the domicile. (Guier *v.* O'Daniel, 1 Binney, 349.)
>
> Intention may be shown more satisfactorily by acts than declarations. (Shelton *v.* Tiffin, 6 How. U. S., 163.)

These are the criteria of domicile, recognized by both international and municipal law. Concurrently existing in this case, they fix the domicile of Elias A. Flutie prior to and on July 2, 1900, in the Republic of Venezuela.

The evidence bearing upon the residence of Elias A. Flutie is the following:

Elias A. Flutie states that he is a native of Syria, 27 years of age (in 1903); that he came to the United States in 1892; that during the years 1899, 1900 and 1901, his occupation was that of a merchant and his residence was in the city of Brooklyn, in the State of New York, where he had resided for several years past; that about the year 1899 he went temporarily to the city of Yrapa in Venezuela to establish a business as a general merchant, returning shortly afterwards to the United States, leaving said business in charge of his brothers; that he had temporarily left his family in Yrapa in charge of his brothers, and

visited them from time to time for a greater or less period; that he made frequent trips to Yrapa to supervise the management of his business, returning each time to his home in Brooklyn; that he was naturalized a citizen of the United States on July 2, 1900; that in August, 1900, he returned to Venezuela where he remained until compelled to flee from the country in June, 1901.

In Flutie's testimony there is no intimation that he was ever in Venezuela prior to "about 1899," when he went there "temporarily" to establish the business at Yrapa, where he "temporarily" left his family whom he visited from time to time "for a greater or less period." Indefiniteness, evasion, a manifest shaping of his statements to accord with the supposed necessities of his case, and a suppression of material facts characterize all his testimony on the subject of his residence and discredit it.

Emilia Alsous Flutie testifies (on March 25, 1903), that she had known Elias A. Flutie for seven and one-half years. Her acquaintance with him must have begun therefore about September, 1895. She swears that she was married to him by the civil authorities of Venezuela on the 25th day of April, 1896, and that she was married to him again, according to the rites of the Roman Catholic Church, on July 22, 1897, at Carúpano, Venezuela; that during part of the year 1899 she resided at Carúpano, Venezuela, going from Carúpano to Yrapa, Venezuela, in the latter part of that year, where she resided until June, 1901; that in both Carúpano and Yrapa she was engaged in the sale of laces, fancy needlework, and fancy goods.

Abraham A. Flutie testifies that he has known Mrs. Emilia Flutie since July, 1897, when she was married to his brother by Father Pedro Ramos, and that the business at Yrapa was established in July or August, 1899.

Julian A. Flutie testifies that the business at Yrapa was conducted under the name of Flutie Hermanos, although it belonged entirely to Elias A. Flutie; that the first met Mrs. Emilia Flutie on the 8th of July, 1897, when he was introduced to her by his brother Elias, who told him that he had been civilly married to her on April 25, 1896; that on July 22, 1897, his brother was married to her according to the rites of the Roman Catholic Church at Carúpano, Venezuela; that he was best man at the wedding, and the ceremony was performed by Rev. Antonio Ramos. He says that in June, 1901, Mrs. Flutie became so frightened, both for her own safety and that of her children, that she was forced to leave the country.

As it does not appear in evidence that Mrs. Flutie was ever in the United States until she went there with her husband in 1901, it is apparent that Elias A. Flutie must have left the United States as early as September, 1895; it is proven that he was married in Venezuela in April, 1896, and remarried there in July, 1897, and by his own statement he was established in business there in 1899.

Flutie claims that for several years prior to July 2, 1900, he resided in the United States, and that subsequent to about 1899 he made frequent trips to Venezuela to visit his family for greater or less periods and to supervise the management of his business, returning each time to his home in Brooklyn.

The Commission is satisfied from all the evidence before it in these cases that the reverse is true; that Flutie resided in Venezuela from at least the fall of 1895 up to July or August, 1899, at or near Carúpano, and after that time at Yrapa; that he may have made trips to the United States, and undoubtedly did make one there shortly before July 2, 1900, returning to his home and family and business in Venezuela shortly afterwards, that is to say, in August, 1900; from which time there is neither allegation nor proof in the record nor any fair implication therefrom that he ever intended voluntarily to return to the United States.

Naturalization in the United States, without any intent to reside permanently therein, but with a view of residing in another country, and using such naturalization to evade duties and responsibilities to which without it, he would be subject, ought to be treated by this Government as fraudulent. (14 Op. Atty. Gen., 295; Wharton, Int. Law Dig., sec. 175.)

The evidence presented in these cases convinces the Commission that Elias A. Flutie did not " reside " in the United States for the continued term of five years nor any considerable portion thereof prior to the 2nd day of July, 1900; that the facts necessary to give the court jurisdiction did not exist, and therefore that the certificate of naturalization was improperly granted.

It follows that these claimants have no standing before the Commission as citizens of the United States, and their claims are therefore dismissed for want of jurisdiction, without prejudice, however, to their presentation in a proper forum.

UNDERHILL CASES

(By the Umpire:)

Claim of J. L. Underhill, as successor in interest of her deceased husband, G. F. Underhill, disallowed because of failure on her part to show succession in interest.

Damages allowed for unlawful detention of claimant, J. L. Underhill, in Venezuela by the governmental authorities refusing to furnish passport.

BAINBRIDGE, *Commissioner* (claim referred to umpire):

I am unable to agree with my honorable colleague in regard to this claim.

At the time of the alleged transfer of the waterworks, Underhill was not, in my judgment, enjoying that freedom from restraint and equality of position as a contracting party which are necessary to give validity to every contract. Furthermore it appears to me that Mrs. Underhill is entitled in propria persona to an award for her unlawful detention.

As this claim must go to the umpire, however, it is unnecessary to discuss in detail the evidence upon which the foregoing opinion is based.

PAÚL, *Commissioner* (claim referred to umpire):

Both of these cases represent a claim for an indemnity amounting to $ 232,316.28 for personal injuries, insults, abuses, and unjust imprisonment. The claim of George Freeman Underhill includes an indemnity for having been forced to sacrifice, or abandon, his property; having been obliged to leave the place of his residence.

George Freeman Underhill died in the city of Havana, Cuba, on the 26th of October, 1901, and his widow, Jennie Laura Underhill, presented on the 17th of June of this year, to the Department of State in Washington, a supplementary memorial as administratrix of the estate of her deceased husband, although it is not proven that she had obtained from the surrogate's court of the county of New York, State of New York, the appointment to said charge.

Underhill's death put an end to any claim that could arise from personal injuries, insults, or other offenses, because these facts require, to serve as a reason for an indemnity, to be preceded by the consequential trial for responsibility against the perpetrator of said offense, and Underhill, as it is proven, limited himself, in his lifetime, to entering an action of responsibility against Gen. José Manuel Hernandez, in the city of New York, and both the circuit court and the Supreme Court of the United States, decided that General Hernandez's acts were not of such nature as to be properly brought within

the jurisdiction of the United States courts. This last judgment of the Supreme Court took place seven years before Underhill's death, and during all those years he never tried to enter before the Venezuelan courts any action of responsibility for the alleged personal offenses, all rights of civil action thus perishing with his own death.

Besides these considerations, it appears, as evidently proven that Underhill never was subjected to any personal illtreatment, nor to any imprisonment from the moment of the taking of the city of Bolívar by General Hernandez, as chief of the revolutionary forces called "Legalista," until Underhill's departure for Trinidad. The facts mentioned by Underhill in his memorial addressed to the Department of State, and which facts took place on the 11th of August, 1892, in reference to his wife and himself, only prove that there existed an excited feeling of the people of Ciudad Bolívar who tried to prevent the sailing of the Underhills, husband and wife, on the steamer *El Callao*, with the chiefs of the party vanquished at the battle of Buena Vista on the previous day, and while there was not in the city any regularly established authority.

It is not true, as it is asserted by the memorialist, that in consequence of said happenings, he was put in prison with his wife, as from his own statement and those of the witnesses produced by him, it appears that from the wharf the Underhills, husband and wife, went to their hotel, and stayed in it until their departure from Ciudad Bolívar.

The report made by the commander of the U.S. man-of-war *Kearsarge*, Mr. A. T. Crowninshield, and addressed to Rear-Admiral J. G. Walker, dated at Trinidad on the 18th of November, 1892, after having obtained from the United States consul at Ciudad Bolívar and from other respectable gentlemen of the same city, all named by the commander in his report, all the necessary information to arrive at the truth of what had occurred at Ciudad Bolívar to the Underhills, very clearly says that far from having the Underhills suffered any humiliating treatment of any kind from General Hernandez they were, on the contrary, protected by him from the feeling of general hostility existing against Underhill amongst all classes and all citizens of Ciudad Bolívar, according to the very words of the commander of the *Kearsarge*.

This feeling was strengthened by the knowledge that Mr. Underhill had entertained at his residence General Carreras and other officers of the Government's army the day before their departure from Ciudad Bolívar, when they went out to meet the revolutionary forces, which were approaching the city under the command of General Hernandez; [and further] I could not find any evidence to support the statement of Mr. Underhill that he was confined in his own house by orders of the new Government; or that guards were placed about his residence, as he states, for several weeks.

From August 11 to September 23, Mr. Underhill made repeated applications to General Hernandez to leave Ciudad Bolívar by every steamer, but permission was invariably refused; first, on the ground that it would be unsafe for Mr. Underhill to leave on one of Mr. Mathison's steamers; second, that the presence of Mr. Underhill was necessary in order to operate the aqueduct. A passport was, however, offered to Mr. Underhill, provided he would obtain some reliable merchant in Ciudad Bolívar to give security for his return, but this proposition Mr. Underhill declined.

It must be noticed that no mention is made in this report of the commander of the *Kearsarge* of the complaints that, later on, Mrs. Underhill has pretended to adduce, in reference to herself, for illtreatment and unjust imprisonment, as a ground to claim the sum of $ 100,000; but it does appear as proven that General Hernandez did offer to said lady a passport for Trinidad, which was delivered on September 27, and she embarked on board the steamer *Bolívar* on the 2nd of October, next.

In regard to the claim of Mr. Underhill for an indemnity for having been forced to sell his rights of exploitation of the aqueduct of Ciudad Bolívar, having to leave the city, it will be sufficient to read the contents of his letter of September 24, 1892, addressed by said Underhill to Gen. J. M. Hernandez, in answer to his official note, No. 278, in regard to the importance given by that civil and military chief of the city, to the work of putting in activity the service of the aqueduct, to maintain the supply of water to the city, in accordance with the contract entered into by Underhill with the Government. In said letter are found the following expressions:

On the 14th of July, when I was obliged to cease pumping, it was my intention to start up again as soon as the works had become dry. But since the occurrence of the 11th of August, and the insults I have received, and your refusal to give me a passport on any steamer that has sailed from this port during the term of six weeks, I have come to the following decisive conclusion pertaining to the aqueduct: I shall never run the aqueduct for the city of Bolívar again.

I left the works in perfect order on the 14th day of July, and so they can be found to-day, unless made otherwise by malicious hands.

If it is your right to take possession of that business, you must know and can act accordingly. All buildings outside of the pump house are my private property. My stock and tools contained in the office building are also my private property.

A few days after the date of this letter, on the 18th of October of the same year, Underhill celebrated a contract of sale, in favor of Mr. R. Tomassi, yielding to this latter all his rights in the aqueduct of Ciudad Bolívar for the sum of 6,500 pesos, which he received in cash; this contract of sale appears as made of his own and free will.

It is to be noted, as an appreciation of the character of those facts, the final part of the judgment of the Supreme Court of the United States in the suit brought by Underhill against General Hernandez:

We agree with the circuit court of appeals that the evidence upon the trial indicated that the purpose of the defendant in his treatment of the plaintiff was to coerce the plaintiff to operate his waterworks for the benefit of the community and revolutionary forces, and that it was not sufficient to have warranted a finding by the jury that the defendant was actuated by malice or any personal or private motive, and we concur in its disposition of the ruling below. The decree of the circuit court is affirmed. [1]

For the above reasons I am of the opinion that the claim of the widow Underhill, per se, and as administratrix of the estate of her deceased husband, should be entirely rejected.

GEORGE F. UNDERHILL CASE

BARGE, *Umpire*:

A difference of opinion having arisen between the Commissioners of the United States of North America and the Republic of Venezuela, this case was duly referred to the umpire.

The umpire having fully taken into consideration the protocol as well as the documents, evidence, and arguments, and likewise all the communications made by the two parties, and having impartially and carefully examined the same, has arrived at the following decision:

Whereas in this case there are presented to the Commission two separate claims: One of George Freeman Underhill for an indemnity for personal injuries, insults, abuses, and unjust imprisonment as well as for forced sacrifice

[1] 168 U. S., 250.

of a property, and one of Jennie Laura Underhill for damages for detention, these claims have to be examined separately, and may be separately decided upon.

The claim of George Freeman Underhill arises out of facts and transactions which took place in the months of August, September, and October, 1892;

Now, whereas Underhill died on the 26th day of October, 1901; and

Whereas, the first ingredient necessary to make a claim is a claimant, it has to be considered by whom this place as a claimant is now legally filled; and

Whereas, whatever may be the law or the opinion as to the transition of the right to claims that arise from personal injuries, insults or other offences, it has at all events to be stated in these cases as well as in cases of claims for financial damages to whom this right to claim was legally transferred by the claimant's death;

Whereas further in this case the only person who claims this right is Jennie Laura Underhill, the deceased's widow; and

Whereas Jennie Laura Underhill declares that she is entitled to administer upon her late husband's estate, but

Whereas no proof whatever of this statement is to be found in the documents laid before the Commission;

Whereas, on the contrary, she stated on the 17th of June, 1903, that she on that day only " was about to make application to the surrogate's court of the county of New York, State of New York, for letters of administration thereon", whilst up to this day (October, 1903) no evidence as to the result of this application has reached the Commission; and

Whereas it does not appear whether claimant at his death left a last will or not; whereas, at all events, nothing about the contents of such a last will, if existing, is known to the Commission; and

Whereas it is merely stated in the exhibit that Underhill married in 1886, and that in that year his wife went with him to Ciudad Bolívar, but not where they married or under which law or on what conditions, the Commission has no opportunity to investigate and testify which right might result for Underhill's widow out of the fact of this previous marriage; whilst out of the declaration sworn to by Jennie Laura Underhill on the 22nd of November, 1898, that at that date and at the time of its origin, the entire amount of her claim belonged solely and absolutely to her, it seems to appear that during the marriage there was no community of financial interests whatever established by law or by acts between Underhill (now deceased) and his (then) wife, Jennie Laura Underhill.

Whereas, therefore, no evidence exists for the rights of Jennie Laura Underhill to appear as a claimant in the place of her deceased husband; and

Whereas, as it was said before, no one else claims this rights before the Commission. the claims of George Freeman Underhill have to be dismissed for want of a claimant.

JENNIE L. UNDERHILL CASE

BARGE, *Umpire*:

A difference of opinion having arisen between the Commissioners of the United States of America and the United States of Venezuela, this case was duly referred to the umpire.

The umpire having taken fully into consideration the protocol and also the documents, evidence, and arguments, and likewise all the communications made by the parties, and having impartially and carefully examined the same, has arrived at the following decision:

Whereas Jennie Laura Underhill on or about the 23d day of November, 1898, filed with the Department of State of the United States of America a memorial whereby she claimed damages against the Government of the United States of Venezuela in the sum of $ 100,000 for facts that had occurred in 1892, which claim, however, was never presented by the Department of State of the United States of America to the foreign office of the United States of Venezuela; and

Whereas this claim was presented to this Commission by the honorable agent of the United States of America on June 16, 1903; and

Whereas the honorable agent of the United States of Venezuela opposed this claim in his answer dated July 9, 1903;

Whereas at the 16th of July, 1903, a brief prepared by the attorneys of the claimant was submitted by the honorable agent of the United States of America " in replication," as he says, " to the answer of the Venezuelan Government in the above-entitled case, thus making this brief the replication of the United States of America to the answer of the United States of Venezuela;

Whereas, further on, claimant says in her claim filed at the State Department: " I claim for assault, insult, abuse, and imprisonment; " and

Whereas the honorable agent of the United States of America, in the first brief, stated that the claim was for damages for personal injuries, insults, abuse, and false imprisonment.

But whereas the brief of attorneys, that has to be regarded as the replication of the United States of America after the answer of the United States of Venezuela was given, formally states that the claim arises out of unlawful arrest and imprisonment, and afterwards repeats, " Her claim is entirely for damages for detention of her person," it is shown that, after the replication, the claim has to be looked upon as a claim for unlawful arrest and detention (which opinion seems to be enforced by the opinion of the honorable Commissioner of the United States of America, when stating his inability to agree with the honorable commissioner for the United States of Venezuela, he declares that it appears to him that Mrs. Underhill " is entitled to an award for her unlawful detention "); and

Whereas perhaps practically the admitting of the other causes named in the claim and in the first brief would be of no great influence, as the evidence shows that, whatever may or might have been proved to have happened to claimant's husband, George Underhill, there is no proof of any assault, insult, or abuse as regards Jennie Laura Underhill, except what happened in the morning of the 11th of August, 1892, when an irritable and exasperated ungoverned mob — which believed the Underhills to be partial to the very unpopular party with whose chiefs and officials they were on the point to escape from the city, which conviction was not without appearance of reason, fostered by the fact that the Underhills entertained the commanding general and chiefs of that party on their departure to fight the then popular party called " Legalista " — prevented her leaving the city and assaulted, insulted, and abused her, for which assault, insult, and abuse of an exasperated mob in a riot, the Government — even when admitting that on that morning there was a de facto government in Ciudad Bolívar (quod non) — can not be held responsible, as neither according to international, national, civil, nor whatever law else anyone can be liable for damages where there is no fault by unlawful acts, omission, or negligence; whilst in regard to the events of the morning of August 11, 1892, there is no proof of unlawful acts, omission, or negligence on the part of what then might be regarded as local authority, which was neither the cause of the outrageous acts of the infuriated mob nor in these extraordinary circumstances could have prevented or suppressed them); still,

equity to the contending parties seems to require that, after the replication of the honorable agent of the United States of America, unlawful arrest and detention be looked upon as the acknowledged cause of this claim.

Now whereas in investigating the evidence laid before the Commission in this claim, it has to be remembered that, if it be true, what the honorable agent of the United States of America remarked about the deposition of General Hernandez (chief of the government in Ciudad Bolívar after 16th of August, 1892), viz, that this gentleman, notwithstanding his honor, integrity, and high position, had been so intimately connected with the acts out of which this claim arises, that he could scarcely be expected to be able to make an unbiased statement in regard to it, at least the same reflection must be borne in mind respecting the memorials and depositions of Jennie Laura Underhill and her husband, which form the main part of the evidence; and

Whereas, according to the brief of the attorney's, the claim arises out of unlawful arrest and imprisonment from August 11, 1892, to September 27 of that same year; and

Whereas the evidence shows, that on the 11th day of August, although the mob shouted: " to the carcel with the Underhills," the Underhills were not arrested and brought to the carcel, but fled in the Union Hotel, where the mob did not follow them, but where a guard was placed before the door, whilst the evidence does not show whether this guard was placed there to protect the Underhills by preventing the mob to enter the hotel, or to prevent Mr. Underhill from leaving the house;

Whereas, further on, Mrs. Underhill herself declares that in the afternoon of that same day: " she hastened from the hotel (where she just before declared herself to be imprisoned) went to the prefect's office, and afterwards, together with her husband, left that place and returned — not to the hotel, where she declared she was imprisoned — but to her home;" and

Whereas, as evidence shows, claimant declared before the United States circuit court, eastern district of New York, that on the 26th of September " she went to General Hernandez in person, to his house; " that afterwards " she went to the Government building and saw Hernandez there; "

Whereas, therefore, no evidence is to be found of claimant being arrested and imprisoned; but on the contrary her own declarations rather show that there scarcely can be question of imprisonment whilst she could leave the hotel and leave the house.

The investigation of the evidence laid before the Commission compels it to come, in regard to claimant, to the same conclusion as that to which it arrived in regard to her husband.

The Commander, Crowninshield, of the United States Navy (after investigating the case on the place itself and almost immediately after the facts occurred, and after hearing the prominent citizens of Ciudad Bolívar by him enumerated — for the most part foreigners) that no evidence of imprisonment could be found;

Wherefore the charge against the Government of Venezuela of claimant's unlawful arrest and imprisonment must be rejected.

But as, furthermore, claimant claims award for damages on the charge of detention of her person;

And whereas, without any arrest and imprisonment, detention takes place when a person is prevented from leaving a certain place, be it a house, town, province, country, or whatever else determined upon; and

Whereas it is shown in the evidence that claimant wished to leave the country, which she could not do without a passport being delivered to her by the Venezuelan authorities; and that from August 14 till September 27

such a passport was refused to her by General Hernandez, then chief of the Government of Ciudad Bolívar, the fact that claimant was detained by the Venezuelan authorities seems proved; and

Whereas, whatever reason may or might have been proved to exist for refusing a passport to claimant's husband, no reason was proved to exist to withhold this passport from claimant; and

Whereas the alleged reason that it would not be safe for the Underhills to leave on one of Mr. Mathison's steamers can not be said to be a legal reason, for if it be true that there existed any danger at that time, a warning from the Government would have been praiseworthy and sufficient. But this danger could not give the Government a right to prevent Mrs. Underhill from freely moving out of the country if she wished to risk the danger; whilst on the other hand it might have been said that the steamer being a public means of transfer, it would have been the duty of the Government to protect the passengers from such danger on the steamers when existing.

Whereas, therefore, it is shown that Mrs. Underhill was unjustly prevented by Venezuelan authorities from leaving the country during about a month and a half, the claim for unlawful detention has to be recognized.

And whereas for this detention the sum of $ 2,000 a month — making $ 3,000 for a month and a half — seems a fair award, this sum is hereby granted.

TURINI CASE

(By the umpire:)

Damages allowed successors in interest of a contractor who, although contract was violated by both parties, before any renunciation of the contract by the Government of Venezuela, performed certain work in pursuance thereof.

BAINBRIDGE, *Commissioner* (claim referred to umpire):

On July 28, 1896, a contract was executed between the secretary of public works of the United States of Venezuela, fully authorized by the President of the Republic, and Giovanni Turini, sculptor, residing in New York City and a naturalized citizen of the United States, whereby it was agreed:

1. On the part of Giovanni Turini that he would execute for the Government of Venezuela three statues, one equestrian of Gen. José Antonio Páez, another of Liberty, and a third of Bolívar, the latter destined to be presented by the Government of Venezuela to the city of New York; that he would deliver the statues of Páez and Liberty on board ship at the port of New York two months before the day set for the inauguration of the same, being for the first statue April 2, 1897, and for the second July 5, 1897; that these two monuments would be made in conformity with the Executive decrees of July 3 and 4, 1896, in reference thereto, and also in conformity with the sketches of said statues delivered by Turini to the secretary of public works; that the equestrian statue of Bolívar would be a replica or copy of the statue of Bolívar erected in the Plaza Bolívar in Caracas, with one change, that the dimensions of the one to be built should be one-fourth larger than natural size; that the materials for the pedestal as well as the statue would be of the same kind as those used for the aforesaid monument, which was to serve as a model; that Turini would deliver the statue of Bolívar to the representative of Venezuela at New York, would engrave on the pedestal such inscription as the Government of Venezuela might suggest to him, and would place such statue in New York at the spot to be designated.

2. On the part of the Government of Venezuela that it would pay Turini for the execution of the three statues the sum of $ 43,000 gold or 227,900

bolivars, in seventeen monthly payments of $ 2,300 or 12,190 bolivars per month, besides one monthly payment of $ 3,900 or 20,670 bolivars; that the first monthly payment would be made August 1, 1896, and that it would pay the freight and expenses of erection of the status of Páez and Liberty.

It was further agreed that at the time of shipment of the statues of Páez and Liberty, the Venezuelan consul at New York must certify that they had been properly executed, were in good condition, and well packed.

Pursuant to this contract —

1. Turini executed the statue of General Páez, together with the pedestal; performed considerable direct work upon the statue of Liberty and that of Bolívar, the models of both being completed ready to be cast in bronze; and completed the pedestal for the statue of Liberty.

2. The Government of Venezuela paid to Turini altogether the sum of $ 8,130, the last payment being made in April, 1897, in the sum of $ 1,850.

By the terms of the contract the Government of Venezuela was to pay seventeen monthly installments of $ 2,300, beginning August 1, 1896, besides one monthly payment of $ 3,900. The contract was broken by Venezuela within four months from August 1, 1896, by its failure to make the stipulated payments. Nevertheless, Turini proceeded with the work and appears to have accepted the payment of $ 1,850 made in April, 1897. But any failure of Turini to complete and deliver the statues at the time specified in the contract was clearly due to the prior failure of the Venezuelan Government to make the monthly payments as provided therein. This provision in the contract may have been and probably was the very reason why Turini agreed to complete and deliver the statues within the times specified.

In 1898 the Venezuelan Government claimed that it could not and would not accept the statue of Bolívar because the National Society of Sculpture of New York declared the statue to be without artistic merit; and also that fearing the statue of General Páez might be lacking the "necessary artistic requisites," it should be submitted to the judgment of a jury of artists, without the award of which the Government could not take into consideration Mr. Turini's claim.

But Turini did not agree to execute for Venezuela a statue of Bolívar which would be acceptable to the National Society of Sculpture of New York; nor did he agree to execute a statue of General Páez, subject to the judgment of a jury of artists. He agreed to execute statues of Páez and of Liberty, in conformity with the Executive decrees of July 3 and 4, 1896, in reference thereto, and in conformity with the sketches of said statues delivered by him to the secretary of public works. He agreed to execute a statue of Bolívar which would be a replica or copy of the one in the Plaza Bolívar in Caracas, the dimensions, however, to be one-fourth larger than natural size.

It is not claimed that Turini's work does not comply as to artistic merit with his agreement; but it is sought to measure it by standards other than those expressed in the contract. If the Venezuelan Government desired work done acceptable to the National Society of Sculpture of New York, or subject to the approval of a jury of artists, it should have so stipulated. Nor can it be assumed that Mr. Turini would have agreed to do such work at the price designated in the instrument before us.

The duty of the Commission is to determine the rights and obligations of the parties under the contract as it is — not as it might have been. And the true measure of damages in a case like this, where one engaged in the performance of a contract is prevented by the employer from completing it, is the difference between the price agreed to be paid for the work and what it would

have cost the party employed to complete it, deducting, of course, the amount already paid.

Here the price agreed to be paid is the sum of $ 43,000, of which $ 8,130 have been paid. The evidence shows that it will cost about the sum of $ 11,000 to complete the work. The difference is the sum of $ 23,870. Interest should be allowed on this sum at the rate of 3 per cent per annum from January 1, 1898, to December 31, 1903, the anticipated date of the final award by this Commission.

The estate of Giovanni Turini is therefore entitled to an award in the sum of $ 28,166.60 gold.

Giovanni Turini died August 27, 1899, and thereafter on September 9, 1899, letters of administration of his estate were duly granted to his widow, Margaret Turini, by the surrogate of the county of New York.

At the time of Turini's death his estate was and still is liable for the following debts which were incurred by him in carrying out his contract with the Government of Venezuela:

(1) To the Gorham Manufacturing Company the sum of $ 6,319, with interest thereon at 6 per cent per annum from July 1, 1897.

(2) To Joseph Carabelli, the sum of $ 3,095, with interest thereon at 6 per cent per annum from October 22, 1898.

(3) To the Lyons Granite Company, the sum of $ 2,358.45, with interest at 6 per cent per annum from October 1, 1898.

The above-named parties, as intervenors in this claim, should be protected to the extent of their proportionate interests, in the distribution, of the award herein made to the estate of Giovanni Turini, deceased.

PAÚL, *Commissioner* (claim referred to umpire):

This claim is presented by the Government of the United States on behalf of the administratrix and heirs at law of Giovanni Turini, deceased; the Gorham Manufacturing Company and Joseph Carabelli, jointly interested, for breach of a written contract. The amount of the claim is $ 28,579.55, interest included.

Giovanni Turini, now deceased, was a naturalized citizen of the United States. The Gorham Manufacturing Company is a corporation existing under the laws of the State of Rhode Island, and a citizen of the United States; and Joseph Carabelli is a naturalized citizen of the United States.

The claim arises out of the following facts:

On July 28, 1896, an agreement was made between the secretary of public works of the United States of Venezuela, fully authorized by the President of the Republic and Giovanni Turini, sculptor, residing in the city of New York, represented by Messrs. J. Boccardo & Co., for the execution of three statues: One equestrian of Gen. José Antonio Páez; another one of " Liberty," both to be erected in the city of Caracas; and a third one of General Bolívar, destined to be presented to the city of New York by the Venezuelan Government.

Turini bound himself to execute the aforesaid statues for the amount of $ 43,000 gold, payable by the Government of Venezuela, at the city of Caracas, to whomsoever should be authorized to represent Turini, in seventeen monthly payments of $ 2,300 per month, and one monthly payment besides, of $ 3,900; the first monthly payment to be made at the office of Messrs. J. Boccardo & Co., on the 1st day of August, 1896.

Turini also bound himself to deliver the statues of Páez and of Liberty, on board ship, at the port of New York, two months before the day set for the inauguration of the same, being for the first statue the 2nd day of April, 1897, and for the second the 5th day of July, 1897. These monuments had to be made

in conformity with the decrees of the Executive of the 3d and 4th days of July of the same year, 1896, in reference to the same, and also in conformity with the sketches of said statues delivered by Turini to the secretary of public works. The statue of Bolívar was to be a replica, or copy of the one erected in the Plaza Bolívar at Caracas, with one change, to wit, that it should be one-fourth larger than natural size. The material for the pedestal as well as for the statue to be of the same kind as those used for the aforesaid monument, which would serve as a model.

It was also agreed that at the time of the shipment of the two monuments, destined to Caracas, the Venezuelan consul at New York had to certify that the same had been properly executed and were in good condition and well packed.

The memorial of Turini shows that pursuant to said contract he executed the statue of General Páez, together with its pedestal, and the same had been ready for delivery many months. He also states that the performed considerable direct work upon the statue of Liberty and on the statue of General Bolívar; the models of both statues being completed and ready to be cast in bronze; and that the pedestal for the statue of Liberty was also completed, but by reason of the nonpayment of the moneys, as stipulated in the contract, further work on these statues was suspended.

Turini acknowledges that he had received from the Government of Venezuela the sum of $ 8,130 gold on account of his contract, the last payment having been made in April, 1897, by General Crespo (then president), and being the sum of $ 1,850. Under the contract Turini should have received, in April, 1897, the sum of $ 20,700.

In the execution of the contract Turini incurred a liability to the Gorham Manufacturing Company, and the memorialists affirm that they had received from him an assignment to the extent of $ 9,000 of the payments due him under the contract, with power to collect same. Turini also affirms that he incurred other liabilities, in and about the prosecution of the work, to Joseph Carabelli, amounting to $ 3,095.97, for which sum Carabelli obtained an assignment, copy of which has been submitted to this Commission.

Margaret Turini, as administratrix of Giovanni Turini, deceased, on the 27th of August, 1899, addressed the Secretary of State of the United States of America. On the 11th of May, 1903, a supplemental memorial was filed with the Department of State, in which, after making an exposition of the indebtedness incurred by the said Giovanni Turini, in carrying out his contract with the Government of Venezuela, with the Gorham Manufacturing Company, Joseph Carabelli, and the Lyons Granite Company, and other expenses incurred by the said Turini for plaster and modeling and labor, affirms that the statue of General Páez has been cast in bronze by the Gorham Manufacturing Company, and since 1897 has been ready for delivery; that the model of the statue of Liberty is at the factory of the Gorham Manufacturing Company, ready to be cast in bronze; that the model for the statue of General Bolívar was fully completed by the said Giovanni Turini in his lifetime. That its artistic merits were passed upon by the Municipal Art Commission of the City of New York, as appears by letter of its president to the said Turini, dated May 25, 1899; that said Turini received in all from the Government of Venezuela the sum of $ 8,130, leaving an unpaid balance amounting to the sum of $ 34,870. That it has been estimated that it would cost the sum of about $ 11,000 to complete the statues of Liberty and Bolívar, and in case the Venezuelan Government should prefer not to have the statues completed, deducting the sum of $ 11,000 from the $ 34,870, there would be a balance due of $ 23,870, to which should be added either interest thereon from January 1, 1898, or the interest

on the said debts incurred to the Gorham Manufacturing Company, Joseph Carabelli, and the Lyons Granite Company, which item of interest, in the aggregate, amounts to the sum of $ 3,623.36, and added to the said sum of $ 23,870, makes a total sum of $ 27,493.36.

As it appears from the above-stated facts, the points submitted to the decision of this Commission spring from the contract celebrated between the Government of Venezuela and Giovanni Turini for the execution of certain sculptorial works, and the case must be disposed of as being that of the administratrix and the heirs at law of Giovanni Turini, sufficiently authorized to prosecute this claim against the Government of Venezuela.

The assignments obtained by the Gorham Manufacturing Company and Joseph Carabelli only give to the creditors the right to collect the amount of their credits from what the Government of Venezuela might have to pay to the administratrix and heirs at law of Giovanni Turini for the responsibilities incurred by said Government by reason of the contract celebrated with Turini.

In his answer, the honorable agent of the Government of Venezuela refers to the merits of a memorial submitted to him by the minister of public works, containing the recital of the facts recorded in his department in reference to the above-mentioned contract with Turini, and the sundry incidents occurred thereon. The honorable agent of the United States, in his replication, admits that in that memorial the statement of facts is essentially in accord with that made in the brief submitted on behalf of the United States in this matter.

From the narrative of those facts it appears that several months after the beginning of the work which Turini undertook to execute, the Venezuelan consul in the city of New York, charged with the inspection of the statues, reported on June 22, 1897, to the Venezuelan Government that he had seen the model in clay of the statue of Bolívar uncompleted; that they were working on the bronze casting of the statue of Páez, and were making the miniature in clay of the statue of Liberty, and consequently he could not judge of the artistic merits and other conditions of the works.

Turini, on July 12, 1897, addressed a private letter to the President of the Republic, asking for the payment of $ 10,000 promised him, inasmuch as to that date there was due him more than $ 20,000. This letter was answered by the minister of public works, who informed him that the President would personally attend to his request, and would give a favorable solution to it, as soon as the financial situation would allow it.

The terms of that correspondence prove sufficiently that the suspension of payment of several monthly sums did not constitute a breach of contract, because Turini did not take the delay of payment as a resolutory cause, nor did he stop the execution of the work for that motive in order to put forward his claim against the Government of Venezuela. At this stage of events, and in the month of September of the same year, the Government of Venezuela had notice that the National Society of Sculpture of the City of New York refused to give its approval to the clay model of the liberator's statue, and consequently that the board of parks of the same city would not give its permit for the erection of the statue as then modeled. The Venezuelan Government having requested Turini to advise the reason of the rejection of the model, to send information about all the particulars pertinent to the execution of the statues, and about the report of the National Society of Sculpture, he answered that, having invited the said society to examine the model in clay of the liberator's statue, he was notified one month after that the statue could not be accepted; but that he succeeded in removing such difficulties after speaking with Mr. Strong, the president of the park commission, who agreed to have the statue accepted, provided it was an exact copy of the original existing in Caracas; and, finally,

that in that same month he would finish the new model in plaster, and the statue should not be cast until approved by the artists.

The terms of the official report addressed by the National Society of Sculpture to the board of public parks of New York, reads as follows:

> That the clay model of the statue of Bolivar, such as it appears at the sculptor's study, does not have the conditions of artistic excellence required to be erected in a public place or park of the city, and consequently does not recommend its acceptance.

After these facts Turini sent on November 20, 1897, a demonstrative account of the sums he pretended the Government of Venezuela owed him for his contract, to wit:

	Bolivars
For the statue of General Páez	106,000
For the statue of Liberty	71,900
For the statue of the Liberator	50,000
Total	227,900

From that total sum Turini made the deduction of 50,000 bolivars for the statue of the Liberator, being in doubt at that time of the acceptance of the model by the board of public works of New York, and having to wait for the Government's order to cast it in bronze. Turini also stated that he had received the sum of 43,125 bolivars, leaving a balance of 134,775 bolivars for the statues of Páez and Liberty which he said would soon be finished and ready to be delivered on board ship.

It was not until May 25, 1899, that C. T. Barney, president of the Artistic Municipal Commission, sent a letter to Turini informing him that in session of the day before the commission had approved the new model of the statue of General Bolívar, and on July 31 of the same year, the Government of Venezuela addressed Turini in reference to a note of Messrs. Olney & Comstock, Turini's attorneys, about the acceptance by the Artistic Commission of New York of the modified model of the statue of Bolívar, and gave its conformity for its execution. One month after this authorization, on the 27th day of August 1899, Giovanni Turini died in the city of New York, leaving the statue of General Páez cast in bronze by the Gorham Manufacturing Company and ready for delivery with its pedestal constructed by Joseph Carabelli; leaving also two clay models of the statue of Liberty and of General Bolívar, and a granite pedestal with inscriptions thereon, for the statue of Liberty, constructed by the Lyons Granite Company.

From the aforesaid, and a just appreciation of the facts, come forth the following conclusions:

First. There was no breach of the contract on the part of the Government of Venezuela by the nonpayment of the stipulated monthly sums, as alleged, because Turini, with perfect knowledge of that fact, did not make it a cause of breach, and pursued the execution of the work, relying on the promises which were made to him that the payment of the sum overdue, in conformity with the agreement, should be paid as soon as the financial situation would allow it. It must be taken into consideration that the price of an artistic work is not properly due until finished and accepted as satisfactory by the person who ordered the execution of the same, and that the monthly advances offered to Turini on account of the prices of the statues were only a facility afforded Turini in order to help him in the performance of his duties as enterpriser, and he was at any time at liberty to renounce and not take advantage of it.

Second. The incidental and very important event of the refusal of the clay model of the liberator's statue by the board of public parks of New York, which took place in August of the year 1897, having as a motive for such refusal the circumstance that the clay model of the statue of Bolívar, such as it appeared in the sculptor's study, did not have the conditions of *artistic excellence* required in such monuments to be erected in a public place or park, *had the consequence of interrupting the final execution of the Liberty and Liberator's statues*, giving occasion to considerable correspondence between the Government of Venezuela and Turini *about the securities asked for by the said Government in reference to the artistic merits of all the statues, and was also the cause of a proposition made by Turini to the Venezuelan Government on November 20, 1897, to withdraw from the whole amount of his contract the sum of 50,000 bolivars, price estimated by him for the statue of General Bolívar, and of an offer to deliver the statues of General Páez and Liberty, all completed and free on board at the port of New York of the sum of 134,775 bolivars*, deduction having been made of 43,125 bolivars already received by him.

Afterwards, on the 22d of March, 1899, another proposition was made by Mr. Oldrini, Turini's attorney, to the Venezuelan Government regarding the delivery of the statue of General Páez and its pedestal, not on board, but at the factory, and to deliver the pedestal of the statue of Liberty, the clay model of this last, and its casted parts, Turini keeping the clay model of Bolívar's statue, all for the sum of $ 25,000 to be paid: $ 15,000 cash down and the balance in monthly installments, without taking into consideration the $ 8,130 already paid to Turini. *To this proposition* the Government of Venezuela answered on the 2d day of June, 1899, formulating *a counter proposition*, to wit: To pay $ 15,000 for the statues of General Páez and Liberty all completed, in partial monthly payments of $ 3,000 from the last day of said month of June. This counter proposition was not accepted by Turini's attorneys, and on the 31st of July the Government addressed again Messrs. Olney & Comstock, after the receipt of the final approval by the New York Artistic Commission of the new clay model of the statue of General Bolívar, requesting that sketches or reproductions of the models for the statues of General Páez and Liberty be sent for examination as to the artistic conditions of the one and the other, in order to make a definite arrangement about their prices and payments. In the meantime Messrs. Olney & Comstock, on behalf of Turini, addressed the Government of Venezuela, *promoting the execution of the contract under the following conditions:* That the Government would accept the three statues referred to in the original contract for the price stipulated of $ 43,000, less $ 8,130 already paid, and the balance of $ 34,870 to be paid $ 15,000 cash down and $ 19,870 in monthly payments of $ 3,000 each. To this last *proposition* the Government did not give any answer, and the death of Turini, which occurred one month later, on the 27th of August, 1899, caused the whole affair to remain at a standstill. As this matter stood at the time of the death of Giovanni Turini it is apparent that there was not any definite understanding established between the Government of Venezuela and Giovanni Turini, neither about the acceptance of the models for the statues of General Páez and Liberty, nor about the price to be paid for the execution of the same; there was only an understanding for the casting in bronze of the statue of General Bolívar by reason of the acceptance by the Venezuelan Government of the modified model executed by Turini and approved by the president of the Municipal Art Commission of the city of New York.

Third. The death of Giovanni Turini, which took place before the completion of the statues of Liberty and General Bolívar, is a resolutive cause of the original contract between the Government of Venezuela and Turini in reference to the execution, pending at the time of Turini's death, of the statues of Liberty

and the Liberator. That resolutive cause entitled the administratrix and heirs at law of Turini to be paid, in proportion to the price agreed, for the work done, and for the value of materials employed and expenses incurred thereon, provided the work done and materials employed were of some use to the other party. In reference to the pedestal for the statue of Liberty, constructed by the Lyons Granite Company, it is not apparent that it could be of any use to the Government of Venezuela to have it without the statue, because in the matter of statues the material of the pedestal is of very secondary importance. The work executed by Turini in modeling the statues of Liberty and of the Liberator, and also the expenses incurred in such works, which amounted to the sum of $ 1,250, must be recognized as good title for compensation. For that motive and in consideration of the sum of $ 8,130 received by Turini during his lifetime, on account of the whole price of the statues and pedestals, a deduction of $ 5,000 must be made from the $ 8,130 as compensation for the personal work of the sculptor and expenses incurred by him in the modeling of said statues, thus leaving the sum of $ 3,130 to be disposed of as determined in the following conclusions.

Fourth. The completion by Giovanni Turini of the statue of General Páez and its pedestal, entitles the administratrix and heirs at law of Giovanni Turini to the payment of the price of that work by the Government of Venezuela, provided, that the sculptural work should be in perfect accordance with the terms specified in article 5 of the original contract between the minister of public works of the Venezuelan Government and Giovanni Turini, dated on the 28th of July, 1896, and besides that the materials employed and the artistic execution prove satisfactory, as is necessary in all works of this kind.

The Commission not having at its disposal the necessary elements to decide on these technical points, nor being able to fix the price for the statue of General Páez and its pedestal in proportion to the full amount of the contract, it is advisable to refer both parties in this claim to the following decision:

The Government of Venezuela is not obliged to receive the pedestal for the statue of Liberty, nor to pay its value, but a compensation is granted in favor of the administratrix and heirs at law of Giovanni Turini, in the sum of $ 5,000, to be deducted from the $ 8,130 received by the cujus, for his labor and the expenses incurred in modeling the statues of Liberty and General Bolívar; the clay models for both statues to become the property of the Government of Venezuela.

The Government of Venezuela and the administratrix and heirs at law of Giovanni Turini are bound to appoint, by mutual agreement, an expert, or a commission of three experts, named one by each party and the third by the two experts named. And said expert or commission will proceed to examine whether the statue of General Páez and its pedestal, are constructed in accordance with the terms of article 5 of the aforesaid contract, dated July 28, 1896, and if they give sufficient satisfaction in regard to their material and artistic merits, the Commission will fix in such case the value of the monument in proportion to the total amount fixed in the original contract for the three statues and the two pedestals, two of which had to be put on board ship by Turini at the port of New York, and the third one to be erected at Turini's expense in Central Park, New York City. After fixing in such manner the sum that the Government of Venezuela should have to pay to the administratrix and heirs at law of Giovanni Turini for the value of the statue of General Páez and its pedestal, the Government of Venezuela is entitled to deduct from that the sum of $ 3,130, as balance due by the administratrix and heirs at law of Turini on the sum of $ 8,130 already paid by the Venezuelan Government during the lifetime of Turini; and the assignees, the Gorham Manufacturing Company

and Joseph Carabelli, are entitled to exercise their rights for collecting from the Government of Venezuela, from the balance due to the administratrix and heirs at law of Giovanni Turini, if any, up to the amount of $ 6,319 on the part of the Gorham Manufacturing Company, and of $ 3,095 on the part of Joseph Carabelli. Any balance left for the price definitely fixed by the decision of the experts, to belong to the administratrix and heirs at law of Giovanni Turini.

In no other way, it appears to me, can this Commission dispose of the claim.

BARGE, *Umpire:*

A difference of opinion arising between the Commissioners of the United States of America and the United States of Venezuela, this case was duly referred to the umpire.

The umpire having fully taken into consideration the protocol and also the documents, evidence, and arguments, and likewise all other communications made by the two parties, and having impartially and carefully examined the same, has arrived at the decision embodied in the present award.

Whereas, on July 25, 1896, an agreement was made between the secretary of public works of the United States of Venezuela, fully authorized by the President of the Republic, and Giovanni Turini, sculptor, citizen of the United States of America, residing in the city of New York, represented by Messrs. J. Boccardo & Co., Caracas, which agreement reads as follows:

Conditions agreed upon between the secretary of public works of the United States of Venezuela, fully authorized by the President of the Republic, and Giovanni Turini, sculptor, residing at the city of New York, Dongan Hills, Richmond County, of the United States of North America, represented by Messrs. J. Boccardo & Co., merchants of this city, as it will be further stated, for the execution of three statues, one equestrian of General José Antonio Páez, another one of La Libertad, both to be erected in the city of Caracas; and a third one, El Libertador, destined to the city of New York.

First. Giovanni Turini binds himself to execute the aforesaid statues for the amount of $ 43,000 gold, or, say, 227,000 bolivars, which is its equivalent at the rate of exchange of 5 bolivars and 30 centimos to 1 dollar, which amount the Government of Venezuela will pay at the city of Caracas to Turini, or whomsoever shall be authorized to represent him, in seventeen monthly payments of $ 2,300 per month, or 12,190 bolivars, and one monthly payment besides of $ 3,900, or, say, 20,670 bolivars.

Second. Giovanni Turini names as attorneys with power to represent him in this city, Messrs. J. Boccardo & Co., merchants of the same. Said power accompanies this agreement so as to enable them to represent said Turini before the National Government in this arrangement, and to collect the payments for his account in accordance with the obligations this Government binds itself.

Third. The first monthly payment will be made at the office of Messrs. J. Boccardo & Co., the 1st day of August next.

Fourth. Turini binds himself to deliver the statue of Páez and of La Libertad on board ship at the port of New York, two months before the day set for the inauguration of the same, being for the first statue the 2d day of April, 1897; and for the second, the 5th day of July, 1897.

Fifth. These monuments will be made in conformity with the decrees of the Executive of the 3d and 4th of July of the present year in reference to the same, and also in conformity with the sketches of said statues Turini has delivered to the secretary of public works.

Sixth. The equestrian statue of El Libertador, which the National Government offers or presents to the city of New York to replace the one existing at present in that city at the Central Park, will be a replica or copy of the one erected to the memory of the said Libertador in the Plaza Bolívar of this capital with only one change, that the dimensions of the one to be built will be one-fourth larger than natural size. The materials for the pedestal as well as for the statue will be of the same kind as those used for the aforesaid monument, which will serve as a model.

Unique condition: Giovanni Turini binds himself to deliver this monument to the representative of Venezuela at New York, who will be opportunely named or appointed in the course of the month of December, 1897, said Turini binding himself also to engrave on the pedestal the inscriptions the Government of Venezuela may suggest to him.

Seventh. Giovanni Turini is under obligation to place for his account in New York, and at the spot that will be designated, the statue of El Libertador.

Eighth. In the price of $ 43,000 the freight from New York to Caracas is not included, nor the expenses for the erection of the monuments to Páez and La Libertad.

Ninth. At the time of the shipment of the two monuments at New York the Venezuelan consul at that city will have to certify that the same have been properly executed and to be in good condition and well packed.

A duplicate copy of this agreement, both of the same tenor, has been drawn at Caracas the 28th day of July, 1896.

G. TURINI
Per J. BOCCARDO & Co.
H. PEREZ B.

And whereas Giovanni Turini died on the 27th of August, 1899, and his widow, Margaret Turini, who was legally instituted administratrix of his inheritance, brought a claim against the United States of Venezuela, based on the contract as cited here above, in which claim the Gorham Manufacturing Company and Joseph Carabelli, holding rights as citizens of the United States of America, appear as intervenors, there must be considered whatever claims may arise out of the above-mentioned agreement on behalf of the heirs of Giovanni Turini.

And whereas it appears from the evidence brought before the Commission that the Government of Venezuela did not fulfill the conditions of article 1 of the agreement, failing to make the stipulated monthly payments;

And whereas the same evidence shows that Giovanni Turini did not fulfill the conditions of article 4 of the agreement, not having ready for shipment at the port of New York on the 2nd day of February, 1897, the statue of Páez with pedestal, which failure can not in equity be said to be excused by the failure of the Venezuelan Government to meet the monthly payments at the time indicated, as this latter fact did not prevent Turini from entering into a contract with the Gorham Manufacturing Company for the casting in bronze of the said statue, whilst even in May, 1897, it did not prevent him from agreeing with Carabelli about the making of the pedestal that should have been ready before February 2 of that year;

And whereas the evidence clearly shows that neither of the two parties had the intention to make this mutual failure a resolutive cause, but each requiring to attain the object of the agreement — Venezuela the statues according to contract and Turini the payment — both, to meet the changed circumstances, almost up to the date of Turini's death, interchanged propositions for a solution of the difficulties that arose out of the nonfulfillment of some conditions of the existing contract.

Whereas it is hereby clearly shown that the original contract was not regarded by them legally dissolved (annulled) the death of Turini should in equity be regarded by parties as the resolutive cause, and therefore the administratrix and heirs at law are entitled to be paid in proportion to the price agreed for the work done and the value and materials employed and expenses incurred thereon, providing the work done and materials employed are of some use to the other party; and whereas it is proved that the statue of Páez, with its pedestal (for which the sculptor fixed $ 20,000, this seeming a fair estimate when considering

the price established for the three statues in regard to the conditions announced in the decrees of their erection), had been ready for delivery many months before November, 1898; that Turini had completed the models of the statues of Liberty and Bolívar, and that the pedestal of the statue of Liberty was also completed; that the expense incurred for plaster and labor in modeling the two statues of Liberty and Bolívar amounted to the sum of $ 1,250, and that the sum of $ 3,500 may be regarded as a just compensation for the personal work of the sculptor on both models;

And whereas the pedestal of Liberty without its statue can not be said to be of any use to the Government of Venezuela, because a pedestal has to be regarded as being in harmony with the figure placed on it and from an artistic point of view, forming with the statue one whole monument; and whereas the statue of Páez, with its pedestal, as well as the models of the statues of Liberty and Bolívar, certainly can be of some use to the Government quite apart from the very varying and very personal opinions on their artistic value;

Whereas, therefore, the United States of Venezuela are indebted to the heirs of Turini, for the statue of Páez and pedestal, $ 20,000; for making the models of the statues of Liberty and Bolívar (which models become the property of Venezuela), $ 3,500; for material and labor in modeling these statues, $ 1,250, making together the sum of $ 24,750.

Whereas, however, Turini, during his lifetime already received for his work from the Government of Venezuela the amount of $ 8,130, the Venezuelan Government owes the inheritance of Turini the sum of $ 16,620, with interest at 3 per cent per annum from the 1st of January, 1898 — the date on which, according to the agreement, the money was due — until the 31st of December, 1903, the anticipated date of the final award by this Commission, making together the sum of $ 19,611.60, which sum is therefore allowed to the administratrix and heirs at law of Giovanni Turini, deceased.

And whereas, further, at the time of Turini's death, the estate was and still is liable for the following debts, which were incurred by him in carrying out his agreement as to the statue of Páez, viz:

1. To the Gorham Manufacturing Company the sum of $ 6,319, with interest thereon at 6 per cent per annum from July 1, 1897.

2. To Joseph Carabelli the sum of $ 3,095, with interest thereon at 6 per cent per annum from October 1, 1898.

The above-named parties, intervenors in this claim, should be protected to the extent of their proportionate interest in the distribution of the award herein made to the estate of Giovanni Turini, deceased.

KUNHARDT & CO. CASE

(By Bainbridge, Commissioner:)

While the property of a corporation in esse belongs not to the stockholders individually or collectively, but to the corporation itself, it is a principle of law universally recognized, that upon dissolution the interests of the several stockholders become equitable rights to proportionate shares of the corporate property after the payment of the debts. The rights of the creditors and shareholders to all the property of the corporation, including choses in action, are not destroyed by dissolution or liquidation.

Claimants, as citizens of the United States, and the equitable owners of their proportionate share of the property of the dissolved corporation, have a standing before the Commission to claim indemnity for such losses as they may prove they have sustained by reason of the wrongful annulment of the concession.

The extent of interest of the claimants not ascertainable because of the want of proof of amount of liabilities, and therefore claim dismissed without prejudice.

(By Paúl, Commissioner:)

The interest acquired by claimants by investing their money in shares of the corporate stock is a private transaction and creates no judicial bonds between the claimants and the Government of Venezuela during the existence of the corporation.

The shareholders of a corporation are not co-owners of the property of the corporation during its existence; they only have in their possession a certificate which entitles them to participate in the profits and to become owners of proportional parts of the property of the corporation when the latter is by final adjudication dissolved or liquidated.

This corporation has not been dissolved or liquidated in accordance with the laws of Venezuela, and therefore the claimants have no standing to claim before the Commission. Claim should be dismissed without prejudice.

(By the Commission:)

Neutral property destroyed by soldiers of a belligerent with authorization, or in the presence of their officers or commanders, gives a right to compensation whenever the fact can be proven that said superiors had the means of preventing the outrage and did not make use of them.

BAINBRIDGE, *Commissioner* (for the Commission):

Kunhardt & Co., claimants herein, are a copartnership doing business in the city of New York, and composed of Henry R. Kunhardt, George W. Kuhlke, and Franz Mueller. Kunhardt and Kuhlke are native citizens of the United States. Mueller was born in Germany in 1859, but was duly naturalized as a citizen of the United States on June 12, 1896, in the district court of the United States for the southern district of New York.

On behalf of Messrs. Kunhardt & Co. the United States presents two separate and distinct claims.

COMPAÑÍA ANÓNIMA TRASPORTES EN ENCONTRADOS

The memorial states that:

On the 24th of February, 1897, a contract was entered into by and between the minister of public works of Venezuela, J. M. Ortega Martinez, and Gen. Joaquín Valbuena U. for the construction of a wooden wharf and other works of public utility in the port of Encontrados, on the Zulia River, in the State of Zulia, Venezuela. By the said contract and in consideration of the building and maintaining of the wharf and other structures by Valbuena, the Government of Venezuela granted to Valbuena, his heirs and successors, the exclusive right for fifteen years to collect tolls from the ships or boats for loading and unloading at said port, a duty not to exceed 75 centimos for every hundred kilograms gross weight of merchandise. The grantee, his heirs or successors, were given the right of ownership over the wharf and its belongings during said term of fifteen years, upon the expiration whereof the wharf and all other works were to become the property of the nation.

The contract by its terms could be transferred to another person or company, national or foreign, with the approval of the Government of Venezuela.

This contract was ratified by the Congress and the national Executive on April 2, 1897, and published in the Gaceta Oficial.

On 15 December 1897, Valbuena, with the consent of the President of the Republic, assigned all his rights under the contract to Frederico Evaristo

Schemel, who, on December 16, 1897, with the consent of the President of the Republic, assigned all his rights under the contract to Bernardo Tinedo Velasco.

Tinedo completed the wharf and other structures in accordance with the terms of the contract. On May 10, 1898, the department of public works appointed Victor Brigé, an engineer, to examine the work, and on July 14, 1898, Brigé reported to the Government that the wharf and other structures conformed to all the requirements of the contract, whereupon said work was accepted on behalf of the Government.

On March 14, 1899, with the approval of the national Executive in the council of ministers, the department of public works authorized Tinedo to assign all his rights under said contract to the company known as " Compañía Anónima Trasportes en Encontrados." This company was formed in Maracaibo on April 10, 1899, by an agreement entered into by Bernardo Tinedo V., Rafael Tinedo, Carlos Rodriguez, and other citizens of Maracaibo, for the purpose of assuming the rights and liabilities of the Valbuena contract. By its articles of agreement it was provided that said company should remain in existence until the expiration of the fifteen years during which the right to collect the tolls was granted to Valbuena and his successors. The capital of the company was 300,000 bolivars, divided into 400 shares of 750 bolivars each. Said shares were issued for full value to the members of said company.

On April 18, 1899, pursuant to the authorization given him by the department of public works, Tinedo, in consideration of the sum of 300,000 bolivars, conveyed to the " Compañía Anónima Trasportes en Encontrados " the wharf and other structures, together with all the rights and privileges under the contract, and said company assumed all the duties and liabilities imposed by said contract. This conveyance was registered in the office of the register of Maracaibo on April 22, 1899.

On or about July 1, 1899, Messrs. Kunhardt & Co. became the owners of an interest in the " Compañía Anónima Trasportes en Encontrados " amounting to 243,750 bolivars, represented by 325 certificates of stock, each certificate representing one share of a par value of 750 bolivars.

On November 15, 1900, the national Executive of the Republic, through the department of public works, adopted the following resolution:

It is resolved,

As the agreement entered into on the 24th of February, 1897, between the department and the citizen, Joaquín Valbuena Urquinaona, for the construction of a wharf in the port of Encontrados, has not been fulfilled in all its parts, the supreme chief of the Republic has declared said contract void.

Let it be known and published.

For the national Executive: J. OTAÑEZ M.

This resolution was published in the Gaceta Oficial November 16, 1900.

The memorialists allege that this resolution, whereby the Valbuena contract and concession were annulled, was without legal or other cause or justification, and wrongfully deprived the stockholders of the company, and in particular Kunhardt & Co., as owners of over three-fourths of said stock, of the property to which they were legally entitled and in which they had invested funds to the amount of 243,750 bolivars upon the faith of the promise of the Government of Venezuela as set forth in said contract and concession; that since November 15, 1900, the Venezuelan Government has prevented said company from collecting the toll to which it was and is justly entitled under the terms of the said contract and has thereby rendered worthless the wharf and other structures erected at Encontrados, and the contract and concession under which the same were built, all in contravention of the terms of said contract; that on January 19, 1901,

the shareholders of said company, including Kunhardt & Co., protested against the action of the Executive in said attempted cancellation of the contract and in the subsequent proceedings in pursuance of said cancellation, but that the Venezuelan Government has continued to prevent the collection of the tolls and has refused to allow said company to exercise its rights under the contract.

Kunhardt & Co., claim that, by reason of said wrongful action of the Government of Venezuela, they have been damaged in the sum of 243,750 bolivars, equivalent to $ 46,875 in United States gold, being the value of their stock in the Compañía Anónima Trasportes en Encontrados prior to November 15, 1900, and they claim indemnity in that amount.

The learned counsel for Venezuela in his answer declares that this claim is unfounded in every aspect; that the corporation Trasportes en Encontrados was organized solely by citizens of Venezuela; that claimants were not in any manner interested in its organization, and that if they became the owners of various shares of stock issued by said company, it was a voluntary act on their part; that if any claim could arise against the Government of Venezuela on account of the annulment of the contract of February 24, 1897, only the managers of the company, or the receiver in case of dissolution, could institute the suit; that the claimants, taking advantage of their status as foreigners by making this claim are using an extraordinary remedy not available to the other shareholders of the company.

Article 163 of the Código de Comercio of Venezuela recognizes three kinds of mercantile companies:

(1) *La compañía en nombre colectivo*, in which all the members administer the business themselves or by means of an agent chosen by common accord. The liability of each member is unlimited. It corresponds to a general partnership.

(2) *La compañía en comandita*, in which one or more of the members are bound only to the amount of their investment. There are two kinds of companies *en comandita:* (*a*) Simple and (*b*) divided into shares. It is similar to what is known in England and the United States as a limited partnership.

(3) *La compañía anónima*, in which the capital is managed by shareholders who are responsible only to the value of their shares. It is the legal entity known to the common law as a private corporation.

Any number of persons not less than seven may by agreement associate themselves into a " compañía anónima." No previous authorization is necessary. It is a corporation created under general charter. The law requires that the articles of agreement (contrato de sociedad), in writing, whatever the number of shareholders, must be made in duplicate, one copy of which is to be filed in the office of the register and the other in the records of the company. (Art. 195.)

The powers, capacities, and incapacities of a corporation under the civil law are similar to those under the English and American corporation law.

The Compañía Anónima Trasportes en Encontrados was organized April 10, 1899, by nine citizens of Maracaibo and its articles of agreement filed in the registry as provided by law on April 13, 1899.

The articles of agreement declare the objects and purpose of the corporation to be the acquisition of the rights and privileges granted by and the assumption of the obligations of the contract executed between the National Government and Gen. Joaquín Valbuena on February 24, 1897. The capital of the company is fixed by said articles at 300,000 bolivars. On April 18, 1899, Bernardo Tinedo Velasco, the then owner of the concession, pursuant to the authorization of the Government, duly transferred to the company all the rights and privileges

which had been acquired by him as concessionary under said contract. The consideration of the transfer is declared to be 300,000 bolivars.

H. R. Kunhardt states in an affidavit dated May 20, 1903, that as a partner of the firm of Kunhardt & Co. he purchased on or about July 1, 1899, 325 certificates of the stock of said compañía of the par value of 750 bolivars each, amounting to 243,750 bolivars, or $ 46,875 American money; that the reasonable value of said 325 certificates on November 15, 1900, was $ 46,875, and that during the year from September 12, 1899, to September 20, 1900, the company declared and paid dividends on said stock amounting to over 10 per cent on the par value of each share of stock.

The capital of the Compañía Anónima Trasportes en Encontrados was represented by the alleged value of the contract and concession of February 24, 1897. It is claimed that the executive action of November 15, 1900, annulling the contract renders worthless the wharf and other structures erected at Encontrados and the contract and concession under which the same were built. In other words, it took away the company's capital. Paragraph 2 of article 204 of the Código de Comercio provides that when the capital of a company has been diminished two-thirds, the company is necessarily put in liquidation if the shareholders do not prefer to refund the same or limit the capital to the existing balance, provided the latter is sufficient to obtain the objects of the company. Article 42 of the reglamento of the company provided that when any of the cases expressed in paragraph 2 of article 204 of the Código de Comercio should exist the company could be dissolved.

When the capital of the corporation was practically destroyed by the taking away of that which represented it, the company was dissolved by operation of law and the by-laws above cited.

While the property of a corporation in esse belongs not to the stockholders individually or collectivity, but to the corporation itself, it is a principle of law universally recognized that, upon dissolution, the interests of the several stockholders become equitable rights to proportionate shares of the corporate property after the payment of the debts. The rights of the creditors and shareholders to the real and personal property of the corporation, as well as to its rights of contract and choses in action, are not destroyed by dissolution or liquidation. But in such case the creditors of the corporation have a right of priority of payment in preference to the stockholders.

The principal asset of the Compañía Anónima Trasportes en Encontrados was the Valbuena concession. Under it the Government of Venezuela for a consideration agreed to give the grantee, his heirs, or successors the rights and privileges therein designated for a period of fifteen years. It is fundamental that if one party to a contract wrongfully violates it he becomes liable to the other for such damages as the latter may sustain by reason of the breach, and this is true " whether such party be a private individual, a monarch, or a government of any kind." [1]

Article 691 of the civil code of Venezuela recognizes and declares that a property right may rest in contract. If the rights granted under the contract of February 24, 1897, were wrongfully taken away by the Government of Venezuela, compensation is justly due from that Government — first, to the Compañía Anónima Trasportes en Encontrados, or, second, upon the dissolution of said company, to its creditors and shareholders.

Messrs. Kunhardt & Co., as citizens of the United States and the equitable owners of their proportionate share in the property of the dissolved corporation,

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[1] See opinion of Sir Henry Strong and Hon. Don M. Dickinson in the Salvador Commercial Co. case. For. Rel. U. S., 1902, p. 871.

have a standing before this Commission to make claim for indemnity for such losses as they may prove they have sustained by reason of the wrongful annulment of the concession.

The claim of Kunhardt & Co. is based upon the alleged value of the concession when called as being 300,000 bolivars, and it is urged on their behalf that they have been damaged to the reasonable value of their interest in the company as measured by their ownership of 325 shares of the capital stock of a par value of 750 bolivars each, or the total value of 243,750 bolivars, equivalent to $ 46,875 in United States gold.

But the real interest of Kunhardt & Co. is an equitable right to their proportionate share of the corporate property after the creditors of the corporation have been paid. An important, and indeed, an essential element of proof to determine the actual measure of the claimant's loss is entirely wanting here. No evidence of the amount of the corporate debts is presented, although the existence of corporate indebtedness is apparent. The protest of January 19, 1901, states that:

> The prejudices are very grave which the company, its stockholders, and many others who have interest in it, suffer from the Executive resolution which declared the contract base of this company " canceled." And said protest is made on behalf of the company, its stockholders, and others connected with it.

Who but creditors of the corporation can be parties in interest to this contract other than the company and its stockholders?

The value of the corporate shares and the extent of a shareholder's interest in the corporate property are absolutely dependent upon the relation which the assets of the corporation bear to its liabilities.

The absence of such a showing in this case renders impossible the determination of Kunhardt & Co.'s interest in the concession or the amount of loss they have sustained by its annulment. The claim must, therefore, be here disallowed, but without prejudice to the corporation, its creditors, and stockholders, or to the interest of these claimants therein.

EL MOLINO

The memorials state:

(*a*) The firm of Kunhardt & Co., are, and since September 12, 1897, have been, the owners of an estate known as " El Molino," situated in the district of Barquisimeto, State of Lara, Venezuela. Said firm invested in the purchase and improvement of this property the sum of $ 35,000. The estate was used for the raising of sugar cane and the manufacture of sugar, the raising of corn and fodder, and for pasturing milch cattle and oxen. Since June 5, 1899, the estate has been in charge of J. Adolphus Ermin, as administrator and agent of claimants, and from said date to December 22, 1899, the firm received from the estate a monthly income exceeding 400 bolivars.

On the night of December 23, 1899, certain troops of the army of General Castro, under the immediate command of General Lara, entered upon and took forcible possession of said estate and encamped thereon for some time. During this period the troops seized for rations the cattle upon the estate and foraged their horses upon the growing crops, destroying all the corn and sugar cane growing upon the estate; took for their own use the horses, donkeys, and mules which were on the estate, and upon the departure of the troops they had killed or taken away all the live stock and destroyed all the growing crops; had injured and destroyed the wire fencing and greatly damaged the sugar house and sugar machinery.

As a direct result of the occupation of the estate by the troops of General Lara, the firm of Kunhardt & Co. sustained damages to the extent of 81,900 bolivars, equivalent to the sum of $ 15,750 in United States gold. An appraisal of the property lost and an assessment of the damages done were made by competent appraisers familiar with the property and its value. The report of said appraisers shows the loss sustained by claimants to be as follows:

	Bolivars
85 selected milch cattle, several of them American, an average of 240 bolivars each	20,400
3 teams of donkeys, with their harness, at 1,200 bolivars per team	3,600
9 mules, at 500 bolivars each	4,500
18 horses, at 500 bolivars each	9,000
Damage to the residence	8,000
3 carts and their harness, at 400 bolivars each	1,200
Damage to the wire fence	2,000
300 tares of corn fodder, at 24 bolivars each	7,200
250 tares of sugar cane, at 40 bolivars each	10,000
Injury to the engine room and loss of the zinc of the engine house	16,000
Total	81,900
Or in United States money	$ 15,750

Said appraisement was verified by the appraisers before Señor R. M. Delgado, judge of the municipal court of the city of Concepción, on April 16, 1901.

(*b*) The claimants allege that since the occupation of " El Molino " by the troops in December, 1899, as above described, the district in which said estate is situated has been in a condition of civil disturbance, which has prevented them from restocking, replanting, or in any way making use of said estate, which, it is claimed, is highly adapted to agricultural use, and except for the civil disorder which has prevailed, would be exceedingly productive; that previous to the occupation of December, 1899, the estate yielded a net annual profit of $ 924; that the Government of Venezuela has failed to suppress said condition of civil disturbance, by reason whereof claimants have lost the use and occupation of said estate to their damage, in the sum of $ 3,054.33.

(*c*) In a supplemental memorial, dated May 20, 1903, claimants allege that they have sustained further losses and damages by reason of additional depredations committed by Government troops upon said estate, " El Molino; " that in order to maintain said estate and reduce as much as possible the damages suffered in respect thereto, the agent of claimants kept on the estate a small number of milch cattle and endeavored to raise hay and corn; that during the first part of the year 1902 the Government troops destroyed all the crops on said estate and seized five milch cattle, and that on the 2d day of April, 1903, said troops seized thirteen milch cattle from said estate, to the additional injury of claimants in the sum of $ 1,407.61.

(*d*) In a supplemental memorial dated June 22, 1903, claimants filed a " justificativo " in proof of loss and damages sustained by them in respect to said estate in addition to that shown in their previous memorials, in the sum of $ 2,635.77 gold.

The entire amount claimed for injuries sustained in connection with the hacienda " El Molino " is the sum of $ 22,847.71 United States gold.

The responsibility of a government for the appropriation of neutral property in time of war has been clearly stated in Shrigley's case[1] decided by the United States and Chilean Claims Commission of 1892, as follows:

[1] Shrigley *v.* Chile, Moore's Arbitrations, p. 3712.

(*a*) Neutral property taken for the use or service of armies by officers or functionaries thereunto authorized gives a right to the owners of the property to demand compensation from the government exercising such authority.

(*b*) Neutral property taken or destroyed by soldiers of a belligerent with authorization, or in the presence of their officers or commanders, gives a right to compensation, whenever the fact can be proven that said officers or commanders had the means of preventing the outrage and did not make the necessary efforts to prevent it.

The evidence submitted in support of this claim satisfactorily shows that the Government troops under the immediate command of General Lara entered upon and confiscated property of the estate "El Molino" in December, 1899, and at various times thereafter. A reasonable compensation is therefore due to claimants from the Government of Venezuela for the losses thus sustained. But that portion of the claim based upon the loss of the annual profits of the estate by reason of the civil disorder which prevailed in the district does not appear to be well founded. The situation of claimants' property in that regard did not differ from that of other property within the same district, and no government is immune from the occurrence of civil commotions. There is also in the last two memorials an obvious duplication of the claim for the 13 milch cattle taken early in April, 1902. Several items of the claim appear to be excessive and the evidence of value is not wholly satisfactory.

The Commissioners have agreed upon an award in favor of Kunhardt & Co. on his branch of their claim in the sum of $ 13,947 gold coin of the United States.

PAÚL, *Commissioner*:

The United States of America presents in this case two individual claims on behalf of Kunhardt & Co. — one for the sum of $ 46,675 for damages arising from the cancellation ordered by the Government of Venezuela of a certain contract and the other for damages to the estate "El Molino" for the amount of $ 22,847.71.

The first claim is based upon the fact that Kunhardt & Co., being owners of a portion of the 400 shares stock capital of a corporation named "Trasportes en Encontrades," they consider themselves entitled to obtain directly from the Government of Venezuela the payment of damages which they allege they have suffered by the decree issued by said Government canceling the Encontrados contract.

The honorable agent for Venezuela, in his answer to this claim, maintains that the claimants have no right, as stockholders of an anonymous corporation, to set forth an action against the Government of Venezuela to obtain an award for damages caused by the annulment of a concession granted by said Government to a citizen of Venezuela and transferred afterwards to an anonymous corporation domiciled in Venezuela, and whose rights, properties, and titles are legally represented by its own manager during the existence of the corporation, or by its liquidators if the same has been put in liquidation.

The contract celebrated in April, 1897, between the minister of public works and Joaquín Valbuena Urquinaona, a citizen of Venezuela, had for its object the construction of a wooden wharf and other works in the port of Encontrados, on the river Zulia, in the State of Zulia. It was transferred two years after to an anonymous corporation called "Trasportes en Encontrados" formed by Venezuelan stockholders with Venezuelan capital, and the price of acquisition of the rights of the grant was paid by the corporation to the owner of the concession from its own funds.

The corporation appointed in its first general assembly of shareholders a board of directors and a manager, all Venezuelans, and chose as its domicile

the city of Maracaibo, capital of the State of Zulia, being, consequently, a domestic corporation of Venezuela.

By the deed of the aforesaid transfer, which was recorded in the subsidiary office of the register of Maracaibo on the 22d of April, 1899, the corporation assumed all rights, exemptions, and privileges arising from the grant, and bound itself to the terms of the article 16 of the contract, which reads as follows:

> That any doubt or dispute arising from the interpretation of this contract should be decided by the courts of the Republic according to its laws, and they could not in any case be a motive for an international claim.

Can it be admitted as belonging to Kunhardt & Co., shareholders of the domestic corporation " Trasportes en Encontrados," the right to claim damages arising from the breach of a contract that does not belong to them, but which is the exclusive property of the corporation " Trasportes en Encontrados?"

Being the fundamental fact for this claim the wrongful annulment of a grant, the claimants necessarily must be the owners of such grant, and said owner, or his legal representative, is the only person entitled to claim restitution, indemnity, or compensation for the value of the property which has been taken from him. There is only one grant; the agreement between the Government of Venezuela and the grantee originates juridical ties only between the two contracting parties. That grantee was originally a Venezuelan named Joaquín Valbuena Urquinaona. Subsequently all the rights and privileges of said contract were transferred and assigned Frederico Evaristo Schemel, and on or about December 16, 1897, said Schemel transferred and assigned all his rights and privileges under said contract and concession to Bernardo Tinedo Velasco. This Tinedo Velasco assigned to the corporation " Trasportes en Encontrados " all his rights and liabilities. By this last transfer the moral person, also a Venezuelan, named " Compañía Anónima Trasportes en Encontrados," became the only owner of said rights, and this fact was expressly notified to the Government of Venezuela, who gave its authorization and conformity to the transfer by a decision of the department of public works of March 14, 1899.

The juridical ties created by the original contract between the Government of Venezuela and Joaquín Valbuena Urquinaona were, by the last transfer, finally established between the said Government and the " Compañía Anónima Trasportes en Encontrados." No juridical ties of any kind exist between Messrs. Kunhardt & Co. and the Venezuelan Government arising from the aforesaid contract.

The interest acquired by Kunhardt & Co. by investing their money in shares of the corporation is a private transaction between them and the corporation and does not create any juridical ties between the Government of Venezuela and them as shareholders during the existence of the corporation.

The shareholders of an anonymous corporation are not co-owners of the property of said corporation during its existence; they only have in their possession a certificate which entitles them to participate in the profits and to become owners of proportional parts of the property and values of the corporation when this one makes an adjudication as a consequence of its final dissolution or liquidation.

The Venezuelan Commercial Code in article 133 expressly determines that an anonymous corporation constitutes a juridical person distinctly separated from its shareholders. Article 204 of the same code provides that when the managers find that the social capital has reduced one-third they should call a general meeting of shareholders to decide whether the corporation ought to liquidate, and in section 2 of the same article it is provided that if the reduction of a capital is of two-thirds the corporation shall be put necessarily in liquidation,

if the shareholders do not prefer to renew the capital or to limit the social capital to the existing funds, provided it would be sufficient to fill the object of the corporation.

The documents in evidence do not show any proof that the corporation "Trasportes en Encontrados" has been put in liquidation, neither has it dissolved in accordance with the commercial law and the statutes of the same corporation. The representation of all its rights, and its juridical person remain the same as they were at the last general special meeting held on January 19, 1901, being that representation exercised by its board of directors. At the same meeting the shareholders limited their action to intrust the managers of the company with the formulation of a protest against *the annulment of the contract, to leave in safety the integrity of its rights and for all the prejudices and damage caused to the company, its stockholders, and others connected with it, in order to make them of value in the manner and at the time they believe opportune.*

Nothing appears to have been done by the managers or board of directors of the corporation "Trasportes en Encontrados" to liquidate the same nor to adjudicate any part of the corporation's property to the shareholders.

The integrity of the rights of the corporation remain in the corporation itself, and its exercise is specially and legally intrusted, by the common law, by the provisions of the commercial code, and by the social contract, to the manager and the board of directors. Therefore the said rights can not be exercised by any other person than the directors of the corporation.

Messrs. Kunhardt & Co. have no legal capacity to stand before this Commission as claimants for damages originated by a breach of a contract whose rights and obligations are only mutually established between the Government of Venezuela and the corporation "Compañía Anónima Trasportes en Encontrados."

The case of the claim of the Salvador Commercial Company and other citizens of the United States, stockholders in the corporation which was created under the laws of Salvador, under the name of "El Triunfo Company (Limited)," and the other one of the Delagoa Bay Railway Company,[1] to which the attention of the Commission has been called by the honorable agent of the United States, have been carefully examined, and they do not present any likeness to the present claim.

By the aforesaid considerations I consider that this first claim for damages, amounting to $ 46,875, must be disallowed, without prejudice to the rights of the corporation "Compañía Anónima Trasportes en Encontrados," its stockholders, and others connected with it.

In reference to the second claim, amounting to $ 22,847.71, for damages to the estate "El Molino," owned by Messrs. Kunhardt & Co., I entirely agree with the honorable Commissioner for the United States, in the appreciation of the evidence and the responsibility of the Government of Venezuela.

An award is therefore agreed to in favor of Kunhardt & Co. for the sum of $ 13,947 United States gold.

Orinoco Steamship Company Case

(By the Umpire:)

Interpretation of the meaning of the word "owned" in the protocol.

Claims to be prosecuted by a government must be claims of such government both in origin and ownership. This rule, however, may be expressly changed by treaty.

Commission had jurisdiction to examine and decide all claims "owned" by citizens of the United States at the time of the signing of the protocol.

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[1] See For. Rel. U. S., 1902, pp. 838 *et seq.*

A concession to the predecessor in interest of the claimant to use for foreign commerce certain waterways reserved exclusively for coastwise trade, and a stipulation that a like privilege should be granted to no other person, did not vest such a right in the claimant to alone navigate these channels as would prevent the Government from subsequently enacting legislation to revoke and annul the former law reserving these waterways exclusively for coastwise trade.

A stipulation in a concession from a government, that all doubts and controversies arising as to the interpretation and execution of the agreement shall be submitted to the local tribunals, and shall never be made the subject of international intervention, bars the concessionary from the right to seek redress before any other tribunals.

A stipulation in the concession that it might be assigned to third parties by giving previous notice to the Government makes it obligatory upon the concessionary to give such previous notice to the Government, otherwise any assignment of the rights and privileges acquired under the concession is absolutely void as against said Government.

Claims for compensation for the use by the Government of the property subsequent to the assignment are enforcible.

Claim for repairs necessitated by the ill treatment of the property while in the hands of the Government disallowed for want of evidence to show in what condition property was delivered.

Closure of ports and waterways during revolt by constituted authorities can not be considered as a blockade unless the rebels have been recognized as belligerents. The right to close portions of the national territory to navigation is inherent in all governments.

Granting permission to others, while refusing it to claimant, to run steamers during the closure of the Orinoco River does not give rise to any right to make a claim, when the Government had good grounds to believe that claimant was in sympathy with the revolutionary movement, although this was not a fact.

Claim for counsel fees in prosecution of case disallowed.

BAINBRIDGE, *Commissioner* (claim referred to umpire):

Inasmuch as, by reason of a disagreement between the Commissioners, this claim is to be submitted to the umpire, to whom in such case the protocol exclusively confides its decision, the Commissioner on the part of the United States limits himself to the consideration of certain questions which have been raised by the respondent Government, affecting the competency of the Commission to determine this very important claim.

It may be presumed that in framing the convention establishing the Commission the high contracting parties had clearly in view the scope of the jurisdiction to be conferred upon it and deliberately chose, in order to define that scope, the words most appropriate to that end.

Article I of the protocol defines the jurisdiction of the Commission in the following terms:

> All claims owned by citizens of the United States of America against the Republic of Venezuela which have not been settled by diplomatic agreement or by arbitration between the two Governments, and which shall have been presented to the Commission hereinafter named by the Department of State of the United States or its legation at Caracas, shall be examined and decided by a Mixed Commission, which shall sit at Caracas, and which shall consist of two members, one of whom is to be appointed by the President of the United States and the other by the President of Venezuela. It is agreed that an umpire may be named by the Queen of the Netherlands.[1]

The protocol was signed at Washington on behalf of the respective Governments on the 17th of February, 1903. In view of the explicit language of the article quoted above, it would seem too clear for argument that the contracting

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[1] See *supra*, p. 115.

parties contemplated and agreed to the submission to this tribunal of all claims not theretofore settled by diplomatic agreement or by arbitration which were on that date owned by citizens of the United States against the Republic of Venezuela.

The Orinoco Steamship Company is a corporation organized and existing under and by virtue of the laws of the State of New Jersey. It is the successor in interest, by deed of assignment dated April 1, 1902, of the Orinoco Shipping and Trading Company (Limited), a company limited by shares, organized under the English companies acts of 1862 to 1893, and duly registered in the office of the register of joint-stock companies, London, England, on the 14th day of July, 1898. Among other of the assets transferred by the said deed of assignment were " all franchises, concessions, grants made in favor of the Orinoco Shipping and Trading Company (Limited) by the Republic of Venezuela, particularly the concession granted by the Government of Venezuela for navigation by steamer from Ciudad Bolívar to Maracaibo, originally made by the national Executive with Manuel Antonio Sanchez, and approved by Congress on the 8th day of June, 1894," and " all claims and demands existing in favor of the Orinoco Shipping and Trading Company (Limited) against the Republic of Venezuela." The claims and demands referred to constitute in the main the claim here presented on behalf of the Orinoco Steamship Company.

The learned counsel for Venezuela contends that:

> At the time when the acts occurred which are the basis of the claim, the Orinoco Steamship Company did not exist and could not have had any rights before coming into existence, and in order that it might be protected to-day by the United States of America it would be necessary, in accordance with the stipulations of the protocol, that the damages in the event of being a fact should have been suffered by an American citizen, not that they should have been suffered by a third party of different nationality and later transferred to an American citizen; such a proceeding is completely opposed to equity and to the spirit of the protocol.

In the case of Abbiatti *v.* Venezuela, before the United States and Venezuelan Claims Commission of 1890, the question arose whether the claimant, not having been a citizen of the United States at the time of the occurrences complained of, had a standing in court; and it was held that under the treaty claimants must have been citizens of the United States " at least when the claims arose." This was declared to be the " settled doctrine." Mr. Commissioner Little, in his opinion, says:

> As observed elsewhere, the infliction of a wrong upon a State's own citizen is an injury to it, and in securing redress it acts in discharge of its own obligations and, in a sense, in its own interest. This is the key — subject, of course, to treaty terms — for the determination of such jurisdictional questions: Was the plaintiff State injured? It was not, where the person wronged was at the time a citizen of another State. The injury there was to the other State. Naturalization transfers allegiance, but not existing State obligations.

It is to be observed that in attempting to lay down a rule applicable to the case the Commission is careful to make the significant reservation that the rule enunciated is " subject, of course, to treaty terms." It does not deny the competency of the high contracting parties to provide for the exercise of a wider jurisdiction by appropriate terms in a treaty. And that is precisely what has been done here. The unequivocal terms employed in the present protocol were manifestly chosen to confer jurisdiction of all claims owned (on February 17, 1903) by citizens of the United States against the Republic of Venezuela presented to the Commission by the Department of State of the United States or its legation at Caracas. Under these treaty terms, the key

to such a jurisdictional question as that under consideration is the ownership of the claim by a citizen of the United States of America on the date the protocol was signed.

The present claim, together with other assets of the Orinoco Shipping and Trading Company (Limited), was acquired by valid deed of assignment by the Orinoco Steamship Company, a citizen of the United States, on April 1, 1902, long prior to the signing of the protocol, and is therefore clearly within the jurisdiction of this Commission.

Pursuant to the requirements of the convention, the Commissioners and the umpire, before assuming the functions of their office took a solemn oath carefully to examine and impartially to decide according to justice and the provisions of the convention all claims submitted to them. Undoubtedly the first question to be determined in relation to each claim presented is whether or not it comes within the terms of the treaty. If it does, the jurisdiction of the Commission attaches.

> Jurisdiction is the power to hear and determine a cause; it is coram judice whenever a case is presented which brings this power into action. (United States *v.* Arredondo, 6 Pet., 691.)

Thenceforward the Commission is directed by the protocol and is bound by its oath carefully to examine and impartially to decide in conformity with the principles of justice and the rules of equity all questions arising in the claim, and its decision is declared to be final and conclusive.

The jurisdiction exercised by this Commission is derived from a solemn compact between independent nations. It supersedes all other jurisdictions in respect of all matters properly within its scope. It can not be limited or defeated by any prior agreement of the parties litigant to refer their contentions to the local tribunals. Local jurisdiction is displaced by international arbitration; private agreement is superseded by public law or treaty.

As to every claim fairly within the treaty terms, therefore, the functions of this Commission, under its fundamental law and under its oath, are not fulfilled until to its careful examination there is added an impartial decision upon its merits. It can not deny the benefit of its jurisdiction to any claimant in whose behalf the high contracting parties have provided this international tribunal. Jurisdiction assumed, some decision, some final and conclusive action in the exercise of its judicial power, is incumbent upon the Commission. Mr. Commissioner Gore, in the case of the *Betsy*, before the United States and British Commission of 1794, well said:

> To refrain from acting, when our duty calls us to act, is as wrong as to act where we have no authority. We owe it to the respective Governments to refuse a decision in cases not submitted to us; we are under equal obligation to decide on those cases that are within the submission. (Moore's Arbitrations, 2290.)

Finally the protocol imposes upon this tribunal the duty of deciding all claims "upon a basis of absolute equity, without regard to objections of a technical nature, or of the provisions of local legislation." Clearly the high contracting parties had in view the substance and not the shadow of justice. They sought to make the remedies to be afforded by the Commission dependent not upon the niceties of legal refinement, but upon the very right of the case. The vital question in this, as in every other claim before this tribunal, is whether and to what extent citizens of the United States of America have suffered loss or injury; and whether and to what extent the Government of Venezuela is responsible therefor.

GRISANTI, *Commissioner* (claim referred to umpire):

The Orinoco Steamship Company (Limited) demands payment of the Government of Venezuela for four claims, as follows:

First. For $ 1,209,701.05, which sum the claimant company reckons as due for damages and losses caused by the Executive decree of October 5, 1900, said decree having, as the company affirms, annulled its contract-concession celebrated on May 26, 1894. The company deems as a reasonable value of the contract $ 82,432.78 per annum.

Second. For $ 147,638.79, at which the claimant company estimates the damages and losses sustained during the last revolution, including services rendered to the Government of the Republic.

Third. For 100,000 bolivars, of $ 19,219.19, overdue on account of the transaction celebrated on May 10, 1900.

Fourth. For $ 25,000 for counsel fees and expenses incurred in carrying out said claims.

The aforementioned claims are held by the Orinoco Steamship Company, a corporation of American citizenship, organized and existing under and pursuant to the provision of an act of the legislature of the State of New Jersey as assignee and successor of the Orinoco Shipping and Trading Company (Limited), of English nationality, organized in conformity with the respective laws of Great Britain.

And, in fact, it has always been the Orinoco Shipping and Trading Company (Limited), which has dealt and contracted with the Government of Venezuela, as evidenced by the documents and papers relating thereto. In case the aforementioned claims be considered just and correct, the rights from which they arise were originally invested in the juridical character (persona jurídica) of the Orinoco Shipping and Trading Company (Limited); and its claims are for the first time presented to the Mixed Commission by and on behalf of the Orinoco Steamship Company, as its assignee and successor, by virtue of an assignment and transfer, which appears in Exhibit No. 3 annexed to the memorial in pages 51 to 59 of the same, and in the reference to which assignment we shall presently make some remarks.

Before stating an opinion in regard to the grounds of said claims, the Venezuelan Commissioner holds that this Commission has no jurisdiction to entertain them. Said objection was made by the honorable agent for Venezuela prior to discussing the claims in themselves, and as the Venezuelan Commissioner considers such objection perfectly well founded he adheres to it and will furthermore state the powerful reasons on which he considers said objection to be founded.

It is a principle of international law, universally admitted and practiced, that for collecting a claim protection can only be tendered by the Government of the nation belonging to the claimant who originally acquired the right to claim, or in other words, that an international claim must be held by the person who has retained his own citizenship since said claim arose up to the date of its final settlement, and that only the government of such person's country is entitled to demand payment for the same, acting on behalf of the claimant. Furthermore, the original owner of the claims we are analyzing was the Orinoco Shipping and Trading Company (Limited), an English company, and that which demands the payment is the Orinoco Steamship Company (Limited), an American company; and as claims do not change nationality for the mere fact of their future owners having a different citizenship, it is as clear as daylight that this Venezuelan-American Mixed Commission has no jurisdiction for entertaining said claims. The doctrine which I hold

has also been sustained by important decisions awarded by international arbitrations.

Albino Abbiatti applied to the Venezuelan-American Mixed Commission of 1890, claiming to be paid several amounts which in his opinion the Government of Venezuela owed him. The acts alleged as the grounds for the claims took place in 1863 and 1864, at which time Abbiatti was an Italian subject, and it appears that subsequently, in 1866, he became a United States citizen. The Commission disallowed the claim, declaring its want of jurisdiction to entertain said claim for the following reasons:

Has the claimant, then, not having been a citizen of the United States at the time of the occurrences complained of, a standing here? The question is a jurisdictional one. The treaty provides: " All claims on the part of corporations, companies, or individuals, citizens of the United States, upon the Government of Venezuela * * * shall be submitted to a new commission, etc." Citizens when? In claims like this they must have been citizens at least when the claims arose. Such is the settled doctrine. The plaintiff State is not a claim agent. As observed elsewhere, the infliction of a wrong upon a state's own citizen is an injury to it, and in securing redress it acts in discharge of its own obligations and, in a sense, in its own interest. This is the key — subject, of course, to treaty terms — for the determination of such jurisdictional questions: Was the plaintiff State injured? It was not, where the person wronged was at the time a citizen of another state, although afterwards becoming its own citizen. The injury there was to the other state. Naturalization transfers allegiance, but not existing state obligations. Abbiatti could not impose upon the United States, by becoming its citizen Italy's existing duty toward him. This is not a case of uncompleted wrong at the time of citizenship, or of one continuous in its nature.

The Commission has no jurisdiction of the claim for want of required citizenship, and it is therefore dismissed. (Opinions United States and Venezuelan Claims Commission, 1890. Claim of Albino Abbiatti versus The Republic of Venezuela, p. 84.) [1]

In the case mentioned Abbiatti had always owned the claim; but as he was an Italian subject when the damage occurred, the Commission declared it had no jurisdiction to entertain said claim, notwithstanding that at the time of applying to the Commission he had become a citizen of the United States.

Article 1 of the protocol signed at Washington on February 17 of the current year says, textually, as follows:

All claims owned by citizens of the United States of America against the Republic of Venezuela which have not been settled by diplomatic agreement or by arbitration between the two Governments, and which shall have been presented to the Commission hereinafter named by the Department of State of the United States or its legation at Caracas, shall be examined and decided by a mixed commission, etc.[2]

Owned when? we beg to ask, in our turn, as in the above inserted decision. Owned ab initio; that is to say, owned since the moment when the right arose up to the moment of applying with it to this Mixed Commission. The verb " to own " means to possess, and as used in the protocol signifies " being the original proprietor; " therefore it will not suffice that the claim be possessed by a citizen of the United States at the time the protocol was signed; the jurisdiction of this Commission requires that the right should have arisen in the citizen of the United States and that said citizen shall never have failed to be the owner of such a right. Thus and thus only could the Government of the United States protect the claimant company; thus, and on such conditions alone, would this Commission have jurisdiction to entertain said claims.

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[1] Moore's Arbitrations, p. 2347.

[2] See *supra*, p. 115.

If the clause, " All claims owned by citizens of the United States of America," etc., were considered doubtful, and consequently should require interpretation, it ought undoubtedly to be given in accordance with the aforementioned universal principle — the basis of this statement — and not in opposition to it. Derogation of a principle of law in a judicial document has to be most clearly expressed; otherwise, the principle prevails, and the protocol must be interpreted accordingly.

While in some of the earlier cases the decisions as to what constituted citizenship within the meaning of the convention were exceptional, it was uniformly held that such citizenship was necessary when the claim was presented as well when it arose. Numerous claims were dismissed on the ground that the claimant was not a citizen when the claim arose. The assignment of a claim to an American citizen was held not to give the Commission jurisdiction.

An American woman who was married in July, 1861, to a British subject in Mexico was held not to be competent to appear before the Commission as a claimant in respect of damage done by the Mexican authorities in November, 1861, to the estate of her former husband, though her second husband had in 1866 become a citizen of the United States by naturalization. On the other hand, where the nationality of the owner of a claim, originally American or Mexican, had for any cause changed, it was held that the claim could not be entertained. Thus, where the ancestor, who was the original owner, had died, it was held that the heir could not appear as a claimant unless his nationality was the same as that of his ancestor. The person who had the " right to the award " must, it was further held, be considered as the " real claimant " by the Commission, and, whoever he might be, must " prove himself to be a citizen " of the government by which the claim was presented. (Moore's International Arbitrations, vol. 2, p. 1353.) [1]

In the memorial (No. 4) it is affirmed that 99 per cent of the total capital stock of The Orinoco Shipping and Trading Company (Limited) was owned by citizens of the United States of America, but this circumstance, even if it were proved, does not deprive said company of its British nationality, on account of its being organized, according to the referred-to memorial, under the English companies acts of 1862 to 1893 and duly registered in the office of the register of joint stock companies, London, on the 14th of July, 1898. The fact is that limited companies owe their existence to the law in conformity to which they have been organized, and consequently their nationality can be no other than that of said law. The conversion of said company, which is English, into the present claimant company, which is North American, can have no retroactive effect in giving this tribunal jurisdiction for entertaining claims which were originally owned by the first-mentioned company, as that would be to overthrow or infringe fundamental principles.

Naturalization not retroactive. — Without discussing here the theory about the retroactive effect of naturalization for certain purposes, I believe it can be safely denied in the odious matter of injuries and damages. A government may resent an indignity or injustice done to one of its subjects, but it would be absurd to open an asylum to all who have, or believe they have, received some injury or damage at the hands of any existing government, to come and be naturalized for the effect of obtaining redress for all their grievances. (Moore, vol. 3, p. 2483.)

The three quotations inserted hold and sanction the principle that, in order that the claimant might allege his rights before a mixed claims commission organized by the government of his country and that of the owing nation, it was necessary that the claim always belonged to him and that he should never have changed his nationality. And this principle demands that this Com-

[1] See also *ibid.*, pp. 2334, 2753, and Italian - Venezuelan Commission (Corvaia Case) in Volume X of these *Reports*.

mission should declare its want of jurisdiction, whether the two companies be considered as different juridical characters (personas jurídicas) and that the claimant is a successor of the other, or whether they be considered as one and the same, having changed nationality.

I now beg to refer to another matter — to the analysis of the judicial value of the deed of assignment.

In the first number of the exhibit " the Orinoco Shipping and Trading Company " appears selling to " the Orinoco Steamship Company," which is the claimant, the nine steamships named, respectively, *Bolívar*, *Manzanares*, *Delta*, *Apure*, *Guanare*, *Socorro*, *Masparro*, *Héroe* and *Morganito*. These steamships were destined for coastal service, or cabotage, some to navigate the rivers Guanare, Cojedes, Portuguesa and Masparro from Ciudad Bolívar up to the mouth of the Uribante River (Olachea contract of June 27, 1891), and others to navigate between said Ciudad Bolívar and Maracaibo, and to call at the ports of La Vela, Puerto Cabello, La Guaira, Guanta, Puerto Sucre, and Carúpano (Grell contract, June 8, 1894). This line was granted the option of calling at the ports of Curaçao and Trinidad.

While the Government fixes definitely the transshipment ports for merchandise from abroad, and while they are making the necessary installations. (Contract, art. 12.)

However, the coastal trade can only be carried on by ships of Venezuelan nationality, in conformity with article 1, Law XVIII, of the Financial Code, which provides that —

Internal maritime trade of cabotage or coastal service is that which is carried on between the open ports of Venezuela and other parts of the continent, as well as between the banks of its lakes and rivers, in national ships, whether laden with foreign merchandise for which duties have been paid or with native goods or productions. (Comercio de Cabotaje, p. 87.)

And if we further add that the steamers were obliged to navigate under the Venezuelan flag (art. 2 of the Grell contract), as in fact they did, the result is that said steamers are Venezuelan by nationalization, wherefore the assignment of said steamers alleged by the Orinoco Shipping and Trading Company (Limited) to the claimant company is absolutely void and of no value, owing to the fact that the stipulations provided by the Venezuelan law (herewith annexed) for the validity of such an assignment were not fulfilled.

Law XXXIII (Financial Code)

ON THE NATIONALIZATION OF SHIPS

ART. 1. The following alone will be held as national ships:
First. * * *
Second. * * *
Third. * * *
Fourth. Those nationalized according to law.

ART. 6. * * * The guaranty given for the proper use of the flag must be to the satisfaction of the custom-house. The property deed must be registered at the office of the place where the purchase takes place, and if such purchase is made in a foreign country a certificate of the same, signed by the Venezuelan consul and by the harbor master, shall have to be sent, drawn on duly stamped paper.

ART. 12. When a ship, or an interest therein, is to be assigned, a new patent must be obtained by the assignee, after having presented the new title deeds to the custom-house and receiving therefrom the former patent, stating measurements and tonnage therein contained, in order to obtain said patent.

The assignment of the aforementioned steamer is, as to the Government of Venezuela, void and of no value or effect whatever.

In Exhibit No. 2 " the Orinoco Shipping and Trading Company (Limited) " appears assigning several immovable properties situated in the Territorio Federal Amazonas of the Republic of Venezuela to the claimant company, and the title deed has not been registered at the subregister office of said Territory, as prescribed by the Venezuelan Civil Code in the following provisions:

ART. 1883. Registration must be made at the proper office of the department, district, or canton where the immovable property which has caused the deed is situated.

ART. 1888. In addition to those deeds which, by special decree, are subject to the formalities of registration, the following must be registered:

First. All acts between living beings, due to gratuitous, onerous, or assignment title deeds of immovable or other property or rights susceptible of hypothecation.

In Exhibit No. 3, the Orinoco Shipping and Trading Company (Limited) appears assigning the Olachea contract of June 27, 1891, and the Grell contract of June 8, 1894. In assigning the first of these the approval of the Venezuelan Government was not obtained, either before or after, thereby infringing the following provision:

This contract may be transferred wholly or in part to any other person or corporation upon previous approval of the National Government.

In assigning the second the stipulation provided in article 13 of giving previous notice to the Government was infringed. If any argument could be made in regard to the annulment of the latter assignment, there is no doubt whatever in regard to the annulment of the former, whereas in the foregoing provision the Government reserves the right of being a contracting party in the assignment, and consequently said assignment, without the previous consent of the Government, is devoid of judicial efficacy.

The assignment of those contracts is, therefore, of no value for the Government of Venezuela.

The fifth paragraph of the same refers to the assignment which " the Orinoco Steamship and Trading Company (Limited) " intended to make to " the Orinoco Steamship Company " of all claims and demands existing in favor of the party of the first part, either against the Republic of Venezuela or against any individuals, firms, or corporations. This transfer of credits, which are not specified nor even declared, and which has not been notified to the Government is absolutely irregular, and lacks judicial efficacy with regard to all parties except the assignor and assignee, in conformity with article 1496 of the Civil Code, which provides as follows:

An assignee has no rights against third parties until after notice of the assignment has been given to the debtor, or when said debtor has agreed to said assignment.

The foregoing article is, in substance, identical to article 1690 of the French Civil Code, and in reference thereto Baudry-Lacantinerie says that —

Les formalités prescrites par l'art. 1690 ont pour but de donner à la cession une certaine publicité, et c'est pour ce motif que la loi fait de leur accomplissement une condition de l'investiture du cessionnaire à l'égard des tiers. Les tiers sont réputés ignorer la cession, tant qu'elle n'a pas été rendue publique par la signification du transport ou par l'acceptation authentique du cédé; voilà pourquoi elle ne leur devient opposable qu'à date de l'accomplissement de l'une ou de l'autre de ces formalités. (*Précis de Droit Civil*, t. III, p. 394, numéro 624.)

Quelles sont les personnes que l'article 1690 désigne sous le nom de tiers, et à l'égard desquelles le cessionnaire n'est saisi que par la notification ou l'acceptation

authentique du transport? Ce sont tous ceux qui n'ont pas été parties à la cession et qui ont un intérêt légitime à la connaître et à la contester, c'est-à-dire: 1. le cédé; 2. tous ceux qui ont acquis du chef du cédant des droits sur les créanciers chirographaires du cédant.

1. *Le débiteur cédé.* — Jusqu'à ce que le transport lui ait été notifié ou qu'il l'ait accepté, le débiteur cédé a le droit de considérer le cédant comme étant le véritable titulaire de la créance. La loi nous fournit trois applications de ce principe. (Baudry-Lacantinerie, work and vol. quoted, p. 395. See also Laurent, *Principes de Droit Civil*, vol. 24, p. 472.)

I do not expect that the foregoing arguments will be contested, having recourse to the following provision of the protocol:

The Commissioners, or in case of their disagreement, the umpire, shall decide all claims upon a basis of absolute equity, without regard to objections of a technical nature or of the provisions of local legislation. [1]

If such a broad sense were given to this clause in regard to all cases as to bar any consideration for Venezuelan law, it would not only be absurd, but monstrous. Such, however, can not be the case. How could a claim possibly be disallowed on the grounds of the claimant being a Venezuelan citizen without invoking the Venezuelan law, which bestows upon him said citizenship? How in certain commissions could Venezuela have been exempted from having to pay for damages caused by revolutionists if the judical principles which establish such exemption had not been pleaded? Said clause provides that no regard shall be had to objections of a technical nature, or of the provisions of local legislation, whenever such objections impair principles of equity, but when, in compliance with said principles, to disregard those objections would be to overthrow equity itself, and equity has to be the basis for all the decisions of this Commission. In the present instance conformity exists between the one and the others. And in merely adding that the majority of the cited provisions are in reference to contracts, it is understood that their basis has been equity and not rigorous law. On the other hand, if this Commission were to decide upon paying an award for a claim which the claimant company is not properly entitled to, through not being the owner thereof, it would be a contention against the precepts of equity.

In view, therefore, of the substantial irregularities of the deed of assignment and transfer, the Government of Venezuela has a perfect right to consider " the Orinoco Shipping and Trading Company (Limited) " as the sole owner of the claims analyzed, and whereas said company is of British nationality, this Venezuelan-American Mixed Commission has no jurisdiction to entertain the claim mentioned.

The incompetency of this Commission has been perfectly established. I shall now analyze the claims themselves. The Orinoco Steamship Company holds that the Executive decree promulgated on October 5, 1900, allowing the free navigation of the Macareo and Pedernales channels, annulled its contract concession of May 26, 1894, which contract the claimant company considered as granting it the exclusive right to carry on foreign trade through said channels. The company states as follows:

Since said 16th day of December, A.D. 1901, notwithstanding the binding contract and agreement between the United States of Venezuela and the Orinoco Shipping and Trading Company (Limited) and your memorialist as assignee of said company, to the contrary, said United States of Venezuela, acting through its duly constituted officials, has authorized and permitted said Macareo and Pedernales

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[1] *Supra*, p. 115.

channels of the river Orinoco to be used and navigated by vessels engaged in foreign trade other than those belonging to your memorialists or its predecessors in interest, and has thus enabled said vessels to do much of the business and to obtain the profits therefrom which, under the terms of said contract-concession of June 8, 1894, and the extension thereof of May 10, 1900, should have been done and obtained solely by your memorialist or its said predecessor in interest, and much of said business will continue to be done and the profits derivable therefrom will continue to be claimed and absorbed by persons and companies other than your memorialists, to its great detriment and damage. (Memorial, p. 106.)

Let us state the facts such as they appear in the respective documents.

On July 1, 1893, the Executive power issued a decree in order to prevent contraband which was carried on in the several bocas (mouths) of the river Orinoco, to wit:

ART. 1. Vessels engaged in foreign trade with Ciudad Bolívar shall be allowed to proceed only by way of the Boca Grande of the river Orinoco; the Macareo and Pedernales channels being reserved for the coastal service, navigation by the other channels of the said river being absolutely prohibited.

On May 26, 1894, the Executive power entered into a contract with Mr. Ellis Grell, represented by his attorney, Mr. Manuel Antonio Sanchez, wherein the contractor undertook to establish and maintain in force navigation by steamers between Ciudad Bolívar and Maracaibo in such manner that at least one journey per fortnight be made, touching at the ports of La Vela, Puerto Cabello, La Guaira, Guanta, Puerto Sucre, and Carúpano. Article 12 of this contract stipulates as follows:

While the Government fixes definitely the transshipment ports for merchandise from abroad, and while they are making the necessary installations, the steamers of this line shall be allowed to call at the ports of Curaçao and Trinidad and any one of the steamers leaving Trinidad may also navigate by the channels of the Macareo and Pedernales of the river Orinoco in conformity with the formalities which by special resolution may be imposed by the minister of finance in order to prevent contraband and to safeguard fiscal interests; to all which conditions the contractor agrees beforehand.

On October 5, 1900, the national Executive promulgated the following decree:

ARTICLE I. The decree of the 1st of July, 1893, which prohibited the free navigation of the Macareo, Pedernales, and other navigable waterways of the river Orinoco is abolished.

Did the 1894 contract grant the Orinoco Shipping and Trading Company (Limited) an exclusive privilege to engage in foreign trade with the use of said Macareo and Pedernales channels? The perusal of article 12 above referred to will suffice without the least hesitation to answer this question negatively. The fact is that the company's contract-concession is for establishing the inward trade between the ports of the Republic, from Ciudad Bolívar to Maracaibo, and the company's steamers were only granted a temporary permission to call at Curaçao and Trinidad, *while the Government fixed definitely the transshipment ports for merchandise from abroad, and while they were making the necessary installations.*

It would be necessary to overthrow the most rudimental laws of logic in order to hold that a line of steamers established to engage in coastal trade or cabotage, navigating on the Macareo and Pedernales channels, which are free from internal navigation, should have the privilege of engaging in foreign trade through the mentioned channels. The decree of July 1 of 1893, promulgated with a view to prevent contraband in the channels of the river Orinoco and on the coast of Paria, is not a stipulation of the contract concession of the Orinoco Shipping and Trading Company (Limited), and therefore the Govern-

ment of Venezuela could willingly abolish it, as, in fact, it did abolish it on October 5, 1900. Neither is it reasonable to suppose that the Government at the time of celebrating the referred-to contract alienated its legislative powers, which, owing to their nature, are inalienable. On the other hand, a privilege, being an exception to common law, must be most clearly established, otherwise it does not exist. Whenever interpretation is required by a contract it should be given in the sense of freedom, or, in other words, exclusive of privileges.

Furthermore, it is to be remarked that the Orinoco Shipping and Trading Company (Limited) has never complied with either of the two contracts — the Olachea and the Grell contracts — particularly as refers to the latter, as evidenced by a document issued by said company, whereof a copy is herewith presented, and as evidenced also by the memorial (No. 15).

On May 10, 1900, a settlement was agreed to by the minister of internal affairs and the Orinoco Shipping and Trading Company (Limited), in virtue whereof the Government undertook to pay the company 200,000 bolivars for all its claims prior to said convention, having forthwith paid said company 100,000 bolivars, and at the same time a resolution was issued by said minister granting the Grell contract (May 26, 1894) a further extension of six years.

The company holds that the decree of October 5, 1900, annulled its contract and also annihilated the above-mentioned prorogation, and that, as the concession of said prorogation had been the principal basis of the settlement for the company to reduce its credits to 200,000 bolivars, said credits now arise in their original amount.

It has already been proved that the referred-to Executive decree of October 5, 1900, did not annul the Grell contract, and this will suffice to evidence the unreasonableness of such contention. It must, furthermore, be added that the settlement and the concession for prorogation are not the same act, nor do they appear in the same document; therefore it can not be contended that the one is a condition or stipulation of the other. Besides, the concession for prorogation accounts for itself without having to relate it to the settlement; whereas in the resolution relative to said prorogation the company on its part renounced its right to the subsidy of 4,000 bolivars which the Government had assigned to it in article 7 of the contract.

The Venezuelan Commissioner considers that this Commission has no jurisdiction to entertain the claims deduced by the Orinoco Steamship Company, and that, in case it had, said claims ought to be disallowed.

BARGE, *Umpire*:

A difference of opinion arising between the Commissioners of the United States of North America and the United States of Venezuela, this case was duly referred to the umpire.

The umpire having fully taken into consideration the protocol, and also the documents, evidence, and arguments, and also likewise all other communications made by the two parties, and having impartially and carefully examined the same, has arrived at the decision embodied in the present award.

Whereas the Orinoco Steamship Company demands payment of the Government of Venezuela for four claims, as follows:

First. $ 1,209,700.05, as due for damages and losses caused by the Executive decree of October 5, 1900, having by this decree annulled a contract concession celebrated on May 26, 1894;

Second. 100,000 bolivars, or $ 19,219.19, overdue on account of a transaction celebrated on May 10, 1900;

Third. $ 147,638.79 for damages and losses sustained during the last revolution, including services rendered to the Government of the Republic;

Fourth. $ 25,000 for counsel fees and expenses incurred in carrying out said claims.

And whereas the jurisdiction of this Commission in this case is questioned, this question has in the first place to be investigated and decided.

Now, whereas the protocol (on which alone is based the right and the duty of this Commission to examine and decide " upon a basis of absolute equity, without regard to the objections of a technical nature or of the provisions of local legislation "), gives this Commission the right and imposes the duty to examine and decide " all claims owned by citizens of the United States of America against the Republic of Venezuela which have not been settled by diplomatic agreement or by arbitration between the two Governments, and which shall have been presented to the Commission by the Department of State of the United States or its legation at Caracas," it has to be examined how far this claim of the Orinoco Steamship Company possesses the essential qualities to fall under the jurisdiction of this Commission.

Now, whereas this claim against the Venezuelan Government was presented to this Commission by the Department of State of the United States of America through its agent;

And whereas it has not been settled by diplomatic agreement or arbitration;

And whereas the Orinoco Steamship Company, as evidence shows, is a corporation created and existing under and by virtue of the laws of the State of New Jersey, in the United States of America,

There only remains to be examined if the company owns the claim brought before the Commission.

Now, whereas almost all the items of this claim — at all events those originated before the 1st of April, 1902 — are claims that " the Orinoco Shipping and Trading Company (Limited)," an English corporation, pretended to have against the Government of Venezuela;

And whereas on the said April 1, 1902, the said English company, for the sum of $ 1,000,000, sold and transferred to the American company, the claimant, " all its claims and demands either against the Government of Venezuela or against individuals, firms, and corporations," these claims from that date prima facie show themselves as owned by the claimant.

Whereas further on it is true that, according to the admitted and practiced rule of international law, in perfect accordance with the general principles of justice and perfect equity, claims do not change nationality by the fact that their consecutive owners have a different citizenship, because a state is not a claim agent, but only, as the infliction of a wrong upon its citizens in an injury to the state itself, it may secure redress for the injury done to its citizens, and not for the injury done to the citizens of another state.

Still, this rule may be overseen or even purposely set aside by a treaty.

And as the protocol does not speak — as is generally done in such cases — of all claims of citizens, etc., which would rightly be interpreted " all claims for injuries done to citizens, etc.," but uses the usual expression " all claims owned by citizens," it must be held that this uncommon expression was not used without a determined reason.

And whereas the evidence shows that the Department of State of the United States of America knew about these claims and took great interest in them (as is shown by the diplomatic correspondence about these claims presented to the commission in behalf of claimant), and that the plenipotentiary of Venezuela, a short time before the signing of the protocol, in his character of United States envoy extraordinary and minister plenipotentiary, had corre-

sponded with his Government about these claims, and that even as late as December 20, 1902, and January 27, 1903, one of the directors of the claimant company, J. van Vechten Olcott, wrote about these claims, in view of the event of arbitration, to the President of the United States of America, it is not to be accepted that the high contracting parties, anxious, as is shown by the history of the protocol, to set aside and to settle all questions about claims not yet settled between them, should have forgotten these very important claims when the protocol was redacted and signed.

And therefore it may safely be understood that it was the aim of the high contracting parties that claims such as these, being at the moment of the signing of the protocol *owned* by citizens of the United States of North America, should fall under the jurisdiction of the Commission instituted to investigate and decide upon the claims the high contracting parties wished to see settled.

And therefore the jurisdiction of this Commission to investigate and decide claims owned by citizens of the United States of North America at the moment of the signing of the protocol has to be recognized, without prejudice naturally of the judicial power of the Commission, and its duty to decide upon a basis of absolute equity when judging about the rights the transfer of the ownership might give to claimant against third parties.

For all which reasons the claims presented to this Commission on behalf of the American company, " the Orinoco Steamship Company," have to be investigated by this Commission and a decision has to be given as to the right of the claimant company to claim what it does claim, and as to the duty of the Venezuelan Government to grant to the claimant company what this company claims for.

Now, as the claimant company, in the first place, claims for $ 1,209.701.05 as due for damages and losses caused by the Executive decree of October 5, 1900, this decree having annulled a contract-concession celebrated on May 26, 1894, this contract-concession and this decree have to be examined, and it has to be investigated:

Whether this decree annulled the contract-concession;

Whether this annulment, when stated, caused damages and losses;

Whether the Government of Venezuela is liable for those damages and losses;

And, in the case of this liability being proved, whether it is to claimant the Government of Venezuela is liable to for these damages and losses.

And whereas the mentioned contract concession (a contract with Mr. Ellis Grell, transferred to the Venezuelan citizen, Manuel A. Sanchez, and approved by Congress of the United States of Venezuela on the 26th of May, 1894) reads as follows:

The Congress of the United States of Venezuela, in view of the contract celebrated in this city on the 17th of January of the present year between the minister of the interior of the United States of Venezuela, duly authorized by the chief of the national executive, on the one part, and on the other, Edgar Peter Ganteaume, attorney for Ellis Grell, transferred to the citizen Manuel A. Sanchez, and the additional article of the same contract dated 16th of May instant, the tenor of which is as follows:

Dr. Feliciano Acevedo, minister of the interior of the United States of Venezuela, duly authorized by the chief of the national executive, on the one part, and Edgar Peter Ganteaume, attorney for Ellis Grell, and in the latter's name and representation, who is resident in Port of Spain, on the other part, and with the affirmative vote of the government council have celebrated a contract set out in the following articles:

ART. 1. Ellis Grell undertakes to establish and maintain in force navigation by steamers between Ciudad Bolívar and Maracaibo within the term of six months, reckoned from the date of this contract, and in such manner that at least one journey

per fortnight be made, touching at the ports of La Vela, Puerto Cabello, La Guaira, Guanta, Puerto Sucre, and Carúpano, with power to extend the line to any duly established port of the Republic.

ART. 2. The steamers shall navigate under the Venezuelan flag.

ART. 3. The contractor undertakes to transport free of charge the packages of mails which may be placed on board the steamers by the authorities and merchants through the ordinary post-offices, the steamers thereby acquiring the character of mail steamers, and as such exonerated from all national dues.

ART. 4. The contractor shall draw up a tariff of passages and freights by agreement with the Government.

ART. 5. The company shall receive on board each steamer a Government employee with the character of fiscal postmaster, nominated by the minister of finance, with the object of looking after the proper treatment of the mails and other fiscal interests.

The company shall also transport public employees when in commission of the Government at half the price of the tariff, provided always that they produce an order signed by the minister of finance or by one of the presidents of the States. Military men on service and troops shall be carried for the fourth part of the tariff rates. The company undertakes also to carry gratis materials of war, and at half freights all other goods which may be shipped for account and by order of the National Government.

ART. 6. The General Government undertakes to concede to no other line of steamers any of the benefits, concessions, and exemptions contained in the present contract as compensation for the services which the company undertakes to render as well to national interests as those of private individuals.

ART. 7. The Government of Venezuela will pay to the contractor a monthly subsidy of four thousand bolivars (4,000) so long as the conditions of the present contract are duly carried out.

ART. 8. The National Government undertakes to exonerate from payment of import duties all machinery, tools, and accessories which may be imported for the use of the steamers and all other materials necessary for their repair, and also undertakes to permit the steamers to supply themselves with coal and provisions, etc., in the ports of Curaçao and Trinidad.

ART. 9. The company shall have the right to cut from the national forests wood for the construction of steamers or necessary buildings and for fuel for the steamers for the line.

ART. 10. The officers and crews of the steamers, as also the woodcutters and all other employees of the company, shall be exempt from military service, except in cases of international war.

ART. 11. The steamers of the company shall enjoy in all the ports of the Republic the same freedom and preferences by law established as are enjoyed by the steamers of lines established with fixed itinerary.

ART. 12. While the Government fixes definitely the transshipment ports for merchandise from abroad, and while they are making the necessary installations, the steamers of this line shall be allowed to call at the ports of Curaçao and Trinidad, and any one of the steamers leaving Trinidad may also navigate by the channels of the Macareo and Pedernales of the river Orinoco in conformity with the formalities which by special resolution may be imposed by the minister of finance, in order to prevent contraband and to safeguard fiscal interests; to all which conditions the contractor agrees beforehand.

ART. 13. This contract shall remain in force for fifteen years, reckoned from the date of its approvation, and may be transferred by the contractor to another person or corporation upon previous notice to the Government.

ART. 14. Disputes and controversies which may arise with regard to the interpretation or execution of this contract shall be resolved by the tribunals of the Republic

in accordance with the laws of the nation, and shall not in any case be considered as a motive for international reclamations.

Two copies of this contract of the same tenor and effect were made in Caracas the seventeenth day of January, 1894.

Feliciano ACEVEDO
Edward P. GANTEAUME

ADDITIONAL ARTICLE. Between the minister of the interior of the United States of Venezuela and Citizen Manuel A. Sanchez, concessionary of Mr. Ellis Grell, have agreed to modify the eighth article of the contract made on the 17th day of January of the present year for the coastal navigation between Ciudad Bolivar and Maracaibo on the following terms:

ART. 8. The Government undertakes to exonerate from payment of import duties the machinery, tools, and articles which may be imported for the steamers, and all other materials destined for the repairs of the steamers; while the Government fixes the points of transport and coaling ports, the contractor is hereby permitted to take coal and provisions for the crew in the ports of Curaçao and Trinidad.

Caracas, 10 May, 1894.

José R. NUÑEZ
M. A. SANCHEZ

And whereas the mentioned executive decree of October 5, 1900, reads as follows:

DECREE

ARTICLE 1. The decree of the 1st of July, 1893, which prohibited the free navigation of the Macareo, Pedernales, and other navigable waterways of the river Orinoco is abolished.

ART. 2. The minister of interior relations is charged with the execution of the present decree.

Now, whereas in regard to the said contract it has to be remarked that in almost all arguments, documents, memorials, etc., presented on behalf of the claimant it is designated as a concession for the exclusive navigation of the Orinoco River by the Macareo or Pedernales channels, whilst in claimant's memorial it is even said that the chief — and indeed the only — value of this contract was the exclusive right to navigate the Macareo and Pedernales channels of the river Orinoco, and that, according to claimant, this concession of exclusive right was annulled by the aforesaid decree, and that it is for the losses that were the consequence of the annulment of this concession of exclusive right that damages were claimed.

The main question to be examined is whether the Venezuelan Government, by said contract, gave a concession for the exclusive navigation of said channels of said river, and whether this concession of exclusive navigation was annulled by said decree.

And whereas the contract shows that Ellis Grell (the original contractor) pledged himself to establish and maintain in force navigation by steamers between Ciudad Bolivar and Maracaibo, touching at the ports of La Vela, Puerto Cabello, La Guaira, Guanta, Puerto Sucre, and Carúpano, and to fulfill the conditions mentioned in articles 2, 3, 4 and 5, whilst the Venezuelan Government promised to grant to Grell the benefits, concessions, and exemptions contained in articles 7, 8, 9, 11 and 12, and in article 6 pledges itself to concede to no other line of steamers any of the benefits, concessions, and exemptions contained in the contract, the main object of the contract appears to be the assurance of a regular communication by steamer from Ciudad Bolivar to Maracaibo, touching the duly established Venezuelan ports between those two cities. For the navigation between these duly established ports no concession

or permission was wanted, but in compensation to Grell's engagement to establish and maintain in force for fifteen years (art. 13) this communication, the Venezuelan Government accorded him some privileges which it undertook to grant to no other line of steamers.

Whereas, therefore, this contract in the whole does not show itself as a concession for exclusive navigation of any waters, but as a contract to establish a regular communication by steamers between the duly established principal ports of the Republic, the pretended concession for exclusive navigation of the Macareo and Pedernales channels must be sought in article 12 of the contract, the only article in the whole contract in which mention of them is made.

And whereas this article in the English version, in claimant's memorial, reads as follows:

> While the Government fixes definitely the transshipment ports for merchandise from abroad, and *while* they are making the necessary installations, the steamers of this line shall be allowed to call at the ports of Curaçao and Trinidad, and any one of the steamers leaving Trinidad may also navigate by the channels of the Macareo and Pedernales of the river Orinoco, etc.

It seems clear that the permission in this article — by which article the permission of navigating the said channels was not given to the claimant in general terms and for all its ships indiscriminately, but only for the ships leaving Trinidad — would only have force for the time till the Government would have fixed definitely the transshipment ports, *which it might do at any moment* and *till* the necessary installations were made, and not for the whole term of the contract, which, according to article 15, would remain in force for fifteen years.

And whereas this seems clear when reading the English version of the contract, as cited in the memorial, it seems, if possible, still more evident when reading the original Spanish text of this article, of which the above-mentioned English version gives not a quite correct translation, from which Spanish text reads as follows:

> ART. 12. Mientras el Gobierno fija definitivamente los puertos de trasbordo para las mercancías procedentes del extrangero, y mientras hace las necesarias instalaciones, las será permitido á los buques de la línea, tocar in los puertos de Curaçao y de Trinidad, pudiendo además navegar el vapor que salga de la última Antilla por los caños de Macareo y de Pedernales del Río Orinoco, previas las formalidades que por resolución especial dictará el Ministerio de Hacienda para impedir el contrabando en resguardo de los intereses fiscales; y á los cuales de antemano se somete el contratista.

(The words " el vapor que salga de la última Antilla," being given in the English version as " any one of the steamers leaving Trinidad.")

It can not be misunderstood that this " el vapor " is the steamer that had called at Trinidad according to the permission given for the special term that the " while " (mientras) would last; wherefore it seems impossible that the permission given in article 12 only for the time there would exist circumstances which the other party might change at any moment could ever have been the main object, and, as is stated in the memorial, " the chief and, indeed, only value " of a contract that was first made for the term of fifteen years, which term later on even was prolonged to twenty-one years.

And whereas therefore it can not be seen how this contract-concession for establishing and maintaining in force for fifteen years a communication between the duly established ports of Venezuela can be called a concession for the exclusive navigation of the said channels, when the permission to navigate these channels was only annexed to the permission to call at Trinidad and would end with that permission, whilst the obligation to navigate between the ports of Venezuela from Ciudad Bolívar to Maracaibo would last.

And whereas, on the contrary, all the stipulations of the contract are quite clear when holding in view the purpose why it was given, viz, to establish and maintain in force a communication between the duly established ports of Venezuela, i. e., a regular coastal service by steamers.

Because to have and retain the character and the rights of ships bound to coastal service it was necessary that the ships should navigate under Venezuelan flag (art. 2), that they should have a special permission to call at Curaçao and Trinidad to supply themselves with coal and provisions (art. 8), which stipulation otherwise would seem without meaning and quite absurd, as no ship wants a special permission of any government to call at the ports of another government, and to call at the same foreign ports for transshipment while the government fixed definitely the transshipment ports (art. 12). In the same way during that time a special permission was necessary for the ship leaving Trinidad to hold and retain this one right of ships bound to coastal service — to navigate by the channels of Macareo and Pedernales — which special permission would not be necessitated any longer than the Government could fix definitely the Venezuelan ports that would serve as transshipment ports, because then they would per se enjoy the right of all ships bound to coastal service, viz, to navigate through the mentioned channels.

What is called a concession for exclusive navigation of the mentioned channels is shown to be nothing but a permission to navigate these channels as long as certain circumstances should exist.

And whereas, therefore, the contract approved by decree of the 8th of June, 1894, never was a concession for the exclusive navigation of said channels of the Orinoco; and whereas the decree which reopened these channels for free navigation could not annul a contract that never existed;

All damages claimed for the annulling of a concession for exclusive navigation of the Macareo and Pedernales channels of the Orinoco River must be disallowed.

Now, whereas it might be asked, if the permission to navigate by those channels, given to the steamer that on its coastal trip left Trinidad, was not one of the " benefits, concessions, and exemptions " that the Government in article 6 promised not to concede to any other line of steamers, it has not to be forgotten that in article 12 the Government did not give a general permission to navigate by the said channels, but that this whole article is a temporary measure taken to save the character and the rights of coastal service, to the service which was the object of this contract, during the time the Government had not definitely fixed the transshipment ports; and that it was not an elementary part of the concession, that would last as long as the concession itself, but a mere arrangement by which temporarily the right of vessels bound to costal service, viz, to navigate said channels, would be safeguarded for the vessel that left Trinidad as long as the vessels of this service would be obliged to call at this island, and that therefore the benefit and the exemption granted by this article was not *to navigate by said channels, but to hold the character and right of a coastal vessel, notwithstanding having called at the foreign port of Trinidad*; and as this privilege was not affected by the reopening of the channels to free navigation, and the Government by aforesaid decree did not give any benefit, concession, and exemption granted to this concession to any other line of steamers, a claim for damages for the reopening of the channels based on article 6 can not be allowed. It may be that the concessionary and his successors thought that during all the twenty-one years of this concession the Government of Venezuela would not definitely fix the transshipment ports, nor reopen the channels to free navigation, and on those thoughts based a hope that was not fulfilled and formed a plan that did not succeed, but it would be a

strange appliance of absolute equity to make the government that grants a concession liable for the not realized dreams and vanished "*chateaux en Espagne*" of inventors, promoters, solicitors, and purchasers of concessions.

But further on — even when it might be admitted that the reopening of the channels to free navigation might furnish a ground to base a claim on (quod non) — whilst investigating the right of claimant and the liability of the Venezuelan Government, it has not to be forgotten that, besides the already-mentioned articles, the contract has another article, viz, article 14, by which the concessionary pledged himself not to submit any dispute or controversies which might arise with regard to the interpretation or execution of this contract to any other tribunal but to the tribunals of the Republic, and in no case to consider these disputes and controversies a motive for international reclamation, which article, as the evidence shows, was repeatedly disregarded and trespassed upon by asking and urging the intervention of the English and United States Governments without ever going for a decision to the tribunals of Venezuela; and as the unwillingness to comply with this pledged duty is clearly shown by the fact that the English Government called party's attention to this article, and, quoting the article, added the following words, which certainly indicated the only just point of view from which such pledges should be regarded:

> Although the general international rights of His Majesty's Government are in no wise modified by the provisions of this document to which they were not a party, *the fact that the company, so far as lay in their power, deliberately contracted themselves out of every remedial recourse in case of dispute, except that which is specified in article 14 of the contract*, is undoubtedly an element to be taken into serious consideration when they subsequently appeal for the intervention of His Majesty's Government;

And whereas the force of this sentence is certainly in no wise weakened by the remark made against it on the side of the concessionary, that "the terms of article 14 of the contract have absolutely no connection whatever with the matter at issue, because 'no *doubt* or *controversy* has arisen with respect to the *interpretation and execution* of the contract,'" but that what has happened is this, "that the Venezuelan Government has, by a most dishonest and cunningly devised trick, defrauded the company to the extent of *entirely nullifying* a concession which it had legally acquired at a very heavy cost," whereas, on the contrary, it is quite clear that the only question at issue was whether in article 12, in connection with article 6, a concession for exclusive navigation was given or not — ergo, a question of doubt and controversy about the interpretation;

And whereas the following words of the English Government addressed to the concessionary may well be considered:

> The company does not appear to have exhausted the legal remedies at their disposal before the ordinary tribunals of the country, and it would be contrary to the international practice for His Majesty's Government formally to intervene in their behalf through the diplomatic channel unless and until they should be in a position to show that they had exhausted their ordinary legal remedies with a result that a prima facie case of failure or denial of justice remained;

For whereas, if in general this is the only just standpoint from which to view the right to ask and to grant the means of diplomatic intervention and in consequence casu quo of arbitration, how much the more where the recourse to the tribunals of the country was formally pledged and the right to ask for intervention solemnly renounced by contract, and where this breach of promise was formally pointed to by the government whose intervention was asked;

Whereas, therefore, the question imposes itself, whether absolute equity ever would permit that a contract be willingly and purposely trespassed upon by one party in view to force its binding power on the other party;

And whereas it has to be admitted that, even if the trick to change a contract for regular coastal service into a concession for exclusive navigation succeeded (quod non), in the face of absolute equity the trick of making the same contract a chain for one party and a screw press for the other never can have success:

It must be concluded that article 14 of the contract disables the contracting parties to base a claim on this contract before any other tribunal than that which they have freely and deliberately chosen, and to parties in such a contract must be applied the words of the Hon. Mr. Finley, United States Commissioner in the Claims Commission of 1889: "So they have made their bed and so they must lie in it." [1]

But there is still more to consider.

For whereas it appears that the contract originally passed with Grell was legally transferred to Sanchez and later on to the English company the Orinoco Shipping and Trading Company (Limited), and on the 1st day of April, 1902, was sold by this company to the American company, the claimant;

But whereas article 13 of the contract says that it might be transferred to another person or corporation upon previous notice to the Government, while the evidence shows that this notice has not been previously (indeed ever) given; the condition on which the contract might be transferred not being fulfilled, the Orinoco Shipping and Trading Company (Limited), had no right to transfer it, and this transfer of the contract without previous notice must be regarded as null and utterly worthless;

Wherefore, even if the contract might give a ground to the above-examined claim to the Orinoco Shipping and Trading Company (Limited) (once more quod non), the claimant company as quite alien to the contract could certainly never base a claim on it.

For all which reasons every claim of the Orinoco Steamship Company against the Republic of the United States of Venezuela for the annulment of a concession for the exclusive navigation of the Macareo and Pedernales channels of the Orinoco has to be disallowed.

As for the claims for 100,000 bolivars, or $ 19,219.19, overdue on a transaction celebrated on May 10, 1900, between the Orinoco Shipping and Trading Company (Limited) and the Venezuelan Government:

Whereas these 100,000 bolivars are those mentioned in letter B, of article 2 of said contract, reading as follows:

(B) One hundred thousand bolivars, which shall be paid in accordance with such arrangements as the parties hereto may agree upon on the day stipulated in the decree 23d of April, ultimo, relative to claims arising from damages caused during the war, or by other cause whatever;

And whereas nothing whatever of any arrangement, in accordance with which it was stipulated to pay, appears in the evidence before the Commission, it might be asked if, on the day this claim was filed, this indebtedness was proved compellable;

Whereas further on, in which ever way this question may be decided, the contract has an article 4, in which the contracting parties pledged themselves to the following: "All doubts and controversies which may arise with respect to the interpretation and execution of this contract shall be decided by the tribunals of Venezuela and in conformity with the laws of the Republic, without such mode of settlement being considered motive of international claims," while it is shown in the diplomatic correspondence brought before the Commis-

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[1] Woodruff *et al. v.* Venezuela, Opinions United States and Venezuelan Claims Commission, 1890, *infra*, Moore's Arbitrations, p. 3564.

sion on behalf of claimant, that in December 1902, a formal petition to make it an international claim was directed to the Government of the United States of America without the question having been brought before the tribunals of Venezuela, which fact certainly constitutes a flagrant breach of the contract on which the claim was based;

And whereas, in addition to everything that was said about such clauses here above it has to be considered what is the real meaning of such a stipulation;

And whereas when parties agree that doubts, disputes, and controversies shall only be decided by a certain designated third person, they implicitly agree to recognize that there properly shall be no claim from one party against the other, but for what is due as a result of a decision on any doubts, disputes, or controversies by that one designated third; for which reason, in addition to everything that was said already upon this question heretofore, in questions on claims based on a contract wherein such a stipulation is made, absolute equity does not allow to recognize such a claim between such parties before the conditions are realized, which in that contract they themselves made conditions sine qua non for the existence of a claim;

And whereas further on — even in case the contract did not contain such a clause, and that the arrangements, in accordance to which it was stipulated to pay were communicated to and proved before this Commission — it ought to be considered that if there existed here a recognized and compellable indebtedness, it would be a debt of the Government of Venezuela to the Orinoco Shipping and Trading Company;

For whereas it is true that evidence shows that on the 1st of April, 1902, all the credits of that company were transferred to the claimant company, it is not less true that, as shown by evidence, this transfer was never notified to the Government of Venezuela;

And whereas according to Venezuela law, in perfect accordance with the principles of justice and equity recognized and proclaimed in the codes of almost all civilized nations, such a transfer gives no right against the debtor when it was not notified to or accepted by that debtor;

And whereas here it can not be objected that according to the protocol no regard has to be taken of provisions of local legislation, because the words " the commissioners, or, in case of their disagreement, the umpire, shall decide all claims upon a basis of absolute equity, without regard to objections of a technical nature, or of the provisions of local legislation," clearly have to be understood in the way that questions of technical nature or the provisions of local legislation should not be taken into regard when there were objections against the rules of absolute equity; for, in case of any other interpretation, the fulfilling of the task of this Commission would be an impossibility, as the question of American citizenship could never be proved without regard to the local legislation of the United States of America, and this being prohibited by the protocol, all claims would have to be disallowed, as the American citizenship of the claimant would not be proved; and as to technical questions it might then be maintained (as was done in one of the papers brought before this Commission on behalf of a claimant in one of the filed claims) that the question whether there was a proof that claimant had a right to a claim was a mere technical question;

And whereas, if the provisions of local legislation, far from being objections to the rules of absolute equity are quite in conformity with those rules, it would seem absolutely in contradiction with this equity not to apply its rules because they were recognized and proclaimed by the local legislation of Venezuela;

And whereas, the transfer of credits from " the Orinoco Shipping and Trading Company " to " the Orinoco Steamship Company " neither was

notified to, or accepted by the Venezuelan Government, it can not give a right to a claim on behalf of the last-named company against the Government of Venezuela:

For all which reasons the claim of the Orinoco Steamship Company (Limited) against the Government of Venezuela, based on the transaction of May 10, 1900, has to be disallowed.

In the next place the company claims $ 147,038.79, at which sum it estimates the damages and losses sustained during the last revolution, including services rendered to the Government of Venezuela.

Now, whereas this claim is for damages and losses suffered and for services rendered from June, 1900, whilst the existence of the company only dates from January 31, 1902, and the transfer of the credits of " the Orinoco Shipping and Trading Company (Limited) " to claimant took place on the 1st of April of this same year, it is clear from what heretofore was said about the transfer of these credits, that all items of this claim, based on obligations originated before said April 1, 1902, and claimed by claimant as indebtedness to the aforenamed company and transferred to claimant on said April 1, have to be disallowed, as the transfer was never notified to or accepted by the Venezuelan Government. As to the items dating after the 1st of April, 1902, in the first place the claimant claims for detention and hire of the steamship *Masparro* from May 1 to September 18, 1902 (one hundred and forty-one days), at 100 pesos daily, equal to 14,100 pesos, and for detention and hire of the steamship *Socorro* from March 21 to November 5, 1902 (two hundred and twenty-nine days), 22,900 pesos, together 37,000 pesos, equal to $ 28,401.55;

And whereas it is proved by evidence that said steamers have been in service of the National Government for the time above stated;

And whereas nothing in the evidence shows any obligation on the part of the owners of the steamers to give this service gratis, even if it were in behalf of the commonwealth;

Whereas therefore a remuneration for that service is due to the owners of these steamers:

The Venezuelan Government owes a remuneration for that service to the owners of the steamers;

And whereas these steamers, by contract of April 1, 1902, were bought by claimant, and claimant therefore from that day was owner of the steamers:

This remuneration from that date is due to claimant.

And whereas in this case it matters not that the transfer of the steamers was not notified to the Venezuelan Government, as it was no transfer of a credit, but as the credit was born after the transfer, and as it was not in consequence of a contract between the Government and any particular person or company, but, as evidence shows, because the Government wanted the steamers' service in the interest of its cause against revolutionary forces; and whereas for this forced detention damages are due, those damages may be claimed by him who suffered them, in this case the owners of the steamers;

And whereas the argument of the Venezuelan Government, that it had counterclaims, can in no wise affect this claim, as those counter claims the Venezuelan Government alludes to, and which it pursues before the tribunals of the country, appear to be claims against the Orinoco Shipping and Trading Company, and not against claimant;

And whereas it matters not whether claimant, as the Government affirms and as evidence seems clearly to show, if not taking part in the revolution, at all events favored the revolutionary party, because the ships were not taken and confiscated as hostile ships, but were claimed by the Government, evidence

shows, because it wanted them for the use of political interest, and after that use were returned to the owners: For all these reasons there is due to claimant from the side of the Venezuelan Government, a remuneration for the service of the steamers *Masparro* and *Socorro*, respectively, from May 1 to September 18, 1902 (one hundred and forty-one days), and from April 1 to November 5, 1902 (two hundred and nineteen days, together three hundred and sixty days);

And whereas, according to evidence since 1894 these steamers might be hired by the Government for the price of 400 bolivars, or 100 pesos, daily, this price seems a fair award for the forced detention:

Wherefore for the detention and use of the steamers *Masparro* and *Socorro* the Venezuelan Government owes to claimant 36,000 pesos, or $ 27,692.31.

Further on claimant claims $ 2,520.50 for repairs to the *Masparro* and $ 2,932.98 for repairs to the *Socorro*, necessitated, as claimant assures, by the ill usage of the vessels whilst in the hands of the Venezuelan Government.

Now, whereas evidence only shows that after being returned to claimant the steamers required repairs at this cost, but in no wise that those repairs were necessitated by ill usage on the side of the Government;

And whereas evidence does not show in what state they were received and in what state they were returned by the Government:

And whereas it is not proved that in consequence of this use by the Government they suffered more damages than those that are the consequence of common and lawful use during the time they were used by the Government, for which damages in case of hire the Government would not be responsible;

Where the price for which the steamers might be hired is allowed for the use, whilst no extraordinary damages are proved, equity will not allow to declare the Venezuelan Government liable for these repairs:

Wherefore this item of the claim has to be disallowed.

Evidence in the next place shows that, on May 29 and May 31, 1902, 20 bags of rice, 10 barrels of potatoes, 10 barrels of onions, 16 tins of lard, and 2 tons of coal were delivered to the Venezuelan authorities on their demand on behalf of the Government forces, and for these provisions, as expropriation for public benefit, the Venezuelan Government will have to pay;

And whereas the prices that are claimed, viz, $ 6 for a bag of rice, and $ 5 for a barrel of potatoes, $ 7 for a barrel of onions, $ 3 for a tin of lard, and $ 10 for a ton of coal, when compared with the market prices at Caracas, do not seem unreasonable, the sum of $ 308 will have to be paid for them.

As for the further $ 106.40 claimed for provisions and ship stores, whereas there is given no proof of these provisions and stores being taken by or delivered to the Government, they can not be allowed.

For passages since April 1, 1902, claimant claims $ 224.62, and whereas evidence shows that all these passages were given on request of the Government, the claim has to be admitted, and whereas the prices charged are the same that formerly could be charged by the " Orinoco Shipping and Trading Company," these prices seemed equitable;

Wherefore, the Venezuelan Government will have to pay on this item the sum of $ 224.62.

As to the expenses caused by stoppage of the steamer *Bolívar* at San Felix when Ciudad Bolívar fell in the hands of the revolution —

Whereas this stoppage was necessitated in behalf of the defense of the Government against revolution;

And whereas no unlawful act was done nor any obligatory act was neglected by the Government, this stoppage has to be regarded, as every stoppage of commerce, industry, and communication during war and revolution, as a

common calamity that must be commonly suffered and for which government can not be proclaimed liable;

Wherefore, this item of the claim has to be disallowed.

And now as for the claim of $ 61.336.20 for losses of revenue from June to November, 1902, caused by the blockade of the Orinoco:

Whereas a blockade is the occupation of a belligerent party on land and on sea of all the surroundings of a fortress, a port, a roadstead, and even all the coasts *of its enemy*, in order to prevent all communication with the exterior, with the right of " transient occupation " until it puts itself into real possession of that port of the hostile territory, the act of forbidding and preventing the entrance of a port or a river on its own territory in order to secure internal peace and to prevent communication with the place occupied by rebels or a revolutionary party can not properly be named a blockade, and would only be a blockade when the rebels and revolutionists were recognized as a belligerent party;

And whereas in absolute equity things should be judged by what they are and not by what they are called, such a prohibitive measure on its own territory can not be compared with the blockade of a hostile place, and therefore the same rules can not be adopted;

And whereas the right to open and close, as a sovereign on its own territory, certain harbors, ports, and rivers in order to prevent the trespassing of fiscal laws is not and could not be denied to the Venezuelan Government, much less this right can be denied when used in defense not only of some fiscal rights, but in defense of the very existence of the Government;

And whereas the temporary closing of the Orinoco River (the so-called " blockade ") in reality was only a prohibition to navigate that river in order to prevent communication with the revolutionists in Ciudad Bolívar and on the shores of the river, this lawful act by itself could never give a right to claims for damages to the ships that used to navigate the river;

But whereas claimant does not found the claim on the closure itself of the Orinoco River, but on the fact that, notwithstanding this prohibition, other ships were allowed to navigate its waters and were dispatched for their trips by the Venezuelan consul at Trinidad, while this was refused to claimant's ships, which fact in the brief on behalf of the claimant is called " unlawful discrimination in the affairs of neutrals," it must be considered that whereas the revolutionists were not recognized belligerents there can not properly here be spoken of " neutrals " and " the rights of neutrals; " but that

Whereas it here properly was a prohibition to navigate;

And whereas, where anything is prohibited, to him who held and used the right to prohibit can not be denied the right to permit in certain circumstances what as a rule is forbidden;

The Venezuelan Government, which prohibited the navigation of the Orinoco, could allow that navigation when it thought proper, and only evidence of unlawful discrimination, resulting in damages to third parties, could make this permission a basis for a claim to third parties;

Now, whereas the aim of this prohibitive measure was to crush the rebels and revolutionists, or at least to prevent their being enforced, of course the permission that exempted from the prohibition might always be given where the use of the permission, far from endangering the aim of the prohibition, would tend to that same aim, as, for instance, in the case that the permission were given to strengthen the governmental forces or to provide in the necessities of the loyal part of the population;

And whereas the inculpation of unlawful discrimination ought to be proved;

And whereas, on one side, it not only is not proved by evidence that the ships

cleared by the Venezuelan consul during the period in question did not receive the permission to navigate the Orinoco in view of one of the aforesaid aims;

But whereas, on the other side, evidence, as was said before, shows that the Government had sufficient reasons to believe claimant, if not assisting the revolutionists, at least to be friendly and rather partial to them, it can not be recognized as a proof of unlawful discrimination that the Government, holding in view the aim of the prohibition and defending with all lawful measures its own existence, did not give to claimant the permission it thought fit to give to the above-mentioned ships;

And whereas therefore no unlawful act or culpable negligence on the part of the Venezuelan Government is proved that would make the Government liable for the damages claimant pretends to have suffered by the interruption of the navigation of the Orinoco River, this item of the claim has to be disallowed.

The last item of this claim is for $ 25,000, for counsel fees and expenses incurred in carrying out the above examined and decided claims;

But whereas the greater part of the items of the claim had to be disallowed;

And whereas in respect to those that were allowed it is in no way proved by evidence that they were presented to and refused by the Government of the Republic of the United States of Venezuela, and whereas therefore the necessity to incur those fees and further expenses in consequence of an unlawful act or culpable negligence of the Venezuelan Government is not proved, this item has, of course, to be disallowed.

For all which reasons the Venezuelan Government owes to claimant:

	United States gold
For detention and use of the steamers *Masparro* and *Socorro*, 36,000 pesos, or	$ 27,692.31
For goods delivered for use of the Government	308.00
For passages	224.62
Total	28,224.93

While all the other items have to be disallowed.

APPENDIX TO THE CASE OF THE ORINOCO STEAMSHIP COMPANY

Memorial, Brief of United States agent, Answer of Venezuelan agent, Replication of United States agent. (See original Report, pp. 97-141 — not reproduced in this series.)

IRENE ROBERTS CASE

A government is responsible for the acts of violence and pillage committed by its troops when under the command of their officers.

Claim duly presented on behalf of claimant is not barred by lapse of time before final adjudication or settlement. [1]

Award of $ 5,000, in addition to actual damage, made for losses that must have been contemplated by the wrongdoers.

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[1] See *infra*, p. 223, (Spader Case) and the Italian - Venezuelan Commission (Contini Case, Giacopini Case, Tagliaferro Case) in Volume X of these *Reports*.

BAINBRIDGE, *Commissioner* (for the Commission):

William Quirk, a native citizen of the United States, came to Venezuela in 1867, to engage in the business of raising sea-island cotton. He first rented a small plantation known as "Guayabite," which he worked successfully for about eighteen months. Satisfied that the soil and climate of Venezuela were adapted to the culture of a fine quality of cotton, he succeeded in April, 1869, in interesting several merchants of Caracas, who advanced him money, with the aid of which in that year he raised a profitable crop, and returned the borrowed capital with interest at 12 per cent.

In the latter part of 1869, the firm of H. L. Boulton & Co., of Caracas, contracted with Mr. Quirk to raise sea-island cotton on a larger scale. The agreement was that Boulton & Co. were to provide Quirk with sufficient capital which, added to his own, would enable them to raise the crop and ship it to Liverpool, the net proceeds to be divided equally between them. Pursuant to this agreement a part of the estate known as "Tocorón" in the State of Aragua was rented. Boulton & Co. state:

"Upon this property we found nothing but a house in a very dilapidated condition and the lands most suited to us in a state of forest, for the most part, and the rest covered with tall grass, called gamblot. The first thing we had to do was to make the house habitable for Quirk and his family, then fence in our property, cut down the forest, pluck up the gamblot by the roots, so that it should not destroy the cotton, and repair to a certain extent, sufficiently to preserve our crop, the water courses."

They brought from the United States all the necessary implements and machinery and thirty-four laborers familiar with the methods of cotton raising. The prospects were so favorable that Boulton & Co. finally agreed with Quirk to continue the planting of cotton for three years, two of which they were to participate in and the third to be for Quirk's sole account. On April 19, 1871, they had already taken off the principal part of the crop and were preparing to take in a second, and arrangements were entered into to plant the crop of 1872.

This was the situation when on April 19, 1871, about 300 regular soldiers under the command of General Rodriguez, and constituting part of the army of General Alcántara, the civil and military governor of the State of Aragua, came to Tocorón, took prisoner and tied with a rope Quirk's bookkeeper; took from the stables 6 horses and a mule belonging to Quirk; entered the dwelling house, which they searched; used threatening and abusive language toward Quirk and his family; compelled his wife to deliver up claimant's revolver, and then left the premises, threatening to return and kill the claimant and destroy the place. Mr. Quirk claimed the protection of his flag and besought the officer in command to desist, but was told by the latter that he was "carrying out strictly the orders of General Alcántara." After this outrage Quirk considered it unsafe for himself or his family to remain at Tocorón, and he left the next day for Caracas. There he claimed the protection of the President, General Guzmán Blanco, who told him that he could not interfere with or control General Alcántara. Quirk then returned to Tocorón, disposed of his household furniture at a sacrifice, and brought to Caracas his machinery, farming utensils, and his American employees. An inventory and appraisement of the immovable property on the plantation was made on May 5, 1871, by order of the local court, and a valuation placed thereon of 21,265 pesos. The property taken by the troops on April 19 was valued at 1,725 pesos. In June, 1871, Mr. Quirk returned with his family to the United States, where he died on May 25, 1896.

On November 4, 1871, the Government of the United States, through its legation at Caracas, presented to the Venezuelan Government a claim on behalf of William Quirk for the losses and injuries sustained by him as a result of the events above narrated. The claim was the subject of an extended diplomatic correspondence between the two Governments, but no settlement thereof was ever reached.

The United States now presents to this Commission, on behalf of Frances Irene Roberts, administratrix of the estate and sole heir at law of William Quirk, deceased, a claim for the crop and immovable property at Tocorón, based upon the appraisement made in May, 1871; for the value of the property taken away by the troops on April 19, 1871; for the loss upon household and other furniture; for the profit that would have been made on the crop of 1871, and for indirect losses; said claim amounting in the aggregate to the sum of $ 187,168.03.

The learned counsel for Venezuela in his answer does not controvert the main facts upon which this claim rests, but he raises the following objections:

1. That it does not appear from the proof adduced that the Venezuelan soldiers who caused the injury obeyed orders of their superior officers or that the latter could have prevented the injury; and that therefore the responsibility of the authors of the deed ought to have been first followed up.

2. That Mr. Quirk was only the manager of the estate for Boulton & Co., and that he ought, therefore, in order to fix equitably the amount of the claim, to have produced the contract which he had entered into with said firm.

3. That the claim is barred by the lapse of time.

It is probably true that acts of pillage committed by soldiers absent from their regiments and not under the direct command of their officers do not affect the responsibility of their Government, and that such acts are considered as common crimes.[1] But this was not the fact here. Quirk complained on the day following the outrage directly to General Alcántara, and stated to him that the officer commanding the soldiers had replied to his appeal that his property and himself be respected, that he (the officer) was "carrying out strictly the orders of General Alcántara." It is clear from all the evidence that the troops were acting directly under the command of General Rodriguez, who in turn was acting directly under the orders of the civil and military governor of the State.

The second objection was also raised by the Venezuelan Government in the course of the diplomatic correspondence regarding this claim. The United States minister in a note dated April 30, 1872, addressed to the minister of foreign relations, transmitted a letter to him from Messrs. Boulton & Co., setting forth that no written contract existed between them and Mr. Quirk. The learned counsel for the United States attaches to his replication in this case a letter of Boulton & Co., dated January 9, 1872, addressed to the United States minister at Caracas, Mr. Pile, showing the arrangement with Quirk to be that already herein set forth. It provides for a joint enterprise in the raising of sea-island cotton in Venezuela on a somewhat extended scale. Boulton & Co. were to put into the enterprise the principal part of the capital, and were to receive in return not interest on money loaned, but profits produced by capital invested. Quirk was to add thereto his more limited capital, as well as his wider knowledge and experience of the business in a general super-

[1] See the Netherland - Venezuelan Commission (Henriquez Case) in Volume X of these *Reports*.

vision of the enterprise, and to receive in return not wages or salary for services rendered, but a moiety of the net proceeds of the crop produced.

The Commission has jurisdiction over all claims owned by citizens of the United States of America against the Republic of Venezuela which have not been settled by diplomatic agreement or by arbitration between the two Governments. This claim has remained unsettled for over thirty years. It was diligently prosecuted by the Government of the United States in a diplomatic correspondence extending from November 4, 1871, to April 22, 1875, but no final agreement upon the subject was ever reached. The claim arose subsequent to the Commission of 1866, and it did not fall within the jurisdiction of the Commission of 1889. There has been no opportunity for its adjudication by arbitration prior to its submission here. It was brought to the attention of the Venezuelan Government within a few days after its inception. The essential facts which fix the liability of Venezuela were not then and are not now denied. The contention that this claim is barred by the lapse of time would, if admitted, allow the Venezuelan Government to reap advantage from its own wrong in failing to make just reparation to Mr. Quirk at the time the claim arose.

The questions for determination here are the fact of Mr. Quirk's individual loss or injury, the liability of the Venezuelan Government therefor, and the amount, if any, of compensation due.

It is urged that the relation existing between Quirk and Boulton & Co. was that of debtor and creditor. But the tenor of Boulton & Co.'s letter introduced in evidence hardly sustains this contention. The interests of each in the joint enterprise appear to have been distinct and are so regarded in this decision. Boulton & Co. state that they make " no mention of their own losses," as they prefer to put forth " no claim in their own name against the Government of Venezuela." The citizenship of Boulton & Co. is not shown in evidence, and this Commission can not assume jurisdiction of any claim for their losses put forth in the name of a citizen of the United States.

On the other hand, Mr. Quirk was not merely the manager of Boulton & Co. He invested his own capital in the enterprise and was entitled to one-half the profits. The specific amount of his investment is not stated, but from all the evidence it is believed that a reasonably accurate estimate of his pecuniary losses can be made. The property taken by the troops on April 19, 1871, is claimed as his own, and its value is proved to have been 1,725 pesos. For loss on his furniture and his personal expenses he claims the sum of 5,000 pesos. It appears from Boulton & Co.'s letter that on the date of the injury the principal part of the crop of 1871 had been taken off and preparations were then making for the second crop. An allowance of 2,000 pesos is believed to be a reasonable valuation of Mr. Quirk's share in the profits of this crop. Upon the total sum of 8,725 pesos, interest is allowed at the rate of 3 per cent per annum from January 1, 1872, to December 31, 1903, making the sum of 17,100 pesos equivalent to the sum of $ 13,154.61 United States gold.

But the responsibility of Venezuela does not end here. The testimony is uniformly to the effect that Mr. Quirk was a peaceable and law-abiding man, engaged in an enterprise of pratical benefit to the State as well as to himself. Even General Alcántara on April 27, 1871, certifies to Quirk's " perfect impartial and circumspect conduct," as pertaining to his condition as a foreigner. The evidence is equally clear and uncontroverted that the attack upon him and his family was wholly without justification or excuse. The act was committed by duly constituted military authorities of the Government. It was never, so far as the evidence shows, disavowed or the guilty parties punished. Under these circumstances well established rules of international law fix a liability

beyond that of compensation for the direct losses sustained. Other consequences are presumed to have been in the contemplation of the parties committing the wrongful acts and in that of the Government whose agents they were. The derangement of Mr. Quirk's plans, the interference with his favorable prospects, his loss of credit and business, are all proper elements to be considered in the compensation to be allowed for the injury he sustained.

To the amount hereinbefore designated is added, in view of the considerations above mentioned, the sum of $ 5,000. An award will therefore be made in this claim for the sum of $ 18,154.61 in gold coin of the United States.

JARVIS CASE

Payment of bonds issued in consideration of services rendered in support of an unsuccessful revolution against the constituted government of a country with which the United States is at peace, cannot be enforced.

A subsequent contract made in aid or furtherance of the execution of one infected with illegality, partakes of its nature, rests upon an illegal consideration, and is equally in violation of the law.

The decision of the political department of the United States Government that no conclusive evidence as to the existence of a de facto government exists, must be accorded great weight as to the fact, and in any event is conclusive upon its own citizens.

BAINBRIDGE, *Commissioner* (for the Commission):

The memorial states:

1. That on or about the 14th day of April, 1863, the Republic of Venezuela did, for value received, duly make, execute, and deliver unto one Nathaniel Jarvis, a native citizen of the United States, its bonds or certificates of indebtedness in the amount of $ 81,000, consisting of 81 bonds of $ 1,000 each, bearing interest at the rate of 7 per cent per annum, payable semiannually, part thereof maturing within five years from the date thereof and the balance within ten years from said date.

2. That thereafter the said Nathaniel Jarvis, being then still the lawful holder and owner thereof, did, for value, duly indorse and deliver the aforesaid bonds unto his nephew, Nathaniel Jarvis, jr., a native citizen of the United States, who remained the lawful owner and holder thereof until the time of his death, which occurred on the 10th day of January, 1901; that the said Nathaniel Jarvis, jr., left a last will and testament, by which he devised and bequeathed all his property to his two daughters, the claimants herein, whereby said claimants became the lawful owners and holders of said bonds.

3. That said bonds were at their maturity duly presented for payment, but that payment of both principal and interest has been most unjustly withheld from the claimants and their predecessors in interest by the Republic of Venezuela, without any legal, equitable, or moral excuse or justification, and that there was on April 14, 1903, justly due and owing to claimants by the Republic of Venezuela on the said bonds the sum of $ 307,800, principal and simple interest.

4. That no other person has any interest in the claim, excepting that claimants' attorney and counsel, Anderson Price, and one Charles N. Dally are contingently entitled for services to a share or part of the recovery, and that 26 of said bonds have been lost or mislaid and are not now in the possession of claimants.

The bonds upon which this claim is based are in the following form;

[Translation]

REPUBLIC OF VENEZUELA

Treasury of the Province of Caracas. For 1,000 dollars.

Bond in favor of Mr. Nathaniel Jarvis, or to his order, for one thousand dollars, money of the United States, payable in the term of five (ten) years counted from this date.

The interest at the rate of seven per cent per annum, which may accrue to the aforesaid sum, shall be paid every six months, the whole in conformity with the resolution of the treasury department issued to-day.

Caracas, April 14, 1863.

The Comptroller

A. EYZAGUIRRE

The Treasurer

M. R. LANDS

The resolution referred to in the bonds is in the following terms:

DEPARTMENT OF THE TREASURY,

Caracas, April 14, 1863.

Resolved, It appears from the proceedings that Mr. Nathaniel Jarvis, a citizen of the United States of North America, lent to His Excellency Gen. José Antonio Páez, in 1849, the sum of 23,500 hard dollars, in the value of a steamer named *Jackson* or *Buena Vista*; and also, that of 15,450 hard dollars in the amount of 3,000 equipments and 100,000 balled cartridges, the payment moreover having been stipulated with said Jarvis of the amount of 2,458 hard dollars, for various indemnities, all amounting to the sum of 41,408 hard dollars. And the Government, considering that the service rendered by Mr. Jarvis in the period mentioned was very opportune, since its object tended to defend the cause of morality under the auspices of the illustrious citizen, overthrowing the ominous domination that oppressed the Republic, and, moreover, that it would not be just or right that that foreigner who so generously contributed to aid, with uncommon disinterestedness, the triumph of the same cause, whose principles this day prevail under the administration of a great number of citizens who fought for it, should suffer damages for the default of the payment of a claim, to a certain point sacred; and, finally, that the application of said objects to the end designed is justified, the Government resolves that the credit which Mr. Nathaniel Jarvis claims, with, moreover, the interest of 7 per cent per annum, be admitted. Instruct the auditor-general to notify the treasury of this province to accredit in its account the sum expressed of 41,408 hard dollars, and the interest previous to the liquidation thereof, which shall be satisfied when the embarrassed circumstances of the national exchequer will permit it.

For His Excellency:

ROJAS

It is a copy.

The subdirector of the department of the treasury.

J. A. PEREZ

Briefly stated, the facts are that Gen. José Antonio Páez, who had been from 1830 to 1838 the first President of Venezuela, was in 1849 in exile. In that year he undertook an expedition to overthrow the then existing Government of Venezuela. It was in aid of this enterprise that Nathaniel Jarvis, a citizen of the United States, rendered General Páez the opportune service referred to in the foregoing resolution, in the loan of the steamer *Jackson* or *Buena Vista*, the munitions of war and advances of money designated. But the expedition was unsuccessful, and the steamer, munitions, and General Páez

himself were captured by the Government within a few weeks. Páez was imprisoned for a time and then was again sent out of the country. He went to New York where he remained until 1858, when he was invited to return to Venezuela. In 1860 he was accredited as minister to the United States. Returning to Venezuela in 1861 he was, on August 29, proclaimed at a public meeting of the citizens of Caracas "supreme civil and military chief of the Republic."

On September 10, 1861, he took possession of the Government as supreme chief of Venezuela and issued a decree containing the following:

> The people of Caracas, to whom entire liberty was left to deliberate in the use of their sovereignty, spontaneously ratified this vote 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.

The Páez government continued until June, 1863. It was never recognized by the United States as the government of Venezuela. In a dispatch to Minister Culver, dated November 19, 1862, Mr. Seward, Secretary of State, said, referring to the disordered condition of Venezuela:

> The United States deem it their duty to discourage that (revolutionary) spirit so far as it can be done by standing entirely aloof from all such domestic controversies until, in each case, the State immediately concerned, shall unmistakably prove that the government which claims to represent it is fully accepted and peacefully maintained by the people thereof.

And furthermore:

> This Government has thus far seen no such conclusive evidence that the administration you have recognized (i. e., the Páez government) is the act of the Venezuelan State as to justify acknowledgment thereof by this Government.

On April 24, 1863, ten days after the Jarvis bonds were issued, the treaty of Coche was signed between the representatives of Páez and Falcón providing for a national assembly, which convened on June 17 following and appointed General Falcón President. The Falcón government was subsequently officially recognized by the United States.

It is to be observed at the outset of the consideration of this claim that the bonds themselves show that they were issued "in conformity with the resolution of the Treasury Department," issued on the same date. The resolution thus referred to in the bonds states that the consideration upon which they were based was the opportune service rendered by Mr. Jarvis to General Páez in 1849, which service "tended to defend the cause of morality under the auspices of the illustrious citizen, *overthrowing the ominous domination that oppressed the Republic*," and declares that "it would not be just nor right that that foreigner who so *generously contributed to aid*, with uncommon disinterestedness, the triumph of the same cause, whose principles this day prevail under the administration of a great number of citizens who fought for it, should suffer damages for the default of the payment of a claim to a certain point sacred." In view of this fact it is idle to argue that "if an inquiry could now be made as to whether the debt represented by the Jarvis bonds was a legal one it would establish a dangerous precedent," and that "no one would be safe in buying and selling national bonds." The Jarvis bonds and the resolution of April 14, 1863, are indissolubly united, and, construed together, inform the world of the insufficient basis upon which they stand.

These bonds, then, were issued in consideration of the opportune service and generous aid rendered by Nathaniel Jarvis to General Páez in 1849, in the latter's attempt to overthrow the then existing Government of Venezuela. There is not the slightest doubt about that. Nor is there the slighest doubt but that Mr. Jarvis's opportune service and generous aid to General Páez in 1849 were in violation of his duty to his country and in disobedience to its laws. Under the Constitution of the United States a treaty between the United States and a foreign government is part of the supreme law of the land. In 1849 the treaty concluded January 20, 1836, between the United States and Venezuela was in full force and obligatory upon both nations; and by the first article of that treaty it was declared that —

there shall be a perfect, firm, and inviolable peace and sincere friendship between the United States of America and the Republic of Venezuela, in all the extent of their possessions and territories, and between their people and citizens, respectively, without distinction of persons or places.[1]

The only Venezuela known to international law in 1849 was the recognized Government of that country and with it the Government of the United States was at peace under the treaty. This treaty was binding upon Mr. Jarvis as a citizen of the United States, and he could lawfully do no act nor make any contract in violation of its provisions.

It was also provided in the second section of Article XXXIV of the treaty of January 20, 1836, that —

If any one or more of the citizens of either party shall infringe any of the articles of this treaty, such citizen shall be held personally responsible for the same, and harmony and good correspondence between the two nations shall not be interrupted thereby, each party engaging in no way to protect the offender, or sanction such violation.[2]

It would seem to be a fair inference from the wording of a resolution of April 14, 1863, and from all the evidence here presented, that Jarvis furnished General Páez with the ship *Jackson*, the 3,000 equipments, and 100,000 balled cartridges from the United States. Referring to his preparations for the expedition of 1849, General Páez in his autobiography says (vol. 2, p. 469):

Además de los recursos indicados, contaba con un buen vapor de guerra y fusiles *que debían venir de los Estados Unidos.*

It is undisputable that Nathaniel Jarvis, a citizen of the United States, and presumably within its jurisdiction, supplied General Páez with a vessel and munitions of war intended for use in a military expedition or enterprise against a Government and people with whom the United States Government was at peace. The inference is strong, if not irresistible, that Jarvis violated the neutrality laws of the United States in such measure as to have rendered himself liable to a criminal prosecution therefor. (Rev. Stats., secs. 5283 and 5286.)

The language of the resolution of April 14, 1863, with regard to Mr. Jarvis's opportune service and generous contribution to the aid of the Páez cause in 1849, precludes the consideration of the original transaction as a mere commercial venture on the part of Jarvis, such as might have been undertaken without a violation of the laws of neutrality. Mr. Jarvis was, according to the evidence, in Caracas at the time the bonds were issued, and the resolution undoubtedly expresses the basis on which he was then urging his claim as well as the true basis of the original obligation.

[1] Treaties and Conventions between the U. S. and Other Powers, 1776-1887, p. 1119.

[2] *Idem*, p. 1128.

It is not deemed necessary, however, to determine whether Jarvis violated the letter as well as the spirit of the neutrality laws of the United States. He did violate the treaty then existing between the United States and Venezuela. He did violate the established rule of international law, that when two nations are at peace all the subjects or citizens of each are bound to commit no act of hostility against the other.

In Dewutz *v.* Hendricks, 9 Moore C. B., 586 (S. C. 2 Bing., 314), it was held to be contrary to the law of nations for persons residing in England to enter into engagements to raise money, by way of loan, for the purpose of supporting subjects of a foreign state in arms against a government in friendship with England, and no right of action attached upon any such contract.

In Kennett *v.* Chambers (14 How., 38), the Supreme Court of the United States held that a contract by an inhabitant of Texas to convey land in that country to citizens of the United States, in consideration of advances of money made by them in the State of Ohio, to enable him to raise men and procure arms to carry on the war with Mexico, the independence of Texas not having been at that time acknowledged by the United States, was contrary to the latter's national obligations to Mexico, violated the public policy of the United States, and could not be specifically enforced by a court of the United States. In the course of his opinion in this case, Chief Justice Taney said:

> The intercourse of this country with foreign nations, and its policy in regard to them, are placed by the Constitution of the United States in the hands of the Government, and its decisions upon these subjects are obligatory upon every citizen of the Union. He is bound to be at war with the nation against which the war-making power has declared war and equally bound to commit no act of hostility against a nation with which the Government is in amity and friendship. This principle is universally acknowledged by the laws of nations. It lies at the foundation of all government, as there could be no social order or peaceful relations between the citizens of different countries without it. It is, however, more emphatically true in relation to citizens of the United States. For, as the sovereignty resides in the people, every citizen is a portion of it and is himself personally bound by the laws which the representatives of the sovereignty may pass, or the treaties into which they may enter, within the scope of their delegated authority. And when that authority has plighted its faith to another nation that there shall be peace and friendship between the citizens of the two countries, every citizen of the United States is equally and personally pledged. The compact is made by the department of the Government upon which he himself has agreed to confer the power. It is his own personal compact as a portion of the sovereignty in whose behalf it is made. And he can do no act, nor enter into any agreement to promote or encourage revolt or hostilities against the territories of a country with which our Government is pledged by treaty to be at peace, without a breach of his duty as a citizen, and the breach of the faith pledged to the foreign nation. And if he does so, he can not claim the aid of a court of justice to enforce it. The appellants say in their contract that they were induced to advance the money by the desire to promote the cause of freedom. But our own freedom can not be preserved without obedience to our own laws, nor social order preserved if the judicial branch of the Government countenanced and sustained contracts made in violation of the duties which the law imposes, or in contravention of the known and established policy of the political department, acting within the limits of its constitutional power.

But it is strongly urged here that the nature of the original consideration is immaterial; that the claim is upon the bonds of 1863, not upon the contract of 1849; and that the act of the Venezuelan Government in 1863 in recognizing the obligation and issuing its bonds in payment thereof was the sovereign act of an independent nation and was final and conclusive and binding upon the Venezuelan people and all succeeding governments of that country.

Differences of opinion may possibly exist as to the political ethics which would justify a temporary ruler in paying his personal debts with national obligations; but certainly none can exist as to the legal proposition that a subsequent contract made in aid and furtherance of the execution of one infected with illegality partakes of its nature, rests upon an illegal consideration, and is equally in violation of the law. The opportune service rendered by Jarvis in 1849 in violation of law created no legal obligation on the part of Páez, much less on the part of the Government of Venezuela. And a past consideration which did not raise an obligation at the time it was furnished will support no promise whatever. (3 Q.B., 234; Harriman on Contracts, 33; Bouvier's Law Dict., title Consideration.)

Essentially the argument of claimants is that the bonds are specialties, importing a valid consideration, and that their issuance as the act of the Venezuelan Government is binding upon it. The claimants have endeavored to show that the power in virtue of which the bonds were issued was the medium through which the authority of the States was conveyed and by which it was bound. In this they have failed. So far as the claimants are concerned, the issuance of the Jarvis bonds was not the " act of the Venezuelan Government." It is doubtless true that the question whether the Páez government was or was not the de facto government of Venezuela at the time the bonds were issued is one of fact. But the decision of the political department of the United States Government on November 19, 1862, that there was no such conclusive evidence that the Páez government was fully accepted and peacefully maintained by the people of Venezuela as to entitle it to recognition must be accorded great weight as to the fact, *and is in any event conclusive upon its own citizens.* And certainly the evidence that the Páez government was " submitted to by the great body of the people " was no stronger on April 14, 1863, when the Jarvis bonds were issued and, when as a matter of historical fact, it was encompassed by its enemies and tottering to its fall.

The language employed by Mr. Hassaurek in his opinion in the cases of the *Medea* and *Good Return* (3 Moore Int. Arb., 2739), decided by the United States and Ecuadorian Commission of 1865, may not inappropriately be quoted here. He says:

> A party who asks for redress must present himself with clean hands. His cause of action must not be based on an offense against the very authority to whom he appeals for redress. It would be against all public morality and against the policy of all legislation if the United States should uphold or endeavor to enforce a claim founded on a violation of their own laws and treaties and on the perpetration of outrages committed by an American citizen against the subjects and commerce of friendly nations. * * * As the American Commissioner I could not sanction, uphold, and reward indirectly what the law of my country directly prohibits. * * * He who engages in an expedition prohibited by the laws of his country must take the consequences. He may win or he may lose; but that is his own risk. He can not, in case of loss, seek indemnity through the instrumentality of the government against which he has offended.

The claim must be disallowed.

WOODRUFF CASE

(By the Umpire):

A provision in a contract made with a nation to the effect that all doubts and controversies, arising by virtue of the contract, should be referred to the local courts of Venezuela and decided according to its laws, and that such doubts or controversies, as well as the decisions of the Venezuelan courts thereon, shall never be

made the subject of an international claim, is binding upon the party making such an agreement, and in the absence of a showing that resort was had to the Venezuelan courts for relief, and justice there unduly delayed or denied, the claim can not be considered by an international commission.

This, however, without prejudice to the rights of the claimant's own country to intervene internationally in the case of a denial or the undue delay in the administration of justice.

BAINBRIDGE, *Commissioner* (claim referred to umpire):

On or about the 8th of January, 1859, the Government of Venezuela granted to José M. Rojas, Juan Marcano, John J. Flanagan and William Hatfield Clark a concession to build a railroad from Caracas to Petare, with the privilege of extending it to Guaranas and Guatire, and authorized the organization of a company or corporation for the purpose of building and equipping said road. Pursuant to this concession a company was organized in Caracas known as the " Compañía del Ferrocarril del Este," or " Company of the Railway of the East," which corporation acquired and held all the rights, powers, privileges, and franchises granted or pertaining to the said line of railway from Caracas to Petare, and its extensions, theretofore held by the parties named in the original concession. The capital stock of the company was fixed at 400,000 pesos for that part of the line from Caracas to Petare, the company having the right to increase this amount in case the road was extended beyond the latter point. The Government of Venezuela was an original subscriber to the capital stock of the company, taking 500 shares and agreeing to pay therefor into the treasury of the company the sum of 50,000 pesos; one-half of said amount was to be paid when all the material for the building of the road should be delivered in Venezuela, and the other half thereof when the railroad should be completed to Petare and open to the public.

On July 10, 1860, a contract was entered into in Caracas by and between Flanagan, Bradley, Clark & Co., a copartnership, successors in interest to John J. Flanagan, William Hatfield Clark, and James F. Howell, of the one part, and José M. Rojas and Juan Marcano, of the other part, which provided:

ARTICLE 1. Flanagan, Bradley, Clark & Co. sell, assign, and transfer by these presents to the Eastern Railroad Company all the materials now in this country for the construction of the said railroad upon the following conditions:

ART. 2. The said Rojas, as president, and Juan Marcano, as treasurer of the Eastern Railroad Company, will issue to order of Flanagan, Bradley, Clark & Co. $ 90,000, United States currency, in first-mortgage bonds, secured by a first mortgage on the said railroad and all the buildings, effects, and lands which may now or hereafter belong to the said company as per grant of the Government of Venezuela bearing date January 8, 1859.

Article 5 of the contract provided that within one month from its date Rojas and Marcano would deliver to Flanagan, Bradley, Clark & Co. $ 55,000 of said bonds, whereupon said firm would deliver to Rojas and Marcano the invoices of all the materials for the building of the railroad.

Article 6 provided that whereas Flanagan, Bradley, Clark & Co. were indebted to Congreve & Son for a balance on the iron then in the hands of Boulton & Co., in La Guaira, if they did not settle said amount within ninety days from the date of the contract, Marcano was to pay said balance and hold as his own the remaining $ 35,000 of bonds and apply the iron to the building of the road.

On the 24th of July, 1860, pursuant to said contract, José M. Rojas, as president, and Juan C. Marcano, as treasurer of the " Compañía de Ferrocarril

del Este," executed a mortgage upon the railway, with all its buildings, cars, effects, tools, lands, and all that belonged or might thereafter belong to said company, to secure the bonds provided for in article 2 of the contract. This mortgage is declared to be the only mortgage on said property, and was registered on the date of its execution. On the same date the company issued 90 coupon bonds of $ 1,000 each, United States currency, bearing 9 per cent interest. The bonds were in both Spanish and English and read as follows:

Republic de Venezuela — Caracas (Sur America)
Number —— — $ 1,000

COMPAÑÍA DEL FERROCARRIL DEL ESTE

Eastern Railroad Company's first-mortgage 9 per cent coupon bond

This bond of one thousand dollars, United States currency, is one of a series of ninety of like tenor and date issued to Flanagan, Bradley, Clark and Company by the Eastern Railroad Company and payable to bearer at the office of said railroad company, in the city of Caracas, on presentation of the coupons as they become due, which represent the principal and interest, at nine per cent per annum, and become due: July 1, 1862, $ 323.33; July 1, 1863, $ 260.66; July 1, 1864, $243.41; July 1, 1865, $ 226.16, and July 1, 1866, $ 208.92.

These bonds are secured by a first mortgage upon said Eastern Railroad from the city of Caracas to Petare and all its buildings, fixtures, equipments, appurtenances, and all the lands belonging to said railroad company as per grant from the Government of Venezuela in the original charter (about 3,500 fanegadas) and bearing even date herewith. If any one of the coupons become due and remains unpaid for ninety days the whole shall be due and collectable upon a wish of a majority of the bondholders.

El Presidente — José M. Rojas

El Tesorero — J. C. Marcano

(Coupons annexed after signatures.)

Of the 90 bonds thus issued 35 were held by Marcano as security for the debt due Congreve & Son for the iron rails, according to the provisions of article 6 of the contract. This left 55 bonds remaining, of which number only 46, according to the memorial, were delivered to Flanagan, Bradley, Clark & Co. The remaining 9 were retained by Rojas and Marcano. The memorialist alleges that he is the holder and owner for valuable consideration of 40 of said bonds and that he is entitled to claim the indemnity in respect of the other 6.

On the 19th of December, 1863, the Government of Venezuela acquired all the rights of the railroad company through a cession made to it by the company, and continued in the sole possession of the road until the 20th day of April, 1864, when the Government transferred the railroad and everything connected therewith to one Arthur Clark, a subject of Great Britain, said Clark agreeing to deliver into the treasury of Venezuela $ 80,000 in amount of legitimate public debt of the Government. Subsequently the contract with Clark was annulled or abrogated at the instance of the Government of Venezuela, and the control and dominion over said enterprise and over the property and franchises of the corporation were resumed by the Government.

This claim was presented to the Commission appointed under the treaty of 25 April, 1866. The Commission caused the papers to be returned to the United States legation, with the following indorsement thereon:

Dismissed this day from further consideration for want of the original bonds, or a legalized copy thereof not presented, and further documents equally required, but in no wise affected or invalidated by said action.

The claim was also presented to the Commission appointed under the treaty of December 5, 1885; and this Commission upon consideration and in relation to the claim made upon its docket the following entry: " Dismissed without prejudice to other prosecution of the claim."

The learned counsel for Venezuela insists in his answer that this claim is res adjudicata. But this position can hardly be sustained in view of the fact that the first Commission expressly declared the claim was in no wise to be affected or invalidated by its action in dismissing the case; and that an examination of the grounds on which the second Commission based its dismissal shows that it was because the Commissioners were of the opinion that " the cause of action has been misconceived and proofs therefor not supplied that otherwise might have been forthcoming." The claim is clearly one owned by a citizen of the United States of America which has not been settled by diplomatic agreement or by arbitration, and hence within the jurisdiction of this Commission under the terms of Article I of the protocol.

Various legal technicalities have been and still are insisted upon in relation both to the presentation and the defense of the claim. It is not deemed necessary to review these here. Substantially the facts are that Flanagan, Bradley, Clark & Co. sold, assigned, and transferred to the Eastern Railroad Company all the materials for the construction of said railroad which they had bought or contracted for and brought to Venezuela with which to build the road. In consideration thereof Rojas and Marcano, acting for the Eastern Railroad Company, issued to Flanagan, Bradley, Clark & Co. the 90 bonds of $ 1,000 each, payable to bearer, and as security for the same executed a mortgage on the property thus sold and also on all other property of the railroad company. Of the 90 bonds thus issued only 46 were actually delivered to Flanagan, Bradley, Clark & Co., and these 46 bonds undoubtedly represent the estimated value of the property owned by that firm and sold in the manner indicated to the railroad company. Besides the 660 tons of iron rails, for which they owed Congreve & Son and on account of which debt 35 of the bonds were retained by the company, the property delivered by said firm to the company consisted of a locomotive weighing 18 tons, a first-class passenger car, a second-class passenger car, 6 box cars, 4 platform cars, and a hand car.

This was in 1860. Three years later the railroad company transferred to the Government all the property, rights, privileges, and franchises of the company, and on April 20, 1864, the Government as " sole owner of the enterprise of the Railroad of the East," transferred to Arthur Clark all appertaining to the road, and in consideration thereof Clark agreed to deliver to the minister of the treasury of Venezuela within six months 80,000 and odd dollars of the legitimate debt of the Government.

It is a fact not without significance that the amount of " legitimate debt of Venezuela " agreed to be paid to the Government by Clark corresponds with the estimated valuation of the railway material represented by the outstanding bonds, deducting the 9 bonds which appear to have been retained by Rojas and Marcano out of the 90 issued. It would seem not an unfair inference that Venezuela recognized an obligation as to the bonds or as to the material which the bonds represented, and that the conveyance to Clark was subject to his obtaining the outstanding bonds and delivering them to the Venezuelan Treasury. Clark indeed made an offer of £ 3,500 for the bonds through the Venezuelan consul in London on September 16, 1864, to John Bradley. The consul, Mr. Hemming, says:

To enable him to do this (i. e., carry on the Eastern Railway), the Government have to take up the bonds held by you, and to facilitate matters so that they may at

once begin the work, Mr. Clark authorized me to offer you £ 3,500 sterling for all the bonds in question.

But Clark failed to comply with his contract with Venezuela and it appears to have been afterwards annulled and the property reverted to the Government.

The Government paid Congreve & Son for the rails the sum of 19,264.39 pesos, and the company, on December 19, 1863, turned over the 35 bonds retained on that account to the Government. Liability for the other property delivered by Flanagan, Bradley, Clark & Co. and represented by the 46 bonds outstanding rested upon the same basis, namely, that Venezuela received the property, but no arrangement as to this property was made with the holders of the bonds and, as shown, the contract with Clark was abrogated.

It is true the bonds were secured by the mortgage given by the railroad company, but the bonds are the real indicia of the indebtedness. The Government after December 19, 1863, held the mortgaged property and the claimant elected to rely upon the responsibility of the Government instead of on the security. This he had a perfect right to do.

I am of opinion that an award should be made in this claim in accordance with the foregoing views. As to interest, the legal rate only should be allowed after the bonds had matured.

PAÚL, *Commissioner* (claim referred to umpire):

Henry Woodruff claims from the Government of Venezuela the payment of the value of 46 bonds, representing the sum of $ 46,000, issued by a corporation called "Railway of the East," which originated from a concession granted by the Government of Venezuela on January 10, 1859, in favor of Messrs. Juan Marcano, José María Rojas, and Flanagan and Clark, and also claims the interest on said bonds at 9 per cent per annum, from July 24, 1860, amounting to $ 176,182.42, making a total sum of $ 222,182.42.

The same claim for the amount represented by the bonds and interest thereon was presented by Woodruff, consecutively to the two mixed commissions created by the conventions agreed upon between Venezuela and the United States of America on April 25, 1866, and December 5, 1885. Both commissions dismissed Mr. Woodruff's claim for want of sufficient proofs in which the responsibility of the Government of Venezuela could be found, but without prejudice for the claimant to prosecute other actions in protection of his rights. This decision, in neither of the two cases, recognized for its cause the lacking of jurisdiction of both commissions to examine and decide upon the claim presented, although Mr. Findlay, Commissioner on the part of the United States, was of the opinion that the Commission of 1889 was lacking in jurisdiction in this case, for reasons mentioned in his opinion, in which he decided that the claim should be disallowed. He states, in his separate decision, the merits of the case as follows:

> As far as these claims (Henry Woodruff and Flanagan, Bradley, Clark & Co., Nos. 20 and 25) are based upon a breach of contract or upon bonds issued in furtherance of the enterprise, we are of opinion that the claimants, by their own voluntary waiver, have disabled themselves from invoking the jurisdiction of this Commission, and for that reason, as well as that the cause of action has been misconceived, and proofs therefore not supplied that otherwise might have been forthcoming, we will disallow the claims and dismiss the petitions without prejudice.[1]

Consequently, by a vote of the majority of the members of the Commission of 1890, charged with the revision of the awards of the Mixed Commission of

[1] Opinions American - Venezuelan Claims Commission, 1890, p. 450.

1867 that dismissed the claims of Woodruff and Flanagan, Bradley, Clark & Co., both claims were dismissed anew.

The protocol signed at Washington the 17th day of February, of this year, which created the present Commission, establishes in the first article its jurisdiction, limiting the same to the claims owned by citizens of the United States of America against the Republic of Venezuela that have not been settled by diplomatic arrangement or by arbitration between the two Governments; and that are presented through the Department of State or through the United States legation at Caracas. Two requisites are thus necessary for this Commission to examine and decide on a claim owned by an American citizen: First, That it had not been settled by diplomatic arrangement or by arbitration between the two Governments; and, second, that it be presented through the Department of State of the United States or through its legation at Caracas.

What is understood by a claim having been settled or not by arbitration between the two Governments? In my opinion a claim that has been the object of an arbitration between the two Governments and which has been disallowed by a judgment of the arbitral commission charged with its examination, not having found merits enough on which an award against the Government of Venezuela could be founded, has been settled. In no other way could the object of these international commissions be considered as reached, and which object is to decide in a definite manner the disputes arising between the citizens of one of the two countries against the other, causing trouble and complaints in the political relations of both countries. For these reasons treaties and conventions are made and signed, giving exceptional faculties to mixed courts composed of judges appointed by the high contracting parties, and in such virtue the convention made between Venezuela and the United States on the 25th of April, 1866, distinctly contains in its article 5 the following stipulation:

> The decisions of this Commission and those (in case there may be any) of the umpire, shall be final and conclusive as to all pending claims at the date of their installation. Claims which shall not be presented within the twelve months herein prescribed, will be disregarded by both Governments, and considered invalid.[1]

And by article 11 of the convention between the same Governments, of December 5, 1885, which had for its object the revision of the awards of the previous commission, and to examine and decide on all claims owned by corporations, companies, or individuals, citizens of the United States, against the Government of Venezuela, which may have been presented to their Government or legation in Caracas before the 1st of August, 1868, it was agreed that "the decisions of the Commission organized under this present convention shall be final and conclusive as to all claims presented or proper to be presented to the former Mixed Commission."

The explanation given by the Commission of 1890, in the dismissal of the Woodruff claim, that it was so dismissed without prejudice of other actions of the claimant, does not mean that it was left pending between the two Governments. If this meaning should be given to the mentioned decision it would be contrary to the intended object of the Mixed Commission, which special object was to finally settle all the pending claims of corporations, companies, or individuals, citizens of the United States, against the Government of Venezuela.

As it has already been said, the Woodruff claim was not the object of a declaration of lack of jurisdiction by any of the two commissions, but of lack

[1] Treaties and Conventions between the U.S. and Other Powers, 1776-1887, p. 1143.

of any foundation that could justify it, and to pretend now that the present Commission should examine anew the same claim for demand of payment from the Venezuelan Government of the nominal value of the same bonds issued by the " Eastern Railway Company " and the interest thereon, changing only the reasons or motives in which the claimant pretends to base the responsibility of the Government of Venezuela, trying to make that responsibility arise from facts and circumstances that were known to the claimant at the time he presented it to the two previous mixed commissions, it would be to consent in the indefinite duration of the claims, as there would not be one claimant that, having had his claim disallowed, could not present it anew, making new arguments on facts not mentioned in the previous trials. Such action would completely destroy the high mission of the arbitration courts, specially in the international disputes that from their nature require the greatest efficiency in the stability of the judgments and their definite settlement.

The Commissioner for Venezuela does not consider as indispensable, after what has been said, to make a study of the new foundation on which Mr. Woodruff bases the same claim presented for the first time against the Government of Venezuela, to the Commission of 1867, thirty-five years ago. The appreciation of the merits of the new arguments has been already made with a high spirit of equity and with a learned criticism by the Hon. Mr. Findlay, Commissioner for the United States in 1890, in his opinion on this case. I have only to add that the claimant has not presented the proof of any new fact that could in any way change the estimation made by the Commission of 1890, and which caused the dismissal of the claim; on the contrary, this Commission has had occasion to examine the documents existing at the department of fomento, in which is found the decision of the meeting of the shareholders of the Eastern Railway Company, dated at Caracas, on December 19, 1863, and by which said railway was surrendered to the Venezuelan Government, and I have not found in that decision any data showing that said Government did directly accept the responsibility for the payment of the bonds issued by said corporation in favor of the first contractors of the works, that were also the grantees of the same and subscribers for the larger part of the shares. I have also perused the communication addressed on September 14, 1865, by said Henry Woodruff to the secretary of foreign affairs, in which he says:

I have been informed by the Government that my right on the lands, iron rails, fixed effects, and road materials was perfect and indisputable, and it is so by the mortgage of security. Not having the conditions of the mortgage complied with, I have, consequently, perfect right to the ownership of the property. Will the Government now consent so that all things included in the mortgage, after due notice, be sold at public auction to the best bidder and the proceeds applied to the payment of the bonds? I only ask for the consent to exercise a right that has not only been acknowledged by the Government, but insisted on its exercise when they acted against third party. When the interested parties are perfectly in accord in the acknowledgment of the rights, it would not only be insane but an offense to incur the necessary delay and expenses for the judicial foreclosure of a mortgage.

Mr. Woodruff well knew in 1866 his right on the mortgage that secured the payment of the bonds, and he made no use of that right in the subsequent years, though the Government of Venezuela presented no difficulty for the enforcing of such right through the courts. He abandoned the property that was given him as security, and knowing all the particulars in reference to the bonds, he presented his claim to the Commission of 1867, pretending to base the responsibility of the Government of Venezuela on a breach of contract, and alleged a lack of documents that he affirmed were in the possession of the Government of Venezuela, while it appears, from the above-mentioned records.

that on October 8, 1864, Mr. Woodruff asked for copies of the deed by which Messrs. J. M. Rojas and Juan Marcano made a cession of the enterprise to the Government, and of the inventory of the railway made in consequence of said cession. The opinion of Mr. Findlay could be quoted here: "We see no reason why immediate and effective proceedings might not have been taken to foreclose or sell the road under the mortgage, which contained full power of sale."

Instead of taking this advice or resorting to any legal step to enforce his claim, either against Clark or under the mortgage, he (Mr. Woodruff) assumes at the outset the position that Venezuela, by what we may call the Rojas-Marcano retrocession had obliterated or rather merged the corporation, and in doing so had assumed the liability of paying the face value of its bonds, with accrued interest to date.

> Venezuela had nothing more than an equity of redemption, and had any individual received the assignment it would never have been contended that he became personally liable for the debts of the concern. * * *
>
> Venezuela neither issued nor indorsed the bonds in question. They were issued by the parties themselves, and unless business is done on different principles in Venezuela than in other parts of the world we must believe that Flanagan, Bradley, Clark & Co., by virtue of the potential ownership of a majority of the stock and their general relations to the enterprise under the construction contract, must have had an equal voice with their associates in the issue of the bonds. When they received them, at least, there could have been no pretense that Venezuela was responsible. Neither by the terms of the concession nor by any contract or connection, direct or remote, express or implied, with the transaction has she assumed any responsibility. * * * Why the claimant did not proceed to make good his debt out of the mortgage security he held, instead of pursuing the claim against the Government upon the theory of merger, is altogether unexplained either by the papers or anything that was said at the arguments.[1]

Has not this claim been already settled by arbitration?

This court of equity could also consider the question whether the bonds represented a nominal value equivalent to the real amount of the debt which caused them to be issued, as it must be remembered that said bonds were issued by agreement between Flanagan, Bradley, Clark & Co., both as original grantees of the enterprise and as contractors, that were to receive a number of shares that represented the largest part of the capital of the company, in payment of their credit as constructors; and that when the 90 bonds for $ 1,000 each were issued Messrs. Rojas and Marcano retained 35 of them that represented the credit of C. Congreve & Co., of New York, amounting to $19,264.39 (Venezuelan pesos), owed to them for rails. This sum represented one-half of the nominal value of the bonds. Neither Flanagan, Bradley, Clark & Co., nor Woodruff presented to the previous commissions, nor has the latter presented to this, any proof that the nominal value of the bonds correspond to the just value of the effects and materials for which payment they were a security. All these considerations were, doubtless, the reasons why the Commission of 1890 considered in justice and equity without foundation the pretension to make the Government of Venezuela responsible for the value of the bonds in question and for the interest thereon, and caused the claim of Henry Woodruff to be disallowed.

For the above reasons it is my opinion that said claim has already been the object of a judgment of the Mixed Commission of 1890 and was dismissed for lack of foundation, and therefore this Commission should entirely disallow

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[1] Opinions American - Venezuelan Claims Commission, 1890, p. 445.

it for want of jurisdiction to reconsider a case that has been already definitively settled by the Arbitral Commission of 1890.

BARGE, *Umpire*: [1]

A difference of opinion having arisen between the Commissioners of the United States of America and the United States of Venezuela, this case was duly referred to the umpire.

The umpire having fully taken into consideration the protocol and also the documents, evidence, and arguments, and likewise all the communications made by the two parties, and having impartially and carefully examined the same, has arrived at the following decision:

Whereas in this case the United States of America presents the claim of Henry Woodruff to recover the face value of 46 bonds of $ 1,000 United States currency each, together in the sum of $ 46,000, with interest at 9 per cent per annum from July 24, 1860; and

Whereas these 46 bonds form part of the 90 bonds of $ 1,000 United States currency which José M. Rojas and Juan Marcano, as president and treasurer of what they called the "Eastern Railroad Company," issued by order of Flanagan, Bradley, Clark & Co., and which bonds were secured by a first mortgage on the said Eastern Railroad and all the buildings, effects, and lands which may now or hereafter belong to said company as per grant of the Government of Venezuela, bearing date of January 8, 1859; and

Whereas this grant was made by the same contract by which the Government of Venezuela did grant to said Juan Marcano and others a charter for the construction of a railroad from the city of Caracas to Petare, with the privilege of extending the same, and authorizing the organization of a company or corporation for the purpose of building and equipping the same; and

Whereas on the 19th of December, 1863, said José M. Rojas and Juan Marcano made a cession of all the rights of the railroad company to the Government of Venezuela, which the Government transferred the same to one Arthur Clark by contract of the 20th of April, 1864, this contract being annulled later on and the right of the railroad company returning thereby to the Government.

Whereas therefore the question of the liability for the bonds issued through the so-called "Eastern Railroad Company" and secured by mortgage on all the belongings of said company, involving the questions on the rights and duties of this company, and the scope of the transfer of these rights and duties from the company to the Government, from the Government to Arthur Clark, and from Arthur Clark back to the Government, centers in the question about the original rights and duties of said company arising from the contract by which the concession for the railroad and the permission for the organization of the company was granted, this contract has in the first place to be contemplated.

Now whereas article 20 of this contract reads as follows:

> Doubts and controversies which at any time might occur in virtue of the present agreement shall be decided by the common laws and ordinary tribunals of Venezuela, and they shall never be, as well as neither the decision which shall be pronounced upon them, nor anything relating to the agreement, the subject of international reclamation;

And whereas this claim to recover from the Venezuelan Government the face value of the bonds issued through the president and treasurer of the Eastern Railroad Company based on the hypothesis of a transferring of the rights and duties of that company to the Government of Venezuela, doubts

[1] For a French translation see: Descamps - Renault, 1903, p. 343.

and controversies on the liability of the Venezuelan Government in this question must be regarded as doubts and controversies which occur in virtue of said agreement, and certainly are " relating to that agreement."

Wherefore they must be considered as being meant by the contracting parties never to be transferred for adjudication to any tribunal but to the ordinary tribunals of Venezuela, and to be there determined in the ordinary course of the law; and

Whereas bondholders — at all events the original bondholders from whom the later owners and possessors derive their rights — before accepting these bonds knew — certainly ought to know, and must be supposed to know — on what foundation stand the power and the solidity to which they give credit by accepting these bonds;

Whereas at all events those who accept bonds of a company or corporation know — certainly must be supposed to know — the statutes and conditions from which this company or corporation derives its powers and rights and — as to these bonds — to have adhered to them in regard to the bondholders as well as in regard to the company or corporation the articles of the fundamental agreement have to be applied.

Furthermore, whereas certainly a contract between a sovereign and a citizen of a foreign country can never impede the right of the Government of that citizen to make international reclamation, wherever according to international law it has the right or even the duty to do so, as its rights and obligations can not be affected by any precedent agreement to which it is not a party;

But whereas this does not interfere with the right of a citizen to pledge to any other party that he, the contractor, in disputes upon certain matters will never appeal to other judges than to those designated by the agreement, nor with his obligation to keep this promise when pledged, leaving untouched the rights of his Government, to make his case an object of international claim whenever it thinks proper to do so and not impeaching his own right to look to his Government for protection of his rights in case of denial or unjust delay of justice by the contractually designated judges;

Whereas therefore the application of the first part of article 20 of the aforesaid agreement is not in conflict with the principles of international law nor with the inalienable right of the citizen to appeal to his Government for the protection of his rights if it is in any way denied to him, equity makes it a duty to consider that part of article 20 just as well as all other not unlawful agreements and conditions of said contract wherever that contract is called upon as a source of those rights and duties whereon a claim may be based.

Now, whereas it might be said, as it was said before, that by the terms of the protocol the other party, viz, the Government of Venezuela, had waived her right to have questions arising under the agreement determined by her own courts, and had submitted herself to this Tribunal it is to be considered that even in the case of this claim as a claim against the Venezuelan Government, owned by an American citizen, being a claim that is entitled to be brought before this Commission, the judge, having to deal with a claim fundamentally based on a contract, has to consider the rights and duties arising from that contract, and may not construe a contract that the parties themselves did not make, and he would be doing so if he gave a decision in this case and thus absolved from the pledged duty of first recurring for rights to the Venezuelan courts, thus giving a right, which by this same contract was renounced, and absolve claimant from a duty that he took upon himself by his own voluntary action; that he has to consider that claimant knew, at all events ought to have known, when he bought the bonds or received them in payment, or accepted them on whatsoever ground, that all questions about liability for the bonds

had to be decided by the common law and ordinary tribunals of Venezuela, and by accepting them agreed to this condition; and

Whereas it does not appear that any appeal of that kind was ever made to the Venezuelan courts, it must be concluded that claimant failed as to one of the conditions that would have entitled him to look on his claim as on one on which a decisive judgment might be given by this Commission; and

Whereas, therefore, in the consideration of the claim itself it appears out of the evidence itself, laid before the Commission, that claimant renounced — at all events adhered to the renunciation of — the right to have a decision on the claim by any other authority than the Venezuelan judges and pledged himself not to go — at all events, adhered to the promise of not going — to other judges (except naturally in case of denial or unjust delay of justice, which was not only not proven, but not even alleged) and that by the very agreement that is the fundamental basis of the claim, it was withdrawn from the jurisdiction of this Commission.

Wherefore, as the claimant by his own voluntary waiver has disabled himself from invoking the jurisdiction of this Commission, the claim has to be dismissed without prejudice on its merits, when presented to the proper judges.

SPADER ET AL. CASE

Claim barred by prescription.[1]
A right unasserted for over forty-three years can hardly be called a claim.

BAINBRIDGE, *Commissioner* (for the Commission):

William V. Spader, claimant herein, states that he is a citizen of the United States of America, and that he is the only child and sole heir-at-law of Mary Elizabeth Franken Spader, deceased, who was the sole legatee under the last will and testament of María Josepha Brion Franken, who was one of the legatees and beneficiaries under the last will and testament of Louis Brion, usually known as Admiral Louis Brion, who died on the 21st day of September, 1821.

The memorial sets forth certain claims against the Republic of Venezuela in favor of Admiral Louis Brion for services rendered by the latter in the cause of Venezuelan independence. Admiral Brion left his estate to his brother, who died shortly afterwards intestate and unmarried, and to his three sisters, María Josepha, Carlota and Helena. María Josepha Brion married Morents E. Franken in Curaçao, and after her husband's death removed to the United States, where she died in 1859, bequeathing all her estate to her daughter, Mary Elizabeth Franken, who married Krosen T. B. Spader. Mary E. Spader was naturalized as a citizen of the United States April 29, 1865. Charlotte Brion married Joseph Foulke, a merchant of New York. She died in 1846.

William V. Spader claims that he and the other proper parties, heirs of Admiral Brion and citizens of the United States, are entitled to be paid by and to receive from the Republic of Venezuela the two-thirds part of the indebtedness of the Republic of Venezuela to the estate of Admiral Brion.

It appears from the record that this claim originated between the years 1810 and 1821. Citizens of the United States had, or appear to have had, interest in the claim prior to 1846. It was first brought to the attention of the United States Government, so far as the evidence shows, on November 1, 1889. No reason or explanation is given for delay in presentation. It was

[1] See the Italian - Venezuelan Commission (Gentini Case, Giacopini Case, Tagliaferro Case) in Volume X of these *Reports*.

submitted to the Commission created by the Convention of December 5, 1885, between the United States and Venezuela. The Commission dismissed it without prejudice, for want of jurisdiction. It does not appear in evidence when or in what manner the claim was ever otherwise brought to the attention of the Government of Venezuela.

A right unasserted for over forty-three years can hardly in justice be called a " claim."

> Prescription [says Vattel] is the exclusion of all pretensions to right — an exclusion founded on the length of time during which that right has been neglected.
>
> All these sorts of prescription by which rights are acquired or lost are grounded upon this presumption, that he who enjoys a right is supposed to have some just title to it, without which he had not been suffered to enjoy it so long; that he who ceases to exercise a right has been divested of it for some just cause; and that he who has tarried so long a time without demanding his debt has either received payment of it, or been convinced that nothing was due him. (Domat, Civil and Public Law, Bk. III, Tit. VII, sec. 4.)
>
> The same presumption may be almost as strongly drawn from the delay in making application to this Department for redress. Time, said a great modern jurist, following therein a still greater ancient moralist, while he carries in one hand a scythe by which he mows down vouchers by which unjust claims can be disproved, carries in the other hand an hourglass, which determines the period after which, for the sake of peace and in conformity with sound political philosophy, no claims whatever are permitted to be pressed. The rule is sound in morals as well as in law. (Mr. Bayard, Secretary of State, to Mr. Muruaga, Dec. 3, 1886. Wharton, Dig. Int. Law, Appendix, vol. 3, sec. 239.)
>
> While international proceedings for redress are not bound by the letter of specific statutes of limitations, they are subject to the same presumptions as to payment or abandonment as those on which statutes of limitation are based. A government can not any more rightfully press against a foreign government a stale claim which the party holding declined to press when the evidence was fresh than it can permit such claims to be the subject of perpetual litigation among its own citizens. It must be remembered that statutes of limitations are simply formal expressions of a great principle of peace which is at the foundation not only of our own common law but of all other systems of civilized jurisprudence. (Wharton, Dig. Int. Law, Appendix, vol. 3, sec. 239.)

It is doubtless true that municipal statutes of limitation can not operate to bar an international claim. But the *reason* which lies at the foundation of such statutes, that " great principle of peace," is as obligatory in the administration of justice by an international tribunal as the statutes are binding upon municipal courts.

In the case of Loretta G. Barberie *v.* Venezuela, decided by the United States and Venezuelan Commission of 1889, Mr. Commissioner Findlay said:

> A stale claim does not become any the less so because it so happens to be an international one, and this tribunal in dealing with it can not escape the obligation of an universally recognized principle, simply because there happens to be no code of positive rules by which its action is to be governed.[1]

The claim is disallowed.

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[1] United States and Venezuelan Claims Commission, 1889-90, Opinions, p. 79; Moore's Arbitrations, p. 4203.

TORREY CASE

Punitive damages not allowed for arrest by mistake where apology for such arrest is promptly made. Damages, however, for personal inconvenience during period of arrest allowed in the sum of 250 dollars.

PAÚL, *Commissioner* (for the Commission):

Charles W. Torrey claims from the Government of Venezuela the sum of $ 10,000 for damages caused by unjust arrest at the port of La Guaira, on May 3, 1876, and for personal ill treatment in connection therewith.

The memorialist bases his pretension on the following facts:

Early in the year 1876 he went to Curaçao for health and pleasure. Shortly after his arrival there he concluded to go to Venezuela to see the country and visit its capital, Caracas. After remaining in Caracas for about a week, he concluded to return to Curaçao by the English royal mail steamer *Severn*. On the 9th of May, 1876, after having obtained a passport with all the necessary visés by the authorized officers of the Venezuelan Government in Caracas, he started for La Guaira, where he intended taking the steamer *Severn* back to Curaçao. With him at the same time were a Mr. Bartram and Dr. Elbert Nostrand, also citizens of the United States. The steamer was lying out in the stream and the three embarked on a boat belonging to said steamer to reach it. While on the way to said steamer they were hailed from shore and ordered back and commanded to report to the civil officer in charge at La Guaira. This officer ordered them all to be imprisoned in the common jail. Torrey claims that he was lodged in a cell with many low prisoners, his cell containing no other accommodation or furniture than a common table and a set of wooden stocks. His request to remain at the hotel under guard, although he was suffering from an attack of inflammatory rheumatism, was arbitrarily refused, and he was taken to jail, and kept in said prison for four hours. He was released through the immediate exertions of the United States consul at La Guaira and the United States representative at Caracas, and he took the steamer bound for Curaçao the same evening at 7 o'clock.

Among the documents presented there is a copy of the communication addressed on the 12th of June, 1885, by the honorable Secretary of State, T. F. Bayard, to Mr. Torrey in reference to his claim, which in itself is sufficient to fix the appreciation that this Commission must make about the fact of the unjust arrest suffered by Mr. Torrey for a few hours in the port of La Guaira. Said communication reproduces the opinion of Mr. Evarts, Secretary of State, contained in a letter addressed by him to the said claimant on April 5, 1877, after having examined the voluminous diplomatic correspondence caused by this affair. This opinion was as follows:

> Though the Department would have preferred that the apology for your arrest should have come directly from that functionary [President Guzmán Blanco], the fact that he ordered his chief of police to make it may be regarded as sufficient. Your complaint may, however, be taken into consideration when diplomatic intercourse with Venezuela shall be resumed, but you [Mr. Torrey] must not expect that this Department will authorize a demand for vindictive damages.

Mr. Bayard, in the same communication, adds:

> Under the circumstances of the case as herein presented, further diplomatic intervention in your behalf is thought to be neither expedient or proper. The Department must, therefore, regard the matter as practically closed, unless you can show to it that the apology made was not a sufficient atonement for the injury done to you, or that an error has accrued to your prejudice in the Department's decision.

This decision need not, however, prejudice your ultimate rights if you see fit to present and support a claim before any international tribunal which may hereafter be organized to take cognizance of cases arising since the award of the late Caracas Commission.

As it appears from the above communications, and as it is plainly shown by the voluminous correspondence between the two departments of foreign affairs of both governments, the incident of the four hours' arrest of the American citizen, Charles W. Torrey, in the port of La Guaira was the act of a local officer, and was due to special circumstances of that epoch, in which act there was no intention to hurt, by any means the person of an American citizen, and, on the contrary, the same gave occasion for the President of the Republic, Gen. Guzmán Blanco, as soon as he knew of said arrest to order by telegraph that the prisoners be put at liberty, thus:

Gen. J. J. YEPEZ:

Those gentlemen should not have taken passage to Curaçao when their passports were for the United States of America, but I have reason to confide in them; thus, I expect you will put them at liberty, stating to them that you are sorry for what has happened. The steamer has my permission to leave as soon as those gentlemen are on board.

GUZMÁN BLANCO

In view of the foregoing, and regarding the compensation to be given in this case as limited to reparation for the personal inconvenience and discomfort suffered by the claimant during his brief detention, an award will be made in the sum of $ 250 United States gold.

GAGE CASE

(By the Umpire:)

Damages for insults and threatened ill treatment during time of lawful arrest allowed.

BAINBRIDGE, *Commissioner* (case referred to umpire):

This claim arises out of the arrest of the claimant, Gage, and one Fred. R. Bartlett, citizens of the United States at La Guaira, on the evening of December 26, 1900.

The arrest was made by the mayor of La Guaira, who had been a fellow passenger of the parties named on the afternoon train from Caracas, on the ground that the conduct of Messrs. Gage and Bartlett during the trip had been prejudicial to good order, as tending to cause a disturbance of the peace. The testimony as to whether the arrest was warranted or not is conflicting, although it must be said the weight of the evidence is to the effect that the conduct of these men was lacking in discretion. It is not deemed necessary, however, to discuss the evidence upon this point in detail. The claim turns primarily upon the occurrences subsequent to the arrest.

The complaint sworn to by both Gage and Bartlett on December 29, 1900, states:

Arriving at the jail we were placed in a small, dirty, dingy room with eight or ten prisoners and with no accommodations of any kind. Our money and valuables were taken from us as we were registered and searched. Shortly after one of the prisoners offered us a bench and we sat down and conversed quietly together and addressed no remarks to anyone.

After having been seated for about fifteen minutes the chief of the prison guard entered the room and roughly ordered us off the bench, and taking the bench in his

hands raised it over Mr. Gage's head and threatened to kill him if he made the slightest protest, abused us, and then left the room. While we were in the prison we asked permission of the chief of the guard and his aids to communicate by telephone with the American consul in La Guaira or the American minister at Caracas. This request was absolutely refused, and we were told that the American consul had been at the jail, but why we did not see him was not explained.

They were released without any trial about half past 7 that evening, their money and valuables being returned to them. Their imprisonment lasted about two and one-half hours.

The citizen or subject of a state who goes to a foreign country is, during his stay in the latter, subject to its laws and amenable to its courts of justice for any crime or offense he may commit in contravention of the municipal laws, nor can the government to which he owes allegiance and which owes him protection properly interpose unless justice is denied him or unreasonably delayed. This principle, however, does not interfere with the right and duty of a state to protect its citizens when abroad from wrongs and injuries; from arbitrary acts of oppression or deprivation of property, as contradistinguished from penalties and punishments, incurred by the infraction of the laws of the country within whose jurisdiction the sufferers have placed themselves.

It would seem too clear for argument that the denial to a foreigner, arrested for an alleged infraction of the municipal law, of the opportunity to communicate with the representatives of his government is an arbitrary act of oppression, amounting, in itself, to a denial of justice. While amenable to the municipal law, the accused is entitled to a speedy and impartial trial, under every civilized code, and to such assistance in securing a prompt and impartial trial, or in other ways as it may be within the province of the representatives of his government to render.

The responsibility of a government for the acts of its administrative officials, injuriously affecting the rights of aliens, is beyond question.

> Presumably, therefore, acts done by them [says Hall] are acts sanctioned by the state, and until such acts are disavowed, and until, if they are of sufficient importance, their authors are punished, the state may fairly be supposed to have identified itself with them.[1]

The conduct of the jefe civil and the police officers at La Guaira in connection with the arrest and detention of Mr. Gage was promptly brought to the attention of the Venezuelan Government by the Government of the United States through its legation at Caracas, and such apology and reparation required as were deemed justified under the rules of international law herein stated. So far as the evidence shows, however, the acts of the civil authorities were not disavowed nor were their authors punished.

For these reasons I am of opinion that an award should be made in this claim.

PAÚL, *Commissioner* (claim referred to umpire):

I regret to disagree with the opinion of the honorable Commissioner of the United States in this case.

The evidence presented is in itself sufficient to prove that George E. Gage misdemeaned himself during his trip from this city to the port of La Guaira, and that he well deserved the punishment inflicted on him upon his arrival at La Guaira by the civil authority, who was a witness to Gage's doings.

Said punishment, which was only an arrest of two and one-half hours, is sanctioned by law, and it is within the power of civil authorities to administer

[1] Hall's International Law, 4th ed., p. 226.

such in a summary way, without previous former trial, in cases of disorderly behavior in public places, or in cases of misdemeanor against other persons. This last was the case of Gage, which happened to be witnessed by the authority. The ill treatment and incommunication with his minister or consul, of which he complains he was a victim during his arrest, only appears from the statement of the claimant, whose truthfulness in the present case is doubtful, considering that in the memorial presented by him he goes so far as to distort Dr. N. Zuloaga's declaration, who, according to Gage, said, " In case of an international claim he would side with his Government regardless of truth." The deposition of Elias de León, who was present as interpreter at the interview between Doctor Zuloaga and Gage, states the contrary, and he assures that Doctor Zuloaga said:

> This matter is not worth raising an international question, but if it comes to this, I am a Venezuelan in the first place, and I will be at the side of my Government and will accomplish my duty.

There is a very substantial difference between fulfilling one's duty and being regardless of truth, a difference which the claimant does away with, with a deliberate purpose of diminishing the weight of the declaration of a person who is perfectly truthful by temperament as well as by education, and who had been the gratuitous victim of Gage's sneers and misbehavior which caused him to be arrested.

I am of opinion that the claim of George E. Gage must be disallowed.

BARGE, *Umpire*:

A difference of opinion having arisen between the Commissioners of the United States of North America and the United States of Venezuela, this case was duly referred to the Umpire.

The Umpire, having fully taken into consideration the protocol and also the documents, evidence, and arguments, and likewise all the communications made by the two parties, and having impartially and carefully examined the same, has arrived at the decision embodied in the present award.

Whereas the claimant claims for damages for false arrest and imprisonment, unlawful detention and personal indignities connected therewith; and

Whereas it appears from the declaration of the witnesses, General García, civil chief of the parish of La Guaira, Dr. N. Zuloaga, Dr. A. M. Díaz, Dr. F. Hernandez Tovar, and E. Ochoa, that the claimant, in a first-class carriage of the Caracas and La Guaira Railway, in which he traveled together with the witnesses, behaved in a way as if he were intoxicated and indulged in actions that were liable to disturb the public peace, which declarations do not seem to be sufficiently contradicted by the declaration of the conductor of the railway, who only from time to time walked through the carriages and was not, as the other witnesses were, in his constant society, nor by the declaration of the consul of the United States of North America at La Guaira, who only saw him two and one-half hours later; and

Whereas, therefore, the act of the police officer who ordered claimant to be arrested and put into jail for disturbing public order can not be said to be unlawful, the charge of false arrest and imprisonment can not be admitted.

Whereas, furthermore, the prisoner was let free after about two and a half hours of detention; and

Whereas, in case of a detention by the police in behalf of public safety of a person who in a state of intoxication has disturbed and may be feared furthermore to disturb the public peace, a detention of little more than two hours

can not be said to be excessively long, the charge of unlawful detention seems, in case of lawful arrest, not to be founded; and

Whereas the claimant further complains that his request to communicate with the American consul at La Guaira or the American minister at Caracas was refused;

Whereas, however, for this refusal there is only the statement of claimant and his former coclaimant, Mr. Bartlett, whilst out of the letter of the minister of foreign affairs of the United States of Venezuela to the minister of the United States of North America of April 2, 1901, it might be concluded that instead of a formal refusal there might have been only a delay commanded by circumstances, and whilst, on the other hand, it is proved that claimant was let free after about two hours of detainment in consequence of — or in every case posterior to — communications between the Venezuelan authorities and the North American consul at La Guaira and the North American minister at Caracas, the fact of absolute refusal seems doubtfully proved. The rule " in dubiis pro reo " must be here applied in favor of the authorities charged with the unjust refusal.

As to the complaint that the claimant was placed in a small, dirty, dingy, stinking room, this is met by the declaration on behalf of the Venezuelan authorities that he was conducted to the only establishment of correction in La Guaira, whereas it has to be kept in mind that this kind of establishments will almost nowhere seem comfortable for persons of claimant's social position.

As regards the further ill treatment claimant complains of.

Whereas for this likewise the only evidence is the statement of the claimant and his former co-claimant, Mr. Bartlett, but

Whereas it has to be considered that, from the nature of the facts as to the treatment of prisoners by their gaoler, it will always be difficult to find other witnesses besides the prisoners themselves; and whereas it has further to be considered that not only the Venezuelan authorities did not deny the facts, but that there is no trace of these authorities investigating the facts and thus trying to undo the charge that was brought up against them; and

Whereas this Commission has to investigate and decide the claims that are brought before it only upon such evidence and information as shall be furnished by or on behalf of the respective governments;

It seems that the sworn declaration of the claimant and Mr. Bartlett, as presented in their behalf by the United States Government, not contradicted or debilitated by any other evidence or by any intrinsic defect, can not be set aside; and

Whereas the ill-treatment by the officials for which the government is liable, and on which the claim is founded, exists in insults and in menaces that were not carried out, a sum of $ 100 seems a just reward, which sum is hereby allowed to the claimant.

ANDERSON CASE

The word " owned " as used in the protocol must refer to claims of American citizens owned at the time of the signing of the protocol.

BAINBRIDGE, *Commissioner* (for the Commission):

At the time of the Venezuelan war for independence, Domingo Hernandez and María Simana García, Spanish subjects, were compelled to emigrate from Venezuela and their properties therein were confiscated by the Government. In payment for the properties thus taken the Government of Venezuela on

December 21, 1846, issued to these parties several bonds, bearing interest at 3 per cent per annum from June 22, 1847. The parties named removed to the city of Humacao, island of Porto Rico, where they died, leaving part of said bonds to Fernando Hernandez y García, who died in February, 1896, leaving said bonds to his son, Fernando Hernandez y Miguene. On the 18th of June, 1903, the latter conferred —

a general and special power of attorney, drawn as required by law, in favor of Mr. Joseph Anderson, jr., resident of Porto Rico, citizen of the United States of America, and a lawyer by profession, so that he might, in the name and as representative of the appearing party, and as owner of said 5 bonds, which he cedes and transfers to him in the legal way, *so that he may claim the payment* of the same, including the corresponding interest before the Commission named to that effect.

The United States now present to the Commission on behalf of Joseph Anderson, jr., a claim, based on said 5 bonds, amounting to 37,250 pesos, principal and interest.

The convention constituting this Commission signed at Washington on the 17th of February, 1903, provides:

" All claims owned by citizens of the United States against the Republic of Venezuela * * * shall be examined and decided by a mixed commission," etc.

Claims owned when? Clearly the object of the convention was to provide a method of settlement by arbitration of claims against the Republic of Venezuela owned by citizens of the United States at the time of its negotiation. No other claims could have been within the contemplation of the high contracting parties, and jurisdiction of no other claims is conferred by the convention upon the Commission.

It is neither proved nor even alleged that this claim was owned by a citizen of the United States on or prior to February 17, 1903. The claimant Anderson did not become the owner of it until June 18, 1903, if, indeed, from the evidence presented here he can rightly be said to be the owner at all.

The claim is therefore dismissed, without prejudice, for want of jurisdiction.

THOMSON-HOUSTON INTERNATIONAL ELECTRIC CO. CASE

Commission has no jurisdiction to decide claims against municipalities.

PAÚL, *Commissioner* (for the Commission):

This company, as claimant, presents itself to this Commission, pretending that the Government of Venezuela should be made directly responsible for the payment of the balance of a credit against the municipality of the city of Valencia, amounting to 48,005.28 bolivars up to May 30, of this year, for the service of public electric lighting for previous years and continued up to date by said company, under its contract.

Among the documents presented there is a copy of the original contract between the national executive and Miguel J. Dooley, dated September 21, 1887, granting to the latter, for the term of 25 years, the exclusive right to establish in the territory of the Republic the electric-light system, the grantee having to make special arrangements with the different municipalities for the establishment of the electric lighting in their respective localities.

From the copies of divers arrangements made with the municipal board of Valencia, annexed to the memorial, it appears that said corporation acknowledges as correct the balance due to the company, presented for collection, and

found, in accordance with the corporation's books, said corporation claiming at the same time that the company owed, on its side, up to June 26, 1902, the sum of 2,333.35 bolivars for municipal taxes of 1,000 bolivars per annum levied by said corporation on the electric light company, from October 15, 1901. The Thomson-Houston International Electric Company denies to the municipality of Valencia the right to levy an annual tax for the exercise of their industry, basing their arguments on the terms of the original grant of the national government, that in article 4 it states that the said industry would be exempt of the payment of any national, state, or municipal taxes.

The account kept by said company with the municipality of Valencia, up to May 31, 1903, has been presented to this Commission, and said account shows that the company has been receiving lately (in the months of February, March, April and May) cash payments on account amounting to 21,280 bolivars, and the company from the month of March reestablished the public lighting service of 50 arc lights that had been suspended from June, 1902, until February, 1903. This circumstance proves that the business relations between the Thomson-Houston International Electric Company and the municipality of Valencia were in activity by a mutual agreement, and it can not be understood why said company pretends to claim from the national government the payment of the balance of a current account kept with a municipality of one of the federal states whilst the interested parties kept in activity the credit and debit of their account.

This Commission ought to dismiss this claim for lack of jurisdiction, without prejudice to the claimant.

BULLIS CASE

Every nation whenever its laws are violated by any one owing obedience to them, whether he be a citizen or alien, has a right to inflict the prescribed penalties upon the transgressor, if found within its jurisdiction, provided always that the laws themselves and the penalties prescribed are not in derogation of civilized codes.

BAINBRIDGE, *Commissioner* (for the Commission):

Henry C. Bullis, a native-born citizen, of the United States in August, 1900, and for nearly two years previous thereto, was employed as chief mechanical and electrical engineer by the Electric Light Company of Maracaibo, Venezuela. Some of the employees of the company were sympathizers with the revolutionary party then making preparations for an uprising. Quantities of bombs, cartridges, and other munitions of war were brought to the electric-light works, stored there, and taken from there for distribution throughout the city to members of the revolutionary party. Some of the bombs were found by the Venezuelan authorities at the electric-light works in a room to which Bullis had a key, and in his private residence several firearms and a quantity of cartridges for Mauser rifles were found.

Bullis was arrested charged with a violation of the laws of Venezuela. He was tried in the municipal court of Santa Bárbara, convicted, and on November 8, 1900, was sentenced to an imprisonment of three months in the public jail. The case was appealed to the district court of Maracaibo, and the sentence of the lower court was affirmed on November 26, 1900, the court stating in its judgment, that " the guilt of said Henry C. Bullis is plainly proven." Through the intervention of the United States legation at Caracas, Bullis was liberated two weeks before the expiration of his sentence.

A claim is here presented on behalf of Bullis in the sum of $ 50,000 for wrongful arrest and imprisonment.

A careful examination of the evidence presented in this case convinces the Commission that Bullis was arrested, tried, and convicted in strict accordance with the laws of Venezuela, to which he was at the time subject, and in conformity with the usual procedure of its courts; that his trial was not unnecessarily delayed; that he was provided with counsel; that he was allowed to communicate with the representative of his Government; that there was no undue discrimination against him as a citizen of the United States, nor was there, in his trial, any violation of those rules for the maintenance of justice in judicial inquiries which are sanctioned by international law. It does not appear that he was subjected to any unnecessarily harsh or arbitrary treatment during his imprisonment.

The respondent Government has incurred no liability to this claimant. Every nation, whenever its laws are violated by anyone owing obedience to them, whether he be a citizen or a stranger, has a right to inflict the prescribed penalties upon the transgressor, if found within its jurisdiction; provided always that the laws themselves, the methods of administering them, and the penalties prescribed are not in derogation of civilized codes.

The claim must be disallowed.

MONNOT CASE

Where reasonable inquiry would have revealed that no suit would lie on the par of the Government for property alleged to have been wrongfully imported, an action for the damages caused by such suit will lie.

BAINBRIDGE, *Commissioner* (for the Commission):

The claimant is a native citizen of the United States. In November, 1899, he established a store at Amacura, British Guiana, for the purpose of supplying men employed by him in collecting balata gum, as well as for the sale of supplies and a general trading business. The town of Amacura is located in the territory awarded Venezuela by the Paris court of arbitration. On December 4, 1900, during Monnot's absence from Amacura, a commissioner of the collector of customs at Ciudad Bolívar came to Amacura, seized claimant's goods, and closed his store. A suit was initiated against Monnot before the judge of finance in Ciudad Bolívar on the charge of smuggling certain merchandise, but it was shown at the trial that the last shipment of goods received by him was on October 19, 1900, while the territory was still in British possession; whereupon a decree of dismissal was entered in the action on February 8, 1901, and upon appeal to the supreme court of finance in Caracas the judgment of the lower court was affirmed on March 16, 1903. The claimant states that in January, 1901, his representative having been expelled from Amacura, the Venezuelan authorities took and sold the greater part of his goods and removed the balance from his store; that as he had no means of supplying the large gangs of men employed by him with goods, and who were largely indebted to him for advances in cash and supplies, they took advantage of the situation and ran away, taking with them the gum they had gathered. He also claims that he had engaged men for the season of 1901 and was unable to put them to work, and as a consequence lost the profits for that year.

Mr. Monnot summarizes his claim as follows:

(1) Value of goods seized as per inventory	$ 2,433.97
(2) Amount lost in advances made to balata gatherers who ran away	5,974.07
(3) Value of the balata gum stolen by said men, 64,800 pounds, at 50 cents per pound	32,400.00
(4) Salaries paid to employees since December, 1900. to February, 1901, 3 months, at $ 225 per month	675.00
(5) One breech-loading shotgun and one revolver taken from my representative	135.00
(6) Expenses occasioned by the case, such as traveling	2,500.00
(7) Attorney's fees in Ciudad Bolivar, as per receipt, 7,800 bolivars	1,500.00
(8) Indemnity for personal time, attention, inconvenience, etc., occasioned in defense of the case	10,000.00
(9) Indemnity for the loss of the gathering season 1901, for which arrangements and contracts had been made	52,000.00
(10) Indemnity for the loss of all business prospects of my enterprise at Amacura	100,000.00
	207,618.04
Or less amount obtained by sale of goods remaining, sold by order of the court of Hacienda, paid my agent at Ciudad Bolívar, November 4, 1901	936.92
	206,681.12

The learned counsel for Venezuela interposes as a defense to this claim that the proceeding of the revenue officers in seizing the claimant's goods was in perfect accord with local legislation. But it is evident from the record in the case that a reasonable inquiry would have disclosed the fact that Monnot had imported the goods prior to the time the Government of Venezuela took possession of the territory. Mr. Monnot's representative testifies that at the time he made " energetic protests " against the seizure.

Only partial restitution was made to the claimant after the dismissal of the case. He is entitled to compensation for the proximate and direct consequences of the wrongful seizure of his property. In the similar case of Smith *v.* Mexico, decided by the United States and Mexican Commission of 1839 (4 Moore International Arbitrations, 3374), an award was made for the value of property lost or destroyed, pending the judicial proceedings, with a reasonable mercantile profit thereon.

Items 1, 4, and 5 of his claim are allowed. To this amount is added the sum of $ 2,000 for expenses incurred by him in consequence of the suit. From this total of $ 5,233.97 must be deducted the sum of $ 936.92, the amount obtained by sale of the goods restored by order of the court. Interest is allowed upon the balance of $ 4,297.05, at 3 per cent per annum, from December 4. 1900, to December 31. 1903, the anticipated date of the final award by this Commission.

As to the remaining items of the claim, the evidence is insufficient to establish any liability therefor on the part of the Government of Venezuela, and they are hereby disallowed.

BANCE CASE

A receiver in bankruptcy only acts as administrator of the property of the bankrupt party, and individual credits can not be considered as the private property of any creditor.

Claim dismissed without prejudice.

PAÚL, *Commissioner* (for the Commission):

Dr. J. B. Bance, as receiver in the bankruptcy of Ernesto Capriles. claims from the Government of Venezuela, on behalf of Weeks. Potter & Co., Seabury

& Johnson, and Johnson & Johnson, American creditors of this bankruptcy, the sum of 15,576 bolivars, which is the proportionate amount corresponding to them in a credit of 200,000 bolivars, held by Capriles against the Venezuelan Government, which credit is now judicially in the hands of the receiver for its collection.

The failure only deprives the bankrupt party of the administration of his property, which then goes to his creditors, represented by the receiver, but in no way does it alter the essence of the property, rights, and actions, which continue to belong to the said bankrupt until an agreement is arrived at, and, failing this, until the final liquidation and adjudication of the property amongst the creditors in proportion to their claims and according to their rank as judicially classified.

Ernesto Capriles, being a Venezuelan, all his property, rights, actions, and liabilities in the bankruptcy case are governed by the Venezuelan law, and are subject to the procedure and decision of the tribunal under which the bankruptcy is investigated.

The receiver, representing the creditors, only acts as administrator of the property of the bankrupt party, and it is not possible to consider any individual credits from the total estate as the private property of any one creditor.

For the above-mentioned reasons the collection of a credit originally owned and still owned by a Venezuelan citizen can not be admitted before this Commission, and therefore this claim must be dismissed for want of jurisdiction, without prejudice to the claimant as representative of the creditors of Capriles in his capacity of receiver.

UPTON CASE

Prayer that Government be compelled to acknowledge on its records claimant's performance with requisites of his contract with Government dismissed for want of jurisdiction.

The taking of private property for public use involves an obligation to compensate the owner.

A person assumes all risks, as well as advantages, of his residence abroad.

BAINBRIDGE, *Commissioner* (for the Commission):

On December 23, 1892, the Government of Venezuela granted a concession to José Trinidad Madriz for the "canalización y navigación por vapores calado del Río Tocuyo," and on the day following Madriz assigned said contract and concession to José Rafael Ricart. On May 1, 1897, the claimant herein, a native citizen of the United States, bought from Ricart, previously authorized by the Government to make the transfer, said concession and all rights and privileges connected therewith and granted thereby. It is alleged that all the foregoing instruments were duly recorded as provided by law.

The claimant avers that the concession referred to is of great value, to wit, more than $ 1,000,000, and that if in the future by reason of insurrection or other cause the Government of Venezuela shall violate the terms of said contract, or revoke it in fact or by obstruction to its operation, he would be damaged in that sum. He states, however, that he has heretofore ever found the Government inclined to recognize and in fact recognizing its obligations under and the validity of said contract. He alleges that he has fully complied with all the terms, conditions, and requirements of the concession on his part.

He asks as a preliminary item of his claim that this Commission shall establish as of record for the future the fact and decision confirming the acts of memo-

rialist, and directing the Government of Venezuela to make acknowledgment upon its official records of his compliance with the terms of the contract.

In regard to this item of the claim, it is sufficient to state that the Commission has no jurisdiction to grant the relief asked. It is clearly not a " claim " within the meaning and intent of the protocol of February 17, 1903, constituting this Commission.

The remaining items of the claim are enumerated as follows:

(*a*) Loss of the launch *Protector*	$ 3,500.00
(*b*) Loss of steel lighter	4,002.25
(*c*) Loss of steamer *Parupano*	8,714.75
(*d*) Loss of 575 sacks of coffee and all chattels at El Salto de Diablo	10,015.00
(*e*) Loss of money by expulsion of colonists	3,988.43
Total	30,220.43

(*a*) The steam launch *Protector* was bought by the claimant for his use in making trips from Puerto Cabello to the Tocuyo River and along the coast and had been thus used for a year or more. The boat was 40 feet long, 8½ feet beam, and 3½ feet draft. In 1900, while the claimant was in the United States, certain revolutionists armed and equipped a steamer on Lake Valencia and used her to molest the Government, whereupon Gen. Federico Escarra, administrator of the maritime customs at Puerto Cabello, seized the *Protector* against the protest of claimant's agent for the purpose of putting her on flat cars on the English railroad to take her to Lake Valencia, where, armed with Government guns and troops, she was to be used against the steamer of the revolutionary party. In transporting the launch to the railway she was so badly damaged by careless or inefficient handling as to be rendered totally useless.

Claimant alleges that she could not be repaired at Puerto Cabello, and that although he has diligently endeavored to do so, he has been unable to sell the boat or any part thereof; and he claims for her destruction the sum of $ 3,500.

It appears from the evidence that the Government paid the expenses of removing the launch from the streets of Puerto Cabello to a vacant lot where, it is alleged, the boat has remained absolutely useless ever since.

The seizure of the launch may have been justified by the necessities of the State, but it was a taking of private property for public use and involved the obligation of just compensation to the owner. The evidence is sufficient as to the fact of the taking of the boat and that as a result thereof it was rendered useless. But as the launch appears to have some value, and as it still remains the property of the claimant, an award of $ 3,000, with interest thereon at 3 per cent per annum from October 15, 1900, to December 31, 1903, is hereby made as compensation for the loss or damage sustained by the claimant upon this item.

(*b*) The claimant states that he is the owner of a duplicate steel hull with boiler intended for a flat-bottomed stern-wheel steamer or for use as a lighter, which was, in 1902, mounted on blocks and covered in the yard of the electric-light company at Puerto Cabello. In July of that year the military authorities of the Government, in order to resist an attack by revolutionists upon the city, constructed a line of barricades, and finding the said hull near the line of defense, filled it with, and piled thereon and about it, stones, rocks, and sand of great weight. It was discovered later that the weight thus put upon it greatly damaged the hull, and, upon complaint of the agent of the claimant, the stones, sand bags, etc., were removed by the Venezuelan authorities.

Memorialist asserts that said hull was rendered useless and that without it the boiler is a complete loss, and he asks an award in the sum of $ 4,002.25.

The evidence of various parties cognizant of the facts is presented showing the condition of the hull prior to its being used in the manner and for the purpose above described and the injury sustained, the witnesses stating that the hull was rendered useless for the purpose for which it was intended, and that the repairs will cost as much as to build a new one.

The same principle is applicable here as in the foregoing item. The right of the State, under the stress of necessity, to appropriate private property for public use is unquestioned, but always with the corresponding obligation to make just compensation to the owner thereof. It is believed, however, from all the evidence here presented, that the sum of $ 2,000, with interest thereon at 3 per cent per annum from July 15. 1902, to December 31, 1903, will fully compensate Mr. Upton for whatever loss or damage he has sustained on this item of his claim.

As to the remaining items of this claim it is evident from the claimant's own statement that the losses set forth in his memorial arose from the disturbed condition of the country, due to the civil war then existing in Venezuela, and not from any acts of the Venezuelan Government or its agents, specially directed against the claimant or his property. Under these circumstances the claimant's privileges and immunities were not different from those of other inhabitants of the country. He must be held, in going into a foreign country, to have voluntarily assumed the risks as well as the advantages of his residence there. Neither claimant nor his property can be exempted from the evils incident to a state of war to which all other persons and property within the same territory were exposed. As to these items, therefore, the claim must be disallowed.

DEL GENOVESE CASE

Award made in favor of claimant for back payments and for work done under contractual obligation, but no interest allowed on delayed payments because of written waiver of claimant.

PAÚL, *Commissioner* (for the Commission):

This claim is based on a breach of a contract entered into by Virgilio del Genovese, the claimant herein, and the Government of Venezuela, through its department of public works, on the 26th day of January, 1897, for the extension of West Ninth street, in this city.

The various items of the claim are as follows:

		Bolivars
First. Balance due, under contract, on account of sections first and second, completed and accepted, as per statement of director of the bureau of roads, etc., April 11, 1903		158,704.05
Second. Extra stonework and filling on sections first and second made necessary by increased length of culverts		32,370.53
Third. For work done to date of this claim (June 29, 1903) on section 3, which has not been fully completed because of failure on the part of the Government of Venezuela to make payments for completed works, as agreed, as follows:		
Total amount agreed to be paid on account of said section, as per article 3 of the contract	203,358.51	
Less amount necessary to complete unfinished portion of the work	4,000.00	
		199,358.51

		Bolivars
Fourth. Damages for delays due to arbitrary stoppages of the work by Venezuelan authorities (1,049 days, at 250 bolivars per day)		262,250.00
Fifth. Damages for indignities suffered and loss of mules, etc., March 2, 1903		25,000.00
Sixth. Interest for payments in arrears at 6 per cent per annum, as follows:		
Section 1. Balance due under contract, but not including extra work, 73,074.05 bolivars, from March 28, 1898, to date, in round numbers	21,600	
Section 2. Balance due under contract, not including extra work, 86,630 bolivars, due since June 19, 1900, 3 years, in round numbers	15,593	
Sections 1 and 2. Extra work done and accepted by Government, amounting to 32,370.53 bolivars	5,826	
		43,019.00
Grand total		720,702.09

From the examination of the documents joined to this claim and by the papers mentioned by the department of public works in its report referred to by the honorable agent for Venezuela in his reply, made before this Commission, the following facts appear proved:

That the Government of Venezuela on January 26, 1897, through the department of public works, made a contract with Mr. Virgilio del Genovese, for the extension of West Ninth street of this city. By article 2 of said contract del Genovese bound himself to begin the work on the construction of the culvert of the stream "Las Tinajetas" and its filling; that upon completion of this work he was to begin the construction of the culvert of the stream "El Tajamar" and its filling, and, this second part of the work completed, to begin that of the stream "Los Padrones" and its filling.

Article 3 of the same contract stipulated the total value of the work to be executed by del Genovese in the sum of 423,492.62 bolivars, distributed in the following way:

	Bolivars
First section	133,494.05
Second section	86,630.00
Third section	203,358.57

Article 5 stipulated that on the completion of each section the contractor should notify the department of public works so as to obtain the acceptance; that the payment of each one of the sections was to be made by weekly installments, to begin when the completed section had been received by said department, the office of which should determine the amount of each weekly installment. The progress of the work was to be regulated by the department of public works in such manner that the second section was to be constructed at the same time the payments for the first were being made, and the third section during the payments of the second, but the payment for no section should have begun until the preceeding had been liquidated; the payment for the third section to be made in a period proportionate to that of the two former, in relation to their respective estimates.

Article 8 stipulated that the work was to be inspected by an engineer appointed by the department of public works, and no trenches for foundations were to be filled in without the order of said employee.

Article 9 provided that the Government reserved to itself the right to modify the plans and other conditions of the work, and the differences which such modification could have produced in relation to the estimate should be calculated at the prices established in the sheet of conditions.

By article 10 the Government of Venezuela allowed Mr. del Genovese the importation free of custom duties of the machines and tools required for the construction of the work, and also granted to him the exoneration of one-half of the dues of the breakwater pier at La Guaira, and one-half of the freight on the La Guaira and Caracas Railway for the said machinery and tools, and for the cement to be used in said work.

From the information asked by the director of the section of roads and aqueducts of the department of public works on the 11th of April of this year it appears that the Government of Venezuela owes to Virgilio del Genovese the sum of 158,704.5 bolivars, balance of the price of the work executed for the extension of West Ninth street of this city, with specification of the price of the sections completed and delivered, according to the contract, and of the sums received by del Genovese on account of section first, as per the orders of payment issued in his favor by the department of public works on the national treasury, and personal payments made to del Genovese by the said department.

Mr. del Genovese found correct the liquidation made by the department of public works of the balance due him for the price of the two sections, first and second, completed and delivered. On August 6, 1900, Mr. del Genovese addressed to the secretary of public works a note, a copy of which has been presented, in the following terms:

Caracas, August 6, 1900.

Citizen Minister of Public Works:

I have the honor to address myself to you in order to advise you that, having completed, since the 19th of June of the current year, the work of the second section, according to the provisions of the contract which I celebrated with the Government of the Republic, I complied with the duty of communicating same to that department, begging that it should proceed, as was natural and just, to accept the work, but up to date this has not been done in spite of all my exertions, verbally and in writing to that end.

As it is now forty-eight days since said work was completed, without its having been accepted officially, which causes me serious material damages and moral uneasiness, I find myself in the indispensable and unavoidable position of requesting once more that you will be pleased to order whatever may be necessary for the official delivery of said work at the earliest possible moment.

I take the liberty of submitting to you, that if the consideration that, in accordance with the provisions of the contract, the value of the first section should be paid to me on the delivery of the second, this consideration ought no longer to delay the said acceptance, because my previous conduct may serve you as a guaranty that I shall know how to appreciate the difficult situation of the Government, and that I shall lend myself gladly to a just and equitable arrangement for the purposes of said payment, since my greatest desire is to begin the work on the third section in order to comply with what I have bound myself in said contract, and that the honor may be mine that this Government, which has given so many proofs of honesty, of progressive spirit, and of the desire to protect the honest and industrious people, and for which I have so much sympathy, may continue satisfied with me.

It is not beside the point to indicate to you that, according to the weekly reports which I have furnished to your department, I have given work daily to some forty laborers who are waiting for me to begin the third section in order to once more have an occupation and bread for themselves and their families.

Confident that all which I have submitted will determine your department to accede to my just request, believe me,

Your obedient servant, Virgilio DEL GENOVESE.

It can be seen, by the terms of this letter, the contractor considered in accordance with the contract an obstacle for the acceptance of the second section of the work by the department of public works, the fact of the first section not having been paid for, and by his own request the said department consented, as it appears from the documents presented, to receive said second section, continuing the periodical payments to del Genovese during the remainder of 1900, 1901 and 1902, to the amount of 21,600 bolivars for the first section, as shown by the liquidated account.

It has not been proved that there had been a breach of contract on the part of Venezuela, as the delay in the payment of the weekly installments that should have been made to del Genovese for the price of the two sections completed and delivered, were tolerated by him, and as it has already been stated, he said to the Government that the delay should not be a cause to stop the acceptance of the second section of the work, his past conduct being a guarantee that he knew how to appreciate the economical difficulties of the Government, and that he would gladly accept a just and equitable arrangement for the payment of said delayed installments.

The circumstance that the contractor again addressed the Government of Venezuela a letter dated March 20, of the current year, acknowledging that the work on the third section had been suspended for two years on account of the political state of the country, and that he was ready to resume said work, evidently proves that he was willing to suspend said work without being justified to make the Government of Venezuela responsible for a breach of contract which he now pretends to establish.

Regarding the balance due to Virgilio del Genovese by the Venezuelan Government, for the price of the first section and the whole price of the second section, amounting to the sum of 158,704.05 bolivars, it appears as shown in an account furnished to Mr. del Genovese under date of April 11, 1903, by the director of the bureau of roads, etc., in the department of public works, that the Government of Venezuela admitted to be due to the claimant, the said sum of 158,704.05 bolivars to that date.

From the evidence presented by the memorialist, it is proven that some extra work in the sum of 32,370.53 bolivars, specified in the affidavit sworn to by the civil engineer, J. Luch, executed by the contractor at the unit price specified in the sheet of conditions, really amounts to that sum and must be allowed.

From the documentary evidence presented by the claimant and also from the other documents recorded in the department of public works, which has been put at the disposal of this Commission for its examination, it is apparent that said department of public works was informed by del Genovese several times that he had prosecuted the work in its third section and, especially in his note of March 16, 1903, he informed the secretary of public works that on that date the work on the third section had been resumed. There exists in the record some orders from the secretary of public works, authorizing del Genovese to introduce free of duties a number of barrels of cement to be employed in the execution of the third section of the extension of West Ninth street. The memorialist admits that some work remains yet to be done for the conclusion of the third section, which he estimates, in conformity with the opinion of two contractors of public work, named José Rodriguez and Daniel Martinez Poleo, could be done for the sum of 4,000 bolivars.

This Commission, desiring to obtain all the necessary information about the value of the work that remained to be done for the completion of the third section, asked and obtained the learned opinion of Dr. Carlos Monagas, a Venezuelan engineer. After having taken in consideration that opinion, and

the careful examination of all the evidence presented by both parties, the Commission arrives at the conclusion that the sum of 30,000 bolivars must be deducted from the amount of 203,358.51 bolivars to be paid for said third section, as per article 3 of the contract.

The damages claimed for the stoppages of the work amounting to the sum of 262,250 bolivars, and the interest at 6 per cent per annum on the balance due for the price of the first and second sections which the claimant puts forth for 43,019 bolivars, must be disallowed, because the stoppage of the work has not been caused by arbitrary action of the Government of Venezuela, but by the natural consequences of the civil war, which were admitted by the same contractor as justified, as it appears from his correspondence with the department of public works.

The damages for indignities suffered and for loss of mules, etc., on March 2, 1903, amounting to 25,000 bolivars, can not be taken into consideration, as the fact on which this part of the claim is founded appears to consist in an act of highway robbery that can not affect the responsibility of the Government of Venezuela.

For the aforesaid reasons an award is made in favor of Mr. Virgilio del Genovese for the sum of $ 70,083.28 United States gold, without interest.

La Guaira Electric Light and Power Co. Case

Claim for breach of contract by municipal corporation disallowed as against General Government because of dual entity of public corporation. It acquires property and makes contracts therefor as an individual, and the National Government can not therefore be held accountable.

Bainbridge, *Commissioner* (for the Commission):

It appears from the evidence that on October 19, 1893, the municipal council of La Guaira, in ordinary session, approved a contract granting to one Luis J. García the privilege of establishing an electric-light plant in that city. The contract was executed on behalf of the city by " Rafael Ravard, chairman of the municipal council of the district of Vargas, sufficiently empowered by this corporation, " and by Luis J. García, " a resident of this city," on the other part.

On October 11, 1895, Luis J. García transferred to his brothers, Juan B. and Antonio García, all the rights and privileges possessed by the former under the contract. Juan B. García and others incorporated the claimant company under the laws of the State of West Virginia on October 17, 1895.

By the fourth article of the contract of 1893, it was provided that the work to establish the plant was to begin within six months and to be finished within ten months. The twelfth article provided that the contract was to run twenty-five years and the municipality bound itself not to grant to anyone for the district of Vargas equal or better rights for the public lighting or to make any contract relating to any illumination.

In April, 1894, Luis J. García was granted an extension of six months to begin the work of installing the plant; again, in March, 1895, another extension of four months was granted him by the municipal council, and still another extension of six months on June 8, 1895.

The minutes of the municipal council of La Guaira, under date of December 27, 1897, show an entry to the effect that all efforts of that body and of the mayor have been useless to obtain the fulfillment of the contract made with

Luis J. García. On December 31, 1897, the municipal council approved a contract with F. Martinez Espino & Co., of Caracas, for the establishment of electric lighting.

On January 23, 1900, in the court of first instance at Petare, in a certain action entered by the La Guaira Electric Light and Power Company against the municipal council of the Vargas district, a settlement of said litigation was effected and made of record whereby F. Martinez Espino & Co. transferred to the La Guaira Electric Light and Power Company all the rights and privileges of the contract executed December 31, 1897, with the council of the Vargas district, and as a compensation for this transfer the La Guaira Electric Light and Power Company recognized the right of Espino & Co. to receive 5 per cent of the shares issued by the cessionary company; and by the fourth article of the settlement the municipal council of the Vargas district and J. B. García, as attorney for the La Guaira Electric Light and Power Company, " agreed to rescind the contract which with the same purpose was executed under date of October 19, 1893, between the said municipal council and Luis J. García, remaining only in force the one caused by this cession." In November, 1897, the municipality had brought suit in the court at Petare for the cancellation of the contract of October 19, 1893. And as indicating the scope of the settlement effected on January 23, 1900, the following is quoted from the judicial record:

> This tribunal gives its approval to this transaction (i. e., the settlement), interposing for its greatest force its authority and judicial decree; and resolves, according to the request, to make appear in the file that the action entered by the municipal council of the Vargas district against the La Guaira Electric Light and Power Company for the abrogation of a contract about electric light, that this settlement has been entered into.

The fifth article of the contract with Espino & Co., referred to in the settlement as being the only one thereafter remaining in force, reads as follows:

> The work for installation of the company must be started six months from date of this contract (i. e., December 31, 1897) and ended six months after started. This time could be extended for cause of superior force. The failure to comply within the time stipulated will make this contract abrogated.

However, it was agreed in the settlement effected in court on January 23, 1900, that —

> as a natural result of this transaction the parties hereto have agreed that the time stipulated in the contract transferred will begin to count from this date.

At an extra session of the municipal council of the department of Vargas, held on January 24, 1901, a resolution was passed that the contract with the La Guaira Electric Light and Power Company had ceased de facto, according to the fifth article thereof.

On February 25, 1901, the municipal council of La Guaira ratified a contract for electric lighting, executed on December 12, 1899, with Messrs. Perez and Morales.

On March 6, 1901, J. B. García, as attorney for the La Guaira Electric Light and Power Company, protested against the action of the municipal council in canceling the contract of which said company was cessionary, as per the judicial settlement of January 23, 1900, and against the refusal of the council to grant the extensions requested for beginning the work, and claiming that the state of civil war and latterly the earthquake of October 29, 1900, had prevented compliance with the contract and rendered necessary the extensions of time asked. He insisted in the protest that, supposing the company were in

fault, the council " could only have an action to ask for the abrogation of the contract before the courts of justice, as the contract is mutual."

Substantially upon the foregoing facts a claim is presented here on behalf of the La Guaira Electric Light and Power Company against the Republic of Venezuela for the sum of $ 1,500,000. But the memorialist states:

> The company is willing, however, on condition that the Republic of Venezuela and the municipalities concerned act in a friendly spirit, paying damages sustained through actual destruction of property, and regranting its charter so that its rights may be extended for a period to compensate for the interruption and destruction of its business, that then the loss of profits specified shall be waived and the sum of $ 150,000 for actual loss of property in that event received.

The memorial is couched in somewhat vague and indefinite terms. Various interruptions of the company's service are alleged and certain unpaid indebtedness from the municipality to the company is set forth. An alleged arrest of all the employees of the company on one occasion and their detention " in the calaboose " over night is charged, and it appears that J. B. García was arrested on April 4, 1898, and confined for a period of twenty-four days, the only excuse for his confinement being that he was a political suspect. Since February 23, 1899, said García has been a citizen of the United States. As nearly as can be ascertained from all the evidence presented the injuries to property complained of occurred during the years 1897, 1898 and 1899, prior, it is to be observed, to the settlement of differences between the company and the municipality effected and made of record in the court of first instance at Petare on the 23d of January, 1900.

The contract of the claimant company then in force was declared null and void de facto " according to the fifth article thereof " by the municipal council on January 24, 1901.

The protest of the company made on March 6, 1901, was against the refusal of the council to grant extensions requested for beginning and executing the work as provided by that article. It is not claimed that the contract had been complied with, but that the state of civil war and the earthquake of October 29, 1900, had prevented compliance and rendered necessary the extensions asked. The protest seeks to " reserve all the rights of the company about the matter, to make them valuable before the tribunals of the Republic against the said municipal council."

Except as hereinafter stated, the Government of Venezuela does not appear in any contract or proceeding relating to this company. The parties to the various contracts and judicial proceedings were the municipal council of the district of Vargas and the claimant. But it is sought here to hold the National Government liable for the acts of the municipality as one of the political subdivisions of the State. No evidence is introduced to fix such liability by reason of special legislative or administrative control exercised by the National Government over the municipality. The learned counsel for the United States argues that by the protocol constituting this Commission all citizens of the United States who possessed claims were given the right of recourse against the entity which entered into this international agreement, and that under this agreement the various political subdivisions of the Government of Venezuela were included; and further, that there is in this case no remedy but against the Federal Government, which by signing the protocol has obligated itself to redress the wrongful acts of municipalities as well as other constituted parts of its power.

The argument, however, overlooks the dual character of municipal corporations; the one governmental, legislative, or public; the other proprietary or private.

In their public capacity a responsibility exists in the performance of acts for the public benefit, and in this respect they are merely a part of the machinery of government of the sovereignty creating them, and the authority of the State is supreme.

But in their proprietary or private character their powers are supposed to be conferred, not from considerations of state, but for the private advantage of the particular corporation as a distinct legal personality. (Bouvier Law Dict., Rawle's ed., Vol. II, 453.)

Those matters which are of concern to the State at large, although exercised within defined limits, such as the administration of justice, the preservation of the public peace, and the like, are held to be under legislative control, while the enforcement of municipal by-laws proper, the establishment of gas works, waterworks, construction of sewers, and the like, are matters which pertain to the municipality as distinguished from the State at large. (*Ibid.*)

The contract between the municipal council and the claimant company for the establishment of the electric-light plant was entered into by the former solely in the exercise of its proprietary functions as a distinct legal personality. Its act was in nowise connected with its governmental or public functions as a political subdivision of the State. So far as the contract is concerned, the municipality is to be regarded as neither more nor less than a private corporation and as such could sue or be sued in respect thereof. (Dillon's Mun. Corp., sec. 66.)

It is fundamental that citizens or subjects of one country who go to a foreign country and enter into contracts with its citizens are presumed to make their engagements in accordance with and subject to the laws of the country where the obligations imposed by the contract are to be fulfilled, and are ordinarily remitted to the remedies afforded by those laws for the redress of grievances resulting from breaches or nonfulfillment of such contracts.

It is only when those laws are not fairly administered, or when they provide no remedy for wrongs, or when they are such as might happen in very exceptional cases as to constitute grievous oppression in themselves, that the State to which the individual belongs has the right to interfere in his behalf. (Hall, Int. Law, p. 291, sec. 87.)

In order to bring this claim within the jurisdiction of the Commission, it was, in our judgment, incumbent upon the claimant to show a sufficient excuse for not having made an appeal to the courts of Venezuela open to it, or a discrimination or denial of justice after such appeal had been made. As the claim stands it is merely a dispute between a citizen of the United States and a citizen of Venezuela in regard to their respective rights under the terms of a certain contract. It has not the necessary basis for an international reclamation. The case is very different from one in which the Government itself has violated a contract to which it is a party. In such a case the jurisdiction of the Commission under the terms of the protocol is beyond question. All that is decided here is that the Commission has no jurisdiction of the claim of the La Guaira Electric Light and Power Company in its present status, and the said claim, except as hereinafter stated, is hereby dismissed on that ground without prejudice to the rights of either the claimant company or the municipality concerned.

But it appears in evidence that on July 7, 1894, the National Government made a contract with Luis J. García "for himself and for the company which he may organize" by which the said García or his company agreed to provide electric light for the custom-house and other public buildings at La Guaira, the Government agreeing to pay to García or to the company for such service the sum of 2,000 bolivars monthly. The claimant herein alleges that there is

due from the National Government according to this contract for services rendered from July 1 to December 1, 1897, the sum of $ 2,307.69. This indebtedness is not denied by the Government of Venezuela, and an award is therefore made for said sum with interest thereon at 3 per cent per annum from December 1, 1897, to December 31, 1903, the anticipated date of the final award by this Commission.

RUDLOFF CASE

INTERLOCUTORY DECISION

(By the Umpire:)

The protocol requiring that claims shall be considered upon the basis of absolute equity, the Commission in doing equity has the right to examine and determine whether the provision of a contract requiring all disputes to be submitted to the local courts is equitable under the circumstances, and, in this case, the contract provision being found to work inequitably, jurisdiction of the claim is entertained.

DECISION ON MERITS

(By the Commission:)

A contract entered into by the minister of public works of the nation and the governor of the Federal District duly authorized by the Chief Executive of the nation, is to be considered as a contract made by the National Government, especially where the National Government entered into an agreement as to free entry of materials for the fulfillment of the contract.

Consequential damages disallowed.

Award made for value of property arbitrarily destroyed.

No sufficient evidence as to value of concession having been submitted, claim for loss on this ground disallowed.

BAINBRIDGE, *Commissioner* (claim referred to umpire on preliminary question of jurisdiction:)

The Government of Venezuela demurs to the jurisdiction of the Commission in respect to the above-entitled claim, and bases its demurrer on the following grounds:

First. That on May 6, 1901, Sofia Ida Wiskow Rudloff and Frederick W. Rudloff sued the nation before the Federal court in order to compel it to pay them, in their capacities as heirs of Henry J. Rudloff, the sum of 3,698,801 bolivars for damages originating in an alleged breach of the contract entered into between their predecessor in interest, the said Henry J. Rudloff and the Government of Venezuela, for the construction of a market building in Caracas. It is argued that as the claimants sought the jurisdiction of the tribunals of Venezuela to submit to them their claim, a voluntary and deliberate act on their part, they have submitted themselves to the provisions of local legislation, both substantive and adjective, in all and everything that might pertain to the suit; that the Federal court has assumed jurisdiction over and decided the claim; that the parties have both appealed from the decision of the court and the court of appeals has taken cognizance of the matter, that article 216 of the Code of Civil Procedure in force provides: " If the discontinuation is limited to the proceedings, it can not be had without the consent of the opposite party", and that the defendant Government not having given its consent for the discontinuance in the manner in which the claimants have done so, the claimants

can not withdraw the claim from the jurisdiction from the Federal court in order to submit it to the Commission.

Second. That article 12 of the aforesaid contract provides that:

> The doubts and controversies that may arise on account of this contract shall be decided by the competent tribunals of the Republic in conformity with the laws and shall not give reason for any international reclamations,

and that the case of a denial of justice can not be alleged because the court of first instance has decided the case favorably to the claimants, and the jurisdiction of the tribunals of the Republic has not been exhausted in the litigation.

These two grounds of demurrer will be considered here in the order stated, but it is to be remarked at the outset that the Commission as a court of last resort is the sole and conclusive judge of its own jurisdiction. Mr. Webster, then Secretary of State, said, in relation to the United States and Mexican Commission of 1839, that it was

> essentially a judicial tribunal with independent attributes and powers in regard to its peculiar functions,

and that

> its right and duty, therefore, like those of other judicial bodies, are to determine upon the nature and extent of its own jurisdiction, as well as to consider and decide upon the merits of the claims which might be laid before it.[1]

The determination by the Commission of the objections to its jurisdiction raised by the Government of Venezuela, as above set forth, is clearly within the scope of its delegated authority.

In determining the first objection, certain material facts must be borne in mind. On the 6th of May, 1901, the claimants brought suit in the chamber of first instance of the Federal court against the Government of Venezuela. The suit proceeded to trial and judgment which was entered on the 14th of February, 1903. On February 16, 1903, the attorney-general, on behalf of the Government, appealed from the judgment, and on the same day the claimants appealed from it. The case thus remains pending in the courts.

The parties to an action pending in court may always by agreement submit the whole or any part of the matter or matters in issue to arbitration. Indeed, the submission to arbitration, in the absence of collusion or fraud, is favored by courts upon broad grounds of public policy. This principle of arbitration enters into and forms a part of every civilized code of jurisprudence, and to this rule the jurisprudence of Venezuela is no exception. Article 493 of the Venezuelan Code of Civil Procedure provides:

> In any condition of the case in which the parties may signify a wish to have it submitted to arbitrators, the course of proceeding shall be suspended and the case immediately passed over to those named.

The rule above stated is the same, so far as it touches the question here, where the arbitration is between nations and the submission concerns a private claim. Only the Government of the claimant, acting in his behalf, enters into the agreement for arbitration.

In this case the parties to the action pending in the local tribunals are on the one hand the claimants, citizens of the United States as plaintiffs, and the Government of Venezuela on the other as defendant. Have these parties litigant agreed to submit the cause to the arbitration of this international tribunal? If they have, the agreement is binding upon both.

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[1] Moore's Arbitrations, 1242; Senate Ex. Doc. 320, 27th Cong., 2d sess., 185.

The appeal was taken by both parties from the judgment of the lower court on February 16, 1903. On the following day the Government of Venezuela signed the protocol constituting this Commission, and by that act agreed to submit to the arbitrament of this tribunal:

> All claims owned by citizens of the United States of America against the Republic of Venezuela which have not been settled by diplomatic agreement or by arbitration between the two Governments.

Nothing could be clearer than the language thus employed to define the scope of the jurisdiction conferred, or than that the jurisdiction conferred is inclusive of such a claim as this one of the Rudloff heirs against the Venezuelan Government. The signing of the convention by the two Governments was in the solemn exercise of the highest prerogative of sovereignty, and it is the duty of the Commission to so interpret the terms of the convention, and, under its oath, so to act as to give effect to the intention, thus unequivocally expressed, of the high contracting parties.

Vattel, speaking of the interpretation of treaties, says:

> The interpretation which renders a treaty null and without effect can not be admitted. It ought to be interpreted in such a manner as it may have its effect, and not to be found vain and nugatory. (Vattel, book 2, ch. 17, sec. 283.)

The claim presented here is a claim owned by citizens of the United States of America against the Republic of Venezuela. It has not been settled by diplomatic agreement or by arbitration. The Government of Venezuela has in the most solemn manner agreed to submit such claims to the jurisdiction of this Commission, under the plain terms of the convention of February 17, 1903. The claimants, availing themselves of the action of their Government in their behalf, agree to submit their claim to the jurisdiction of this Commission by its presentation here.

The identical objection to the jurisdiction was urged in the case of Selwyn *v.* Venezuela before the British and Venezuelan Claims Commission now in session at this capital. In sustaining the jurisdiction of the Commission, Plumley, umpire, said:

> International arbitration is not affected jurisdictionally by the fact that the same question is in the courts of one of the nations. Such international tribunal has power to act without reference thereto, and if judgment has been pronounced by such court to disregard the same, so far as it affects the indemnity to the individual, and has power to make an award in addition thereto or in aid thereof, as in the given case justice may require. Within the limits prescribed by the convention constituting it, the parties have created a tribunal superior to the local courts.[1]

In fact the law which governs this Commission, and which it must apply in the exercise of its functions, is not the municipal law of either of the contracting nations, but it is that paramount code which is obligatory upon both.

Says Hall (4th Ed., p. 1):[2]

> International law consists in certain rules of conduct which modern civilized states regard as being binding on them in their relations with one another with a force comparable in nature and degree to that binding the conscientious person to obey the laws of his country, and which they also regard as being enforceable by appropriate means in case of infringement.

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[1] See p. 323; see also the Italian - Venezuelan Commission (Martini Case) in Volume X of these *Reports*.

[2] See the German - Venezuelan Commission (Kummerow *et al.*, opinion of Umpire) in Volume X of these *Reports*.

These rules of conduct recognize the right and duty of a state to protect its citizens or subjects at home or abroad, and the corresponding obligation of a state to make due reparation and give just compensation for injuries inflicted upon another state, or upon its citizens or subjects. And whenever two independent nations have by solemn compact provided a forum to determine the extent of the injuries inflicted by the one upon the other, and the means of redress therefor, the legislation of neither of the contracting parties can interpose to limit or defeat the jurisdiction of that forum in respect of any matter fairly within the purview of the compact. The two Governments have for the purposes expressed created a tribunal superior to the local courts —

an independent judicial tribunal possessed of all the powers and endowed with all the properties which should distinguish a court of high international jurisdiction, alike competent, in the jurisdiction conferred upon it, to bring under judgment the decisions of the local courts of both nations, and beyond the competence of either Government to interfere with, direct, or obstruct its deliberations. (Moore, 2599.)

The second objection to the jurisdiction of the Commission raised by the Government of Venezuela is based upon article 12 of the contract, which reads as follows:

The doubts or controversies that may arise on account of this contract shall be decided by the competent courts of the Republic, in conformity with the laws, and shall not give reason for any international reclamation.

The memorial states that, pursuant to an order of the national Executive, the governor of the Federal district placed the contract in question before the municipal council, who, on September 8, 1903, by a decree, declared it null, and authorized the governor to take possession of the market and demolish the work done by Rudloff, and that this decree was carried out by the public functionaries, notwithstanding the protests of Mr. Rudloff. For the purpose of this preliminary inquiry as to jurisdiction, the statements in the memorial are to be considered as true, the sole question for the present being whether, if true, this Commission can take cognizance of the claim.

In regard to that portion of article 12 of the contract inhibiting international reclamation, it is perfectly obvious that under established principles of the law of nations such a clause is wholly invalid. A contract between a sovereign and a citizen of a foreign country not to make matters of differences or disputes arising out of an agreement between them or out of anything else the subject of an international claim, is not consonant with sound public policy and is not within their competence. In the case of Flanagan, Bradley, Clark & Co. *v.* Venezuela, before the United States and Venezuelan Commission of 1890, Mr. Commissioner Little said:

It (i.e., such a contract) would involve, pro tanto, a modification or suspension of the public law, and enable the sovereign in that instance to disregard his duty toward the citizen's own government. If a state may do so in a single instance, it may in all cases. By this means it could easily avoid a most important part of its international obligations. It would only have to provide by law that all contracts made within its jurisdiction should be subject to such inhibitory condition. For such a law, if valid, would form the part of every contract therein made as fully as if expressed in terms upon its face. Thus, we should have the spectacle of a state modifying the international law relative to itself. The statement of the proposition is its own refutation. The consent of the foreign citizens concerned can, in my belief, make no difference — confer no such authority. Such language as is employed in article 20, contemplates the potential doing of that by the sovereign toward the foreign citizen for which an international reclamation may rightfully be made under ordinary circumstances. Whenever that situation arises — that is, whenever a wrong occurs of such a character as to justify diplomatic interference — the government of the

citizen at once becomes a party concerned. Its rights and obligations in the premises can not be affected by any precedent agreement to which it is not a party. Its obligation to protect its own citizen is inalienable.[1]

The contingency suggested by Commissioner Little appears to have happened in the case of Venezuela, since article 139 of the constitution of 1901 provides that the inhibitory condition against international reclamation shall be considered as incorporated, whether expressed or not, in every contract relating to public interest, and essentially the same provision was embodied in article 149 of the constitution of 1893. These constitutional provisions and legislative enactments of like nature are, however, clearly in contravention of the law of nations; they are pro tanto modifications or suspensions of the public law, and beyond the competence of any single power. For every member of the great family of nations must respect in others the right with which it is itself invested. And the right of a State to intervene for the protection of its citizens whenever by the public law a proper case arises can not be limited or denied by the legislation of another nation. Mr. Justice Story says:

> The laws of no nation can justly extend beyond its own territories, except so far as regards its own citizens. They can have no force to control the sovereignty or rights of any other nation within its own jurisdiction. And however general and comprehensive the phrases used in our municipal laws may be, they must always be restricted in construction to places and persons upon whom the legislature have authority and jurisdiction. (The *Apollon*, 9 Wheaton, 362.)

The subject of international reclamation is by its very terms outside the legislative jurisdiction of any one nation. And it is, furthermore, an utter fallacy to assert that this principle is an encroachment upon national sovereignty. That nation is most truly sovereign and independent which most scrupulously respects the independance and sovereignty of other powers.

Neither is it within the power of a citizen to make a contract limiting in any manner the exercise by his own government of its rights or the performance of its duties. A state possesses the right and owes the duty of protection to its citizens at home and abroad. The exercise of this right and the performance of this duty are as important to the state itself as the protection afforded may be to the individual. The observance of its obligation is fundamental and vital to every government. An injury to one of its citizens is an injury to the state, which punishes for infraction of municipal law and demands redress for violation of public law upon broad grounds of public policy. The individual citizen is not competent by any agreement he may make to bind the state to overlook an injury to itself arising through him, nor can he by his own act alienate the obligations of the state toward himself except by a transfer of his allegiance.[2]

There remains to be considered that portion of article 12 of the contract which provides that —

> the doubts and controversies that may arise on account of this contract shall be decided by the competent courts of the Republic in conformity with the laws.

Assuming, for the purposes of the examination, but in no wise admitting, that this portion of the article refers to such a case as is presented here, it must be apparent that the obligations of the article bore equally and reciprocally upon both parties to the contract — upon the Government of Venezuela as well as upon the claimants — and that when the Government, without resort

[1] Opinions of Commission of 1889-90, p. 451; Moore's Arbitrations, p. 3566.

[2] See also upon this point the Italian - Venezuelan Commission (Martini Case, opinion of Umpire) in Volume X of these *Reports*.

to the tribunals of the Republic, declared the contract null, the claimants were absolved from all obligations, if any had theretofore existed in that behalf.

In the great case of the Delagoa Bay Company,[1] the Government of the United States said, in reply to a similar objection raised by Portugal, that it was not within the power of one of the parties to an agreement first to annul it and then to hold the other party to the observance of its conditions, as if it were a subsisting engagement. It is contrary to every principle of natural justice that one party to a contract may pass judgment upon the other, and this is no less true when the former is a government and the latter is a foreign citizen. Public law regards the parties to a contract as of equal dignity, equally entitled to the hearing and judgment of an impartial and disinterested tribunal.

> The acts of a sovereign [says Mr. Wheaton, a very high authority], however binding on his own subjects, if they are not conformable to the public law of the world, can not be considered as binding on the subjects of other states. A wrong done to them forms an equally just ground of complaint on the part of their government, whether it proceed from the direct agency of the sovereign or is inflicted by the instrumentality of his tribunals. (Wharton's Int. Law Dig., sec. 242.)

It is undoubtedly true that citizens or subjects of one country who go to a foreign country and enter into contracts with its citizens are presumed to make their engagements in accordance with and subject to the laws of the country where the obligations of the contract are to be fulfilled, and ordinarily can have recourse to their own government for redress of grievances only in case of a denial of justice. But as was forcibly stated by Mr. Cass, Secretary of State of the United States:

> The case is widely different when the foreign government becomes itself a party to important contracts, and then not only fails to fulfill them but capriciously annuls them, to the great loss of those who have invested their time, and labor, and capital from a reliance upon its own good faith and justice.[2]

It is just such a " widely different case " that is presented here. It is just such a case that is within the terms of Article I of the protocol, defining the jurisdiction of this Commission. And in my judgment the Commission can not refuse to take cognizance of this claim without disregarding its solemn oath —

> carefully to examine and impartially decide according to justice and the provisions of said convention all claims submitted to it in conformity with its terms.

Prima facie, the memorial presents the case of a wrongful annulment, by the arbitrary act of the Venezuelan Government, of a contract to which it was a party, injuriously affecting the rights of the other party thereto, who was a citizen of the United States. Manifestly, the first part of article 12 of the contract relates solely to questions growing out of the agreement itself, and can not be construed to apply to a claim resulting from the capricious annulment of the agreement by one of the parties. Such a claim does not rest upon any doubts or controversies arising out of the contract, but is based upon the fact that the claimants have been deprived of valuable rights, moneys, property, and property rights by the wrongful act of the Government of Venezuela, which they were powerless to prevent and for which they claim compensation. The " doubts and controversies " referred to in article 12 obviously relate to questions affecting the interpretation of the contract, to questions whether it was being or had been complied with, and the like. As to such matters the parties, by that article, mutually agreed to have recourse to the local tribunals. But when the Government, on whatever grounds of policy, saw fit to abrogate

[1] Moore's Arbitrations, p. 1865.
[2] Wharton, International Law Dig., sec. 230, Vol. II, p. 615.

the contract itself, and then to appropriate or to destroy the property or the property rights of the claimants, it must be held to have done so subject to the obligation to make full and adequate reparation and in full recognition of the right of the claimants, as citizens of the United States, to seek the intervention of their Government for their protection.

The term " property " embraces every species of valuable right and interest, including real and personal property, easements, franchises, and hereditaments.

Property is again divided into corporeal and incorporeal. The former comprehends such property as is perceptible to the senses, as lands, houses, goods, merchandise, and the like; the latter consists in legal rights, as choses in action, easements, and the like. (Bouvier's Law Dict., Rawle's ed., Vol. II, p. 781.)

The law of Venezuela recognizes that property rights may rest in contracts. Article 691 of the civil code provides:

La propiedad y demás derechos se adquieren y transmiten por sucesión, por donación y por efecto de los contratos.

The taking away or destruction of rights acquired, transmitted, and defined by a contract is as much a wrong, entitling the sufferer to redress, as the taking away or destruction of tangible property; and such an act committed by a government against an alien resident gives, by established rules of international law, the government to which the alien owes allegiance and which in return owes him protection, the right to demand and to receive just compensation. Such an act constitutes the basis of a " claim " clearly within the meaning and intent of the convention constituting this Commission.

In addition to the foregoing it may be said the presence of article 12 in the Rudloff contract is obviously due to the constitutional and legislative provisions requiring it. The protocol, which is the fundamental law of this tribunal, however, provides that:

The Commissioners, or, in case of their disagreement, the umpire, shall decide all claims upon a basis of absolute equity, without regard to objections of a technical nature or the provisions of local legislation.

I am of the opinion that this claim is within the jurisdiction of this Commission, and that its careful examination and impartial decision constitute a solemn duty which the Commission can not with propriety either evade or ignore.

PAÚL, *Commissioner* (claim referred to umpire on preliminary question of jurisdiction):

The honorable agent for the United States presented to this Commission a memorial signed by Sofia Ida Wiskow de Rudloff and Frederick W. Rudloff, citizens of the United States, and heirs of Henry Frederick Rudloff, deceased, in which memorial said heirs claim from the Republic of Venezuela the payment of the sum of 3,698,801 bolivars, with interest, for the loss of capital and damages caused by the abrogation of certain contract made between said Henry Frederick Rudloff and the minister of public works and the mayor of the Federal district, published in the Official Gazette, No. 5717, of February 8, 1893, which contract had for its object the construction of a new market building in the San Jacinto square, this city.

The honorable agent for Venezuela, in his reply to the above-mentioned memorial, presented to this Commission, as a previous and special question to be decided, the exception against jurisdiction, based on the following reasons:

That on May 8, 1901, the same claimants, represented by Dr. Ascanio Negretti, sued the Venezuelan Government before the Federal court for the

payment of the same amount and on the same basis that they now present to this Commission;

That the claimants having chosen the jurisdiction of the Federal court and submitted themselves to its decision, it is evident that they also accepted the dominion of the local legislation, substantive as well as adjective, in connection with the action brought by them against the Government of Venezuela, with the special circumstance that, by article 12 of the contract presented as evidence by the claimant, the contracting party agreed that —

all doubts and disputes arising by reason of said contract should be decided by the tribunals of the Republic, and said disputes could never give reason for international reclamations.

That the hall of the first instance of the Federal court having taken cognizance of and decided the said action, and both parties having appealed from its decision, the same Federal court in its hall of the second instance has this matter under its judicial notice at the present time; and Venezuela, that is to say, the defendant party, not having consented to the withdrawal of the suit from the jurisdiction of that high tribunal in order to have it submitted to this Commission, the latter consequently lacks jurisdiction; and, finally, that the case of denial of justice could not be alleged, since, not only has the court of the second instance not yet given a judgment that could cause definite execution in the case, but the decision rendered by the first instance of the Federal court was favorable to the claimants.

The question of jurisdiction in this case evidently is a matter of interpretation of the terms of the first article of the protocol dated February 17, 1903, signed at Washington by the Secretary of State of the United States of America and the plenipotentiary of Venezuela, that had for its object to submit to arbitration all the claims not settled, owned by citizens of the United States against the Republic of Venezuela.

The exact terms of said article are as follows:

All claims owned by citizens of the United States of America against the Republic of Venezuela which have not been settled by diplomatic agreement or by arbitration between the two Governments, and which shall have been presented to the Commission hereinafter named, by the Department of State or its legation at Caracas, shall be examined and decided by a mixed commission which shall sit at Caracas, etc.

The general terms in which this article defines the jurisdiction of this tribunal are apt to be interpreted in such a way that the scope of the faculty intended to be given to the Commission comprised all claims owned by citizens of the United States against the Republic of Venezuela that had been the object of diplomatic correspondence between the two Governments without having reached a final settlement, or that were unknown to both Governments; but this amplitude of jurisdictional scope does not in any way interfere with the principles of common law and sound logic, which naturally exclude, because of nature and peculiar circumstances, certain questions or pretensions of those parties that consider themselves entitled to claim from the Republic of Venezuela from being presented, examined, or decided by this Commission. For instance, the above-mentioned article does categorically state that those questions or claims of citizens of the United States against the Republic of Venezuela that had already been submitted to the ordinary tribunals of the country and had been the object of definite executory judgment, and against which there has not been invoked as a basis for a new and different claim a denial of justice or evident injustice were excluded from the jurisdiction of this Commission, and notwithstanding that these claims could not be considered as settled by *diplomatic agreement or by arbitration between both Governments*, it is an indisputable fact that

such questions or pretensions do not constitute a claim susceptible of submission to the examination and decision of this Commission.

In the meaning of the word " claim " it is indispensable to admit as a consubstantial element the idea of controversy between the Government of Venezuela and the claimant. That controversy, as in the present case, arises from a contract, and has been submitted for its definite decision to the jurisdiction of a tribunal of the Republic, which, according to the laws of the country and by the special articles of the same contract, has full jurisdiction to decide whether or not there exist responsibilities and obligations in favor of either party, and the stage of the proceedings of the action in that case determine that it is not a claim of a Government against another Government to obtain satisfaction for a damage caused to the interests of one of its citizens, but it enters upon that condition of every question which is the object of a civil action in which concur all the elements and means accorded by the laws for the dilucidation and protection of the rights of both parties.

The Washington protocol could not have for its object the withdrawal from the decision of the tribunals of the Republic the judicial disputes that had been already submitted to them when it is natural to suppose that it had no other object than to facilitate, by means of the Mixed Commission, the definitive decision of those claims that had been already object of diplomatic dissension between the two Governments and about which a settlement had not been reached by agreement or arbitration. The act of making nugatory the laws of the Republic which are a part of its constitutional statute in regard to contracts and in regard to the jurisdiction of its tribunals, thus opposing the terms of the express contractual conditions that oblige the parties to submit all questions arising from said contract to the courts of the country without same ever becoming a cause for international claims, would have been a transgression on the legitimate powers with which the plenipotentiary of Venezuela was invested, which powers could never have made ineffectual the constitutional precepts established in the fundamental charter of 1901 that was in force at that date of the signing of the protocol. It is not then possible to admit an interpretation of the terms of said protocol that is not in perfect accordance with the fundamental basis of the national sovereignty exercised through its tribunals of justice, and in accordance with the universal principles that establish as supreme law to the parties in contracts and obligations, the judicial ties established by themselves in the exercise of their free will, and as a law to the contract.

It was in the exercise of this liberty, it was in the observance of the laws of the Republic that were known to Sofia I. W. de Rudloff and Frederic Henry Rudloff which laws they were obliged to comply with, as well as to the very special clause 12 of the said contract, on which they found their claim; and it was also in view thereof, that the Department of State of the United States of America, which under its constant rule of nonintervention in disputes arising form contracts between its citizens and foreign countries until after having availed themselves of all the remedies which the laws of such country afforded for the protection of their rights, instructed the claimants to make use of their right before the tribunals of Venezuela, and in accordance with those instructions said claimants presented to the Federal court their demand for damages against the Government of Venezuela. While this action exists, and while all the remedies afforded by our laws in their various instances are not exhausted, and while there is not used as a basis of a claim the fact of denial of justice or evident injustice in the judicial proceedings and in the final judgment of the Federal court, there does not exist any claim with reference to this matter that could be a subject for examination by this Commission.

It is true that the parties have the right, by article 216 of the code of civil proceedings, to desist from any action brought before a tribunal. The same article establishes that such desistance can not take place without the consent of the other party; and article 492 of the same code, quoted by the honorable agent for the United States in his reply, stipulates that when at any stage of the case the parties manifest that they have submitted themselves to the decision of umpires, the course of the action be suspended and the pleadings and proceedings be immediately delivered to the umpires, it reveals by its own terms that such a statement should be made explicit, and by both parties, before the tribunal where the action was pending, and by no means could such a manifestation be deduced from the more or less exact interpretation of the terms of the protocol. When the protocol was signed at Washington the said action was pending before the Federal court, and had it been the intention of the Government of Venezuela, notwithstanding the conditions stated in the constitution of the Republic, and the clause of the contract which is the cause of the demand, and the natural jurisdiction of a high court of the Republic in the action brought by the same plaintiffs, such an exception would have to have been the object of an especial statement in the terms of the protocol, as happened in the Venezuelan-Mexican protocol signed by the same plenipotentiary of Venezuelan, Mr. Bowen, on the 26th day of the same month of February.

Said Venezuelan-Mexican protocol expressly states:

> It is understood that if before the 1st of June, 1903, the claims of Mexico above mentioned are settled by agreement between the claimants and the Government of Venezuela, or decided in favor of said claimants by the court of Venezuela, said claims shall not be submitted to the arbitration agreed upon in the preceding articles.[1]

This exception was caused by the circumstances that the representatives of the high contracting parties knew of the existence of the demand entered in action by the firm of Martinez del Río & Bros. before the high Federal court, and both representatives thought it indispensable to specify a date and a condition that would contribute to fixing the jurisdiction of the Mixed Commission in the special case of the above-mentioned claim, it being in limine litis submitted for its decision to a court that fully exercised that jurisdiction, and which the parties could not avoid without a special, express, and definite declaration.

For the above-stated reasons, it is my opinion that while there exists a demand in action brought by the same claimant before the Federal court for the same object mentioned in the memorial presented to this Commission, which judgment is still pending by reason of an appeal made by both parties to the hall of the second instance of the same court from the decision pronounced by the hall of the first instance, there does not properly exist a claim against the Government of Venezuela which could be submitted to the jurisdiction of this Commission by the Rudloff heirs, and consequently this Commission has absolutely no jurisdiction and ought to reject the pretension of the applicants.

INTERLOCUTORY DECISION OF THE UMPIRE ON JURISDICTION

BARGE, *Umpire.*

A difference of opinion having arisen between the Commissioners of the United States of North America and of the United States of Venezuela about

[1] See the Mexican - Venezuelan Commission (Article VI of the Protocol of February 26, 1903) in Volume X of these *Reports.*

the question of jurisdiction in this case, this question was duly referred to the umpire for an interlocutory decision.

The umpire having fully taken into consideration the protocol, and also the opinions and arguments of the Commissioners, as well as the documents, evidence, and arguments, and likewise all the communications made by the two parties, and having impartially and carefully examined the same, has arrived at the following decision:

Whereas the protocol, whereupon solely and wholly rests the jurisdiction of this Commission, says that all claims owned by citizens of the United States of North America against the Republic of Venezuela which have not been settled by diplomatic agreement or by arbitration between the two Governments, and which shall have been presented to this Commission by the Department of State of the United States or its legation at Caracas shall be examined and decided by this Commission; and

Whereas claimants in the first place are citizens of the United States, and, secondly, own a claim against the Republic of Venezuela, which claim has not been settled by diplomatic agreement or by arbitration between the two Governments, whilst in the third place it has been duly presented to this Commission by the Department of State of the United States through its agent.

This claim certainly prima facie shows itself as standing under the jurisdiction of this Commission.

Now, whereas the Government of Venezuela, by its honorable agent, opposes that in article 12 of the contract entered into by the predecessor in interest of the claimants, the parties stipulated that the doubts and controversies which might arise by reason of it should be decided by the tribunals of the Republic, it has to be considered that this stipulation by itself does not withdraw the claims based on such a contract from the jurisdiction of this Commission, because it does not deprive them of any of the essential qualities that constitute the character which gives the right to appeal to this Commission; but that in such cases it has to be investigated as to every claim, whether the fact of not fulfilling this condition and of claiming in another way, without first going to the tribunals of the Republic, does not infect the claim with a *vitium proprium*, in consequence of which the absolute equity (which, according to the same protocol, has to be the only basis of the decisions of this Commission) prohibits this Commission from giving the benefit of its jurisdiction (for as such it is regarded by the claimants) to a claim based on a contract by which this benefit was renounced and thus absolving claimants from their obligations, whilst the enforcing of the obligations of the other party based on that same contract is precisely the aim of their claim; and

Whereas the evidence of such a *vitium proprium* can only be the result of an examination of the claim in its details, the jurisdiction of the Commission as to the examination of the case is not impeached by the above-mentioned clause, leaving open for the decision of the Commission the question whether this clause, under circumstances sufficiently evidenced after investigation, forbids the Commission in absolute equity to give claimants the benefit of this jurisdiction as to the decision;

Wherefore this argument does not seem conclusive against the jurisdiction of this Commission.

Whereas, furthermore, the Government of Venezuela, by its honorable agent, opposes that this same claim, being already the object of a suit before the Federal court, it can not, in accordance with article 216 of the code of civil procedure, be withdrawn from the jurisdiction of that court without the consent of the opposite party, which consent is here failing, it has to be considered that;

Whereas, even admitting the facts as stated by the Government of Venezuela, this argument does not seem to go against the provisions of the protocol, which states that the Commission shall decide all claims without regard to the provisions of local legislation and which at all events does not except claims in litigation, when it speaks about " All claims owned by citizens, etc.; " whilst it should be borne in mind that this protocol is the fundamental law for this Commission and the only source of its jurisdiction; and in which way soever the provisions of the protocol might be discussed in view of the principles of right — international as well as right in general — the adage should not be forgotten, " *dura lex sed lex*," and it must be remembered that this protocol under what circumstances soever originated, is an agreement between two parties, and that the Commission, whose whole jurisdiction is only founded on this agreement, has certainly above all to apply the great rule, " *pacta servanda*," without which international as well as civil law would be a mere mockery; whilst, on the other hand, it is not to be forgotten that this Commission, in the practice of its judicial powers, may find that the *absolute equity*, which according to that same protocol has to be the *only* basis for its decision, forces it to take into consideration, whether conflict with the provisions of local legislation as well as with previous agreements between parties, may infect the claim with that *vitium proprium* in consequence of which that same absolute equity prevents the Commission from making use of the jurisdiction as to the decision:

Whereas, therefore, the arguments opposed do not seem to impeach the prima facie arguments that speak for the jurisdiction of the Commission under the protocol, this jurisdiction has to be maintained and the claim has to be submitted to it.

(DECISION OF CLAIM ON ITS MERITS)

BAINBRIDGE, *Commissioner:*

On the 1st day of February, 1893, a contract was entered into by and between the minister of public works and the governor of the Federal district, sufficiently authorized thereto by the chief of the Executive power, parties of the first part; and Henry F. Rudloff, civil engineer, a citizen of the United States of America, residing in Caracas, party of the second part, whereby:

Rudloff agreed to construct for his own account or through a company, either national or foreign, a building of iron and masonry, principally for a public market on the place where then stood the market of " San Jacinto," including the park " El Venezolano," and the grounds and buildings annexed to said market. He was to construct the building for the market according to the plans presented by him to the minister of public works; he was to commence the work of construction eleven days after the signing of the contract, and to finish the work within two years; he was granted the buildings and grounds above referred to; he was to take exclusive charge of the management and collecting of the proceeds of the market, and the policing of the same from the day on which he commenced the work; the duration of the contract was to be eighteen years.

Rudloff agreed to pay to the municipality of Caracas the following sums: From the first to the fourth year, 75,000 bolivars per year, or for the four years 300,000 bolivars; and from the fifth to the eighteenth year 120,000 bolivars per year, or for the period of fourteen years the sum of 1,680,000 bolivars; a total for the eighteen years of 1,980,000 bolivars. Rudloff agreed to pay these sums to the municipality on daily payments of 205 bolivars and 50 centimos; he agreed to offer yearly at public auction the localities of the market, and the buildings with all its fixtures and utensils was to belong to the municipality

without the necessity of any legal transfer, upon the expiration of the eighteen years; free entry through the custom-house of La Guaira was granted for all the materials, fixtures, and tools necessary for the construction of the market, and free use of water for the construction and for the use of the building. The enterprise was not to be subject to any kind of taxes, ordinary or extraordinary, by whatever terms they may be denominated, during the term of the contract, and neither the National Government nor the municipality was to construct or allow to be constructed any other public market in Caracas. Article 12 of the contract provided that the doubts or controversies that may arise on account of the contract shall be decided by the competent tribunals of the Republic, in conformity with the laws, and shall not give reason for any international reclamation.

The foregoing contract was published in the Official Gazette, No. 5717, dated February 8, 1893.

On February 11, 1893, pursuant to the contract, the market to " San Jacinto " and the grounds and buildings appertaining thereto were ceded and delivered to Rudloff by public functionaries thereunto authorized, and the work of construction of the new building was begun.

The evidence shows that on April 30, 1893, the governor of the Federal District entered Rudloff's office, took possession of his books, and made an examination of them, contrary to the provisions of the constitution and laws of Venezuela. Against this unlawful act Rudloff protested to the minister of the interior on the following day.

The fifth article of the contract provided that Rudloff should take exclusive charge of the market and the policing of the same from the day on which he commenced work. Trouble arose with reference to this provision of the contract almost immediately, Rudloff contending that it meant simply that he was to see that the market was kept clean and in a sanitary condition; the municipality, that Rudloff was to pay the salary and rations of the police guards detailed in the market. This controversy was finally referred to the Executive, who decided that Rudloff must pay, which, under protest, he did; whereupon the force of policemen at the market was largely increased.

On July 15 the governor of the Federal District personally ordered the workmen engaged upon the building to suspend the work, threatening with arrest anyone who dared to continue. Through his representative, Mr. Rudloff immediately protested to the minister of public works against the governor's action.

On September 9 the governor informed Mr. Rudloff that the municipal council in its last meeting had declared void the contract for the market and that he would take possession the next day, as in fact he did take possession by armed force on September 10, 1893. The work which had been done by Rudloff was subsequently demolished.

On September 26, 1893, Rudloff addressed himself to the Government of the United States through the Department of State and presented his claim against the Government of Venezuela. In its reply, dated December 22, 1893, through the United States minister at Caracas, the Department of State was of the opinion that the action of the Venezuelan authorities was arbitrary and unjust; but the claimant was advised that before he could invoke the official intervention of the United States it should he made to appear that he had sought redress in the courts of Venezuela and that justice had been there denied him.

On May 8, 1901, the claimants, as successors in interest to Henry Rudloff, began suit against the Government of Venezuela in the chamber of first instance of the Federal court. A decision was rendered on the 14th of February, 1903, favorable to the claimants so far as the existence and validity of the contract

and the liability of the Government were concerned; but holding that the amount to be adjudged should be determined by the just estimate of experts, pursuant to the provision of the Civil Code. An appeal was taken from this decision by the parties litigant on the 16th of February, 1903.

In consequence of the protocol signed at Washington on February 17, 1903, for the submission to arbitration of all unsettled claims owned by citizens of the United States against the Republic of Venezuela, the claimants have presented their claim to this Commission.

Before proceeding to answer the claim upon its merits here, the learned counsel for Venezuela entered a plea to the jurisdiction of the Commission upon the following grounds:

First. That the action was still pending in the tribunals of the Republic.

Second. That article 12 of the contract stipulates that the doubts and controversies which might arise by reason of it should be decided by the local courts, and that the contract could never give rise to an international reclamation.

A difference of opinion existing between the Commissioners, the question of jurisdiction was duly submitted to the umpire, who, in an interlocutory decision, sustained the jurisdiction of the Commission to examine the claim.

Answering to the merits, the honorable agent for Venezuela denies the claim in all its parts for the following reasons:

First. Because the nation was not a party to the contract entered into by the predecessor in interest of the claimants.

Second. Because the acts which they say were committed in violation of such contract were done by municipal authorities.

Third. Because in federal republics munipalities are autonomous entities and juridicial personalities, capable of contracting rights and obligations, and for whose acts in the matter of contracts the State can not be responsible.

Fourth. Because the damages claimed are in the greater part remote, unascertained, and indirect damages for the recovery of which the civil law gives no right.

Fifth. Because the contractor violated the contract made with the municipality in the first place, disposing during the time when he was in charge of the market of the whole of its rents.

The objection that the National Government was not a party to the contract can hardly be sustained in view of the fact that the contract itself shows that it was entered into by the minister of public works and the governor of the Federal District sufficiently authorized by the chief of the Executive power. It is indeed contended that the extent of the national interest consisted in the cession of certain Government lands to the contractor, Rudloff. But the general tenor of the agreement indicates the active participation of the executive authority therein, granting the right of free entry of all materials and tools through the Federal custom-house of La Guaira and the guaranty that neither the National Government nor the municipality would allow any other market to be constructed in Caracas.

It would seem that a sufficient answer to the first as well as to the second and third objections raised by the Government of Venezuela lies in the fact that the Federal District was not at the time of this contract an autonomous entity, but rather a political subdivision of the State directly subject to the executive authority. The decision of the chamber of first instance of the Federal court is, of course, not conclusive upon the Commission, but upon this question of fact it may be cited as authoritative. The court says:

With reference to the authority which the Chief of the Executive power of the nation had to enter by himself into the contract with Rudloff, it is unquestionable

that it was sufficient through the ample powers which it exercised by virtue of the triumph of the revolution of 1892, of which Gen. Joaquin Crespo was the chief, so that in signing the contract by the minister of public works and the governor of the Federal District, these functionaries were the simple agents of the Chief of the Republic who was at the same time, according to the Federal system, the superior chief of the Federal District; [and further] that at the date of the signing of the contract the Federal District had no autonomy, the functions thereof being filled by the Chief of the Republic, who, by appointing discretionally the ministers, the governor of the Federal district, and the members of the executive council, made all these functionaries dependent on his authority, and therefore without any power to control his acts.

In view of the foregoing the responsibility of the National Government for the acts of the governor of the Federal District and of the municipal council is clear. It is equally clear that those acts were wrongful, arbitrary, and unjust. If any consideration of public policy required the abrogation of the Rudloff concession, the proper judicial proceedings should have been taken to that end, and in conformity with law. The seizure of Rudloff's books and correspondence the imprisonment of his manager, the interference with his workmen, and other hostile acts, were wholly unjustifiable and lawless. Moreover, it is not apparent by what right the National Government, acting through the governor of the Federal District, could annul the contract with Mr. Rudloff. The jurisprudence of civilized states and the principles of natural law do not allow one party to a contract to pass judgment upon the other, but guarantee to both the hearing and decision of a disinterested and impartial tribunal. These encroachments upon the legal rights of their predecessor in interest entitle the claimants herein to a just indemnification.

The claim is summarized as follows:

	Bolivars
Estimated income from rentals for eighteen years	8,168,500
Amount spent in construction and expense	78,232
Amount paid for policemen's wages	8,645
Damages to credit	600,000
	8,855,377
Less cost of building, interest, maintenance, and payment of municipal rents, as per contract	5,156,576
Total damages	3,698,801

The amount claimed is the sum of 3,698,801 bolivars, equivalent to the sum of $ 711,307.90 in United States gold.

The learned counsel for Venezuela contends, not without reason, that the damages thus claimed are in their greater parts remote, unascertained, and indirect.

The contract provided that Rudloff should have during the period of eighteen years therein designated the exclusive management and the collection of the proceeds of the market, and that he was to offer yearly at public auction the localities. It contained no agreement for the payment to him by the Government or the municipality of any sum whatever. The adventure was on his part wholly speculative, and his income therefrom was dependent upon the sale of localities, the payment of the rentals by the lessees, the success or failure of his management, and other indeterminate contingencies. Under these circumstances any estimate of the pecuniary advantages derivable from the contract is necessarily conjectural. Damages to be recoverable must be shown with a reasonable degree of certainty, and can not be recovered for an uncertain loss. All that the claimants pretend to prove here, all indeed that from the

nature of the case it is possible for them to prove, is that their predecessor in interest might have obtained the income claimed if the Government had not broken the contract. They are necessarily unable to prove with reasonable certainty that he could or would have obtained it. The case presented here is not that of the loss of the prospective profits of an established business, nor is it that of the loss of the ascertained profits derivable from a contract unperformed. It is simply that of the loss of the expected profits of a business venture wrongfully prevented of fulfillment by the defendant Government, and for these expected profits the claimants can not recover, because they are wholly unable to show that a profit would have been made. It is true the general rule of damages for the deprivation of real property is the value of its use — the rental value. But it has been held by respectable authority that when the defendant destroyed a building in course of construction by the plaintiff, the prospective profits which the plaintiff might have made by renting the building are not recoverable. (Bingham *v.* Walla Walla, 3 Wash., 68.) The damages claimed in this item are speculative and contingent, and can not form the basis of an award.[1]

The claim for " loss of credit " is not supported by sufficient evidence, and indeed the damages alleged in that respect, as involving the intervention of the will of the other parties, are too remote and consequential.

But it by no means follows from the foregoing considerations that these claimants are remediless. The evidence is perfectly clear that Rudloff possessed, in virtue of his contract, valuable property rights; that he entered upon the performance of the contract; acted in all matters relating thereto in conformity with its terms, invested upon the faith of it a considerable amount of capital and was apparently ready and willing to comply fully with its obligations. The evidence is also clear that he was denied the protection of the law, was ruthlessly interfered with and harassed, and finally, without a hearing, or judicial procedure of any sort, was by force of arms deprived of his property and of the rights vested in him under the contract. These acts of hostility and oppression were committed by the constituted authorities of the Government and evidently in the execution of its plans. In the commission of this wrong against an alien resident, the Government of Venezuela must be held to have assumed the responsibility of making just reparation; and for the wrong thus committed against one of its citizens the Government of the United States, on behalf of the claimants, is entitled to an award justly commensurate with the injuries sustained.

GRISANTI, *Commissioner* (for the commission):

On the 1st of February, 1893, the minister of public works and the governor of the Federal District entered into a contract, sufficiently authorized therefore by the Chief of the Executive Power on one part, and on the other with Henry F. Rudloff, civil engineer, citizen of the United States of America, in virtue of which contract Rudloff undertook —

"to construct on his own account or through a company, either national or foreign, a building of masonry and iron, principally for a public market, on the same place which is at present occupied by the market called " San Jacinto," including the square called " El Venezolano," and the grounds and buildings adjoining the actual market, the properties of the municipality (or the Government)." (Art. I.)

[1] See discussion as to speculative damages in Oliva Case (Italian - Venezuelan Commission) and Sanchez Case (Spanish - Venezuelan Commission), Volume X of these *Reports*.

The building ought to have been constructed according to the three plans which the contractor had already presented to the minister of public works. (Art. 2.)

Rudloff undertook to commence the construction of the building eleven days after signing the contract, and to finish the work within the following two years of the same date, allowing him an extension of time of six months. (Art. 3.)

The National Government and the city of Caracas granted to the contractor the buildings and the grounds mentioned in article 1 for the time fixed for the duration of the contract. (Art. 4.)

The contractor should take exclusive charge of the management and collection of the proceeds of the market and management of the police of the same from the day of commencing the work. (Art. 5.)

The duration of the contract was fixed for eighteen years, counting ten days after being signed. (Art. 6.)

The contractor bound himself to pay the municipality of Caracas 1,980,000 bolivars during the eighteen years mentioned, as follows: From the first to the fourth year, inclusive, 75,000 bolivars par annum, and from the fifth to the eighteenth year 1,680,000 bolivars, at the rate of 5,000 bolivars fortnightly. (Art. 7.)

It is evident that on February 11, 1893, Rudloff was placed in possession of the market of San Jacinto and other premises mentioned in Art. 1, and that on that same day he commenced the construction works.

On the 11th of the following May the governor of the Federal District demanded of Rudloff payment for the police which rendered services at the market, adducing therefore the referred-to contract, said payment having been satisfied by Rudloff, compelled to it by the mentioned authority, and having previously protested against the same.

In September, 1893, the governor of the Federal District submitted the mentioned contract entered into with Rudloff, to the consideration of the municipal council, and said corporation in an accord, issued on the 8th of the month and year just mentioned, resolved:

> First. That the aforementioned contract be declared void; second, that the governor be authorized to take possession forthwith of the market and organize it in conformity with the provisions of the ordinance of February 20, 1884, in force with regard to markets, and with the others agreeing therewith; third, to accord for the demolishment of the works carried out in the Plaza de El Venezolano.

This resolution was complied with in all its parts; that is to say, the contract was annulled and the construction of works done by Rudloff was demolished.

The non-jurisdiction of the Commission was alleged by the honorable agent for Venezuela and held by the honorable Commissioner for Venezuela, Doctor Paúl, and the honorable umpire, in his decision of October 24, decided in favor of the jurisdiction of the Commission, and consequently the case was submitted to it.

In view of the aforementioned statement, perfectly in accordance with convincing documents and proved facts, the Venezuelan Commissioner proceeds to draw his conclusions.

The market is a work belonging to the municipality, but the national Executive appears as contracting it, represented by the minister of public works, together with the governor of the Federal District.

The municipal council of the Federal District had no right to annul of its own free will the referred-to contract in the resolution of November 13, 1895; because, as the municipality was one of the contracting parties, it could not at

the same time judge as to the validity or nullity of the same. To obtain said nullity the municipality should apply for a lawsuit to the competent tribunals.

The contract was not submitted to the National Congress in its regular sessions of 1894, for its approval or disapproval, as required by the constitution then in force, and required also by the one actually in force; but it is not just that said omission should be ascribed to the contractor, Rudloff, but to the national Executive, to whom the compliance of said formality corresponded.

It is evident that the Government of Venezuela owes the claimants an indemnification for having suddenly put a stop to a contract which their legator, Henry F. Rudloff, was carrying out; but the undersigned thinks that the amount they demand, of 3,698,801 bolivars, is exceedingly exaggerated, and he agrees to grant them an indemnification of $75,745 United States gold.

TURNBULL, MANOA COMPANY (LIMITED), AND ORINOCO COMPANY (LIMITED) CASES

(By the Umpire:)

A party to a contract containing a covenant obligating the other party to perform certain obligations, has no right to declare the contract null and void, and must apply to the courts to have it set aside.

In order that a party to a contract containing the clause that " any questions or controversies which may arise out of this contract shall be decided in conformity with the laws of the Republic and by the competent tribunals of the Republic" may make a claim before an international tribunal for damages for its breach, he must first go before the local courts and obtain a judgment that this breach of the contract took place.

A contract containing the clause " any questions or controversies which may arise out of this contract shall be decided in conformity with the laws of the Republic and by the competent tribunals of the Republic," can not be declared void by one of the parties thereto for the nonfulfillment of any of the covenants, and it remains legally existing until so declared by the local tribunals, and another contract made with another party to take effect in case the first contract should become void has no value unless the first contract has been declared by the local tribunals to be inoperative, and no damages will lie for the supposed breach of the second contract.

A claim based upon the payment to the government of a sum of money for rights which the government could not concede, and which rights the claimant was prevented from enjoying by said government, will be allowed for the sum so paid with legal interest from the date of payment.

(These claims were filed separately but grouped in the decision.)

BAINBRIDGE, *Commissioner* (claim referred to umpire):

On the 22nd day of September, 1883, a contract was celebrated in the city of Caracas, Venezuela, in the words and figures following, to wit:

[Translation]

The minister of fomento of the United States of Venezuela, duly authorized by the President of the Republic, of the one part, and Cyrenius C. Fitzgerald, resident of the Federal territory Yuruari, of the other part, have concluded the following contract:

ARTICLE I. The Government of the Republic concedes to Fitzgerald, his associates, assigns, and successors for the term of ninety-nine years, reckoning from the date of this contract, the exclusive right to develop the resources of those territories, being national property, which are hereinafter described.

(1) The island of Pedernales, situated to the south of the gulf of Paria, and formed by the gulf and the Pedernales and Quinina streams.

(2) The territory from the mouth of the Araguao, the shore of the Atlantic Ocean, the waters above the Greater Araguao to where it is joined by the Araguaito stream; from this point, following the Araguaito to the Orinoco, and thence the waters of the upper Orinoco, surrounding the island of Tortola, which will form part of the territory conceded, to the junction of the José stream with the Piacoa; from this point following the waters of the José stream to its source; thence in a straight line to the summit of the Imataca Range; from this summit following the sinuosities and more elevated summits of the ridge of Imataca to the limit of British Guayana; from this limit and along it toward the north to the shore of the Atlantic Ocean, to the mouth of the Araguao, including the island of this name, and the others intermediate or situated in the delta of the Orinoco, and in contiguity with the shore of the said ocean. Moreover, and for an equal term, the exclusive right of establishing a colony for the purpose of developing the resources already known to exist, and those not yet developed of the same region, including asphalt and coal; for the purpose of establishing and cultivating on as high a scale as possible agriculture, breeding of cattle, and all other industries and manufactures which may be considered suitable, setting up for the purpose machinery for working the raw material, exploiting and developing to the utmost the resources of the colony.

ART. II. The Government of the Republic grant to the contractor, his associates, assigns, and successors, for the term expressed in the preceding article, the right of introduction of houses of iron or wood, with all their accessories, and of tools and of other utensils, chemical ingredients, and productions which the necessities of the colony may require; the use of machinery, the cultivation of industries, and the organization and development of those undertakings which may be formed, either by individuals or by companies which are accessory to or depending directly on the contractor or colonization company; the exportation of all the products, natural and industrial, of the colony; free navigation, exempt from all national or local taxes, of rivers, streams, lakes, and lagoons comprised in the concession, or which are naturally connected with it; moreover, the right of navigating the Orinoco, its tributaries and streams, in sailing vessels or steamships, for the transportation of seeds to the colony, for the purpose of agriculture, and cattle and other animals, for the purpose of food and of development of breeding; and, lastly, free traffic of the Orinoco, its streams and tributaries, for the vessels of the colony entering it and proceeding from abroad, and for those vessels which, either in ballast or laden, may cruise from one point of the colony to another.

ART. III. The Government of the Republic will establish two ports of entry at such points of the Colony as may be judged suitable, in conformity with the Treasury Code.

The vessels which touch at these ports, carrying merchandise for importation, and which, according to this contract and the laws of the Republic, is exempt from duties, can convey such merchandise to those points of the colony to which it is destined and load and unload according to the formalities of the law.

ART. IV. A title in conformity with the law shall be granted to the contractor for every mine which may be discovered in the colony.

ART. V. Cyrenius C. Fitzgerald, his associates, assigns, or successors are bound:

(1) To commence the works of colonization within six months, counting from the date when this contract is approved by the Federal council in conformity with the law.

(2) To respect all private properties comprehended within the boundaries of the concession.

(3) To place no obstacle of any nature on the navigation of the rivers, streams, lakes, and lagoons, which shall be free to all.

(4) To pay 50,000 bolivars in coin for every 46,000 kilograms of sarrapia and cauche which may be gathered or exported from the colony.

(5) To establish a system of immigration which shall be increased in proportion to the growth of the industries.

(6) To promote the bringing within the law and civilization of the savage tribes which may wander within the territories conceded.

(7) To open out and establish such ways of communication as may be necessary.

(8) To arrange that the company of colonization shall formulate its statutes and establish its management in conformity with the law of Venezuela, and submit the same to the approbation of the Federal Executive, which shall promulgate them.

ART. VI. The other industries on which the law may impose transit duties shall pay those in the form duly prescribed.

ART. VII. The natural and industrial productions of the colony, distinct from those expressed in Article V, and which are burdened at the present time with other contracts, shall pay those duties which the most favored of those contracts may state.

ART. VIII. The Government of the Republic will organize the political, administrative and judicial system of the colony, also such armed body of police as the contractor or the company shall judge to be indispensable for the maintenance of the public order. The expense of the body of police to be borne by the contractor.

ART. IX. The Government of the Republic, for the term of twenty years, counting from the date of this contract, exempts the citizens of the colony from military service and from payment of imposts or taxes, local or national, on those industries which they may engage in.

ART. X. The Government of the Republic, if in its judgment it shall be necessary, shall grant to the contractor, his associates, assigns, or successors a further extension of six months for commencing the works of colonization.

ART. XI. Any questions or controversies which may arise out of this contract shall be decided in conformity with the laws of the Republic and by the competent tribunals of the Republic.

Executed in duplicate, of one tenor and to the same effect, in Caracas, September 22, 1883.

Señor Heriberto Gordón signs this as attorney of Señor Cyrenius C. Fitzgerald, according to the power of attorney, a certified copy of which is annexed to this document.

[SEAL] M. CARABAÑO
Minister of Fomento
Heriberto GORDÓN

The foregoing contract was approved by the Congress on May 23rd, 1884, and a copy thereof with the approbation was published in the Official Gazette, No. 3257, on May 29th, 1884, and it was afterwards published in and among the laws and decrees of Venezuela. (Recopilación, Vol. XI, p. 98.)

On the 19th of February, 1884, an extension of six months was granted to Fitzgerald to commence the work of colonization, the extension to count from March 22 of that year. (Official Gazette, No. 3182.)

On June 14, 1884, Cyrenius C. Fitzgerald granted and assigned said contract-concession to the Manoa Company (Limited), a corporation created, organized and existing under and by virtue of the laws of the State of New York.

On August 24, 1884, one J. M. Laralde, government secretary, in the absence of the citizen governor of the territory of Delta, certifies to the arrival at Pedernales on that date of the North American steamer *Wandell*, with Mr. Thomas A. Kelly, superintendent of the Manoa Company (Limited), C. E. Fitzgerald, engineer of the same company, and other employees thereof.

On September 21, 1884, Luis Charbone, national fiscal supervisor, temporarily in charge of the government of the Federal territory of Delta, certified that the

Manoa Company (Limited) had commenced the erection of a building and to colonize at the mouth of the river Arature on the 10th of that month, "in conformity with what is established in the contract celebrated between the General Government and Mr. C. C. Fitzgerald on the date of the 22nd of September 1883."

On the 14th of November, 1884, the following certificate was given:

FEDERAL TERRITORY OF THE DELTA,
OFFICE OF THE GOVERNMENT OF THE TERRITORY.

I, Manuel M. Gallegos, governor of the Federal territory of the Delta, on petition of Mr. Thomas A. Kelly, resident administrator of the Manoa Company (Limited), domiciled in Brooklyn, Phoenix Building, 16 Court street, United States of America, certify that on the 24th of August of the present year arrived at this port on the steamer *Wandell* the above-mentioned Mr. Thomas A. Kelly, Mr. C. E. Fitzgerald, engineer of said company, and various employees of the same, so complying with the stipulations of article 5 and of the prorogation authorized on the 19th of February of this year of the contract celebrated with the Federal executive by Mr. C. C. Fitzgerald, of whom the above-mentioned Manoa Company is the successor.

Pedernales, November 14, 1884, 21st of the law and 26th of the Federation.

Manuel M. GALLEGOS

On the 7th of October, 1884, the following resolution was issued from the ministry of fomento (Official Gazette, No. 3345):

Resolved, The Cabinet having considered the solicitude of Mr. Heriberto Gordón, attorney for the Manoa Company (Limited), in which he asks, whether there is any contract, anterior or posterior, which impairs or limits the rights which the said company has acquired as successor to the contract celebrated with Mr. C. C. Fitzgerald on the 22d of September 1883, the President of the Republic has seen fit to declare that the Manoa Company (Limited) has perfect right in accordance with the contract to exploit the products which are to be found within the limits of the lands comprised in this concession.

Communicate it and publish it.

For the National Executive: Jacinto LARA

In May, 1885, the Manoa Company (Limited) shipped by the brig *Hope* a consignment of about 338,068 kilograms of asphalt mining and refining machinery, material for houses and wharves, and a steam launch for work on piers, etc. Under date of May 23, 1885, the minister of fomento addressed a note to the minister of hacienda asking for order of exemption of duties on shipment per brig *Hope* under the terms of the Fitzgerald contract.

On March 4, 1885, the Manoa Company, by C. C. Fitzgerald, its president, notified the Venezuelan Government that the agitation of the boundary dispute between Great Britain and Venezuela seriously interfered with the plans of the company in the development of the concession. Fitzgerald stated that he had been notified by the agents of the British Government that the latter would not permit the development of the resources of or the establishment of industries in such part of the concession as was claimed by it, and would maintain a force for the purpose of hindering trespass thereon. In view of this Fitzgerald requested of the Venezuelan Government a clear statement of the guarantees to be expected in the future as to any interference with the company's rights because of such invasion, and that whatever the result of the negotiations between England and Venezuela, the time lost thereby by the company should not be counted against the company.

On the 1st day of January, 1886, Gen. Guzmán Blanco, envoy extraordinary and minister plenipotentiary of the United States of Venezuela to various courts of Europe, on the one part, and of the other George Turnbull, American

citizen, residing in New York, 115 Broadway, and then in London, entered into a contract at Nice; ad referendum, of which articles 1 to 11 were identical with the articles of corresponding numbers in the Fitzgerald contract, with change of names of concessionary. Article 12 of the Turnbull contract is as follows:

This contract shall enter into vigor in case of becoming void through failure of compliance within the term fixed for this purpose of the contract celebrated with Mr. Cyrenius C. Fitzgerald the 22nd of September, 1883, for the exploitation of the same territory.

On the 9th of September 1886, the following resolution was issued from the ministry of fomento (Official Gazette, No. 3852):

UNITED STATES OF VENEZUELA,
MINISTER OF FOMENTO, DIRECTION OF TERRITORIAL RICHES,

Caracas, September 9, 1886.

Twenty-third year of the law and twenty-eighth of the federation:

Resolved, Señor Heriberto Gordón, with power from C. C. Fitzgerald, celebrated on the 22d of September, 1883, with the National Government, a contract for the exploitation of the riches existing in lands of national property in the Great Delta, and the works ought to have been begun within six months from the aforesaid date. In spite of such time having elapsed without commencing the works the Government granted him an extension of time for the purpose; and inasmuch as said contractor has not fulfilled the obligations which he contracted, as stated in the report of the director of national riches, specifying in reference as to article 5 of the contract in question, the councilor in charge of the presidency of the Republic, having the affirmative vote of the Federal council, declares the insubsistency or annulment of the aforesaid contract.

Let it be communicated and published.

By the National Executive: G. PAZ SANDOVAL

On the 10th of September, 1886, the following resolution was issued from the ministry of fomento (Official Gazette, No. 3852):

UNITED STATES OF VENEZUELA,
MINISTRY OF FOMENTO, DIRECTION OF TERRITORIAL RICHES,

Caracas, September 10, 1886.

Twenty-third year of the law and twenty-eighth of the federation.

Resolved, By disposition of the citizen Federal councilor of the Republic and with the affirmative vote of the Federal council is approved the contract celebrated by the illustrious American, Gen. Guzmán Blanco, envoy extraordinary and minister plenipotentiary of Venezuela to various courts of Europe, with Mr. George Turnbull for the exploitation of the Delta of the Orinoco, of the following tenor:

Gen. Guzmán Blanco, envoy extraordinary and minister plenipotentiary of the United States of Venezuela to various courts of Europe of the one part, and of the other George Turnbull, American citizen, residing in New York, 115 Broadway, and at present in London, have settled and arranged to celebrate the following contract ad referendum:

(Here follow articles 1 to 11, inclusive, which are identical with the articles of corresponding numbers in the Fitzgerald concession, with change of names of concessionary.)

ART. 12. This contract shall go into effect in case of the becoming void through failure of compliance within the term fixed for this purpose of the contract celebrated

with Mr. Cyrenius C. Fitzgerald, the 22d day of September, 1883, for the exploitation of the same territory.

Done three of one tenor to a single effect in Nice the 1st of January, 1886.

GUZMÁN BLANCO

[L. S.] Geo. TURNBULL

Let it be communicated and published.

For the Federal Executive: G. PAZ SANDOVAL

The Guzmán Blanco-Turnbull contract was approved by act of Congress on the 28th of April, 1887 (Official Gazette, No. 4048).

On the 13th of March, 1888, the following resolution was issued from the ministry of fomento (Official Gazette, No. 4290:)

UNITED STATES OF VENEZUELA,
MINISTRY OF FOMENTO, DIRECTION OF TERRITORIAL RICHES,

Caracas, 13th of March, 1888.

Resolved, Señor George Turnbull having purchased 500 hectares of waste lands, situated on both banks of the Caño Corosimo, Manoa district of the Federal territory of Delta, and acquired the ownership, in conformity with the law, of the mine of iron denominated Imataca, situated in the said lands, the President of the Republic, with the vote of the Federal council declares, on the petition of the interested party, that the said mine and lands constitute a property apart from the concession made to said Turnbull according to the contract celebrated on the 1st of January, 1886, and consequently is not submitted to the conditions and obligations of the said contract, but is governed by the decree regulating the law of mines in force.

Let it be communicated and published.

For the Federal Executive: Manuel FOMBONA PALACIO

On the 14th of March, 1888, the ministry of fomento issued the following document (Official Gazette, No. 4292):

The President of the Republic, with the vote of the Federal council:

Whereas it appears that Señor George Turnbull has applied to the Government to grant definite title of ownership of a mine of iron, which, by virtue of the right secured to him by article 23 of the decree regulating the law of the matter, he has accused before the governor of the Federal territory of Delta, which mine is found situated in the Manoa district of the same territory, 1,000 meters from the left margin of the Caño Corosimo starting from a point distant 2,500 meters from its debouchment in the Orinoco, upon a hill called Loma del Monte which runs east and west and whose geographical position is latitude north 8 degrees 29 minutes, longitude west 61 degrees 18 minutes, Greenwich — accusation which has been confirmed by the presentation of the provisional title of said mine issued with date of the 30th of October of the year last past by the governor of the territory, and the requisites provided by the decree regulating the law of mines, dictated the 3rd of August, 1897, having been fulfilled — has ordered to concede to Señor Turnbull the ownership of the said mine in all the extension which belongs to it and in respect to all the deposits of iron comprised in the same, in conformity to the denunciation of law made before the said governor. The present title shall be recorded in the respective office of registry, and give right to the concessionary and his successors, for the term of 99 years, to the exploitation and possession of the said mine, with the restrictions of law, and without burden imposed on its mineral products, which are found in the case determined article 40 of the regulating decree already mentioned.

Given, signed, sealed, and countersigned, in the Federal palace at Caracas, March 14, 1888, twenty-fourth year of the law and thirtieth of the federation.

Hermógenes LOPEZ

Countersigned: The minister of fomento.

Manuel FOMBONA PALACIO

UNITED STATES OF VENEZUELA,
MINISTRY OF FOMENTO, DIRECTION OF TERRITORIAL RICHES,

Caracas, 13th of March, 1888.

The law of public lands and the decree regulating the law of mines in force, having been complied with in the accusation made by Mr. George Turnbull, of 500 hectares of public lands for use in the exploitation of the mine of iron which he possesses, denominated Imataca, situated on both margins of the Caño Corosimo, in the district Manoa of the Federal territory of Delta, the President of the Republic, with the affirmative vote of the Federal council, has disposed that the corresponding title of adjudication shall be issued.

Let it be communicated and published.

For the Federal Executive: Manuel FOMBONA PALACIO

On the 14th of March, 1888, the ministry of fomento issued the following document:

UNITED STATES OF VENEZUELA,
MINISTRY OF FOMENTO, DIRECTION OF TERRITORIAL RICHES.

Having observed the formalities prescribed in the law of June, 1882, and in the decree regulating the law of mines in force, the National Executive, with the affirmative vote of the Federal council, has declared the adjudication, with date of the 3rd instant, in favor of the citizen, George Turnbull, of 500 hectares of waste lands which form the superfices of the mine of iron which said Señor George Turnbull possesses, denominated Imataca, which lands he acquires for uses of the exploitation of said mine, and are situated in the jurisdiction of the Manoa district of the Federal territory of Delta. The land surveyed is bounded on its four sides by lands of national property, conceded by contract to Señor George Turnbull. The 500 hectares surveyed are divided in two sections: 100 hectares to the north of the stream Corosimo, which commences near the village of Manoa and which comprise part of a hill which runs east and west; and 400 hectares to the south of said stream, including part of the Imataca range denominated " Loma del Monte", where is situated the mine of iron owned by Señor Turnbull. The adjudication has been made for the price of 7,100 bolivars in coin, equivalent to 20,000 bolivars of the 5 per cent national consolidated debt, which the purchaser has made over to the office of the board of public credit; and the Government having disposed that the title of ownership of said lands be issued, the subscriber, the minister of fomento, declares, in the name of the United States of Venezuela, that, by virtue of the completed sale, the dominion and ownership of said lands is from now transferred in favor of the purchaser, Señor George Turnbull, with the respective declarations expressed in articles 6, 7, and 8 of the law cited, which, in their letter and contents authorize the present adjudication, and whose terms must be considered as clauses decisive in this respect.

Caracas, 14th of March, 1888.

Twenty-fourth year of the law and 30th of the federation.

Manuel FOMBONA PALACIO

On the 28th of June, 1888, the following resolution was issued from the ministry of fomento (Official Gazette, No. 4382):

UNITED STATES OF VENEZUELA,
MINISTRY OF FOMENTO, DIRECTION OF TERRITORIAL RICHES,

Caracas, 28th of June, 1888.

Resolved, The requirements of the decree regulating the law of mines in force, having been complied with, by Señor George Turnbull in the accusation of the mine

of asphalt which he has discovered in the district Guzmán Blanco of the Federal territory delta on the borders of the Pedernales channel, on the island of the same name; and having been presented the provisional title of ownership of the mine issued by the governor of aforesaid Federal territory delta, in conformity with article 9 of the aforesaid decree, the President of the Republic, with the vote of the Federal council, resolves: That the definitive title of ownership to the above-cited mine of asphalt for ninety-nine years shall be issued in favor of Mr. George Turnbull.

Let it be communicated and published.

For the Federal Executive: CORONADO

On the 30th day of June, 1888, the following document was issued by the ministry of fomento:

The President of the Republic, with the vote of the Federal council:

Whereas it appears that Señor George Turnbull has petitioned the Government to issue definite title of ownership of a mine of asphalt which, by virtue of the right conceded by article 23 of the decree regulating the law of the matter, he has accused before the governor of the Federal territory Delta, which mine is situated in the district Guzmán Blanco of the territory mentioned, on the shores of the stream of Pedernales on the island of the same name, upon a visible extension of 1,300 meters in length by 500 in width, which runs northeast to southwest, and whose geographical position is as follows: Latitude north, 10 degrees, 11,7; longitude 62 degrees, 12, 24 west of the meridian of Greenwich; which accusation he has proved by the presentation of the provisional title to said mine, issued under date of the 9th of January of the current year by the governor of the territory; and the requisites provided by the decree regulating the law of mines of August 3, 1887, having been fulfilled, has disposed to concede to Señor George Turnbull the ownership of the said mine in all the extensions which belong to it and in respect of all the deposits comprised in the same, in conformity with the denunciation of law made before the said governor.

The present title shall be registered in the respective office of registry, and give right to the concessionary and to his successors, for the term of ninety-nine years, to the exploitation and profit of the said mine, and without that burden on its products imposed on any mine by reason of being in the case determined by article 40 of the regulating decree already mentioned.

Given, signed, sealed, and countersigned in the Federal palace in Caracas, the 30th of June, 1888, twenty-fifth year of the law and 30th of the federation.

Hermógenes LOPEZ

Countersigned: The minister of fomento.

Vicente CORONADO

On the 3d day of October, 1888, the ministry of fomento issued the following document:

THE UNITED STATES OF VENEZUELA,
MINISTRY OF FOMENTO, DIRECTION OF TERRITORIAL RICHES.

The formalities prescribed in the law of June 2, 1882, concerning the matter having been observed, the National Executive, with the affirmative vote of the Federal council, has declared the adjudication of this date in favor of Señor George Turnbull of 200 hectares of public lands, destined for the uses of the exploitation of a mine of asphalt which the purchaser possesses, situated in the district Guzmán Blanco of the Federal territory Delta, in the island of Pedernales, and whose boundaries are: Upon the north, groves of mangrove trees and the mine of asphalt which Señor Turnbull actually exploits; upon the south, uncultivated waste lands and the lake denominated Angosturita; upon the east, plains and groves of mangroves; upon the west, agricultural plantations pertaining to various residents of Pedernales, and also some groves of mangroves. The adjudication has been made for the price of 2,970 bolivars in coin, equivalent to 8,000 bolivars of the 5 per cent national consolidated debt,

which the purchaser has made over in the office of Public Credit; and the Government having disposed that the title of ownership of said lands shall be issued, the undersigned, the minister of fomento, declares in the name of the United States of Venezuela that by virtue of the completed sale the dominion and ownership of said lands is henceforth transferred in favor of the purchaser, Señor George Turnbull, with the respective declarations expressed in article 6, 7, and 8 of the law cited, which in their letter and contents authorized the present adjudication, and whose terms must be considered as clauses decisive in the matter. Caracas, October 3, 1888. Twenty-fifth year of the law, and 30th of the federation.

Vicente CORONADO

On the 18th of June, 1895, the following resolution was issued by the ministry of fomento (Official Gazette, No. 6433):

UNITED STATES OF VENEZUELA,
MINISTRY OF FOMENTO, DIRECTION OF TERRITORIAL RICHES,

Caracas, June 18, 1895.

Resolved, On April 28, 1887, the national Congress approved the contract ad referendum which was made in Nice the 1st day of January, 1886, by Gen. Guzmán Blanco, envoy extraordinary and minister plenipotentiary to several courts of Europe, and the North American citizen, George Turnbull. The Government had undertaken in that contract to grant for a term of ninety-nine years to the aforesaid George Turnbull the right to exploit the riches found in a large portion of the grand delta of the Orinoco and an exterior portion of territory in Guayana, Lower Orinoco, including the islands of Tortola and Aragua, together with all the franchises in connection with the colonization, exploitation, and development of the aforesaid territories. The national Executive, on its part, has complied with all the obligations incurred upon as per the contract, and it being evident that the cessionary citizen, George Turnbull, during the eight years elapsed since the celebration of the said contract, excepting some steps taken for the exclusive benefit of his own convenience, has not complied with any of the obligations stipulated, neither has he exercised any act in favor of the interests of the nation, nor by any means profitable to the development of the natural riches of the regions that were the object of the concession, the President of the Republic considering as injurious and fruitless to the nation the concession granted to the citizen George Turnbull, has decided to declare the annulment of the contract ad referendum, signed at Nice the 1st day of January, 1886, which was approved by the Executive of the Republic on September 10th of the same year, comprising in the same case of nullity and insubsistency of the aforesaid contract the concession of the " Imataca " iron mine, definitive title to which was issued March 13, 1888, and the concession of the asphalt mine situated in the island of Pedernales, the definitive title of which was issued June 28 of the same year, as well as any other rights, titles, or concessions deriving from the said contract.

Let this be communicated and published.

By the national Executive: Jacinto LARA

On the same day, to wit, the 18th day of June, 1895, the ministry of fomento issued the following resolution (Official Gazette, No. 6433):

UNITED STATES OF VENEZUELA,
MINISTRY OF FOMENTO, DIRECTION OF TERRITORIAL RICHES,

At Caracas, June 18, 1895.

Resolved, After having considered in the cabinet the petition addressed to this ministry by the Manoa Company (Limited), which among other things solicits the ratification, confirmation, and execution in its favor of all the rights and privileges

conceded to Cyrenius C. Fitzgerald on the 22nd day of September, 1883, by the contract declared insubsistent on the 9th day of September, 1886, the President of the Republic, after examination of the same, has declared the caducity, for reason of want of faithful compliance with its obligations and stipulations of the concession of George Turnbull, and has substituted therefor in the same rights and privileges the aforesaid contract, and has seen fit to dispose and authorize the said Manoa Company (Limited), within six months reckoning from the date of this resolution, to renew its works of exploitation in order to the greater development of the natural riches of the territories embraced in said concession, hereby confirming it in all the rights stipulated and granted to said Fitzgerald by the said contract of September 22, 1883. And the said Manoa Company (Limited) shall report to the national Executive from time to time through the organ of this ministry all of the works carried on by it in execution of said contract, in order that the Government may be enabled to judge of its compliance with the obligations of said contract in conformity with the spirit and the magnitude of its stipulations.

Communicate and publish.

By the national Executive: Jacinto LARA

On the 10th of July, 1895, a resolution was issued by the ministry of fomento as follows (Official Gazette, No. 6451):

UNITED STATES OF VENEZUELA,

MINISTRY OF FOMENTO, DIRECTION OF TERRITORIAL RICHES,

Caracas, July 10, 1895.

Resolved, After having considered in the council of ministers the petition addressed to this office by the Citizen George Stelling, vice-president of the board of directors of the National Anonymous Company called " Mines of Pedernales," requesting the modification of the resolution issued on June 19, last, by which the general concession granted to the Citizen George Turnbull was declared null, in order to except from the said annulment the mine of Pedernales and the 200 hectares of public lands belonging to the aforesaid company, the President of the Republic, after studying the document filed by the petitioner and taking into consideration:

First. That in accordance with article 28 of the mining law under which the definitive title to the asphalt mine of the Pedernales Island was granted, said title " can be transferred to any person able to contract."

Second. That as per article 50 of the same laws and the documents filed by the petitioner on November 19, 1890, date on which Citizen George Turnbull transferred to the National Company " Mines of Pedernales " the above referred mining concession and the 200 hectares of public lands needed for its exploitation, the definitive title issued had not been voided or annulled inasmuch as the cessionary had been exploiting the mine therein mentioned; and finally, that the National Company " Mines of Pedernales " obtained the property through a good title, has been possessing in good faith and has been and is now exploiting the said asphalt mine, as per evidence shown in the documents which were filed, so that respecting the said mine the failure of fulfillment on the part of the concessionary, upon which the said resolution of June 10 of the present year is based, is not applicable; does hereby resolve in equity and justice that the said resolution of June 19 last, in which the contract celebrated with the Citizen George Turnbull was declared null, does not in any way affect the rights, legitimately acquired, of the asphalt mine of the Pedernales Island, nor the 200 hectares of land destined to its exploitation by the National Anonymous Company, called " Mines of Pedernales," which company shall, consequently, be at liberty to go on with the works of the aforesaid mine and the 200 hectares of public land referred to.

Jacinto LARA

On November 20, 1896, the following resolution was issued from the ministry of fomento (Official Gazette, No. 6877):

UNITED STATES OF VENEZUELA,
MINISTRY OF FOMENTO, DIRECTION OF TERRITORIAL RICHES,

Caracas, November 20, 1896.

Resolved, Having considered at the council of ministers the petition addressed to this department by Citizen George Turnbull, therein proving — as per the documents attached thereto — that the said George Turnbull lawfully obtained the definitive title to the iron mine called " Imataca," situate on both banks of the Caño Corosimo of the Manoa district of the Federal territory Delta; that he complied with the requirements of the land laws, and paid for the price of the adjudgment of 500 hectares of land which comprise the superficial area of said mine; that by virtue of George Turnbull having acquired the aforesaid mine and lands, the national Executive, by resolution of March 13, 1886, declared that said mine and lands constitute a separate property from the Manoa concession granted to the above-mentioned Turnbull as per contract made January 1, 1886, not being subject therefor, to the obligations of the aforesaid contract, but which will be ruled by the decrees regulating the mining laws; that it is also proved that the above-mentioned Turnbull has maintained the aforesaid mine in exploitation, according to the legal regulation, and finally, that at the Ciudad Bolívar custom-house the mining taxes were paid corresponding to the 500 hectares which formed said mining concession; the citizen President of the Republic has thought fit to decide: that the resolution of this department of June 18, 1895, published in the Official Gazette of June 19 of the same year, marked No. 6433, declaring the annulment of the contract made January 1, 1886, with the above-mentioned Turnbull for the exploitation of a portion of the Delta of the Orinoco, does in no way affect the rights legitimately acquired by him to the " Imataca " iron mine, which is hereby excluded from the aforesaid resolution, together with the 500 hectares of land forming its superficial area, and, consequently, the citizen George Turnbull, remains authorized to continue the exploiting of the mine and public lands referred to.

Let it be notified and published.

For the national Executive: Manuel A. Díaz

On the same day the following resolution was issued by the minister of fomento (Official Gazette, No. 6877):

UNITED STATES OF VENEZUELA,
MINISTRY OF FOMENTO, DIRECTION OF TERRITORIAL RICHES,

Caracas, November 20, 1896.

Resolved, Having considered at the council of ministers the petitions addressed to this department by the Citizens J. A. Radcliffe, J. A. Bowman, James P. Elmer, Francisco de P. Suarez, Luis Aristigueta Grillet, George N. Baxter, and Ellis Grell, in behalf and by authority of the companies called " Manoa Company, Limited," " Orinoco Mining Company", and " Orinoco Company, Limited," as well as to reports and other documents filed; the citizen president of the republic, wishing to put an end to the difficulties which have presented themselves preventing the exploitation of the delta of " the Orinoco concession," otherwise known as " The Manoa," referred to in the resolutions of June 18, 1895, has thought fit to recognize as valid the transfer made by the " Manoa Company, Limited " to the " Orinoco Company, Limited " of all its rights and title to and in the aforesaid concession with the exception of the " Imataca Iron Mine," situate on both banks of the Caño Corosimo in the Manoa district of the old Federal territory Delta and the 500 hectares of public lands which comprise its superficial area, as well as the asphalt mine called " Minas de Pedernales," situate in the island of the same name, together with the 200 hectares destined for its exploitation. He acknowledges, likewise, as valid

the work and all other acts of the " Orinoco Company, Limited " (successor to the " Manoa Company, Limited ") done and performed by them in fulfillment of the terms of the resolution of June 18, 1895, and the President of the Republic disposes that the said company be granted the exemption from payment of custom-house duties on machinery and other effects, imported through the Ciudad Bolívar custom-house destined to the works of said concession; and, finally, that all the facilities be granted to the interested parties for the aforesaid exploitation providing such facilities be not in opposition to the laws and resolutions of the Republic in force.

Let it be notified and published.

For the national Executive: Manuel A. Díaz

On the 10th of October, 1900, the following resolution was issued by the ministry of fomento (Official Gazette, No. 8053):

UNITED STATES OF VENEZUELA,

MINISTRY OF FOMENTO, DIRECTION OF TERRITORIAL RICHES,

Caracas, October 10, 1900.

Resolved, Considering that the contract celebrated September 22, 1883, with Cyrenius C. Fitzgerald, and on which the Orinoco Company, Limited, now bases its rights for the exploitation of the natural riches in the Delta of the Orinoco and colonization of the land conceded, has now no legal existence, for that it was declared void for failure of performance of what was in it stipulated; that in April, 1887, the national Congress approved a contract celebrated with the North American citizen, George Turnbull, in the same regions and with the same clauses, and in all equal with that of the Manoa Company, Limited, (cessionary of Fitzgerald) declared void, which was also for the same clauses declared in caducity on the 18th of June, 1895; and that on the same day of the said month and year, this office issued an Executive resolution restoring to the Manoa Company, Limited, the rights and privileges conceded by the original contract with Fitzgerald in 1883; and

Considering (first) the contract celebrated with C. C. Fitzgerald having been declared void for failure of compliance with article 5th, this can not be considered in vigor without the intervention of a new contract approved by the national congress; (second) that the legislature of the State of Bolívar, in its ordinary session of 1899, adopted a joint memorial to the national congress, declaring that the company cessionary of the contract celebrated with Fitzgerald had not complied in its fourteen years of existence with any of the clauses established in article 5 of the said contract and that this interferes with the interests of the Venezuelans for exploiting the natural products of that region of the Republic; and (third) that according to the notes and reports forwarded to this office by the authorities of the different places of the region to which refers the concessions already mentioned, all concur in the failure of performance of the same and of the palpable evils which it occasions, as well to the national treasury as to the individual industries.

The supreme chief of the Republic has seen fit to dispose: That the mentioned contracts are declared insubsistent.

Let it be communicated and published.

For the national Executive: Ramón Ayala

The following provisions of the constitution of Venezuela adopted in 1881 and in force on September 22, 1883, are pertinent to the consideration of these claims. Similar provisions are found in the later constitutions of the Republic.

By paragraph 15, article 13, of this constitution the States of the Federation agree to cede to the Government of the Federation the administrations of the mines, public lands, and salt deposits, to the end that the former shall be governed by a system of uniform exploitation and the latter for the benefit of the people.

Title 5, section 1, article 66, provides in relation to the powers of the Executive:

Besides the foregoing powers of the United States of Venezuela, he, with the deliberative vote of the Federal Council, shall exercise (inter alia) the following:

PAR. 2. Administer the public lands, the mines and the salt deposits of the States by delegation of an authority from the latter.

PAR. 6. Celebrate contracts of national interest in accordance with the laws and submit the same to the legislature for its approval.

Title 5, section 2, article 69, provides in relation to the ministers as follows:

The ministers are the natural and public organs of the President of the United States of Venezuela. All his acts shall be subscribed by them, without which requisite they shall not be complied with nor executed by the authorities, by employees, or by private individuals.

Among the powers of the Congress enumerated in Title 4, section 5, article 43, is the following, paragraph 17:

To approve or reject the contracts concerning national works which the President, with the approval of the Federal council, shall make, without which requisite they shall not become effective.

Of the high Federal court the constitution in Title 6, section 2 of article 80, provides, paragraph 9a, that it shall —

Take jurisdiction of the controversies which result from the contracts or negotiations which the President of the Federation may celebrate.

The act of Congress of May 7, 1881, providing for the organization of the high Federal court, prescribes in regard to the said court that it shall have the power (inter alia):

To take jurisdiction in the first and sole (única) instance —
First. Of the judicial matters comprised in the attributions 1, 2, 3, 4, and 9 of article 80 of the constitution, and in No. 30 of article 13.

These three claims are so intimately related in respect of the facts and circumstances out of which they arise that they are herein considered together.

The Fitzgerald contract of September 22, 1883, was executed in strict conformity with constitutional requirements. It was signed on behalf of the Government by the minister of fomento, "duly authorized by the President of the Republic." It was approved by the Federal council. It was submitted for approval to the National Legislature, and was by it approved, on the 23d day of May, 1884, and it received the formal sanction and signature of the President on May 27, 1884. It was published in the Official Gazette, No. 3257, on May 29, 1884.

The instrument thus solemnly executed constituted a bilateral contract, giving rise, as between the parties thereto, to certain mutual rights and obligations. The Government of Venezuela granted to Fitzgerald, his associates, assigns, and successors, for the term of ninety-nine years, reckoning from the date of the contract, the exclusive right to develop the resources of the territories designated; and, for an equal term of years, the exclusive right of establishing a colony for the purpose of developing the resources already known to exist, and those not yet developed of the same region, including asphalt and coal. The Government agreed that a title in conformity with the law should be granted to the contractor (Fitzgerald) for every mine which might be discovered in the colony. Fitzgerald agreed to perform the stipulations of Article V in respect to exploration and colonization therein set forth. The parties mutually

agreed that any questions or controversies which might arise out of the contract should be decided in conformity with the laws of the Republic and by its competent tribunals. The constitution of the Republic provided that the high Federal court had jurisdiction of the controversies which might result from the contracts celebrated by the President.

Fitzgerald assigned the contract-concession to the Manoa Company, Limited, on June 14, 1884. The evidence shows that the company, within the time stipulated in the contract and its prorogation of February 19, 1884, commenced the work of exploitation and colonization. It proceeded with the work until in the spring of 1885 it encountered serious difficulties resulting from a domestic revolution headed by General Pulgar, and from the aggression of the British Government upon the territories included within the concession. The company duly notified the Venezuelan Government of these difficulties.

In December, 1885, one George Turnbull, a citizen of the United States, entered into negotiations with Gen. Guzmán Blanco, ex-President of Venezuela, and at that time occupying the position of envoy extraordinary and minister plenipotentiary of Venezuela to various courts of Europe, and these negotiations resulted in the signing at Nice on January 1, 1886, of an ad referendum contract substantially of the same purport and tenor as the Fitzgerald contract, granting to Turnbull the same rights and privileges in the territories designated as had previously been conceded to Fitzgerald and his assigns, and containing the provisions that it should become effective in case of the becoming void through failure of compliance within the term fixed for this purpose of the Fitzgerald contract for the exploitation of the same territory.

The time fixed for beginning the work of colonization in the Fitzgerald contract expired on September 22, 1884, prior to the Guzmán Blanco-Turnbull agreement, and no evidence is presented here of any complaint by the Government of Venezuela of nonfulfillment with its terms on the part of the concessionaries prior to that date, nor is any evidence presented of authority on the part of Guzmán Blanco in his capacity as envoy extraordinary and minister plenipotentiary to various courts of Europe to enter into the contract with Turnbull for a concession for the public lands and mines — that power being by the constitutional provisions above quoted vested in the President of the Republic. The article recognizes the then existence and validity of the Fitzgerald concession. But in view of the well-known dominant influence of Guzmán Blanco in Venezuelan affairs at the time, and the practical certainty of its ratification the obvious effect of the Turnbull agreement was to work grave injury to the interests and credit of the Manoa Company, Limited.

On the 9th of September, 1886, by Executive resolution issued through the ministry of fomento, " the councilor in charge of the Presidency, having the affirmative vote of the Federal council," declared the insubsistency or annulment of the Fitzgerald concession upon the ground that the contractor had not fulfilled the obligations of the contract as stated in the report of the director of the national riches, specifically referring to the provisions of Article V thereof. One day later an Executive resolution declared the approval of the Guzmán Blanco-Turnbull contract of January 1, 1886; and said contract was approved by Congress on April 28, 1887.

It is perfectly evident that the question whether or not the Manoa Company, Limited, had fulfilled the obligations of the contract, or any controversies as to that fact, was a question or controversy arising out of the contract, determinable, according to law and the agreement of the parties, only by the competent tribunals of the Republic. The Government of Venezuela, being a party to the contract, was not competent to decide such a controversy. The jurisprudence of civilized States and the principles of natural justice do not

allow one party to a contract to pass judgment upon the other. If the Government had any reason to believe that the grantees of the concession —

had, by misuser or nonuser thereof, forfeited their rights, then it should have itself appealed to the proper tribunals against the said grantees, and there, by due process of judicial proceedings, involving notice, full opportunity to be heard, consideration, and solemn judgment, have invoked and secured the remedy sought. (Salvador Commercial Co. Case. — For. Rel. U. S., 1902, p. 871.)

Nemo debet esse judex in propia sua causa.

Moreover, the Executive resolution of September 9, 1886, annulling the Fitzgerald contract, was an illegal assumption of power. Under the constitution of Venezuela the Executive was clothed with no such prerogative. Jurisdiction of controversies arising out of contracts celebrated by the President was vested solely in the high Federal court. (Par. 9, art. 80, Const. and Law of May 7, 1881.)

The decree, in the absence of legal authority in the Executive to issue it, was an absolute nullity.

The decision of the high Federal court under identical constitutional provisions rendered August 23, 1898, in the case of the New York and Bermudez Company would seem to be conclusive upon the point. That company claimed under a contract similar to that under consideration here. On January 4, 1898, the contract of the New York and Bermudez Company, for alleged failure of performance by the concessionary, was declared null by Executive resolution. The matter was brought by petition of the company before the high Federal court, which, by its judgment of August 23, 1898, declared that —

the Executive resolution passed by the National Government, dated the 4th of January of the present year, declaring broken and determined the contract of which the New York and Bermudez Company is concessionary, is null and void.

The court says in its opinion:

The only point for our investigation is whether or not the Executive resolution which has given rise to the petition of the representative of the New York and Bermudez Company constitutes an act of usurped authority.

Notwithstanding the Executive resolution of September 9, 1886, the Fitzgerald contract remained subsistent and effective to vest in the grantees all the rights and privileges therein designated. And it follows that the subsequent approval of the Guzmán Blanco-Turnbull contract could not operate to invest Turnbull with the same rights and privileges, inasmuch as the Government could not grant to Turnbull the rights which it had previously granted to and which were legally existing in the grantees of the Fitzgerald contract.

It appears from the evidence that on March 14, 1888, the President of the Republic, with the affirmative vote of the Federal council, declared the adjudication in favor of George Turnbull of 500 hectares of land which forms the superficies of the "Imataca" iron mine, under the formalities of the law relating to waste lands of June 2, 1882. The adjudication was made for the price of 7,100 bolivars in coin, equivalent to 20,000 bolivars of the 5 per cent national consolidated debt, which it is alleged Turnbull made over to the office of the board of public credit; and the Government having disposed that the title of ownership of said lands be issued, the minister of fomento declared in the name of the United States of Venezuela that by virtue of the completed sale the dominion and ownership of said lands was transferred in favor of the purchaser, George Turnbull.

On the same day, the President of the Republic, with the vote of the Federal council, pursuant to the provisional title to the " Imataca " mine, issued by the governor of the Federal territory Delta on October 30, 1887, to George Turnbull, and in accordance with the provisions of the decree regulating the law of mines, dictated August 3, 1887, conceded to George Turnbull the ownership of said mine in all the extension which belongs to it and in respect of all the deposits of iron comprised in the same; giving to the said Turnbull as concessionary and his successors for the term of ninety-nine years the right to the exploitation and possession of said mine.

On the 30th of June, 1888, the President of the Republic, with the vote of the Federal council, conceded to George Turnbull a definitive title to the mine of asphalt situated in the district of Guzmán Blanco in the Federal territory Delta on the island of Pedernales, " the requisites provided by the decree regulating the law of mines of August 3, 1887, having been fulfilled."

On October 3, 1888, the national Executive, with the affirmative vote of the Federal council, declared the adjudication in favor of George Turnbull of 200 hectares of public lands, " destined for the exploitation of a mine of asphalt which the purchaser possesses," situated in the district of Guzmán Blanco of the Federal territory Delta in the island of Pedernales. The adjudication was made for the price of 2,970 bolivars in coin, equivalent to 8,000 bolivars of the 5 per cent national consolidated debt, which Turnbull is alleged to have made over to the office of public lands; and the Government having disposed that the title of ownership of said lands shall be issued, the minister of fomento declared in the name of the United States of Venezuela that by virtue of the completed sale the dominion and ownership of said lands was henceforth transferred in favor of the purchaser, George Turnbull.

It is difficult to perceive in what manner these grants to George Turnbull can be sustained, in view of the fact that at the time they were made the Fitzgerald contract had not been judicially declared forfeited and was in full force and effect. The lands and mines described in the Turnbull titles are within the territory designated in the Fitzgerald concession. The Government of Venezuela by the latter instrument conceded to Cyrenius C. Fitzgerald, his associates, assigns and successors for the term of ninety-nine years, the exclusive right to develop the resources of —

> the island of Pedernales [and] the territory from the mouth of the Araguao, the shore of the Atlantic Ocean, the waters above the Greater Araguao to where it is joined by the Araguaito stream; from this point, following the Araguaito to the Orinoco, and thence the waters of the upper Orinoco, surrounding the island of Tortola, which will form part of the territory conceded, to the junction of the José stream with the Piacoa; from this point following the waters of the José stream to its source; thence in a straight line to the summit of the Imataca Range; and from this point following the sinuosities and more elevated summits of the ridge of Imataca to the limit of British Guayana; from this limit and along it toward the north shore of the Atlantic Ocean, and, lastly, from the point indicated, the shore of the Atlantic Ocean to the mouth of the Araguao, including the island of this name and the others intermediate or situated in the delta of the Orinoco, and in contiguity with the shore of the said ocean.

Moreover, and for an equal term of years, the Government of Venezuela conceded to the grantees of the Fitzgerald contract —

> the exclusive right of establishing a colony for the purpose of developing the resources already known to exist and those not yet developed of the same region, including asphalt and coal, etc.

And, furthermore, the Government of Venezuela agreed with Fitzgerald, his associates, assigns and successors that —

a title in conformity with the law shall be granted to the contractor for every mine which may be discovered in the colony.

If the grants to Turnbull are valid, then the language of the Fitzgerald franchise is meaningless, for on any such theory the Government of Venezuela could by piecemeal take away from the grantees of the Fitzgerald concession and give to others every right or privilege therein conferred. It is perfectly clear that the Government, having in 1883 transferred the exclusive right of developing and exploiting the resources of the territory in question to Fitzgerald and his assigns, could not in 1888 transfer to Turnbull the right to any part of their sources of that same territory, for the plain and simple reason that the Government could not transfer what it did not possess. That he who is prior in time is stronger in right is a maxim of both the civil and the common law. The Fitzgerald concession of September 22, 1883, not having been declared forfeited by any competent judicial authority, after notice, hearing, and judgment, was in 1888 a legally subsisting and valid agreement, binding upon both the parties to it, vesting in the grantees the exclusive right of exploitation of the Delta territory and the island of Pedernales and imposing upon the Government of Venezuela the obligation to grant a title in conformity with the law to Fitzgerald or his assigns for every mine discovered in the colony. The Turnbull titles of 1888 were in derogation of these prior rights and obligations and vested in the grantee no rights whatever. They were altogether null and void.

The hostile and arbitrary acts of the Government, which the Manoa Company (Limited), assignee of the Fitzgerald contract, was wholly powerless to prevent, were calculated to and, it is alleged, did paralyze the operations of the company, impaired its credit, and prevented the further prosecution of its work of exploitation. So matters stood until, on the 18th of June, 1895, the Government declared the annulment of the Turnbull contract of January 1, 1886, and the definitive titles to the Imataca iron mine and the Pedernales asphalt mine, which had been issued to Turnbull in 1888, and on the same date the Government reaffirmed the Fitzgerald contract of September 22, 1883, and authorized the Manoa Company (Limited), within six months from that date, to renew its works of exploitation in order to the greater development of the natural riches of the territory embraced in said concession, requiring the company to report to the National Executive from time to time through the ministry of fomento all of the works carried on by it in execution of the contract.

These resolutions of June 18, 1895, in no wise changed the legal status of the various interested parties. The Fitzgerald contract had never been legally annulled. The Guzmán Blanco-Turnbull contract of January 1, 1886, and the Turnbull titles of 1888 had never been legally effective, but were invalid ab initio. The resolution in favor of the Manoa Company, however, amounted to an authorization by the Venezuelan Government to the renewal of the work of exploitation and colonization, a permission of which the company promptly availed itself, as its reports presented in evidence here clearly show.

On the 10th of July, 1895, the Government, at the instance of the National Anonymous Company, " Mines of Pedernales," resolved that " the resolution of June 19 (18) last, in which the contract celebrated with the citizen, George Turnbull, was declared null," did not in any way affect the rights legitimately acquired of the asphalt mine of the Pedernales Island, nor the 200 hectares of land destined to its exploitation by the National Anonymous Company, called " Mines of Pedernales," which company was, consequently, at liberty to go

on with the works of the aforesaid mine and the 200 hectares of public land referred to.

On the 20th of November 1896, upon the petition of George Turnbull, the President of the Republic thought fit to decide that the resolution of June 18, 1895, declaring the annulment of the contract made January 1, 1886, with the above-mentioned Turnbull for the exploitation of a portion of the Delta of the Orinoco, did in no way affect the rights legitimately acquired by him to the " Imataca " iron mine, which was thereby excluded from the aforesaid resolution, together with the 500 hectares of land forming its superficial area, and, consequently, the citizen, George Turnbull, remained authorized to continue the exploitation of the mine and public lands referred to.

These resolutions are merely reassertions of the original Turnbull titles of 1888, and, like their originals, are in plain derogation of the prior and subsisting rights of the grantees of the Fitzgerald concession, and altogether null and void. The National Anonymous Company, " Mines of Pedernales", could not have occupied the position of innocent purchaser, inasmuch as the Fitzgerald contract had been for many years a matter of public record.

On the 16th of October, 1895, the Orinoco Company was organized under the laws of the State of Winconsin, and on the following day the Manoa Company (Limited), conveyed to the said Orinoco Company the property described in the Fitzgerald concession until September 21, 1982, excepting, however, the Pedernales asphalt mine and the Imataca iron mine. On February 4, 1896, the Orinoco Mining Company was incorporated under the laws of the State of Wisconsin, and on February 10, 1896, the Orinoco Company conveyed to the Orinoco Mining Company all its rights in the concession as transferred to it by the Manoa Company (Limited), (i. e., reserving and excepting the Pedernales asphalt mine and the iron mine of Imataca).

The Orinoco Mining Company on October 1, 1896, filed in the office of the secretary of state of the State of Wisconsin an amendment to its articles of association, changing its name to Orinoco Company (Limited); and on October 17, 1896, the Manoa Company (Limited) and the Orinoco Company certified to the transfer of title of all the lands, rights, interests, privileges, and immunities originally granted by the Fitzgerald contract (except as to the asphalt and iron mines) to the said Orinoco Company (Limited). The Manoa Company (Limited), on May 15, 1895, conveyed to William M. Safford the location of the Imataca iron mine; and the same company had on October 17, 1895, conveyed to Samuel Grant the Pedernales asphalt deposits. These conveyances are evidently explanatory of the reservations and exceptions as to the said properties in the transfer above set forth.

On November 20, 1896, the President of the Republic of Venezuela, " wishing to put an end to the difficulties which have presented themselves, preventing the exploitation of the Delta of the Orinoco, otherwise known as the 'Manoa,' referred to in the resolutions of June 18, 1895," recognized as valid the transfer made by the " Manoa Company (Limited) " to the " Orinoco Company (Limited) " of all its rights and titles to and in the said concession, with exception of the mine of iron, " Imataca," situated on both banks of the stream Corosimo, in the Manoa district of the old Federal territory Delta, and the 500 hectares of public lands which comprise its superficial area, and of the mine of asphalt called " Minas de Pedernales," situated on the island of the same name, together with the 200 hectares of public land destined for its exploitation. He acknowledged likewise as valid the work and other acts of the " Orinoco Company (Limited) " (successors to the " Manoa Company (Limited) " done and performed by them in fulfillment of the terms of the resolutions of June 18, 1895, and disposed that the said company be granted the exemption

from payment of custom-house duties on machinery and other effects imported through the Ciudad Bolívar custom-house destined to the works of said concession; and that all facilities be granted to the interested parties for the aforesaid exploitation, providing such facilities be not in opposition to the laws and resolutions of the Republic in force.

On December 30, 1896, James A. Radcliffe, receiver of the Manoa Company (Limited), William M. Safford and George N. Baxter, trustees, conveyed to the Orinoco Company (Limited), its successors and assigns, the contract and concession of September 22, 1883. The deed recites that at a special term of the supreme court of the State of New York, a court of general jurisdiction, sitting in the county of Kings, on the 3d day of March, 1896, it was, among other things, ordered, adjudged, and decreed by the said court in a certain action then pending, and which was commenced on the 14th day of February, 1896, between Randolph Stickney and the Manoa Company (Limited) for a sequestration of the property of said company, pursuant to the laws of the State of New York, that the said James A. Radcliffe be appointed permanent receiver of said Manoa Company (Limited), and that by its judgment of November 11, 1896, said court ordered the said receiver to sell at public auction all the rights, title, and interest of said Manoa Company (Limited) in and to said concession to the highest bidder and make report of said sale to the court, and that said receiver did on the 28th day of November, 1896, sell said property to William M. Safford and George N. Baxter, they being the highest bidders; and that said report of the receiver was afterwards confirmed and the receiver ordered to make a deed to the parties named, which was done; and that the said Safford and Baxter declared that they bid in said property as trustees for the Orinoco Company (Limited), and that the said Safford and Baxter in the execution of said trust joined in said deed to the Orinoco Company (Limited).

The Orinoco Company (Limited), on July 22, 1897, entered into a contract with the Orinoco Iron Company, a corporation organized under the laws of the State of West Virginia, whereby it granted to the said iron company the right to mine and ship any and all deposits of iron ore on the Fitzgerald concession which it had the right to exploit under its contract for the unexpired term thereof in consideration of certain stipulated royalties. The president of the Orinoco Iron Company was Albert B. Roeder, its secretary was Benoni Lockwood, jr., and its treasurer was James E. York.

It appears from the evidence that on the 30th day of March, 1895, George Turnbull, then residing in London, entered into a contract with one Joseph Robertson, of London, as trustee of a syndicate thereafter to be formed and called the Orinoco Iron Syndicate (Limited), under the English companies acts of 1862 to 1890, the object of which syndicate was to examine, test, and work the " Imataca " iron mine and to output and market iron ore, timber, and other commercial products on the land during the period of one year from the date of their shipment of the first cargo therefrom; if the said syndicate should be satisfied with the result of their trial, they were to register a limited company under said acts within twelve months for the purpose of acquiring the said property, which Turnbull agreed to lease and convey with his whole rights and interests therein and the ores and minerals therein and thereunder. The syndicate was bound on or before January 15, 1896, to intimate to Turnbull whether or not they intended to go on with the formation of said company. The Orinoco Iron Syndicate was afterwards formed and, on September 18, 1895, adopted the agreement between Turnbull and Robertson of March 30, previous.

The English company, the Orinoco Iron Syndicate (Limited), chartered the schooner *New Day* and shipped therein to Venezuela its employees, machinery.

material, and supplies. The *New Day* proceeded to Manoa, where on January 20, 1896, the machinery, materials, and supplies were landed. For failure to land at the proper port of entry, Ciudad Bolívar, the *New Day* and her cargo were denounced by Gen. Joaquín Berrio, the then administrator of customs at said port, and proceedings were instituted in the national court of hacienda of Ciudad Bolívar against the schooner, her captain, and the Orinoco Iron Syndicate (Limited), resulting in a judgment on May 9, 1896, imposing a fine upon the syndicate of 249,985.17 bolivars. This judgment was affirmed on September 24, 1896, by the high Federal court. On November 14, 1896, the court of hacienda decreed the embargo of all the rights, shares, and belongings which the Orinoco Iron Syndicate had in the lands and mines of Manoa. On October 18, 1898, the said court ordered the sale, by public auction, of the rights of exploitation acquired by the Orinoco Iron Syndicate (Limited) in the iron mines of Manoa, situated on both banks of the Corosimo stream, so as to pay with the product the duties owing, according to the liquidation made to the national treasury and to General Berrio, denouncer and apprehender of the contraband introduced, and the other expenses and costs of suit; that the said right of exploitation acquired in the iron mine of Manoa by the said company had been appraised by experts appointed for that purpose at 200,000 bolivars; that the rights which the company had in the mine of Manoa included 500 hectares of surface according to the acknowledgment of right made by the National Executive in a resolution of November 20, 1896.

Pursuant to the above-cited order of the court of hacienda the judicial sale took place in the said court on November 18th, 1898. Benoni Lockwood, jr., being the highest bidder at the sale, was declared the purchaser of the property sold upon his offer of 120,000 bolivars, to be paid within fifteen days from the date of sale. Robert Henderson was nominated the depositary. The court declared that the condition stipulated in Lockwood's proposition being complied with he should be put in possession of the auctioned rights, and that a certified copy in due form of the sale should be issued to him to serve as title of property. The time for payment was extended to December 20. On December 19, Carlos Hammer, with power of attorney from Benoni Lockwood, jr., paid into the court the sum of 120,000 bolivars, the purchase money of the Manoa or Imataca mine, and demanded a certificate of sale. The court declared well and duly performed the payment of the purchase money and ordered that the proper certificate be issued to Lockwood, and that he be given, in virtue of his title, the actual possession of said mine. The power of attorney executed by Lockwood to Hammer states that the purchase of the mine was made by him in the name of and representing the Orinoco Company (Limited), and that in consequence the title of the property must be made out in favor of said company, to which corporation the rights exclusively belonged by virtue of the purchase made by him.

In its memorial the Orinoco Company (Limited) alleges that it adopted this course with the object of quieting its title to the " Imataca " iron mine as against the claims of George Turnbull.

On November 29, 1898, Benoni Lockwood, jr., in consideration of the sum of $23.026, to him paid by the Orinoco Company (Limited), conveyed to the said company all his rights, title, and interest in and to the " Imataca " iron mine, meaning and intending to convey all his rights, title, and interest in and to the premises purchased by him at a judicial sale at Ciudad Bolívar on the 18th day of November, 1898.

Mr. Turnbull protested against the judicial sale under the execution issued from the national court of hacienda at Ciudad Bolívar, and on November 21, 1898, filed a petition in the second hall of the high Federal court at Caracas

that the proceedings relative to the case in the said court of hacienda be remitted to the second hall of the high Federal court for review; and, therefore, the latter court on February 21, 1899, held that Turnbull had proven by authentic documents which he had exhibited and which were in the expediente that he was the legitimate owner of the mine referred to, and that the said court declared without force the auction sale carried out with reference to the iron mine " Imataca," and that said mine was affected by said rule. But afterwards, upon appeal to the third hall of the high Federal court, the foregoing judgment of the hall of second instance was, on May 6, 1899, reversed, and declared to be revoked " en todas sus partes " (in all its parts).

In the month of May, 1899, George Turnbull brought an action in the court of first instance of the Federal District, civil division, against Benoni Lockwood, jr., the Orinoco Iron Company, and Gen. Joaquín Berrio for damages resulting from the condemnation proceedings and sale at Ciudad Bolívar, alleging that the English syndicate — the Orinoco Iron Syndicate — had had no right whatever in the Imataca mine, and that therefore the execution against said mine was illegal and the sale thereunder void. Benoni Lockwood, jr., having declared before the court at Ciudad Bolívar that he was acting on behalf of the Orinoco Company (Limited) Turnbull afterwards joined said company in the action, in order, as the court states, " that it should be declared that said company had no right of action against him nor claim over his mine Imataca by virtue of the so-called auction sale which took place at Ciudad Bolívar before the national judge of hacienda since the English syndicate had no rights." On jurisdictional grounds the claims against Berrio were withdrawn. The cause then proceeded, counsel for the remaining defendants answering in obedience to the directions of the court, but not in any respect accepting the jurisdiction and the validity of the proceedings.

The court then sustained its jurisdiction against Lockwood and the American company and entered judgments as follows: On the claim for damages that the proof for Turnbull was insufficient, and judgment was accordingly entered for Benoni Lockwood, jr., and the corporation sued; and as to the second part of the action, the court held that as George Turnbull has, with the documents registered in the sub-office of the Federal District and dated the 14th and 19th of March, 1888, issued by the President of the Republic, proved his ownership of an iron mine situated at Manoa, in the State of Guayana, and also his ownership of 500 hectares of unreclaimed lands which form the superficies of the iron mine denominated Imataca, and by the resolution of the 20th of November, 1896, that the said lands and mine constitute a property, legally acquired by Turnbull, apart from the Manoa concession which had been declared forfeited; and as the Orinoco Company (Limited) opposed this title by a title given by an auction on the 18th of November, 1898, before the judge of hacienda of Ciudad Bolívar, which auction took place in virtue of an execution against the Orinoco Iron Syndicate (Limited) an English syndicate, and as in this respect the court was of opinion that the said title is not sufficient to lessen the rights and privileges which Turnbull has as proprietor in the said mine, because in the first place it did not appear that Turnbull intended to grant his property or any part thereof to any company, and much less was it proved before the judge and auctioneer that the Orinoco Iron Syndicate (Limited) had rights over the mine now in dispute, because for that purpose it would first have been necessary to have sought for the title from which the existence of those rights was derived in order to make the auction sale feasible, and to furnish the purchaser such knowledge of what he was buying, that in the presence therefore of the title shown by plaintiff and that set in opposition by the American company the court declared that it must maintain George Turnbull in the rights and privileges granted by

law to legal owners and give judgments against the Orinoco Company (Limited) holding that said company had no rights of action against Turnbull and no rights to enforce on his mine, Imataca, by reason of the title herein referred to.

The foregoing judgment was rendered in the hall of the tribunal of the first instance, civil division of the Federal District, in Caracas, on June 7, 1900. On July 27, 1900, in the magistrate's court of Ciudad Bolívar, it was decreed:

That having considered the application of the judge of the district of Dalla Costa, dated the 20th instant, in which, as the executing officer of a judgment of the civil division of the court of first instance, he asks the assistance of armed forces to enable him to execute the said judgment, by the reason of the resistance on the part of parties required and condemned to deliver possession of the Imataca mines, situated in the jurisdiction of Della Costa, and also considering the representation of Mr. Juan Padrón Uztáriz, as the attorney of George Turnbull, in whose behalf the delivery of said property is to be made under said judgment, this civil and military court, in conformity with the legal prescriptions in the matter of civil authorities aiding the judicial, as is proper in this case, doth order that there shall be placed at the disposal of said judge of the district of Della Costa, 20 armed men under the command of Colonel Uscategui, belonging to the military force of this place, in the name of the State, to enforce said judgment.

Accordingly, on August 4, 1900, proceedings were taken as set forth in the following certificates:

Juan E. Pino, acting secretary of the judge of the district in commission, certifies that pursuant to the measures adopted by the mandate of execution, given on the 19th day of June, 1900, by the judge of the civil court of the first instance in the Federal District, there is found an act as follows: In the Manoa region of the Della Costa district, on the 4th of August, 1900, there was constituted a judge of the said district at the iron mine of Imataca, on the side of the mountain, in which location is found the principal location of said mine. And in view of the objection made by the representatives of the Orinoco Company (Limited) to the transfer of the effects belonging to George Turnbull, then proceeded to comply with the mandate and execution given on the 19th of June, 1900, by the judge of the court of first instance in the civil court of the Federal District, by taking formal possession of said mine and all its appurtenances in the presence of the witnesses José Maria Escobar and Augosto Parejo Gaines. The court being held at the above-mentioned place, the above-mentioned judge solemnly declared, in the name of the Republic and by the authority of the law, that George Turnbull, represented by Juan Padrón Uztáriz, is placed in possession of the immovables, consisting of 400 hectares to the north of the Corosimo River and 100 hectares to the south of the same river, conforming to the title of the said property given the 14th of March, 1888, and reaffirmed the 20th of November 1896. Having accomplished which, the court was afterwards transferred to the banks of the Corosimo River, where were found the buildings and other appurtenances of the above-mentioned mining establishment, and it was again declared, equally in the name of the Republic and by authority of the law, that the owner, George Turnbull, is placed in possession of the following property: The railroad line that goes to the mine, its rolling stock and other appurtenances; a large house and two small living houses; two sheds covered with zinc; two small houses covered with zinc; a house and six sheds of straw for laborers, and about 3,500 tons of iron ore situated at the above-mentioned river and taken out of the mine. There presented themselves H. H. Verge and P. Mattei manifesting, the first in his character as superintendent of the Orinoco Company (Limited), and the second authorized by George B. Boynton, who protested in the most solemn manner against the above-mentioned acts, and in consequence made a written protest, in accordance with the above action. Furthermore, the court imposed on all those present the obligation that they are to respect all acts legally done and to abstain and avoid any act that might impede or interfere with the owner, George Turnbull, or his representative, in exercising the rights that they are entitled to.

In a communication addressed to the Secretary of State of the United States, dated December 18, 1900, G. E. Hinnau, " of counsel for George Turnbull," states that the court of first instance in the Federal District at Caracas, being a duly constituted court of competent jurisdiction, had, on June 9, 1900, finally and conclusively adjudicated and by decree confirmed the tenor of the resolution of the Government of Venezuela, finding, as in said resolution recited, that the title to the Imataca mines was vested in said Turnbull, and that no other person had or possessed any right, title, or interest therein, and having no such title, any possession adverse to said ownership was unlawful; and that from such findings and a mandate and decree thereon made by said court, dated the 19th day of June, 1900, there is no appeal; that pursuant to the adjudication and mandate of said court, and in the enforcement and effectuation thereof, the proper authorities on the 4th day of August, 1900, placed said Turnbull, through his agent, Juan Padrón Uztáriz, in possession of the property and its appurtenances; and that the court, for the purpose of thereinafter maintaining Turnbull in the lawful maintenance of such property, ordered and decreed by perpetual injunction that all persons be thereafter enjoined and restrained from impeding or interfering with the rights of said Turnbull in and to said mines and property.

It is, however, to be observed that the judgment of the civil division of the court of first instance of the Federal District is res adjudicata solely upon the issue properly before it for its determination; that the Orinoco Company (Limited) was a party to the proceedings in said court only in its capacity as grantee of the rights and interests, if any, obtained by Benoni Lockwood, jr., by virtue of the judicial sale at Ciudad Bolívar on November 18, 1898, under the execution against the Orinoco Iron Syndicate (Limited); that the judgment of the court was that " in the presence of the title shown by plaintiff (Turnbull), *and that set in opposition by the American company* (to wit, as the record shows ' a title given by an auction on the 18th of November, 1898, before the judge of hacienda of Ciudad Bolívar '), the tribunal must maintain George Turnbull in the rights and privileges granted by law to legal owners," and that " the company has no rights of action against him (Turnbull), and no rights to enforce on his mine, Imataca, *by reason of the title herein referred to.*" In other words, the court held that the Turnbull titles of March, 1888, were to be sustained in opposition to the title obtained by Benoni Lockwood, jr., in virtue of the judicial sale, declared invalid, of November 18, 1898.

It is evident from the record that the prior valid and subsisting rights of the Orinoco Company (Limited) as cessionary of the Fitzgerald contract of September 22, 1883, were not before the civil division of the court of first instance of the Federal District in the case of *George Turnbull* v. *Benoni Lockwood, jr., et al.*, and therefore that they are in no manner affected or determined by the judgment of said court in that action. Rulings of courts must be considered always in reference to the subject-matter in litigation and the attitude of the parties in relation to the point under discussion.

Moreover, as has been shown heretofore, jurisdiction of the Fitzgerald contract vested, constitutionally, in the high Federal court alone.

On the 10th of October, 1900, it was, through the ministry of fomento, resolved:

Considering that the contract celebrated September 22, 1883, with Cyrenius C. Fitzgerald, and on which the Orinoco Company (Limited) now bases its right for the exploitation of the national riches in the Delta of the Orinoco and colonization of the lands conceded, has now no legal existence, for that it was declared void for failure of performance of what was in it stipulated; that in April, 1887, the National Congress approved a contract celebrated with the North American citizen, George Turn-

bull, in the same regions and with the same clauses and in all equal with that with the Manoa Company (Limited) (cessionary of Fitzgerald), declared void, which was also for the same causes declared in caducity on the 18th of June, 1895; and that on the same day of the said month and year this office issued an executive resolution restoring to the Manoa Company (Limited) the rights and privileges conceded by the original contract with Fitzgerald in 1883; and

Considering (first) the contract celebrated with C. C. Fitzgerald having been declared void for failure of compliance with article 5, this can not be considered in vigor without the intervention of a new contract approved by the National Congress; (second) that the legislature of the State of Bolívar, in its ordinary session in 1899, adopted a joint memorial to the National Congress, declaring that the company concessionary of the contract celebrated with Fitzgerald had not complied in its fourteen years of existence with any of the clauses established in article 5 of the said contract, and that this interferes with the interests of the Venezuelans for exploiting the natural products of that region of the Republic, and (third) that according to the notes and reports forwarded to this office by the authorities of the different places of the region to which refers the concession already mentioned, all concur in the failure of performance of the same and of the palpable evil which it occasions, as well to the national treasury as to the individual industries, the supreme chief of the Republic has seen fit to dispose:

That the mentioned contracts are declared insubsistent.

Let it be communicated and published.

For the National Executive: Ramón Ayala

The evidence presented here discloses that in the joint memorial adopted by the legislative assembly of the State of Bolívar, it was by that body resolved:

Article 1. To solicit the National Congress to order the necessary dispositions to the end that shall be petitioned by the competent organ, and shall be declared by the high Federal court the rescission of the contract celebrated by the National Executive with the citizen, Cyrenius C. Fitzgerald, his associates, assigns, and successors, the 22nd of September, 1883, which was approved by the Congress in session the 23rd of May, 1884.

It is furthermore significant that in the National Congress on April 7, 1899, the special commission appointed to consider and report concerning the resolution of the legislative assembly of the State of Bolívar with reference to the Fitzgerald contract, reported to the citizen president of the chamber of deputies proposing to the chamber that it remit said resolution to the National Executive, in order that it resolve what is convenient, but that on April 26, 1899, when the chamber of deputies considered in session the foregoing report, the deputy, Doctor Martinez, proposed —

That at the end of said report, where it says, "in order that it resolve what is convenient," it shall say: "*In order that they be submitted to the high Federal court, to the end that that tribunal shall resolve the affair in conformity with justice.*"

And this proposition was voted approved.

Clearer and more conclusive evidence (except the constitutional provision itself) could not be required than the foregoing action of the chamber of deputies on April 26, 1899, and the decision of the high Federal court in the New York and Bermudez case hereinbefore cited, to demonstrate that jurisdiction of the Fitzgerald contract vested solely in the high Federal court, and that such executive resolutions as those of September 9, 1886, and of October 10, 1900, declaring said contract insubsistent are illegal assumptions of power and null and void.

The question whether or not the grantees of the Fitzgerald concession had fulfilled its conditions was remitted by the agreement itself to the competent tribunals of the Republic, to be there determined in conformity with the laws.

But it may be remarked that the evidence shows that various high officials of Venezuela, including the governor of the Federal territory of the Delta, certify that within the time limit of the contract the concessionaries had commenced the work of exploitation "in conformity with what is established in the contract." When the Government on June 18, 1895, authorized the Manoa Company (Limited) to renew its work of exploitation and colonization the reports made by the company to the Government presented in evidence show that the company actively resumed the prosecution of the enterprise. Furthermore, it is to be observed that complaints of nonfulfillment of the Fitzgerald contract come with small grace from the Government of Venezuela. Evidence is not wanting here that shortly after the signing of the alleged contract between Guzmán Blanco and George Turnbull in Europe the Government of Venezuela ordered the governor of the Federal territory of Delta to require the Manoa Company (Limited) to suspend its operations. The hostile, arbitrary, and vacillating course of the Government toward the grantees of the Fitzgerald concession from the illegal annulment of their contract on September 9, 1886, to the equally illegal annulment on October 10, 1900, was calculated to paralyze every effort to fulfill their obligations, destroy their credit, create expensive litigation, and involve in financial ruin every person induced to invest his capital in the company's enterprises in reliance upon the good faith of the Venezuelan Government. Enterprises of pith and moment require for their successful prosecution and depend upon the stability of rights the protection of law, the sacredness of obligations, and the inviolability of contracts. Of all these elements necessary to success the grantees of the Fitzgerald contract were deprived by the arbitrary acts of the Venezuelan Government, which in equity and justice can not now be heard to complain that the said grantees did not, in the presence of such obstacles and in opposition to the unlawful exercise of superior force, fulfill their obligations.

The twelfth article of the collusive Guzmán Blanco-Turnbull contract of January 1, 1886, shows that George Turnbull had full knowledge of the exclusive rights and privileges possessed by the grantees of the Fitzgerald concession within the territories described. With this knowledge Mr. Turnbull's efforts then and thereafter were persistently directed toward the dispossession of said grantees from the rights lawfully vesting in them by virtue of that contract. His status throughout the history of this remarkable case has been that of a mere stranger and trespasser seeking to devest the prior lawful and subsisting titles vesting by and through the Fitzgerald concession.

> And it is a common maxim that he who has the precedency in time has the advantage in right; not that time, considered barely in itself, can make any such difference, but because the whole power over a thing being secured to one person, this bars all others from obtaining a title to it afterwards. (1 Fonbl. Eq., 320.)

The basis of Mr. Turnbull's claim against the Government of Venezuela presented to this Commission is the alleged interference with and deprivation of the titles obtained by him in 1888 to certain lands and mines. But these titles were knowingly sought and secured by him in derogation of the rights of the grantees of the Fitzgerald concession. His titles were void and his possession unlawful *ab initio*.

Mr. Turnbull complains of the Venezuelan Government:

First. That by reason of certain acts of said Government he was prevented from either improving or selling his said property, and that he thereby sustained a loss of upward of $50,000.

Second. That by reason of certain other acts of the Venezuelan Government he was deprived of the consideration agreed to be paid him under his contract

of the Orinoco Iron Syndicate for the lease of said property, and was unable to make any other contracts with respect thereto, or to develop or take the products of said mines, and was thereby damaged to the extent of £140,000.

Third. That by reason of certain acts of the Venezuelan Government he was deprived of the use and occupation of said property, and prevented from concluding any contracts, or to use, develop, lease or, sell said property, or the minerals or product thereof, from November 20, 1896, to June 8, 1900, and was thereby damaged in the sum of $500,000.

Fourth. That between the years 1893 and 1900 he expended and caused to be expended the sum of $120,000 in the United States and England in travel, legal disbursements, fees to the Government of Venezuela, legal expenses of negotiating, promoting, and procuring six several contracts for the leasing, testing, and sale of said property, all of which contracts were made ineffectual and void by reason of the spoliation of titles to said property by said Government and the withholding of the use, possession and occupation thereof.

The Manoa Company (Limited) in its memorial alleges respecting the damages and injuries caused said company by the acts of the Government of Venezuela:

First. That if by reason of the force and effect of the resolutions of September 9. and September 10, 1886, and the act of Congress of April 28, 1887, or of any or either of them, said company was divested of its rights, titles, and interests in and to the Fitzgerald concession. it was damaged thereby in the sum of $5,000,000.

Second. But that if the said resolutions and act did not have that effect, it was, by their consequences, prevented from the development and exploitation of the resources thereof, and the receipts of the rents, revenues, royalties, and profits which it would have derived therefrom between the date thereof when its rights thereto had been repudiated by the Government, and the date of the resolution of June 18, 1895, when its said rights were confirmed, reaffirmed, ratified, acknowledged, and re-established; which rents, revenues, royalties, and profits said company estimates, in view of all the then existing conditions and circumstances of the case, would have amounted to the sum of $300,000.

Third. That if the resolution of July 10, 1895, by its force and effect devested said company of its right, title, and interest in or to the mine of asphalt, it was damaged in the sum of $250,000; but that if it did not have that effect or operation then the said company was damaged thereby in the nominal sum of $1,000.

Fourth. That by the effect thereof as a slander of its title to the entire concession and each and every part of it, by the assertion immanent in that resolution and an obvious implication from it that the title and rights of the said company to its entire concession were liable at any time to be arbitrarily and summarily devested and annulled in like manner, either totally or in fragments, at the discretion or caprice of the Executive authority and without due process of law, it was damaged in the sum of $2,000,000.

Fifth. That if the resolution of November 20, 1896, by its force and effect divested said company of its rights, title, and interest in or to the mine of Imataca and its appurtenant lands, it was damaged thereby in the sum of $1,000,000; but that if it did not have that effect, then said company was damaged thereby in the nominal sum of $1,000.

The Orinoco Company (Limited) complain of the Government of Venezuela:

First. That on account of the acts and doings of said Government and its officers touching the sale under execution issued from the national court of hacienda at Ciudad Bolívar, and for the damages caused by it and them to said

company by the deprivation of said company of its lawful possession of the mine of Imataca under the claim that the Government had a lien thereon in consequence of the judgment in said court against the Orinoco Iron Syndicate; and by the exaction and appropriation of the purchase price thereof and the costs, expenses, and disbursements caused thereby, and the ejectment from and deprivation of said mine, that said company was damaged in the sum of $125,000.

Second. That by reason of the Executive resolution of the 10th of October, 1900, declaring insubsistent the contract of September 22, 1883, the company lost the profits of a certain contract entered into by it with Charles Richardson and his associates for the lease of the asphalt mine on the island of Pedernales, and was thereby damaged in the sum of $100,000.

Third. That by reason of said resolution the company lost the opportunity of completing an agreement with Messrs. Moore, Schley & Co. for the exploitation of the Imataca iron mine, and was damaged thereby in the sum of $100,000.

Fourth. That the company on the 10th day of October, 1900, had concluded negotiations with Messrs. Power, Jewell & Duffy, of Boston, whereby it was stipulated that for a certain consideration the said parties should pay into the treasury of said company as and for a working capital with which to prosecute its intended operations on the concession the sum of $2,800,000, but that by reason of the Executive resolution of October 10, 1900, the said parties refused to execute the proposed contract and abandoned the same, whereby the company lost the benefit and advantage thereof and was damaged in that sum.

Fifth. That, if under the constitution and laws of the Republic of Venezuela, the resolution of October 10, 1900, had the effect to devest said company of its rights, titles, and interests in and to the contract of September 22, 1883, the company was damaged in the sum of $10,000,000; and if it be otherwise and said resolution was an act of usurped authority beyond the competence of the Executive power, then the company was damaged thereby in the aggregate of the damages mentioned as having been occasioned thereby; but that the company advisedly limits its claim against the Republic of Venezuela for the damages occasioned by said resolution of October 10, 1900, to the sum of $1,000,000, for which it demands the judgment and award of this tribunal.

Sixth. That if it be considered that by force of the constitution and laws of Venezuela the Orinoco Company (Limited) has been devested of its rights, titles, and interest in and to certain land and mining concessions granted by the Government since the date of the resolution of October 10, 1900, the company makes claim on that account for the reasonable value thereof which it alleges upon information and belief exceeds the sum of $1,000,000; but if it be considered that the said land and mining concessions are of no force or validity as against the elder patent and paramount title of said company under its contract, then the company claims only nominal damages for and on account of the granting of the same in manner and firm but without legal effect upon the right of said company to have and exploit the same.

In view of all the foregoing I am of the opinion:

First. That the contract-concession entered into on the 22nd day of September, 1883, by and between the Government of Venezuela and Cyrinius C. Fitzgerald, granting to the said Fitzgerald, his associates, assigns, and successors for the term of ninety-nine years the exclusive right to develop the resources of certain territories therein described, and the exclusive right of establishing a colony for the purpose of developing the resources already known to exist

and those not yet developed in the same region, and other rights, privileges, and immunities therein specifically enumerated, is and since the 29th day of May, 1884, has been a valid subsisting contract, lawfully vesting in the grantee Cyrenius C. Fitzgerald, his associates, assigns, and successors all the rights, privileges, and immunities in the said contract set forth.

Second. That George Turnbull obtained no rights of property, either in the concession as a whole, under and by virtue of the alleged contract of January 1, 1886, or to the lands and mines of Pedernales and Imataca, under and by virtue of his alleged titles.

Third. That the Fitzgerald contract-concession being subsistent, the Manoa Company (Limited) is entitled to an award generally for the wrongful interference with and deprivation of the exercise of its rights and privileges under the said contract-concession by the Government of Venezuela from the 9th day of September, 1886, to the 18th day of June, 1895, justly commensurate with the loss or injury sustained thereby; and in particular to an award for damages, however nominal, for injuries sustained relative to the Pedernales asphalt mine and to the iron mine of Imataca.

Fourth. That the Fitzgerald contract-concession being subsistent, the Orinoco Company (Limited) is entitled to an award generally for the wrongful interference with and deprivation of the exercise of its rights and privileges under the said contract-concession by the Government of Venezuela, from the 10th day of October, 1900, to the 14th day of January, 1901, justly commensurate with the loss or injury sustained thereby; and in particular to an award for the amount paid into the national court of hacienda on the 19th day of December, 1898, together with interest on said sum at the rate of 3 per cent per annum from said date to the 31st of December, 1903, the anticipated date of the final award by this Commission.

GRISANTI, *Commissioner* (claim referred to umpire):

" The Manoa Company (Limited) " sets forth a claim against the Republic of Venezuela, the memorial of which ends as follows:

> Your orator claims, however, that by the effect thereof as a slander of its title to the entire concession and each and every part of it, by the assertion immanent in that resolution and an obvious implication therefrom, that the title and rights of the said company to its entire concession was liable at any time to be arbitrarily and summarily devested and annulled in like manner, either totally or in fragments, at the discretion or caprice of the Executive authority and without due process of law; that it was in fact damaged in the sum of $2,000,000 and more; and if said resolution of November 20, A.D. 1896, by its force and effect divested said company of its said right, title, and interest in or to said mine of Imataca and the appurtenant lands aforesaid, that it was damaged thereby in the sum of $1,000,000; but if it did not have that effect or operation, then that said company was damaged thereby in the nominal sum of $1,000.

On September 22, 1883, a contract was celebrated between the Government of Venezuela and Cyrenius C. Fitzgerald, approved by the National Congress on May 23, 1884, whereby was conceded unto said Fitzgerald, his associates, successors, and assigns, for the term of ninety-nine years, the exclusive right to exploit the resources of the territories of national property referred to in Article I of said contract; as also the exclusive right for the same term to establish a colony, to develop the resources known, and also those as yet not exploited in said region, including asphalt and coal; for the purpose of establishing and cultivating on as high a scale as possible agriculture, breeding of cattle, and other industries and manufactures which may be considered suitable, setting

up for the purpose machinery for working the raw material, exploiting and developing to the utmost the resources of the colony.

Fitzgerald undertook to commence the works of colonization within six months, counting from the date when said contract was approved by the Federal council (art. 5) — that is to say, from the date of its being granted (September 22, 1883) — the Government having promised that, if in its judgment it should be necessary, it should grant to the contractor a further extension of six months for commencing the said works (art. 10).

On the 7th day of February, 1884, Dr. Heriberto Gordón, acting as Mr. Fitzgerald's attorney, requested that said Mr. Fitzgerald should be conceded the further extension of time referred to in said article 10; and by resolution of the 19th of the same month it was so conceded, to be counted from the 22d of the following March.

In the course of said extension of time — on the 14th of June — Fitzgerald assigned the contract to " the Manoa Company (Limited)," and on April 10, 1886, seven months and ten days after said extension had elapsed. Doctor Gordón, attorney for said company, addressed a petition to the minister of agriculture (fomento), the last part of which (pp. 64, 65, and 66 of the record) is as follows:

Therefore, in compliance with instructions given me by " the Manoa Company (Limited)," I beg to apply to the Benemérito general, President of the Republic, through your respectable organ, beseeching him most entreatingly and urgently to declare by resolution that to " the Manoa Company (Limited)" are not imputable the circumstances which have prevented it, up to the present, from carrying out works in accordance with the contract celebrated between the Government and C. C. Fitzgerald on September 22, 1883, of which it is an assignee; and that, therefore, said contract is in force, and the company in possession of all its rights, as in the extensions accorded will not be computed the time elapsed up to the present.

Throughout all of said solicitude, and particularly in the above-inserted paragraph, " the Manoa Company (Limited) " confesses through its attorney, Doctor Gordón, that at that date (April 10, 1886), a long time after the extension had expired, it had not commenced to fulfill the contract, and likewise admits considering it annulled. And considering only in fact that the company held such an opinion, can it be accounted for that the company should request the Government to promulgate a resolution declaring *that the causes which had prevented it from carrying out the contract are not imputable to it; that therefore the contract is in force and the company in possession of all its rights, as in the extensions accorded will not be computed the time elapsed.*

The above-mentioned petition was followed on September 9 by this resolution, to wit:

Resolved, Señor Heriberto Gordón, with power from Señor C. C. Fitzgerald, celebrated on the 22d of September, 1883, with the National Government a contract for the exploitation of the riches existing in lands of national property in the Grand Delta, and the works ought to have been begun within six months of the aforesaid date. In spite of such time having elapsed without commencing said works, the Government granted him an extension of time for the purpose; and inasmuch as said contractor has not fulfilled the obligations which he contracted, as stated in the report of the director of territorial riches, specifying in reference to article 5 of the contract in question, the councilor in charge of the presidency of the Republic, having the affirmative vote of the Federal council, declares the insubsistency or annulment of the aforesaid contract.

In any other case the lawfulness of said resolution would be doubtful, but in the present one it is not; firstly, because " the Manoa Company (Limited) " has authentically declared the facts whereon it is based; secondly, because said

company tacitly acknowledged the annulment of the contract; and, lastly, because the company itself made the National Government a judge as to the enforcement or termination of the contract, when requesting it to declare the enforcement of said contract, whereby it authorized the Government ipso facto to promulgate its annulment.

As an explanatory argument of the unlawfulness of the above-inserted resolution, quotation is made of the judgment passed by the high Federal court on August 23, 1898, declaring the insubsistency and nullity of the Executive resolution of January 4, of said year, whereby the contract of the " New York and Bermudez Company " was declared terminated and void.

Without discussing said decision, which in our opinion is erroneous, as shown by the reasonings contained in the voto salvado of three of the judges (Official Gazette, No. 7421, dated September 17, 1898), we shall undertake to establish that the case of the " New York and Bedmudez Company " and that of " the Manoa Company (Limited) " are entirely different, whereas the claimant company, in the aforementioned petition, authentically confessed the insubsistency of its contract, the forfeiture of its rights, and requested the National Government to ratify the same, which confession and petition the " New York and Bermudez Company " did not make. And the most obvious evidence of the difference between the two cases is that " the Manoa Company (Limited) " did not apply to the high Federal court to request that the resolution of September 9, 1886, be declared void.

" The Manoa Company (Limited) " alleges as the principal cause for preventing it from fulfilling the obligations contracted, the British invasion, for, according to the claimant company's statement, the British authorities were apt to hinder its use and full power over a considerable portion of the territory marked out in Article I of the contract.

In an article inserted in the *Evening Post*, New York, dated February 10, 1896, we find the following account:

Mr. Fitzgerald especially attributes the subsequent misfortunes, decadence, and collapse of the Manoa Company solely to the British invasion.

But there are some peculiar facts in this connection. Mr. Fitzgerald, when requested to point out on the map the location of the sawmill, indicated it as above specified. Now, that particular spot is to the westward of the Schomburgk line; and every one familiar with the geographical aspects of British claims in the Guiana controversy knows that they never extended in the interior so far as to approach any part of the course of the Orinoco River.

Moreover, the Anglo-Venezuelan diplomatic correspondence appertaining to McTurk's proceedings of 1884 shows that his assertion of British jurisdiction did not extend farther west than the Amacuro River, i. e., the coast limit of the Schomburgk line. Guzmán Blanco, as Venezuela's plenipotentiary in London, reviewed in a note to Lord Salisbury, dated July 28, 1886, all the circumstances of the McTurk affair, and in it there is no allusion to forcible British acts west of Amacuro. In his communication Guzmán Blanco cites a note written by McTurk, *from the right bank of the Amacuro*, to Mr. Thomas A. Kelly, resident manager of the Manoa Company, *stating that he* (McTurk) *had received notice that the company was going to erect a sawmill at the mouth of the Barima*, and warning him against such encroachment. This seems to establish that the British Government's interference with the Manoa Company in 1884 had in view only the prevention of the company's intended programme for intrusion east of the Schomburgk line, and involved no interference with the sole improvements made by the company up to that on the grant.

Accordingly there was nothing to deter the Manoa corporation from pushing forward its *mercantile, agricultural, commercial, manufacturing, shipping, and mining business* in territory exclusively Venezuelan, with the Orinoco sawmill settlement as a basis. Besides, the really valuable portions of the concession for the purposes of immediate development (including the Pedernales asphalt property) were those which lay

to the west of the Schomburgk line, and which could have been worked in absolute security of ownership under the laws of Venezuela.

An affidavit of Mr. Jerome Bradley, ex-president of the Manoa Company (Limited), rendered on October 21, 1886, filed at the United States circuit court in Brooklyn (case of Everett Marshall *v.* The Manoa Company *et al.*) reads as follows, to wit:

I have read the affidavit of C. C. Fitzgerald, verified July 30, 1887. It is untrue that I was informed by his (Fitzgerald) son George, upon the latter's return from Venezuela, that the lumbering operations upon said grant were discontinued in 1884 owing to the interference of the British Government claiming the territory; but, on the contrary, I allege that the same were discontinued for the reason that the Manoa Company did not pay, and had not the means to pay, the few men employed by them to cut lumber and transport it to the sawmill; that the sawmill spoken of was not upon that portion of said grant to which a claim was made by the British Government. The said sawmill was distant from that portion of the grant over 50 miles. (Taken from an insertion of Mr. Turnbull's appended to this claim.)

This shows that the British invasion is only a pretext alleged by the claimant company so as to conceal the real cause of its collapse, which was its inability to raise funds for commencing the works of colonization and fulfilling the other obligations to which it was bound under the contract. Moreover, the company never protested against the aforementioned resolution (although said company asserts to the contrary) nor applied to the Federal court to demand its annulment. Said company was well aware that on lawful grounds it was at a loss; that the executive act was based on true facts and in conformity with justice.

On January 1, 1886, Gen. Guzmán Blanco, envoy extraordinary and minister plenipotentiary of Venezuela to various courts of Europe, celebrated a contract on behalf of Venezuela with Mr. George Turnbull, the same as that as the Manoa Company (Limited); but said contracts, besides requiring for its legal validity the approval of the President of the Republic with the affirmative vote of the Federal council, as also the sanction of Congress (Article 66, attribution 6 of the constitution of 1881), in article 12 stipulates as follows:

This contract shall enter into vigor in case of the becoming void through failure of compliance within the term fixed for this purpose of the contract celebrated with Mr. Cyrenius C. Fitzgerald the 22d of September, 1883, for the exploitation of the same territory.

The referred to contract was approved by the Federal council on September 10, 1886, and by Congress on April 28, 1887; that is to say, after the Manoa Company's contract became void; therefore the Turnbull contract did not deprive said company of the rights it had forfeited and which the Republic of Venezuela had newly acquired.

On June 18, 1895, and at the request of the Manoa Company (Limited), the National Government issued a resolution, ordering that—

due authorization be given to the said Manoa Company (Limited), within six months, reckoning from the date of this resolution, to renew its works of exploitation in order to the greater development of the natural riches of the territories embraced in said concession; hereby confirming it in all its rights stipulated and granted to C. C. Fitzgerald by the contract of September 22, 1883; and the said Manoa Company (Limited) shall be bound to report to the national Executive from time to time through the organ of this ministry of all and every work done by it in execution of said contract in order that the Government may be enabled to judge of its compliance with the obligations of said contract in conformity with the spirit and the magnitude of its stipulations.

The contract of the Manoa Company (Limited), being insubsistent through it not complying the obligations thereunder, and also in view of the contents of the Executive resolution dated September 10, 1886, could not, in virtue of the Executive resolution already inserted, revive said contract, but had to be issued anew in conformity with the National Constitution of 1893; that is to say, that it had to be celebrated by the President of the Republic with the affirmative vote of the Government council and with the approval of Congress. Article 44 of the constitution which establishes the duties of Congress, contains, under No. 16 the following:

To approve or deny such contracts of national interest as the President of the Union may have celebrated, and without which they can not be carried out into effect.

The Executive resolution of June 18, 1895, was, and is, absolutely inefficacious for giving existence to a contract that had become void ten years before.

The claimant company presents as a proof of the subsistence of its contract a resolution issued by the minister of fomento on February 26, 1886, which in no wise refers to said contract but to another, as I shall forthwith show. Hence the text of the resolution:

UNITED STATES OF VENEZUELA,
MINISTRY OF FOMENTO,
DIRECTION OF TERRITORIAL RICHES,

Caracas, 26 February 1886

Year twenty-second of the law and twenty-seventh of the federation.

Resolved, In view of the petition of Citizen Heriberto Gordón, as attorney to C. C. Fitzgerald, assignee of the contract for colonization and exploitation of a part of the waste lands of the former State of Guayana, celebrated on May 21, 1884; the President of the Republic, with the vote of the Federal council, has resolved: That for the effects of the extensions of time fixed for the performance of said contract, the time elapsed since the 11th of June, 1885, up to this day, be not computed, and that consequently the mentioned contract continue in force and the concessionary is in possession of all his rights.

Let it be published.

For the Federal Executive: J. V. GUEVARA

This resolution refers to the contract celebrated by Dr. Heriberto Gordón on his own behalf for colonizing the waste lands situated in the former State of Guayana, which are comprised within the limits expressed in Article I.

The Manoa contract was celebrated on September 22, 1883, and approved by the National Congress on May 23, 1884; the Gordón contract was celebrated on May 20, 1884, and its approval by the legislature took place in the 12th of June of the same year.

Owing, no doubt, to a mistake, which I have corrected, the claimant company has adduced the mentioned resolution as evidence.

" The Manoa Company " considers itself as being the owner of the Imataca iron mine and the Pedernales asphalt mine, alleging such ownership in view of article 4 of the contract; and whereas in 1888 the Government of the Republic conceded the definite title to said mines to Mr. George Turnbull, who previously fulfilled the formalities of law in force at the time, said company pretends to be dispossessed and on the ground of such erroneous opinion lays one of its claims.

The memorial states as follows:

Afterwards, on or about the 13th day of March, A.D. 1888, the authorities of the Republic conceded and issued to said Turnbull, in form of law but without right the

definite title to the said iron mine of Imataca; and afterwards, on the 28th day of June of that year, they conceded and issued unto him in like manner and form the definite title to said mine of asphalt; and afterwards put said cessionary in possession thereof and of the lands comprising the superficial area of the same and intended for their use in the exploitation thereof; the definite title of which lands also said authorities about the same time conceded to said Turnbull.

All of said arbitrary acts and doings were accomplished without notice to said company or other process, legal proceeding, or opportunity to them to be heard, and were in manifest derogation of its rights.

The basis which the claimant company pretends to have for the series of mistakes contained in the two foregoing paragraphs is article 4 of the contract, to wit:

ART. IV. A title in conformity with the law shall be granted to the contractor for every mine which may be discovered in the colony.

The claimant company holds that, in virtue of said clause, every mine discovered in the territory described in article 1 of the contract belongs to it, whoever the discoverer may be. A gross absurdity, which baffling interest alone could have led the claimant company to believe. The Government of Venezuela undoubtedly celebrated the contract which is being subject to analysis, with a view to develop the natural riches and colonization of the mentioned territory, and according to the curious meaning given to article 4 by the company, the exploitation of the mines depended exclusively on their will, so that if said company did not wish to discover any, nobody could denounce one, even if he discovered it.

Furthermore, the article provides that a title should be granted in conformity with the law to the enterpriser on every mine he discovered; that is to say, that if the company discovered a mine, it had, in order to obtain said title, to comply with the legal formalities.

Since 1883, when the Manoa contract was signed, up to 1887, when Turnbull obtained his title to the iron mine of Imataca and to the asphalt mine of Pedernales, five mining codes were in force in Venezuela, to wit: one of March 13, 1883; one of November 15, 1883; one of May 23, 1885; one of May 30, 1887; and an organic decree of the latter issued on August 3, 1887.

All of said codes are based on the principle that mines are the property of the State wherein they are situated, the administration alone of the same being in charge of the Federal Executive; therefore it has to be taken for granted that whosoever wishes to exploit a mine, even he who discovers the same on his own grounds, must previously obtain a corresponding title thereto. For such obtainment the following formalities, briefly stated, have to be complied with:

Whoever may intend to exploit mines shall notify the president of the State or the governor of the territory wherein the mines discovered are located, so that they may be entered in the register which must be kept by the secretaries of said functionaries. (Art. 11.)

The petition for a concession shall be published once only in the official gazette of the State or territory, as the case may be, or in default thereof in the paper of largest circulation, or if the latter does not exist either, it will suffice to post placards or advertisements in the municipality where the mines are located during thirty days. (Art. 12.)

In every petition for mines addressed to the president of the State or to the governor, accordingly, the number of mines requested must be expressed, as also the district, municipality, or colony wherein such are contained; if these are not private, municipal, or waste lands, the name must be stated of the engineer or public surveyor who is to measure them and make out the plans, which acts

will take place after having published a notice to that effect in the press, in order to inform the adjacent neighbors thereof, so that they may assist at said acts. Plans made only by engineers or surveyors having a title, will be considered authentic and will alone produce legal effect in the matter of mensuration and plans contained in the records of mines. (Art. 16.)

Once the mensuration takes place, the record, together with the plans made, is turned over to the mining inspector for him to verify the acts, which in its turn, and in addition to his report, is all forwarded to the ministry of fomento. (Art. 17.) Thereupon, and in view of the record and its merits, the national Executive decides as to whether it will or will not grant the concession. (Art. 19.)

The Manoa Company (Limited) should have complied with all said formalities in order to obtain a title to the aforesaid mines, and it did not do so. The only judicial effect which can be attached to article 4 of the contract is the right of the company to be preferred when in competition with any other discoverer, in conformity with articles 13, 14, and 15 of the referred-to law.

Article 13 provides that—

> Those who think to have a right to oppose others who have petitioned for mining concessions in virtue of the preceding articles, may present their petitions to the president of the state or to the governor of the territory. These petitions will be registered in the same order of their presentation, stating the day and hour thereof, and the only notification to the parties concerned therein will be published in the official gazette three times in the course of a month, or placards and advertisements will be posted as mentioned in the foregoing article.
>
> On the expiration of said thirty days, and the formalities provided in the preceding articles having been fulfilled, the president or governor, as the case may be, will decide with regard to the petitions for concessions, and his resolution will refer also to the merits of oppositions, if such oppositions have been made.
>
> After said decision has been given no oppositions will be admitted, and the favored party or parties will be authorized by the president or governor accordingly, to proceed to the exploration and other preparatory acts required for putting the record in a condition to be considered, and to enable him to issue or deny a title of concession, reporting the same to the national Executive. (Art. 15.)

The provisions quoted are those of the law of November 15, 1885.

If, as before stated, whenever a person discovers a mine in his own territory he must, in order to obtain a title thereto, comply with the formalities provided under the respective law, all the more reasons why the claimant company should have complied with the same is that under the contract of September 22, 1883, no other right to the territory designated in article 1 was conceded to it than that of exploiting the natural riches therein contained.

In the opinion of the Venezuelan Commissioner, as the claimant company has no title of ownership of the aforesaid mines nor made any opposition to Turnbull when he attempted to acquire them, the claim of said company in regard to such mines is absolutely groundless.

" The Manoa Company (Limited)," has not shown that it fulfilled the obligations imposed under the contracts of September 22, 1883, and consequently it is deprived of any right to claim for losses sustained through the annulment of said contract. In effect, it would be the most flagrant violation of equity — which has to be the basis for the decisions of this tribunal — to acknowledge the rights which a contract concedes to a contractor without considering that said contractor has not fulfilled the obligations he was under, and that these are correlative to said rights.

Lastly, " The Manoa Company (Limited)," raises its claim to the exorbitant amount of $2,000,000 without producing the slightest evidence to prove that the losses alleged amount to that sum. I am firmly convinced that this high

tribunal has to be extremely exigent and conscientious in examining and appreciating to evidence produced in support of claims, as otherwise it might inadvertently serve the unbounded avarice of unscrupulous claimants.

GEORGE TURNBULL

Let us now analyze Mr. Turnbull's claims.

One is for $500,000, at which amount the plaintiff reckons the damages and losses which a judicial proceeding against "the Orinoco Iron Syndicate" caused him.

This part of the claim is perfectly groundless, as the said proceeding was quite legal, and the most decided and efficacious protection was tendered by the Government of Venezuela to Mr. George Turnbull's interests.

At the national court of finance at Ciudad Bolívar a judgment of confiscation was given against the English schooner *New Day*, of which the captain was John W. Baxter, on account of having discharged at Manoa a cargo that had been transshipped at Barbados from the steamers *Java*, *Yucatan*, *West Indian*, and *Spheroide*, and which cargo had been shipped at London and Liverpool by the Orinoco Iron Syndicate (Limited) to the port of Ciudad Bolívar, addressed to that same company, the manager of which was Mr. George Turnbull. And whereas Manoa is not a port authorized for foreign trade, nor had the schooner obtained a permit to discharge goods therein, the fact was denounced at the national court of hacienda, and said court, in the exercise of its legal duties, passed the corresponding judgment thereon. Said judgment having been finally determined, a sentence was delivered declaring that the schooner *New Day*, together with its boat, tackle, and other appurtenances, were liable to the penalty of confiscation, as also was the cargo discharged at Manoa, in conformity with No. 6, article 1, law 21 of the Code of Hacienda, to wit:

ARTICLE 1. *The objects which are liable to the penalty of confiscation are those* included in each of the following cases:

First. * * *
Second. * * *
Third. * * *
Fourth. * * *
Fifth. * * *

Sixth. The cargo of any vessel which attempts to load or discharge, or which is found loading or discharging, or which may have loaded or discharged, in ports not equipped therefor, along the coasts, in bays, inlets, rivers, or on desert islands, with permission and authorization of the law in the premises, and the vessel, together with all its tackle and appurtenances, and the canoes, boats, lighters, or other vessels which may be used for the purpose, shall suffer the same penalty.

That same judgment condemned Capt. John W. Baxter to pay *mancomún et in sólidum* with "the Orinoco Iron Syndicate (Limited)," as the owner and shipper of the cargo, the fiscal duties in addition to the double of these duties, etc. Said condemnation is contained in the provisions of No. 3, article 2, of the cited law 21, to wit:

ART. 2. Besides the loss of the merchandise or effects which may have been the subject of the suit brought to declare the confiscation, and the boats and other vessels, wagons, beasts of burden, and lashings, as the case may be, the transgressors shall incur the following penalties:

First. * * *
Second. * * *
Third. In the sixth case the captain of the vessel and the owner of the cargo, together with the loaders or unloaders, shall jointly and severally (*mancomún et in*

sólidum) suffer a fine of twice the custom dues, and the captain shall suffer an imprisonment of from six to ten months.

The above quoted sentence was confirmed by the high Federal court in the following terms:

The minutes of the procedure having been analyzed by this department, it is noted: That the evidence clearly shows that the facts denounced by the administrator of the custom-house at Ciudad Bolívar; that all the extremities of law have been correctly complied with; that the sentence has not been applied for; that therein the penalties of law have been enforced; and that the fisc is not prejudiced; wherefore in conformity with paragraph 2, article 34 of the law of confiscation in force, administering justice, authorized thereto by the law, this procedure is approved in all its parts. (Official Gazette, No. 6829, October 2, 1896.)

This sentence effected, and as the value of the ship and cargo did not suffice to cover the penalties imposed, the rights acquired for exploitation of the iron mine of Imataca by " the Orinoco Iron Syndicate (Limited) " were denounced and offered for sale.

Mr. Turnbull, finding his ownership over the Imataca mine endangered in view of the aforesaid sale, applied to the Government, requesting protection of his rights, and it was forthwith and most fully accorded in a resolution issued on December 10, 1898, by the ministry of agriculture, industry, and commerce (the name at that time of the ministry of fomento), with that view, as affirmed by the claimant himself in his memorial.

Said resolution was telegraphed to the judge of hacienda at Ciudad Bolívar, but arrived after the sale of the aforementioned rights of exploitation had taken place. Turnbull appealed to the court against the sale, and the Federal court decided that the appeal was unlawful.

Subsequently, Turnbull sued Messrs. Benoni Lockwood, jr., and the Orinoco Company (Limited) before the primary court of the Federal District for damages and losses through their bidding at the sale of his Imataca mine, and furthermore sued said company for the annulment of the definite title derived from the sale. On June 7, 1900, a sentence was passed on this case, declaring that " the Orinoco Company (Limited) had nothing to claim against him (Turnbull), nor had it any rights to claim on his Imataca mine with regard to the title already mentioned."

The reasons assigned and the documents quoted prove most evidently that Mr. George Turnbull has no right whatever to demand anything of the Government of Venezuela on account of the claim analyzed. On the contrary, the Government of the Republic always readily sought to protect Mr. Turnbull's interests. In order that this claim might be partially legal, it would have been necessary that the claimant had acknowledged that the sentence passed on the Orinoco Iron Syndicate (Limited) by the national court of hacienda at Ciudad Bolívar, and confirmed by the high Federal court, was notoriously unjust or was a denial of justice; this Mr. Turnbull has not even attempted to do, and if he had, it would have been impossible for him to prove it, as said sentence is entirely in conformity with Venezuelan laws.

Mr. George Turnbull alleges that his having been deprived of the Imataca mine since the annulment of his contract (resolution of June 18, 1895) until his said Imataca mine was excluded from such annulment (resolution of November 10, 1895), impeded him from celebrating any contract and from developing and receiving the benefits of the mines, and that thereby he lost £140,000.

Turnbull ascribes the aforesaid loss to the fact that " the Orinoco Iron Syndicate (Limited) " rescinded its contract celebrated with him for exploiting the Imataca mine. This assertion is denied by the authentic facts which

were related while analyzing those alleged as the grounds for the former claim. In fact, it is evident that the above-mentioned syndicate did not rescind its contract on account of the reasons assigned, but that it dispatched the schooner *New Day* to Manoa with machinery and other articles necessary for making assays for the exploitation of the Imataca mine, but, as said ship was found to be discharging its cargo at a port not authorized for foreign trade, the corresponding lawsuit was brought against it, and the final sentence thereof declared that the ship and cargo, together with its tackle and appurtenances, had incurred the penalty of confiscation; all having been complied with in conformity with Venezuelan law. According to Turnbull himself, his affairs with said syndicate were rescinded, owing to the referred to calamity. If such a calamity occurred through Turnbull's fault he ought to take upon himself the injurious consequences thereof; if the same occurred through the syndicates fault, it had no right to rescind the contract, and Turnbull could demand of it payment for damages and losses. In consequence thereof the claim under analysis is deprived of all legal grounds.

There is another general feature common to all of Mr. Turnbull's claims, and that is the want of evidence in regard to the damages he pretends to have suffered, and which he reckons at really fabulous amounts. With regard to the detention of three of his ships during one month, effected by a Government official, he does not even mention his name, and the claimant affirms that as soon as the Government heard of this, they replaced the said employee and put the ships at liberty, which means that the Government tendered their protection to Mr. Turnbull's interests. And as regards the stealing and destruction effected in 1893, of the tools and machinery placed at the mines by the claimant, he himself declares that such injurious acts were committed " *by certain individual who were revolting against the Government,*" which shows that such acts were an infringement of common law, and that Turnbull should have applied to the courts of justice to denounce or report the perpetrators thereof and demand of them lawful civil atonement.

THE ORINOCO COMPANY (LIMITED)

This company claims to be paid $125,000 for damages alleged to have been caused through its having bought the Imataca mine, at a judicial sale before the court of hacienda at Ciudad Bolívar, and through the court of common pleas of the Federal District having declared in a sentence issued on June 7, 1900, that the mine belonged to Turnbull.

When analyzing the claims of said Turnbull, we minutely stated everything relative to the confiscation suit brought against " the Orinoco Iron Syndicate (Limited) " before the national court of hacienda at Ciudad Bolívar, and we fully showed the lawfullness of said tribunal's proceedings, for which reason we shall briefly demonstrate the entire want of grounds for this claim.

This want of grounds for the claim and its wrongfulness are evidenced in the memorial itself, which, on the other hand, shows, besides, the negligence and unskillfulness wherewith the company and its representatives carried on the whole affair. The fact is that in said memorial it is admitted that Mr. Benoni Lockwood, jr., took no care to ascertain, before becoming a purchaser, what rights were about to be sold, or whether such rights actually belonged to the Orinoco Iron Syndicate (Limited), against whom said action was brought, and said gentlemen thought, without reading the respective titles, that " said syndicate was assignee of all of the rights which had been claimed by said Turnbull to said premises, and being assured and advised by said Berrio, and supposing and believing that said sentence was a lien upon, and that the pur-

chaser of said premises at said sale would therefore acquire, all the rights of said Turnbull or said syndicate to the possession, development, or exploitation of said mine, and the title of ' the Orinoco Company (Limited) ' thereto be effectually and finally quieted as against the same, etc.," he became a purchaser thereof. All of which evidently proves that Lockwood fell into a series of deplorable mistakes, and " the Orinoco Company (Limited) " holds the inconceivable absurdity that Venezuela must indemnify it for the injurious consequences thereof.

Mr. Baxter, the direct representative of " the Orinoco Company (Limited)," did not share in Mr. Lockwood's mistakes, as having powerful reasons to doubt that " the Orinoco Iron Syndicate (Limited) " was the owner of the mine, and in doubt also as to whether said sale were legal he refused to deliver to Lockwood the 120,000 bolivars, which was the price of the sale, and did not effect said payment until much later, having done so in virtue of an agreement which the claimant says he made with Gen. Celis Plaza and General Berrio, etc. We repeat that, in the fourth paragraph of the memorial, destined to expound and support this claim, its insubsistency is shown.

The high Federal court in its last sentence pronounced the unlawfulness of the recourse to appeal against said sale which Turnbull had pretended, and then said Turnbull brought an action against Benoni Lockwood, jr., and " the Orinoco Company (Limited)," in which case a definite sentence was passed on June 7, 1900, its dispositive part being as follows, to wit:

> For the above reasons the tribunal administering justice in the name of the Republic declares groundless the part of the action brought for injury and damages by George Turnbull against Benoni Lockwood, jr., American citizen, resident in New York, and " the Orinoco Company (Limited)," an American corporation organized in conformity with the laws of the State of Wisconsin, as is shown by the power produced, and of effect the other part in which the said Turnbull asks that it be declared that " the Orinoco Iron Company " has no right of action against him, and has no rights to enforce on his mine Imataca. No special order is made as to costs.

No claim arising from said sentence is just, except to prove that the same is notoriously unjust; furthermore, " the Orinoco Company (Limited) " was satisfied with said decision, since it did not attempt the recourse to appeal against it, which is granted under article 185 of the code of civil procedure, and which provides as follows, to wit: " On all definite sentences issued in first instance appeal is given, except when special disposition is made to the contrary. "

And lastly, the real purchaser is Mr. Benoni Lockwood, jr., and not " the Orinoco Company (Limited); " whereas if by said sale the company sustained damages whatever, it ought to claim compensation of the former, and not of the Government of Venezuela.

It is extremely surprising that the sale having been for 120,000 bolivars, the company should inconsiderately raise this claim to $125,000.

It has most clearly been shown that the claim analyzed entirely lacks grounds, and therefore must be disallowed.

The second claim of " the Orinoco Company (Limited) " is supposed to arise from the executive resolution issued on October 11, 1900, whereby the nullity and insubsistency of the Fitzgerald contract of September 22, 1883, was declared.

" The Orinoco Company (Limited) " sets forth this claim as assignee and successor of the " Manoa Company (Limited) " in regard to the Fitzgerald contract. From a judicial point of view the position of both companies is identical, and consequently the reasons which I exposed on analyzing said contract suffice for rejecting, as I absolutely do reject, this claim.

I therein proved that the resolution of September 9, 1886, is quite legal:

First, because the " Manoa Company (Limited) " confessed authentically the facts which are the grounds thereof; secondly, because the company itself acknowledged the forfeiture of the contract; and, lastly, because it made of the Government a judge as to the subsistency of said contract, which, having been annulled, could not revive through a resolution, but was essentially necessary that it should be issued anew, fulfilling all the requisites and formalities wherewith it was originally issued.

REMARKS IN REFERENCE TO " THE MANOA COMPANY (LIMITED) " AND TO " THE ORINOCO COMPANY (LIMITED) "

The Venezuelan Commissioner can not accept the alternative and doubtful form in which the aforementioned companies set forth some of their claims.

" The Manoa Company (Limited) " states, that if by reason of the force and effect of said resolution of September 9, 1886, the Fitzgerald concession was annulled the company estimates the damages sustained at a certain amount; but that if said resolution did not attain legal efficiency, then the compensation demanded amounts to a different sum. And in the same way it sets forth its claims for the Imataca and Pedernales mines.

" The Orinoco Company (Limited) " adheres to the same alternative form in setting forth its claims regarding the contract and aforesaid mines.

Such a form is inadmissible according to the spirit and meaning of the protocol in the first place, because every claimant must set forth his claims in categorical and not in doubtful terms, as the Commission entirely lacks jurisdiction to decide as to the validity or nullity of a contract and of titles of ownership, and because it has been organized to entertain claims of United States citizens for obtaining indemnification for damages and losses caused by acts of the Government, or of Government officials; wherefore, whenever this Commission examines the lawfulness or unlawfulness of a resolution of the Government from which a claim derives, it is with a sole view of awarding an indemnification in case of said resolution being unlawful, and of denying it if it is lawful; but this Commission entirely lacks jurisdiction for declaring a resolution inefficacious and making its effects void.

The Government of Venezuela in organizing the mixed commissions appointed judges, and not authorities capable of annulling its acts.

For the same powerful reasons the writer does not admit the arguments of the honorable commissioner on the part of the United States, Mr. Bainbridge, especially those affirming the existence of the Fitzgerald contract and those denying validity to the titles of ownership of the Imataca and Pedernales mines issued by the Government of Venezuela.

In virtue of the reasons stated, the opinion of the Venezuelan Commissioner is that the claims marked Nos. 45, 46, and 47 set forth by George Turnbull, " the Manoa Company (Limited)," and " the Orinoco Company (Limited)," respectively, must be absolutely disallowed.

BARGE, *Umpire:*

A difference of opinion arising about these three claims between the Commissioners of the United States of North America and the United States of Venezuela, they have duly referred to the umpire, and as they all have the same origin and follow the same order of facts the umpire thought it well to consider them jointly, and having fully taken in consideration the protocol, and also the documents, evidence, and arguments, and likewise all the other communications made by the parties, and having impartially and carefully examined the same, has arrived at the decision embodied in the present award.

Whereas in the month of September, 1883, the Government of Venezuela entered into a contract with Cyrenius C. Fitzgerald for the exploitation of the natural products of a certain extent of territory, which contract reads as follows:

The minister of fomento of the United States of Venezuela, duly authorized by the President of the Republic, of the one part, and Cyrenius C. Fitzgerald, resident of the Federal Territory of Yuruary, of the other part, have concluded the following contract:

ARTICLE I. The Government of the Republic concedes to Fitzgerald, his associates, assigns and successors, for the term of ninety-nine years, reckoning from the date of this contract, the exclusive right to develop the resources of those territories, being national property, which are hereinafter described.

1. The island of Pedernales, situated to the south of the Gulf of Paria and formed by the gulf and the Pedernales and Quinina streams.

2. The territory from the mouth of the Araguao, the shore of the Atlantic Ocean, the waters above the Greater Araguao, to where it is joined by the Araguaito stream; from this point, following the Araguaito to the Orinoco, and thence the waters of the upper Orinoco, surrounding the island of Tortola, which will form part of the territory conceded, to the junction of the José stream with the Piacoa; from this point following the waters of the José stream to its source; thence in a straight line to the summit of the Imataca range; from this summit following the sinuosities and more elevated summits of the ridge of Imataca to the limit of British Guayana; from this limit and along it toward the north to the shore of the Atlantic Ocean to the mouth of the Araguao, including the island of this name and the others intermediate or situated in the delta of the Orinoco and in contiguity with the shore of the said ocean. Moreover, and for an equal term, the exclusive right of establishing a colony for the purpose of developing the resources already known to exist and those not yet developed of the same region, including asphalt and coal; for the purpose of establishing and cultivating on as high a scale as possible agriculture, breeding of cattle, and all other industries and manufactures which may be considered suitable, setting up for the purpose machinery for working the raw material, exploiting and developing to the utmost the resources of the colony.

ART. II. The Government of the Republic grant to the contractor, assigns, and successors, for the term expressed in the preceding article, the right of introduction of houses of iron or wood, with all their accessories, and of tools and of other utensils, chemical ingredients and productions which the necessities of the colony may require; the use of machinery, the cultivation of industries, and the organization and development of those undertakings which may be formed, either by individuals or by companies, which are accessory to or depending directly on the contractor or colinization company; the exportation of all the products, natural and industrial, of the colony; free navigation, exempt from all national or local taxes, of rivers, streams, lakes, and lagoons comprised in the concession or which are naturally connected with it; moreover the right of navigating the Orinoco, its tributaries and streams, in sailing vessels or steamships, for the transportation of seeds to the colony for the purpose of agriculture, and cattle and other animals for the purpose of food and of development of breeding; and lastly, free traffic of the Orinoco, its streams and tributaries, for the vessels of the colony entering it and proceeding from abroad, and for those vessels which, either in ballast or laden, may cruise from one point of the colony to the other.

ART. III. The Government of the Republic will establish two ports of entry, at such points of the colony as may be judged suitable, in conformity with the treasury code.

The vessels which touch at these ports, carrying merchandise for importation, and which, according to this contract and the laws of the Republic, is exempt from duties, can convey such merchandise to those points of the colony to which it is destined and load and unload according to the formalities of the law.

ART. IV. A title in conformity with the law shall be granted to the contractor for every mine which may be discovered in the colony.

ART. V. Cyrenius C. Fitzgerald, his associates, assigns, or successors are bound:

1. To commence the works of colonization within six months, counting from the date when this contract is approved by the Federal council in conformity with the law.

2. To respect all private properties comprehended within the boundaries of the concession.

3. To place no obstacle of any nature on the navigation of the rivers, streams, lakes, and lagoons, which shall be free to all.

4. To pay 50,000 bolivars in coin for every 48,000 kilograms of sarrapia and cauche which may be gathered or exported from the colony.

5. To establish a system of immigration which shall be increased in proportion to the growth of the industries.

6. To promote the bringing within the law and civilization of the savage tribes which may wander within the territories conceded.

7. To open out and establish such ways of communication as may be necessary.

8. To arrange that the company of colonization shall formulate its statutes and establish its management in conformity with the laws of Venezuela, and submit the same to the approbation of the Federal Executive, who shall promulgate them.

ART. VI. The other industrial productions on which the law may impose transit duties shall pay those in the form duly prescribed.

ART. VII. The natural and industrial productions of the colony, distinct from those expressed in Article V and which are burdened at the present time with other contracts, shall pay those duties which the most favored of those contracts may state.

ART. VIII. The Government of the Republic will organize the political, administrative, and judicial system of the colony, also such armed body of police as the contractor or company shall judge to be indispensable for the maintenance of the public order. The expense of the body of police to be borne by the contractor.

ART. IX. The Government of the Republic, for the term of twenty years, counting from the date of this contract, exempts the citizens of the colony from military service, and from payment of imposts or taxes, local or national, on those industries which they may engage in.

ART. X. The Government of the Republic, if in its judgment it shall be necessary, shall grant to the contractor, his associates, assigns, or successors a further extension of six months for commencing the works of colonization.

ART. XI. Any questions or controversies which may arise out of this contract shall be decided in conformity with the laws of the Republic and by the competent tribunals of the Republic.

Executed in duplicate, of one tenor and to the same effect, in Caracas, 22nd September, 1883.

Señor Heriberto Gordón signs this as attorney of Señor C. Fitzgerald, according to the power of attorney, a certified copy of which is annexed to this document.

[SEAL] M. CARABAÑO
Minister of Fomento
Heriberto GORDÓN

And whereas the term fixed in Article V, 1, of this contract, on the petition of Fitzgerald, was extended to six months more, to count from the 22d of March, 1884;

And whereas during this term, v. g., on the 14th of June, 1884, this concession was transferred from Fitzgerald to " the Manoa Company (Limited); "

And whereas on the 9th of September, 1886, a resolution of the Federal Executive declared this contract " insubsistente ó caduco; "

And whereas on the 28th of April, 1887, the Congress approved a contract passed in Nice on the 1st of January, 1886, between Guzmán Blanco, envoy

extraordinary and minister plenipotentiary of the United States of Venezuela to various courts of Europe, and George Turnbull, which contract reads verbally as the above-mentioned contract with Fitzgerald, except that an Article XII was added, reading as follows:

This contract shall enter into vigor in case of the becoming void through failure of compliance, within the term fixed for this purpose, of the contract celebrated with Mr. Cyrenius C. Fitzgerald the 22d of September, 1883, for the exploitation of the same territory;

And whereas on these contracts, respectively, are based the claims of " the Manoa Company (Limited)," all the claims but one of " the Orinoco Company (Limited)," and the claims of George Turnbull, it has to be considered what rights to claim for damages against the Venezuelan Government these contracts give to the claimants, " the Manoa Company (Limited)," " the Orinoco Company (Limited)," and George Turnbull, and what obligations on the side of the Venezuelan Government to grant to the said claimants what they claim for can be based upon these contracts:

First, as to the Fitzgerald contract, purchased by the " Manoa Company (Limited)," as being prior in date;

Whereas this contract in due form was lawfully performed, all its stipulations, of course, were binding upon both contracting parties as long as the contract legally existed.

Now, whereas claimants' claims center in the assertion that this contract was unlawfully annulled by the Venezuelan Government, and while it is for losses suffered in consequence of this unlawful annulment that damages are claimed, it has to be examined —

Whether the contract was unlawfully annulled; and, if so,

Whether this unlawful action gives a right to the claimant to claim for damages and imposes a duty on the Venezuelan Government to grant what is claimed;

Now, whereas the incriminating act of the Venezuelan Government is the resolution of the Federal Executive of September 9, 1886, this resolution has to be considered. It reads as follows:

El Señor Heriberto Gordón, con poder del Señor C. C. Fitzgerald, celebró el 22 de Setiembre de 1883 con el Gobierno Nacional un contrato para explotar las riquezas que se encuentran en terrenos de propiedad nacional en el Gran Delta, debiendo empezar los trabajos dentro de seis meses contados desde la fecha expresada, y aunque trascurrido este término sin dar principio á ellos, el Gobierno le concedió una prórroga para verificarlos; y como el indicado contratista no ha cumplido las obligaciones que contrajo, según se expresa en el informe del Director de Riqueza Territorial especificados en el mismo, refiriéndose al articulo 5 del contrato en que se determinen; el Consejero Encargado de la Presidencia de la República, con el voto afirmativo del Consejo Federal declara insubsistente ó caduco el expresado contrato.

Comuníquese y publíquese.

Por el Ejecutivo Federal: G. PAZ SANDOVAL

Reading this resolution it is clear that the contract was declared " insubsistente ó caduco " for the reason that the contracting party (claimant) had not done what in Article V of the contract he pledged himself to do.

Now, whereas this Article V reads as stated above, and whereas it is quite clear by evidence, not only that the claimant on the said 9th of September 1886, had not complied with one of his obligations; whereas even at the end of the prolongation of six months that was granted as a term to begin the works of colonization this colonization can not be said to have begun, as the

sending of an engineer and some employees on the 24th of August can not be said to be " commencing the works of colonization " (even if the then governor of the Federal Territory of the Delta, on the petition of the claimants' administrator stating the arrival of these employees, added the words " so complying with the stipulation of Article V," because this authority could only state the facts, and was not the legal authority to judge whether by these facts claimant complied with the stipulation of the contract); whereas further on the original contractor himself, director of the claimant company, stated even as late as September, 1885, that claimant had not commenced the works of colonization;

That claimant had not established a system of colonization;

That claimant had not promoted the bringing within law and civilization the savage tribes which might wander within the territory conceded;

That claimant had not opened up and established any ways of communication, and that claimant had not even arranged that the company of colonization should formulate its statutes.

And whereas the claimant company itself as late as April 10, 1886, stated in a petition to the Government of Venezuela that it had not realized the works it was pledged to realize by the contract;

But that by the same evidence is shown that the claimant company, through its pecuniary position, could not have realized what by contract it was pledged to do, as, according to the company's president himself, the company from October, 1885, to November, 1886, never had in cash more than $6, and in that time did not spend a farthing for the execution of the contract, while during all that time the drafts drawn by the company's Venezuelan attorney, Mr. Heriberto Gordón, were protested, as they could not be paid, with the exception of two for $400 each, which were paid by Mr. Safford, and not by the company's cash;

And whereas evidence shows that in January, 1885, stockholders resolved for the execution of the contract to issue $5,000,000 in bonds, which in November of that year were secured by mortgage on the concession, and for which even until November, 1886, not a penny was received by the company, that even the printing of the bonds could not be paid, and that Fitzgerald, who had sold the concession for 44,750 shares of $100 nominal each, in July, 1886, was willing to sell them for a few thousand dollars. The facts alleged as a reason for declaring the contract " insubsistente ó caduco " are proved, and it is clearly shown by evidence that on the 9th of September, 1886, the claimant company had in nowise fulfilled any of the duties imposed by the contract.

Now, whereas it is settled that there were sufficient reasons to declare the contract " insubsistente ó caduco," it has to be seen if by the declaration of the Federal Executive the contract really was annulled. And then it has to be remembered that the question could be and really has been put whether No. 1 of Article V of the contract was a condition, the nonfulfillment of which would retroact, so that it were as if the contract had never existed — in which case the resolution would be a simple act whereby it was stated that the contract did not exist, that it was " insubsistente " — and the contract would really not exist;

Or whether this No. 1 — as all the other numbers of Article V — was an obligation, the nonfulfillment of which would be a sufficient reason for making the contract " caduco " — that is to say, to annul the contract that was till then really existing — which annulment, according to the general principles of equity, accepted by the laws of almost all the civilized nations, could not be executed by one of the parties, but had to be pronounced by the proper judge.

Now, whereas Article V expressly says that the concessionary, his associates, assigns, and successors " se obligan " (pledge themselves) to begin within a

certain time, and whereas they could not begin without a concession, because they would have had no right to work according to the concession on the Government grounds granted by the concession if they had not this concession; and whereas they could not have this concession, the contract by which it was granted not existing;

It seems evident that according to the will of contracting parties (the supreme law in this matter) this No. 1 of Article V, as all the other numbers of this article, was an obligation and not a condition;

Wherefore the mentioned executive decree can not be regarded as a mere declaration that the contract was " insubsistente," but has to be regarded as an act by which the Government declared it " caduco " — that is to say, " annulled it " — which act could never have the effect of really annulling the contract, because in cases of bilateral contracts, the nonfulfillment of the pledged obligations by one party does not annul the contract ipso facto, but forms a reason for annulment, which annulment must be asked of the tribunals, and the proper tribunal alone has the power to annul such a contract — this rule of the law of almost all civilized nations being in absolute concordance with the law of equity, that nobody can be judge in his own case.

This annulment is superfluous, of course, when both parties agree that the contract is annulled because the obligations were not fulfilled, and the executive decree in question can not be regarded as anything more but a communication on the part of the Government that it thought the contract was ended, to which the other party could agree or not agree as it thought fit; and if it did not think this fit the contract would subsist until its annulment was pronounced by the proper tribunal.

In consequence of all the beforesaid we stand here before the case of a contract between two parties, of which one, disregarding all the pledged obligations, gave more than sufficient reason for the annulment of the contract, while the other acted as if the contract were annulled by its own declaration of that annulment, in that way disregarding (as if not existing any longer) an always still lawful existing contract.

Now, it might be asked, if absolute equity without regard to technical questions would allow to one of the parties the right to a claim based on a contract, the existence of which is, it is true, unjustly denied by the opposing party, but all the stipulations of which contract were trespassed by that same demanding party.

But there is more to consider.

It has not to be forgotten that the contract in question has an Article II reading as follows:

> Any questions or controversies which may arise out of this contract shall be decided in conformity with the laws of the Republic and by the competent tribunals of the Republic;

which article forms part of the contract just as well as any of the other articles, and which article has to be regarded just as well as any of the other articles, as the declaration of the will of the contracting parties, which expressed will must be respected as the supreme law between parties, according to the immutable law of justice and equity: pacta servanda, without which law a contract would have no more worth than a treaty, and civil law would, as international law, have no other sanction than the cunning of the most astute or the brutal force of the physically strongest.

It has to be examined, therefore, what parties intended by introducing this article in the contract; and in how far does it interfere with the claims herein examined?

Now, whereas it is clear that in the ordinary course of affairs, when nothing especially was stipulated thereupon, all questions and controversies arising for reason of the contract would have to be decided by the competent tribunals and in conformity with the laws. There must be looked for some special reason to make this stipulation, and to induce parties to pledge themselves expressly to a course of action they would without this special pledge be obliged to follow just as well. There must be a meaning in the article which makes the judges by law judges by contract as well; and this meaning can be no other but that parties agreed that the questions and controversies that might arise for reason of the contract should be decided only by the competent tribunals of the Republic, and therefore not by the judges of the country, of the other party, if he be a foreigner, nor by arbitration either national or international, while it is not to be overlooked that it is not said in the contract that *the claims* of one party against the other should be judged (that is to say, allowed or disallowed) by the mentioned judge only, but that only these judges should decide about the *questions and controversies* that might arise; which decision of course implies the decision about the question whether the interpretation of the contract by one of the parties, or that party's appreciation of facts in relation to the contract were right, and therefore could be a good reason for a claim for damages, so that properly speaking there could be no basis for a claim for damages, but the decision of these expressly indicated judges about this question or controversy.

Wherefore if one of the parties claims for damages sustained for reason of breach of contract on the part of the other party, these damages can, according to the contract itself, only be declared due in case the expressly designed judges had decided that the fact, which according to the demanding party constituted such a breach of contract, really constituted such a breach, and therefore formed a good basis whereon to build a claim for damages. Parties have deliberately contracted themselves out of any interpretation of the contract and out of any judgment about the ground for damages for reason of the contract, except by the judges designed by the contract; and where there is no decision of these judges that the alleged reasons for a claim for damages really exist as such, parties, according to the contract itself, have no right to these damages, and a claim for damages which parties have no right to claim can not be accepted. Parties' expressly expressed will, and their formal pledge that for reason of the contract no damages should be regarded as due by those declared due by the indicated judges, must be respected by this Commission, when judging about a claimed based on such a contract, just as well as all the other stipulations of that contract, and therefore it can not declare due damages that parties in that contract solemnly themselves declared not to be due.

And whereas all the claims of the Manoa Company (Limited), as well as all the claims but one of the Orinoco Company (Limited) are claims for damages based on points that are questions and controversies arisen for reason of the Fitzgerald contract;

And whereas not one decision of the competent tribunals of Venezuela about these questions and controversies that would make these damages due was laid before the Commission, while according to the contract itself between parties only such damages should be due which were asked on such grounds as would have been declared good grounds by these tribunals, the Commission can not declare due the damages claimed which the parties, by contract, declared not to be due.

And therefore it can not allow these claims.

Now, as to the claims of George Turnbull.

Whereas, as was shown above, on the 1st of January, 1886, on the 11th of

September, 1886, and on the 27th of April, 1887, the Fitzgerald contract was as yet legally existing, the Republic of Venezuela could not dispose on behalf of Turnbull of what it already had disposed on behalf of another, and therefore, Turnbull obtained no right whatever of property in the concession under and by virtue of the contract confirmed by Congress on the 27th of April, 1887;

And whereas the mines of Pedernales and Imataca formed part of the still existing Fitzgerald concession, Turnbull's alleged titles to these mines are equally void;

And as all his claims are based on this void contract and these void titles, they can not be allowed.

Lastly, as to the claim of " the Orinoco Company (Limited)," that is not based on the Fitzgerald concession.

Whereas evidence shows that on the 19th of November, 1898, Carlos Hammer, with power of attorney from Benoni Lockwood, jr., in the name of and representing " the Orinoco Company (Limited)," paid to the Venezuelan Government the sum of 120,000 bolivars for rights purchased on a judicial sale on November 18, 1898, which rights, as evidence shows, the Republic could not dispose of, and out of the possession of which rights claimant was expelled by the proper authorities of that Republic;

This unduly received sum of 120,000 bolivars has to be restored to him who unduly paid it.

Wherefore the Republic of the United States of Venezuela shall have to pay to " the Orinoco Company (Limited) " the sum of 120,000 bolivars, or $23,076.93, with interest at 3 per cent per annum from the 19th of November, 1898, to the 31st of December, 1903.

The American Electric and Manufacturing Co. Case

(By the Umpire:)

A clause contained in a contract that " doubts and controversies which may arise in consequence of this contract shall be settled by the courts of the Republic in conformity with its laws " does not preclude the claimant from demanding damages from the Government for the breach by it of a collateral promise.

The breach of a promise to do an illegal act can not be made the basis of a claim, and a promise by the Government to annul an existing contract containing the clause that " doubts and controversies that may arise in consequence of this contract shall be settled by the courts of the Republic and in conformity with its laws " is a promise to do an illegal act.

Grisanti, *Commissioner* (claim referred to umpire; no opinion by the American Commissioner):

The American Electric and Manufacturing Company deduces a claim against the Republic of Venezuela, adducing as the grounds for it, the facts stated in its memorial, some of which denoting most importance, will presently appear in this statement.

In May, 1887, the Government of Venezuela made a contract in virtue of which they granted Aquilino Orta —

the right to establish telephonic communication within the towns and cities of the Republic and between the same; also in the country districts and country villages and between both; and further, to extend the same communication outside of Venezuela by such means as he may deem most suitable.

In July, 1883, the Government of Venezuela had signed another contract which had the same object, with the Intercontinental Telephone Company of New Jersey, represented by Mr. J. A. Derrom.

After several assignments the claimant company became an assignee of the contract signed with Orta, and at the time of fulfilling the same by establishing some telephonic lines entered into competition with the Intercontinental Telephone Company of New Jersey, in which competition the claimant company was defeated, and ended in its transferring the contract to its competitor.

This simple statement, strictly adhering to the truth, is an abridged record of the case. On what principle, then, of justice or equity can " the American Electric and Manufacturing Company " rely for its claim. From what juridical postulate or from what legal precept does liability arise for Venezuela to indemnify damages caused by the defeat in that struggle of enterprises, considering the political economy as the most efficacious means of ameliorating and rendering products cheaper and developing industrial progress?

The American Electric and Manufacturing Company pretends to found its claim on the grounds of article 8 of its contract, which is worded as follows:

> The Government shall not grant similar concessions to any other person or company, nor shall it permit additions to contracts interfering with the present one, during a period of nine years, which shall be reckoned from the date on which it is signed, and may be extended for three years longer, at the option of the Government.

The foregoing article was not infringed, as the Government of Venezuela did not grant any concession that impaired or collided with the right of the claimant company.

It is also adduced as the grounds for the claim that the Government authorities of Venezuela assured the claimant company that as soon as its telephone plant should be in operation the concession of 1883 would be revoked.

Of this assertion, which is inverisimil, not the least proof has been produced; and in case such promise had been given, not being legal, it could not give rise to any right. On the other hand, the principal reason assigned for said revocation, which was the poor service of the Intercontinental Telephone Company of New Jersey, is denied by the real facts, as it defeated the claimant company in competition.

It is the opinion of the Venezuelan Commissioner that on the strength of the reason stated the claim specified, which the American Electric and Manufacturing Company deduce, should be disallowed.

BARGE, *Umpire:*

A difference of opinion having arisen between the Commissioners of the United States of America and the United States of Venezuela this case was duly referred to the umpire.

The umpire having fully taken into consideration the protocol and also the documents, evidence, and arguments, and likewise all the comunications made by the two parties, and having impartially and carefully examined the same, has arrived at the following decision:

Whereas the claimant in this claim was the proprietor of a contract made between the Government of Venezuela and one Aquilino Orta about the establishment of telephonic communication, and claims for damages suffered by him through the fault of the Venezuelan Government in his enterprise to realize the object of this contract;

And whereas article 10 of this contract reads as follows:

> Doubts and controversies that may arise in consequence of this contract shall be settled by the courts of the Republic in conformity with its laws

the honorable agent of the United States of Venezuela opposes that before coming to this Commission the claimant company ought to have attempted to recover the pretended damages before the judges chosen by itself with its contractor.

Whereas, however, it is clearly shown by the evidence before the Commission that at the moment Aquilino Orta made said contract with the Venezuelan Government that Government was bound by a prior contract with another party, which contract, if not annulled, would make so much as void the contract passed with said Orta, wherefore, as is shown in the evidence, the claimant company and his predecessors did not cease to ask for the annulment of the prior contract, basing their demand on the pretended promise of the Government to annul that contract, and wherefore the honorable agent of the United States of America in his replication (which replication at the same time bears the character as a brief on behalf of the claimant) cites: " The failure on the part of the Venezuelan Government to fulfill its promise with respect to this cancellation of the (prior) concession " as cause of claimant's losses for which damages are claimed;

Whereas, therefore, not the contract, but the pretended promise from which the contract had to deduce its value, shows itself as cause of this claim, no article of the contract seems apt to interfere with the question of jurisdiction about a claim originated in the nonfulfillment of a promise by which only that contract would obtain its full force and proper value;

Wherefore the fact that the claimant company did not first go to judges chosen by itself in this contract does not disable it to come to this Commission for decision in a claim, originated in pretended promises whereon the force of the contract depended.

And now as to the main question:

Whereas article 1 of the contract made in 1887 with Aquilino Orta, afterwards transferred to the claimant, reads as follows: " The Government grants to Aquilino Orta the right to establish telephonic communication *within the towns and the cities* of the Republic and *between the same*; also in the *country districts* and the *country villages* and *between both*," etc., while article 1 of a contract made in 1883 between the same Government and one J. A. Derrom (law of 31 July, 1883), reads as follows: " The Intercontinental Company of Telephone pledges itself to establish telephonic lines in the *interior of the cities* and *between the principal cities and communities* of the Republic where this may be deemed necessary," being followed by these words of article 3:

" The Government pledges itself during the time of fifteen years, beginning from this date, not to give equal concession to any other person or company." It is clearly shown that the concession given to Aquilino Orta was in flagrant opposition with the rights granted to the Intercontinental Company, and that the contract with Orta could never obtain its main effect as long as this contract with Derrom existed, wherefore the cancellation or the annulment of this prior contract was the condition sine qua non for the contractors of the later contract to attain the main effect of their act; and

Whereas the evidence laid before the Commission shows that claimant and his predecessors were well aware of this fact, as they never ceased to appeal to the Government for the revocation of the contract under which the Intercontinental Telephone Company was operating; while it may be regarded as very characteristic for the way the contract with Orta was looked upon by its possessors that this contract a few months after its origin, being already transferred into the hands of the fourth possessor — this fourth possessor (the American Telephone Company, Consolidated, from which the claimant company

afterwards purchased it) — refused to pay it with $100,000, but agreed, as the evidence says, " only to give in payment thereof one million two hundred and fifty thousand dollars in shares," thus valuing its own shares at the very outset of the enterprise at less than 8 per cent; and

Whereas further on the former legal attorney of the American Telephone Company, who transacted the purchase of the contract by that company (from which, the company, the claimant company, in turn purchased its rights), declared under oath, as the evidence shows, that " it was with the explicit understanding that *the Intercontinental Company was to be entirely removed* that the American Telephone Company undertook to establish the telephone business in that country (Venezuela)."

By all these facts it is clearly shown that to the knowledge of the claimant company and its predecessors the contract with Orta was in flagrant opposition with the prior contract made with Derrom, and could not have its main effect without the annulment of this prior contract, which annulment the possessor of the Orta contract pretended and pretends was promised to them by the Venezuelan Government, and that therefore not the contract itself but the nonfulfillment of the promise that had to give the contract its force — or, as the honorable agent of the United States puts it in his answer, " the failure on the part of the Venezuelan Government to fulfill its promise with respect to the cancellation of the Intercontinental Telephone Company " is to be regarded as the cause of this claim.

And whereas no direct proof of this promise is to be found in the evidence:

But whereas the fact that the Government decided to make the Orta contract in flagrant opposition with the prior Derrom contract, and the fact that the Government has not contested the different protests of the claimant company and its predecessors as to the nonfulfillment of this promise, might seem to point to the probability of such promise having been (at least orally) given.

Whereas, on the other side, the facts —

First. That the Government never interrupted the acts of the Intercontinental Telephone Company when this company continued to carry out the prior contract;

Second. That no proof of any sign of difficulties between the Government and the Intercontinental Telephone Company is given except the complaint of the company not reducing their tariffs;

Third. That the Government, on the contrary, always behaved in respect to the Intercontinental Telephone Company in a way which made the claimant company and its predecessors speak about the Intercontinental as about " the favored company " and complain of the Government's predilection for that company, and which even made the honorable agent of the United States of America point tc " the favors shown to the Intercontinental Telephone Company " as to one of the reasons for the ultimate sacrifice of the undertaking of the claimant company and its predecessors; seem to speak for the improbability of the Venezuelan Government ever intending to cancel the prior contract in favor of the second, and consequently for the improbability of any formal promise as to that cancellation — for all which reasons the fact that the Government of Venezuela promised to the claimant company and its predecessors the cancellation of the Derrom contract can not in equity be said to be sufficiently proved.

Whereas further on article 8 of the Derrom contract reads in the same words as article 10 of the Orta contract:

Doubts and controversies that may arise in consequence of this contract shall be settled by the courts of the Republic in conformity with its laws,

and

Whereas, therefore, even if, as claimant assures, the Government wanted to finish up with the Derrom concession, and for that reason promised its cancellation, this promise would be a promise to do an illegal act; as the Government as well as the other party was bound to this article, and therefore to the laws of the country, which laws, in complete accord with general principles of law, would not allow the Government to cancel the contract on its own authority, but would require that the annulment be declared by an adverse judgment between the contracting parties.

For which reason such a promise, even when proved to have been given, would not give rise to any right as being illegal, and with relation to the contract (which without it would be void of its main value) would stand as a condition explicitly given orally and implicitly contained in the contract, which condition, according to the laws of the country as well as according to the general principles of law, would be null, and make null the contract that depends on it.

Whereas, therefore, whatever may be or might have been the wrong of the Government in making a contract in flagrant contradiction with a prior contract, or in promising to do an illegal deed so that the later contract might have its force, absolute equity forbids to recognize a right to a claim founded either on the breach of a contract that could only get its force by the fulfillment of a promise to do an unlawful deed, or on the nonfulfillment of this unlawful promise itself.

The claim of the American Electric and Manufacturing Company has to be disallowed.

RAYMOND ET AL. CASE

(By Bainbridge, Commissioner):

The expenditure of money in necessary repairs of a vessel creates a lien thereon in favor of the party advancing the money and the lien follows the vessel no matter into whose hands she may fall.

The acceptance of an assignment in payment of the debt thus contracted releases the lien.

(By Grisanti, Commissioner):

The assignment of property in payment of a debt amounts to a sale of said property, and the acceptance of such an assignment releases the debtor.

BAINBRIDGE, *Commissioner* (for the Commission):

It appears from the evidence that on May 1, 1867, one Charles M. Burns, a subject of Great Britain, being indebted to Ovide de Sonneville, a French subject, in the sum of $35,000, executed and delivered to the latter at New Orleans a mortgage or bottomry bond upon a certain steam vessel owned by Burns, called the *Irene*. At the same time Burns gave De Sonneville power of attorney to sell the vessel or to make contracts for the affreightment or charter party thereof, and to collect all sums that may be due said steamship.

De Sonneville took possession of the vessel and made a voyage first to Barbados, and thence to the island of Trinidad. Near Barbados the *Irene* collided with another steamer, and in order to pay for the repairs rendered necessary by the accident, De Sonneville, on October 9, 1868, borrowed from Charles Raymond, a citizen of the United States, the sum of $2,500.

At Trinidad, on September 12, 1869, De Sonneville, as attorney in fact of Charles M. Burns, entered into a contract with one George Fitt, as representative of the Venezuelan Government, for the charter of the *Irene* for a period of not less than sixty days at the stipulated rate of $100 per day. The contract provided that the Government should be responsible for all expenses and risks of the steamer, and that in case she were lost or suffer any very severe damage that might render her useless, then her value, fixed at $30,000, should be paid to De Sonneville. Fitt paid De Sonneville the sum of $5,000 at the time of the contract in order to free the vessel from obligations which caused her detention at Port of Spain, and this sum De Sonneville agreed to credit upon the amount the ship might earn under the charter. The contract also stipulated that the *Irene*, " being of English nationality," could not be engaged in a naval combat or be used for any operations from which the law of nations prohibits a foreign vessel.

On November 20, 1869, the Government of Venezuela notified De Sonneville that the charter having expired he might take possession of the *Irene*, and that his account for the charter would be liquidated. De Sonneville, however, refused to receive the steamer because of serious injury suffered by the vessel in one of her boilers on October 17 previous, and insisted that the Government of Venezuela either repair the injury or pay the price stipulated in the contract for the vessel. On November 27, 1869, De Sonneville, " in the name and representation of Charles M. Burns, subject of Her Britannic Majesty," made a protest before the register at Puerto Cabello, and on December 1, 1869, " as attorney of Mr. Charles Burns, a subject of Her Britannic Majesty," he made protest before the British vice-consul at Puerto Cabello in regard to the action of the Venezuelan authorities and the injuries sustained by the steamer *Irene*, " the exclusive property of said Charles M. Burns."

On December 15, 1869, De Sonneville addressed a communication to Venezuelan minister of war and navy, stating that he was obliged to leave the *Irene* in the possession of the Government until the contract was complied with, and considering it in the service of the Republic, but suggesting that a commission be appointed to examine it, and if found in the same state in which it was delivered he would receive it back, and that if, on the contrary, the commission should find that repairs were needed they should be made at the cost of the Government.

De Sonneville eventually abandoned the ship, and for many years continued to urge his claim upon the Government. In 1873 he instituted proceedings in the high Federal court, but the suit was subsequently withdrawn. All of his efforts to obtain an adjustment of his claim proved fruitless.

In 1878, De Sonneville made a holographic will, in which he declared himself indebted to Charles Raymond in the sum of $2,500, with interest, and desired that after his death his property should be used to satisfy said indebtedness, and particularly setting forth that if the other property left by him should not be sufficient for that purpose, the necessary sum should be appropriated out of any recovery made on his claim against Venezuela occasioned by the loss of the *Irene*. He left to Florence Raymond, daughter of Charles Raymond, the sum of $5,000, and the surplus to his brother and sister in France.

In April, 1890, De Sonneville executed an assignment to Raymond of all his " present and future properties " in order to pay the indebtedness due the latter. The assignment states that " the properties which I give him in payment are the following: " — enumerating some fourteen different pieces of property, but not including the claim against the Government of Venezuela. De Sonneville died on June 15, 1893.

A claim is now presented here on behalf of the heirs of Charles Raymond as follows:

Value of vessel, as stipulated in contract	$30,000
127 days' hire of vessel, from September 15, 1869, to January 20, 1870, when abandoned	12,700
130 tons of coal, at $12 per ton	1,566
	44,260
Credit payment on account, September 12, 1869	5,000
Balance due January 20, 1870	39,260
Interest at 3 per cent from January 20, 1870	39,260
Total	78,520

Notwithstanding the fact that De Sonneville made the contract with the representative of Venezuela for the charter of the *Irene* as attorney in fact of Charles M. Burns, and subsequently made his protests in the name and representation of Burns as the owner of the steamer, it is quite evident that Burns' interest in the boat was merely nominal. The debt of Burns to De Sonneville secured by the bottomry bond was $35,000. The valuation placed upon the boat in the contract with Fitt was $30,000. The obvious intention of the parties to the bond was to cancel Burns's obligation, and the explanation given of the transaction is that Burns's nominal ownership would entitle the *Irene* to fly the English flag, under which it was desired she should sail. De Sonneville was at any rate in lawful possession, duly empowered by Burns to make out of the sale or use of the vessel the amount of the debt; and the question at the base of De Sonneville's claim is his beneficial interest in the contract with the Government of Venezuela and the rights accruing to him from its breach. Apparently that interest did not exceed the amount which, under the bond and power given by Burns, he was entitled to receive from the use or sale of the vessel, leaving Burns no equitable interest whatever in any claim arising out of the contract.

De Sonneville was a French subject, and the Commission has no jurisdiction of his claim against Venezuela, except in so far as by proper assignment or transfer it may have become the property of citizens of the United States. The contention made here on behalf of the claimants is that they are owners of De Sonneville's claim, either —

First, as a whole under the assignment of 1890; or,

Second, under the will of 1878, of so much of the claim as the amount of De Sonneville's indebtedness to Raymond, with interest, and the amount of the bequest to Florence Raymond.

The assignment of April 29, 1890, recites the indebtedness due to Raymond, and states: " In order to pay that debt I hand over to him all my present and future properties, as I have no heirs," and that " the properties which I give him in payment are the following: " enumerating fourteen different pieces of property.

These properties are represented in the assignment to be worth 25,000 bolivars, free from all incumbrances, annuity, or mortgage. It is alleged that frequent attempts were made after De Sonneville's death to realize on the properties specifically enumerated in the assignment, but without success, and that although at one time the said properties may have had some value, it consisted principally in the coffee groves, which have since become ruined, and that these properties are at present absolutely worthless.

Among the properties which De Sonneville " gave in payment " by the assignment, the claim against Venezuela does not appear. There is certainly no reason to infer that De Sonneville intended to include it, inasmuch as the

estimated value of the property enumerated exceeded the amount of the debt. The general terms are controlled by the specific enumeration, which evidently expresses the definite intention of the assignor, and to which in construction the conveyance must be limited. Expressio unius exclusio alterius. The position that the Raymond heirs are owners of the De Sonneville claim as a whole under the assignment is clearly untenable.

The alleged holographic will of De Sonneville bears date November 15, 1878. Substantially it states that, desiring as far as possible to repair the losses he has occasioned to his excellent friend, Mr. Charles Raymond, of New Orleans, by the want of punctuality on the part of the Republic of Venezuela toward himself, he declares himself indebted to Raymond or to his legitimate heirs in the sum of $2,500, which Raymond had delivered to him at the English island of Barbados, in October 1868, to cover the expenses of repairs which had been occasioned by the collision of another steamer with his own; that if the debt should not be paid before his death he desired that his property should be used for its payment, and that the surplus should then become the property of his goddaughter, Florence Raymond, and that, being a creditor of the Republic of Venezuela of a debt occasioned by the charter of a steamer, the said credit, after its recovery, he wished to be distributed as follows: If the properties left by him were not sufficient to pay the debt, with interest, of Charles Raymond, the necessary sum should be employed for that purpose out of the money, and to his goddaughter, Florence Raymond, the sum of $5,000 should be paid, the surplus to go to his brother and sister in France.

Two witnesses certify to the foregoing instrument and that De Sonneville had declared to them that in case of his death he desired the disposition made therein to be put into effect by the French consular authorities.

There is no evidence presented that this instrument was ever legally proved as the last will and testament of De Sonneville, or that there has ever been an administration of his estate. A will must be proved before a title can be set up under it, and, so far as the adequacy of its execution is concerned the probate must be according to the law of the testator's last domicile. In the absence of such proof, the document in question must be held inoperative to pass any rights whatsoever. The probate jurisdiction of this Commission is believed to be extremely limited.

The evidence shows that, in order to make the repairs rendered necessary by the collision of the *Irene* with another steamer near Barbados, De Sonneville borrowed from Raymond on October 9, 1868, the sum of $2,500. The expenditure of this money in necessary repairs in a foreign port created a lien in Raymond's favor upon the vessel. The presumption of law is that when advances are made to the captain in a foreign port upon his request for the necessary repairs or supplies to enable his vessel to prosecute her voyage, or to pay harbor dues, or for pilotage, towage, or like services rendered to the vessel, they are made upon the credit of the vessel as well as upon that of her owners. It is not necessary to the hypothecation that there should be any express pledge of the vessel, or any stipulation that the credit should be given on her account. (The *Emily B. Souder v.* Pritchard, 17 Wall., 666. Hazlehurst *v.* The *Lulu*, 10 Wall., 192. Merchants' Mut. Ins. Co. *v.* Baring, 20 Wall., 159.)

It is notorious (The Ship *Virgin*, 8 Pet., 538) that in foreign countries supplies and advances for repairs and necessary expenditures of the ship constitute, by the general maritime law, a valid lien on the ship. * * *

In Wilson *v.* Bell, 20 Wall., 201, the Supreme Court of the United States say:

> The ordering, by the master, of supplies and repairs on the credit of the ship is sufficient proof of such necessity to support an implied hypothecation in favor of the material man or the lender of money, who acts in good faith.

Under the foregoing principles of maritime law it is clear that Raymond held a lien upon the *Irene* for the advances made by him at De Sonneville's request, and expended by the latter in the necessary repairs. Raymond's lien followed the ship when the Venezuelan Government took possession of her under the charter party of September 12, 1869.

It is the very nature and essence of a lien that, no matter into whose hands the property goes, it passes " cum onere." (Burton *v.* Smith, 13 Pet., 464.)

In Myer *v.* Tupper, 1 Black, 522, it was held that where respondents purchased without notices of a lien for repairs or supplies in a foreign port their want of caution in this respect could not deprive the libellants of a legal right they had done nothing to forfeit.

Mr. Raymond, therefore, might have pressed his remedy against the Government of Venezuela in virtue of his lien upon the vessel to the extent of his interest in case of the violation of the contract under which the Government obtained possession, or he could rely upon the personal responsibility of De Sonneville for the debt. It is quite evident that Raymond chose the latter of these alternatives. His claim against De Sonneville appears to have been in the hands of Venezuelan lawyers for a number of years. Finally, on April 29, 1890, De Sonneville, in order to discharge the debt to Raymond, executed the assignment transferring thereby specified pieces of property " which represent 25,000 bolivars value, free from all incumbrances, annuity, or mortgages." And one Ascanio Negretti, lawyer, " with power of attorney from Charles Raymond," accepted this transfer. In accordance with law, this assignment was registered in the registry of Altagracia de Orituco on May 16, 1890, and also in the French legation at Caracas on October 21, 1891. The valuation of 25,000 bolivars placed upon the property thus transferred in satisfaction of the debt is included in the instrument signed by both De Sonneville and the representative of Raymond, and must be regarded as a part of the agreement. It equals, if it does not excel, the amount due at the time.

The acceptance of this transfer discharged the debt of De Sonneville to Raymond and canceled any claim which Raymond might have had against the Government of Venezuela in virtue of his lien upon the steamer. The lien could not exist after the debt was paid. As the assignment of the property specified was received in discharge of a money debt due from De Sonneville, it is in judgment of law to be considered as the same thing as if De Sonneville had actually paid money to the amount agreed upon in the assignment as being the value of the property transferred. The subsequent depreciation in value can not operate to revive the debt.

The claim must, therefore, be disallowed.

GRISANTI, *Commissioner:*

Elizabeth Wild Raymond, widow of Charles Raymond, deceased, Anna J. Raymond, Elizabeth E. Raymond, Letitia J. Raymond, Florence A. Raymond, Edwin J. Raymond, Charles J. Raymond, and Victoria R. Gauce (née Raymond), children of said Charles Raymond, deceased, claim of the Government of Venezuela payment for $ 78,520 as capital and interests of a credit which they, sole heirs at law of the mentioned Charles Raymond, deceased, pretend holding against Venezuela.

The history of the claim is as follows:

On September 12, 1869, a contract was signed at Port of Spain between George Fitt, acting on behalf of the citizen Gen. José Ruperto Monagas, at that time President of Venezuela, and Ovide De Sonneville, acting as proxy for Mr. Charles M. Burns, owner of the British vessel *Irene*, in virtue of which

contract Fitt chartered said vessel *Irene*, having on board 130 tons of coal for the service of carrying troops on account of the Government of Venezuela. (Art. 1.)

Ovide De Sonneville received from George Fitt $5,000 with which he paid the debts of the vessel in Port of Spain, and for which debts she was there detained. (Art. 2.)

Both contracting parties agreed that if the Government of Venezuela decided to buy the vessel the price should be $30,000; if not, the vessel would continue chartered at the rate of $100 per day, for a term of not less than sixty days, it being a formal condition of said contract that the Government of Venezuela on the expiration of said term, or other term which the parties might agree to extend, should, on returning Sonneville the vessel, pay him for the 130 tons of coal above referred to, at the price the same should happen to have at the port of the Republic where the return takes place; also that he should be paid such amount as both parties might consider necessary for conducting said vessel to the harbor of Port of Spain, and also the extra pieces lost or worn out. (Art. 3.)

In the $100 per day stipulated as the rent for the *Irene* none of her expenses were included therein, all of which were on account of the Government of Venezuela, and if the vessel, during the time of her leaving Port of Spain up to that on which she was returned to Sonneville, should be lost or suffered very serious injuries, such as to make her useless, Sonneville should be paid her value, which beforehand was fixed at $30,000, and would forthwith be the property of the Republic. If the injury sustained by the vessel were of easy repair, the Government of Venezuela had the option of returning her, previously making the necessary repairs at their own expense. (Art. 4.)

On November 23, 1869, a note was addressed to Sonneville by the Jefe de estado mayor general in Puerto Cabello to the following effect:

> The term of the contract for chartering the vessel *Irene* having expired, and the war being over, the citizen general president in campaign orders me to notify you thereof, so that you may this day take charge of the mentioned vessel under formal inventory, and afterwards call at the general headquarters to settle your charter account, balance of coal missing to make up the 120 tons and agree as to the amount required for your sailing to Port of Spain.

On November 24, Sonneville answered, denying to receive the vessel if the very serious injury suffered by the vessel in one of her boilers on October 17 were not repaired, unless the Government should choose to pay the price fixed on the vessel.

Afterwards a discussion followed between the Government of Venezuela and Sonneville in reference to the case, and steps were taken by the latter to apply to the French Government, and pretending to apply to the British Government also, for them to second his motion in the claim against Venezuela. On April 29, 1890, Sonneville issued a document wherein he declares to be a debtor to Charles Raymond for the amount of 12,500 bolivars, which he acknowledged to have received from him to settle his (Sonneville's) account with the consignee of the British vessel *Irene*, and in payment for that amount he assigned to him the sole possession of several properties perfectly specified in the aforementioned document.

The principal grounds whereon Messrs. Raymond lay their claim are the following:

> In the year 1890, as above stated, Mr. De Sonneville assigned all his property to Mr. Charles Raymond, predecessor in interest of the present claimants. Neither Mr. Charles Raymond nor Mr. Sonneville were paid any sum of money on account of the claim.

To the judge of the lawfulness or unlawfulness of this claim the following point must, above all, be examined:

Is, or is not, the mentioned claim included in the dedition which Sonneville made in payment to Charles Raymond, contained in the document drawn at Caracas on April 29, 1890, and registered in the subaltern registry office of the Monagas district on the 16th of May of the same year? In other words, did Sonneville transfer to Raymond the referred-to credit against Venezuela by virtue of said dedition in payment?

The Venezuelan Commissioner is of opinion that the question put must be answered negatively without the least vacillation. Consequently the claim not being expressly included in the dedition in payment, it is excluded from the same because in all contracts, such as this, which have the object of alienation of property, it is an essential requisite that the goods alienated be perfectly determined.

I must not let the fact go by, that some Venezuelan lawyers of undeniable knowledge argued that on the strength of the foregoing contract Charles Raymond was the owner of the claim; but such is an error, and errors have no authority, however respectable the persons who fell into them.

This erroneous opinion is undoubtedly derived from the generality of the terms with which the dedition of payment commences. Sonneville says:

* * * And to pay that amount (the 12,500 bolivars) I deliver him all my present and future property, as I have no heirs, and have on the other hand my gratitude bound to Mr. Charles Raymond, to whom I am attached not only by the ties of friendship but also by those of spiritual relationship.

But the amplitude and vagueness of this clause are perfectly determined and limited by the phrase following forthwith: " The goods which I give him in payment for my debt are the following, " then said goods are specified. The former generality must be interpreted in the light of this limitation, without which it would be deprived of judicial and even rational value. If there existed only the clause, " I deliver him my present and future goods," the contract would completely lack legal value. The fact is, that when the dedition in payment has the object, as in the present case, of extinguishing a pecuniary debt, no difference exists between the former and an ordinary sale; both contracts are identical. Therefore the consent of the contracting parties is an essential requisite for the existence of every contract, which must be in regard to the thing or price when it refers to buying or selling, and in regard to the debt and thing transferred for payment if it refers to a dedition in payment, and without determining these two elements consent is impossible because it lacks matter, and consequently the existence of the contract would also be impossible. Wherefore, if the dedition in payment refers to " present and future goods," with no other explanation, it would never have attained judicial existence. Neither Sonneville would have known what he gave, nor Raymond what he received; and consent requires knowledge — consent can not be given to what is not known.

If the principles and reasons stated were laid aside and it were attempted to hold that the claim being the property of Sonneville he had the will to transfer it to Raymond, such assignment could have no effect against the Government of Venezuela, owing to its lack of visible existence.

Another question:

Was or was not the credit of 12,500 bolivars extinguished in virtue of the assignment, which, according to the public document above, refers to Charles Raymond, held against Sonneville?

It most certainly was. That is the natural, judicial effect of an assignment, and as the one in question is pure and simple — that is to say, that it is not subject to any conditions, either suspensive or resolutory — the mentioned extinguishing effect took place definitively and perpetually from the very moment of signing the contract.

It is alleged that no price was able to be got for the sale of the property assigned in payment, and that it fell to ruin. This fact is very unlikely, as the transaction was carried out in 1890, at a time when Venezuela reached its greatest material prosperity. The property assigned in payment consisted of coffee plantations, and at that time the hundredweight of this grain was worth ——.[1] But even admitting such allegation to be a fact, it could not revive the credit, as its extinction was complete and forever.

Before closing, the writer begs to state a few more remarks which he considers unnecessary but not irrelevant.

In the charter party of the vessel *Irene*, Sonneville appears acting as proxy for Charles M. Burns, British subject; the latter then is the real charterer and the only owner of the rights acquired as such.

When Sonneville thought that France might tender him some protection he addressed the French consul at Caracas (December 12, 1888); then the Venezuelan-French Mixed Commission, which at that time was sitting here (April 6, 1890); then the minister for foreign affairs of the French Republic (May 8, 1890), requesting his help and advising the latter besides that if the intervention of his Government be considered unlawful he should forward the documents to the minister of foreign affairs of Great Britain with the view already mentioned. The request having purely and simply been denied by the French Government and the documents returned to Sonneville, the claim arises out of the hands of the present solicitors, not out of its own dust, as the Phœnix of the fable, but out of nothing — that is to say, out of a dedition in payment which is not contained in it.

In virtue of the reasons explained, it is the opinion of the Venezuelan Commissioner that the referred-to claim must be entirely disallowed.

VOLKMAR CASE

Compensation can not be demanded for neutral property accidentally destroyed in the course of civil or international war.

BAINBRIDGE, *Commissioner* (for the Commission):

The claimant is a native citizen of the United States, residing in the city of Puerto Cabello, Venezuela. In the year 1892 he was the sole owner of the electric light plant of that city. On the 22nd, 23rd, and 24th of August, 1892, the forces of General Crespo, who was engaged in a revolution, ultimately successful, against the then existing government, attacked the city of Puerto Cabello, and during the engagement the power house, lines, lamps, and machinery of the claimant suffered damage amounting, as claimed, to the sum of 84,160 bolivars, for which sum, with interest, an award is asked.

The evidence presented in support of this claim is amply sufficient to prove the fact and nature of claimant's loss, but it fails to establish any liability on the part of the Government of Venezuela therefor. It is perfectly clear that the losses complained of were the result of military operations in time of flagrant

[1] Left blank in original.

war, and for such losses there is, unfortunately, by established rules of international law, no redress. Such losses are designated by Vattel as " misfortunes which chance deals out to the proprietors on whom they happen to fall," and he says that " no action lies against the State for misfortunes of this nature, for losses which she has occasioned, not willfully, but through necessity and by mere accident in the exertion of her rights."

As a principle of international law, the view that a foreigner domiciled in the territory of a belligerent can not expect exemption from the operations of a hostile force is amply sustained by the precedents you cite and many others. Great Britain admitted the doctrine as against her own subjects residing in France during the Franco-Prussian war, and we, too, have asserted it successfully against similar claims of foreigners residing in the Southern States during the war of secession. (Mr. Evarts, Secretary of State, to Mr. Hoffman, July 18, 1879. Wharton's Int. Law Dig., sec. 224.)

" The property of alien residents," says Mr. Frelinghuysen, Secretary of State, " like that of natives of the country, when 'in the track of war,' is subject to war's casualties." (Wharton's Int. Law Dig., vol. 2, sec. 224, p. 587.)

The rule that neutral property in belligerent territory is liable to the fortunes of war equally with that of subjects of the State applies in the case of civil as well as international war. In Cleworth's case, decided by the American and British Claims Commission of 1871, a claim was made for the value of a house destroyed in Vicksburg by shells thrown into the city by the United States forces during the bombardment. The Commissioners said: " The United States can not be held liable for any injury caused by the shells thrown in the attacks upon Vicksburg." And the same principle was applied in the case of James Tongue *v.* The United States to a claim for property destroyed by the bombardment of Fredericksburg on the 11th, 12th, and 13th days of December, 1862. (Moore Int. Arb., 3675.)

In view of the foregoing considerations the claim must be disallowed.

MIXED CLAIMS COMMISSION
BELGIUM-VENEZUELA
CONSTITUTED UNDER THE PROTOCOL OF
7 MARCH 1903

REPORT: Jackson H. Ralston — W. T. Sherman Doyle, *Venezuelan Arbitrations of 1903,* **including Protocols, personnel and Rules of Commission, Opinions, and Summary of Awards, etc., published as Senate Document No. 316, Fifty-eighth Congress, second session, Washington, Government Printing Office, 1904, pp. 261-290.**

PROTOCOL OF AGREEMENT BETWEEN THE PLENIPOTENTIARY OF HIS MAJESTY THE KING OF THE BELGIANS AND THE PLENIPOTENTIARY OF VENEZUELA FOR SUBMISSION TO ARBITRATION AND PAYMENT OF ALL UNSETTLED CLAIMS OF THE GOVERNMENT AND SUBJECTS OF BELGIUM AGAINST THE REPUBLIC OF VENEZUELA[1]

His Majesty the King of the Belgians and the President of the Republic of Venezuela having deemed it expedient to conclude the above mentioned protocol to that end have appointed as Their Plenipotentiaries: His Majesty the King of the Belgians: Baron Moncheur, The President of Venezuela: Herbert W. Bowen, Who, after having communicated to each other their full powers found in due and good form, have agreed and signed the following protocol:

ARTICLE I

All Belgian claims against the Republic of Venezuela which have not been settled by diplomatic agreement or by arbitration between the two Governments, and which shall have been presented to the Commission hereinafter named by the Belgian Government or the Belgian Legation at Caracas shall be examined and decided by a Mixed Commission which shall sit at Caracas, and which shall consist of two members, one of whom is to be appointed by His Majesty, the King of the Belgians, and the other by the President of Venezuela.

It is agreed that an umpire may be named by the Queen of The Netherlands.

If either of said commissioners or the umpire should fail or cease to act, his successor shall be appointed forthwith in the same manner as his predecessor. Said commissioners and umpire are to be appointed before the first of May, 1903.

The commissioners and the umpire shall meet in the City of Caracas on the first day of June, 1903. The umpire shall preside over their deliberations and shall be competent to decide any question on which the commissioners disagree.

Before assuming the functions of their office, the commissioners and the umpire shall take solemn oath carefully to examine and impartially to decide, according to justice and the provisions of this convention, all claims submitted to them, and such oaths shall be entered on the records of their proceedings. The commissioners, or in case of their disagreement, the umpire, shall decide all claims upon a basis of absolute equity without regard to objections of a technical nature or of the provisions of local legislation.

The decisions of the commission, and in the event of their disagreement, those of the umpire, shall be final and conclusive. They shall be in writing. All awards shall be payable in Belgian gold or its equivalent in silver.

ARTICLE II

The commissioners, or umpire, as the case may be, shall investigate and decide said claims upon such evidence or information only as shall be furnished

[1] For the French text see pp. 261-264 of original Report referred to on preceding page.

by or on behalf of the respective Governments. They shall be bound to receive and consider all written documents or statements which may be presented to them by or on behalf of the respective Governments in support of or in answer to any claim, and to hear oral or written arguments made by the agent of each Government on every claim.

In case of their failure to agree in opinion upon any individual claim, the umpire shall decide.

Every claim shall be formally presented to the commissioners within thirty days from the day of their first meeting, unless the commissioners or the umpire in any case extend the period for presenting the claim, not exceeding three months longer.

The commissioners shall be bound to examine and decide upon every claim within six months from the day of its first formal presentation, and in case of their disagreement, the umpire shall examine and decide within a corresponding period from the date of such disagreement.

ARTICLE III

The commissioners and the umpire shall keep an accurate record of their proceedings. For that purpose, each commissioner shall appoint a secretary versed in the language of both countries, to assist them in the transaction of the business of the Commission. Except as herein stipulated, all questions of procedure shall be left to the determination of the Commission, or in case of their disagreement, to the umpire.

ARTICLE IV

Reasonable compensation to the commissioners and to the umpire for their services and expenses, and the other expenses of said arbitration, are to be paid in equal moieties by the contracting parties.

ARTICLE V

In order to pay the total amount of the claims to be adjudicated as aforesaid and other claims of citizens or subjects of other nations, the Government of Venezuela shall set apart for this purpose, and alienate to no other purpose, beginning with the month of March, 1903, thirty per cent in monthly payments of the customs-revenues at La Guaira and Puerto Cabello, and the payments thus set aside shall be divided and distributed in conformity with the decision of the Hague Tribunal.

In case of the failure to carry out the above agreement, Belgian officials shall be placed in charge of the customs of the two ports, and shall administer them until the liabilities of Venezuela in respect of the above claims shall have been discharged.

The reference of the question above stated to the Hague Tribunal will be the subject of a separate protocol.

ARTICLE VI

All existing and unsatisfied awards in favor of Belgium shall be promptly paid, according to the terms of the respective awards, or according to any new arrangement that the Government of Venezuela may make in conformity with article VI of the protocol signed February 13, 1903, by Mr. Herbert W. Bowen and Sir Michael Herbert.

Done at Washington the seventh day of March, 1903.

[SEAL] Herbert W. BOWEN

[SEAL] Baron MONCHEUR

PERSONNEL OF BELGIAN-VENEZUELAN COMMISSION

Umpire. — J. Ph. F. Filtz.
Belgian Commissioner. — F. Goffart.
Venezuelan Commissioner. — Pedro Vicente Azpurúa, until July, 1903, when he was followed by — Carlos F. Grisanti.
Venezuelan Agent. — F. Arroyo-Parejo.
Belgian Secretary. — Charles Piton.
Venezuelan Secretary. — Emilio de Las Casas.

OPINIONS IN THE BELGIAN-VENEZUELAN COMMISSION

PAQUET CASE (Expulsion)

(By the Umpire):

The right of nations to expel foreigners from, or prohibit their entrance into the national territory is generally recognized, if they are prejudical to public order; but when these measures are resorted to, the Government of such foreigners is entitled to know the reasons therefor, and if such explanations are refused, the act of expulsion is to be considered as arbitrary and indemnity must be paid to those expelled or prevented from entering. [1]

GOFFART, *Commissioner* (claim referred to umpire):

The claim presented by Mr. Paquet, because of his expulsion, contains five counts.

	Francs
Direct damages, traveling and hotel expenses	50,000
Indirect damages, divided into three counts	230,000
Total	280,000

The Venezuelan Commissioner contends that the entire claim of 280,000 francs should be rejected because, in his judgment, Venezuela had the right to expel Mr. Paquet and therefore owes him no indemnity.

The Belgian Commissioner has renounced the indirect damages of 230,000 francs; he does not demand anything except direct damages, traveling and hotel expenses, etc., and these even he reduces from 50,000 to 4,500 francs.

The Belgian Commissioner does not dispute the right of expulsion invoked by Venezuela, so long as this right is a consequence of the right to protect the State; but by reason of this very fact it is important that it be employed to this end and to no other. The constant practice among European governments has been never to refuse to give to the representative of a nation of the party expelled the reasons which have moved the Government expelling him to exercise this right. The demand, therefore, that this be done in this case does not seem unreasonable.

The Government of Venezuela employed a measure of severity against the claimant. There is no proof that it took this course in order to protect itself in accordance with the line of conduct adopted by all the countries represented

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[1] See the Italian - Venezuelan Mixed Claims Commission (Boffolo Case and Oliva Case) in Volume X of these *Reports*.

in Venezuela — Germany, England, the United States, Spain, Italy, France, the Netherlands, and Belgium.

The Belgian Commissioner must therefore consider it as unwarranted, and maintain the liability of the Government.

This principle having been established, the Belgian Commissioner invokes it very moderately, demanding in lieu of the 280,000 francs claimed, the sum of 4,500 francs for the expenses of various kinds to which the claimant had been put by reason of his temporary expulsion.

GRISANTI, *Commissioner* (claim referred to umpire):

Mr. Noberto Paquet claims an indemnity from the Government of Venezuela because it prevented his wife in the first place (in August, 1902) and afterwards himself and wife (last June) from disembarking in the port of La Guaira. Mr. Paquet says literally:

> The act of preventing my wife in the first place and afterwards myself from entering Venezuela, after having allowed us to depart more or less freely, constitutes an unwarranted expulsion. This expulsion was carried out without formalities and without explanation of any sort.

And Mr. Paquet demands reimbursement for his expenses of travel, hotel, and maintenance in Trinidad of a family composed of six persons from the end of August and beginning of September, 1902, until the end of May and beginning June, 1903; the expenses of moving, etc.

In the last session I expressed the opinion that said claim should be disallowed, because there is no convincing proof in the record of the facts which he alleges as the foundation of the claim, and because even if such proof did exist, since the Paquets are foreigners and are domiciled at Port of Spain, the Government of Venezuela exercised a perfect right in prohibiting them from entering the national territory, a right which publicists acknowledge and which governments assert and exercise.

The Belgian Commissioner accepted the claim for 4,500 bolivars. The Venezuelan Commissioner rejected it absolutely, alleging that, so far as he is concerned the question is not one of amount but of principle, and he expresses his regret that it was not possible for him to consent to a matter of that nature.

> A foreigner may be expelled from French territory by a simple administrative act, provided his presence appears dangerous to public order. (Law of Dec. 3-11, 1849, arts. 7-8.)

If hospitality imposes duties, he who offers it also imposes greater ones on him receiving it. He who accepts hospitality in order to more surely take advantage of and deceive his trusting benefactor loses his right to hospitality.

The right of expulsion with which the Government is armed against the resident foreigner who inhabits the French soil transiently or permanently is explained, therefore, by the violation of his duties as a guest whereby he has made himself culpable; but even if he had respected them, the measure of expulsion taken against him will, nevertheless, be found to be justified for high political reasons because of the rights of public policy with which the authorities are vested, for the public interest and for the national safety, which they alone are able to determine. (André Weiss, Elementary Treatise on Public International Law, p. 34; see also Pradier-Fodéré, Public International Law, vol. 3, No. 1857, p. 1078.)

Because of the reasons expressed it is the opinion of the Venezuelan Commissioner that the aforesaid claim should be absolutely disallowed.

FILTZ, *Umpire:*[1]

The umpire having examined and studied the record, and considering —

That Mr. N. A. Paquet, a Belgian subject, domiciled in Caracas, claims the sum of 280,000 bolivars for damages, direct and indirect, traveling expenses and hotel expenses, because the Government of Venezuela prevented him from landing at La Guaira;

That the claim has been reduced by the Belgian Commissioner by the sum of 250,000 bolivars for indirect damages, and insisted upon only for direct damages, estimated at 4,500 bolivars;

That the right to expel foreigners from or prohibit their entry into the national territory is generally recognized; that each State reserves to itself the exercise of this right with respect to the person of a foreigner if it considers him dangerous to public order, or for considerations of a high political character, but that its application can not be invoked except to that end;

That, on the other hand, the general practice among governments is to give explanations to the government of the person expelled if it asks them, and when such explanations are refused, as in the case under consideration, the expulsion can be considered as an arbitrary act of such a nature as to entail reparation, which is aggravated in the present case by the fact that the attributes of the executive power, according to the Constitution of Venezuela, do not extend to the power to prohibit the entry into the national territory, or expelling therefrom the domiciled foreigners whom the Government suspects of being prejudicial to the public order;

That, besides, the sum demanded does not appear to be exaggerated —

Decides that this claim of N. A. Paquet is allowed for 4,500 francs.

PAQUET CASE (Concession)

(By the Umpire:)

If a person by reason of a permit from the Government is induced to spend time and money, he is equitably entitled to an indemnity, if the permit is revoked without sufficient reason.

GOFFART, *Commissioner* (claim referred to umpire):

In deciding to refuse all indemnity for the arbitrary taking away from the claimant of the waste waters of the Asylum of the Feeble Minded, the Commissioner of Venezuela stands upon two facts:

1. There was no concession.

2. If there were a concession, it was not made forever, as the claimant alleges, but for an undefined time only.

The Commissioner of Belgium maintains that Mr. Paquet has a right to an indemnity of 50,000 francs, which he claims, and he bases his opinion upon the following:

The document conceded by the municipal council is a document in proper form, engrossed upon sealed paper, which was executed in accordance with all the formalities required by law to guarantee the claimant against future eviction.

The municipal council employs in it the term itself *conceder* to express the right which it created in favor of Mr. Paquet.

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[1] For a French translation see: Descamps - Renault, *Recueil international des traités du XX^e siècle*, année 1903, p. 882.

There exists, therefore, a true concession, and, supposing that the term of it be undefined, the authorities lacked the right to revoke it without indemnity.

In order to convince one's self of this, it is sufficient to recall the facts of the negotiations before mentioned.

Sewage waters pollute the place, engender fevers, and injure the public health. This condition exists without anybody being able to find a remedy for it. An intelligent man arrives, whose laborious studies have prepared him to relieve this difficulty. He finds not only a means of rendering the place healthy, but even a method of transferring the evil existing into a font of benefit. Is it just, is it equitable that he should be allowed to apply his idea, guaranteeing him a benefit; that he should be allowed to undergo all the expenses of construction, that the people should profit by reason of the public health thus obtained, and that when the experiment is concluded, when the petitioner is about to profit from that idea, which until to-day has not been of benefit except as to the others, that he should then be deprived of his property without indemnity?

Nobody will sustain it. It would be to deny the modern laws concerning property in ideas.

GRISANTI, *Commissioner* (claim referred to umpire):

Mr. Noberto Paquet claims the payment of 100,000 bolivars because the Government of Venezuela has deprived him of the use of the waste waters of the asylum, formulating his claim in these terms:

On November 8, 1898, the municipal council of Caracas, considering a petition which I had directed to it and demanding the assurances and formalities requisite, conceded to me in perpetuity the use of the waste waters of the asylum of Catia to use for irrigating my plantation of Agua Salud.

This claim is based on two great errors into which Mr. Paquet has fallen, and, unfortunately, with him, the Belgian Commissioner.

Paquet thinks that the municipal council made him a perpetual concession, and the wording of the documents, relative to the matter, makes it manifest that it was neither a concession nor was it perpetual. The fact is, the municipal council sanctioned the following:

Resolved, That the petition of citizen Noberto Paquet be allowed, granting him the permission which he has asked, to make use for an undefined time of the waste waters which flow out of the asylum of Catia, running freely through the gulch of Agua Salud, conducting them by means of a pipe line to his plantation situated on the said Agua Salud.

As will be seen from the text of the resolution, the council gave to Paquet the mere *permission* to make use of the waste waters, etc.

A *permission* is essentially revocable, and can confer no rights on the person who obtains it, nor impose any obligation on the one giving it. It did not, therefore, constitute any juridic link between the municipal council and Mr. Paquet. That permission could have ceased legally at the moment when the council should consider it advisable to revoke it, and if one considers it from this point of view, he will cease entirely to believe that the permission was given for an *undefined time*, a condition which better shows, if that be possible, the perishable and revokable character of the permission.

The words " *temps indéfini* " and their equivalent in Spanish mean that the stipulation to which they refer has no fixed term and may cease at any moment.

I have demonstrated what I asserted at the beginning of this argument, that is to say, that the claim analyzed is based upon two errors, namely:

(1) That the *permission* to which the resolution refers confers a right upon Mr. Paquet.

(2) That the words *undefined time* signify perpetually.

Secondarily, I put forward the following considerations:

It does not appear, in a credible way, that the Government has deprived the plantation of Agua Salud of said waste waters because, aside from the fact that the letter from Sister Anacleta lacks authenticity, the claimant limits himself to formulating his demand in this vague and indefinite way:

> I succeeded, nevertheless, on account of my imperturbable tenacity, in maintaining in some sort of fashion the irrigation by the waste waters * * * until January, 1901. It was then that a high authority intervened in a decisive manner, which permitted the others to convert to their own benefit the waste waters upon the fields next to the asylum, a practice which is, on the other hand, very unhealthy.

Lastly, if the permission to use the waste waters conferred any rights it would have created a servitude in favor of the property, Agua Salud, and since this belongs to Mr. Emelio Franklin, it would not be Paquet but Franklin who would have the right to claim.

For the reasons expressed, it is the opinion of the Venezuelan Commissioner that the claim under consideration, which Mr. Paquet makes, should be disallowed absolutely.

FILTZ, *Umpire:*

The umpire having examined the record and considering —

That on November 5, 1896, at the request of Mr. N. A. Paquet, the municipal council of Caracas granted him the permission to make use for an undefined time of the waste waters which run out of the hospital of Catia and which flow freely by way of the ravine of Agua Salud, conducting them by means of a pipe line to his rural estate, " Agua Salud; "

That some time thereafter this permission was withdrawn from him;

That, in order to prove this fact, Mr. Paquet relies upon the letter of Sister Anacleta which is to be found in the record. This letter is not authenticated, as has been noted by the Commissioner of Venezuela; nevertheless, I accept its contents as the expression of the truth;

That it is superfluous to discuss the differences which might exist between a concession and a permission;

I do not even care to dispute the right to withdraw a permit of concession running for an undefined time; but when a permit is withdrawn from anyone, by virtue of which he has been put to expense and labor and accomplished a great public service, draining a part of the city in order to take advantage of his ingenuity, at the moment he was about to enjoy the results of his labor, and this in order that it may be of advantage to others, it would certainly be equitable to indemnify him.

Unfortunately for Mr. Paquet, from the aforesaid letter, which I ought to accept in its entirety as the truth, it is manifest that Mr. Paquet performed labor in the interior of the asylum in order to take this waste water which occasioned serious damage, stopping for several days the supply of drinking water which came from the canal Polvorin, which left the establishment entirely unprovided with water;

That Mr. Paquet himself has abused the permission which was granted him appears to him (the umpire) to be of sufficient weight to justify its revocation, and it is this fact alone that prevents him from allowing the claim.

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POSTAL CLAIM

(By the Umpire:)

Interest will not be allowed upon a claim, if it is not demanded in the claim itself.

GOFFART, *Commissioner* (claim referred to umpire):

Article 33 of the Universal Postal Convention (signed June 15, 1897), a convention signed by almost all the nations of the world, and among others by Venezuela and by Belgium, says literally:

2. Payment of the accounts of transit expenses relating to a period of service must be effected with the least possible delay, and, at the latest, before the expiration of the first six months of the following period of service. In any case, if the office which has transmitted the account has not received during that period a correcting observation, the account is considered as duly accepted. This provision likewise applies to the uncontested observations made by one office relative to the accounts presented by another. When the term of six months has passed, the amounts due from one office to another office are subject to interest at the rate of 5 per cent per annum, dating from the day of expiration of said term.

3. The offices interested are, however, at liberty to make, by mutual agreement, arrangements other than those formulated in the present article.[1]

This text gives rise to no doubt, and in No. 2 a general rule is established; by No. 3 it is permissible that it be replaced by means of special agreement.

Has the term of six months allowed, at the end of which the expense of transportation that were due for the year 1898 should have borne interest, expired? Evidently.

Does there exist a special agreement which supersedes the general rule? It is possible that it will be alleged that the acceptance on the part of Belgium in July, 1900, of an arrangement for the extinguishment of the debt by means of the series of monthly payments of 250,296 francs, since no interest has been mentioned, constitutes a tacit renunciation of interest, but the suspension of the payments in June, 1901, has annulled this tacit agreement.

If, therefore, there exists a part agreement that agreement has ceased to exist and the debt is governed by the general rule contained in article 2.

Therefore the Belgian Commissioner proposes the following award:

The Venezuelan-Belgian Commission decides that the debt for 8,249.36 francs, which the Government of Venezuela owes, is allowed.

(2) This sum shall be increased by interest at 5 per cent from June 1, 1901, until the day of payment.

GRISANTI, *Commissioner* (claim referred to umpire):

The Commissioner of Venezuela has the honor to make the following observations:

In the claim for 8,249 francs 36 centimes for expenses of transportation of correspondence, the payment of interest has not been demanded upon that sum, and since it is indispensably requisite, in order that the Commission may take jurisdiction of and decide the claim, that said claim shall have been made, it is clear in the present case that the Commission can not allow interest which has not been demanded.

In Article I of the protocol, signed at Washington on February 13, of the current year by the plenipotentiaries of Belgium and Venezuela, it says that —

All Belgian claims against the Republic of Venezuela, which have not been settled by diplomatic agreement or by arbitration between the two Governments

[1] U. S. Statutes at Large, vol. 30, p. 1691.

and which shall have been presented to the Commission hereinafter named by the Belgian Government or by the Belgian legation. * * *

Consequently, the payment of interest has not been claimed either by the Government of Belgium or by the legation of Belgium at Caracas.

Secondly, I make the following argument:

The cause which has prevented the Venezuelan Government from effecting the punctual payment of the sum named consists in civil war, which possesses the character of *force majeure* and excuses the payment of interest, in accordance with article 1191 of the civil code:

The debtor is not obliged to pay damages if these are the consequences of an accident or force majeure, which has impeded him from refraining to do, or doing, that which he was obliged to do, or that he has done that which was forbidden.

For these reasons I am of opinion that there is no reason to demand the payment of interest with which the Belgian Commissioner has increased the demand.

FILTZ, *Umpire:*

The umpire having studied and examined the documents and the record and considering:

That, the demand for interest has not been presented in the claim itself;

That, besides it is contrary to the terms of the protocol;

For these reasons declares that the demand for interest made by the Commissioner of Belgium is disallowed.

COMPAGNIE GÉNÉRALE DES EAUX DE CARACAS

DECISION ON JURISDICTION

(By the Umpire):

Under the terms of the protocol, the Commission has jurisdiction to examine and decide the claim of a Belgian corporation, even though some of its stockholders may not be Belgians.

DECISION ON MERITS

(By the Umpire):

The failure to perform a contract for the payment of certain bonds issued by the Government of Venezuela in payment for certain properties purchased of claimant gives the claimant a right to claim indemnity, even though the bonds were made payable to bearer.

Where the property conveyed was encumbered by a bond and mortgage, formal registration of a satisfaction of the mortgage can not in equity be demanded when the evidence clearly shows that all but a few of the mortgage bonds have been paid and the claimant is willing to amply secure the grantee against loss on account of the outstanding bonds. The objection to the payment founded on the above would be one of a technical nature, which is expressly barred by the protocol.

Evidence can not be introduced to show that bonds issued for the payment for property were delivered at 40 per cent of their nominal value where the contract of transfer expressly states that the bonds were issued at par.

(The allegations contained in the memorial sufficiently appear in the following opinions. This plea to the jurisdiction was the first step taken by the Venezuela Government in opposition to the claim.)

ANSWER OF VENEZUELA ON JURISDICTION

To the Honorable Members of the Mixed Venezuelan-Belgian Commission:

The undersigned, agent of the United States of Venezuela, has studied the claim presented by the Compagnie Générale des Eaux de Caracas, and respectfully shows to the tribunal:

Before answering the claim upon its merits the undersigned must present to the consideration of the honorable arbitrators a preliminary objection which requires a previous decision.

By the protocol signed in Washington between the two Governments only the claims owned by Belgian subjects can be submitted to the decision of this honorable Commission; it is necessary, therefore, for the claimant company to prove that all the special bonds issued by Venezuela, as the price for the assets of the enterprise, are held by Belgian subjects.

The undersigned considers that this is an essential condition to give jurisdiction to the tribunal.

Moreover, the Government of Venezuela, in refusing to continue the regular payment of the special debt created to make payment for the aforesaid sale, has done so because it considers indispensable the fulfillment of a requirement to which the company is obligated by the internal law — viz, the cancellation of the mortgage which it made, by which it guaranteed the payment of 27,400 bonds at 500 francs each — because it is to be noted that when the enterprise was sold to the Government no mention of this incumbrance was made.

In case the honorable tribunal should consider the objection interposed without foundation, the undersigned will proceed to answer the claim, without any delay, upon its merits.

PRELIMINARY QUESTION AS TO JURISDICTION

GOFFART, *Commissioner* (claim referred to umpire):

In his answer, dated July 18, 1903, the agent of the Venezuelan Government sets forth, incidentally, that if Venezuela has suspended the payment of the waterworks debt it has been because of a mortgage which ought to have been canceled according to local legislation.

It would be easy to meet this objection if the explicit prohibition which the protocol provides for recourse to local legislation did not render such refutation completely useless.

The true objection should be formulated thus:

By the protocol signed at Washington between the two Governments only claims owned by Belgians can be submitted to this Commission; it is therefore necessary that the company should prove that all the bonds issued by Venezuela in payment for the assets of the company are held by Belgian subjects. The undersigned considers that this is an essential condition to give jurisdiction to the tribunal.

In case this tribunal should consider the objection unfounded, the undersigned will proceed to answer the claim upon its merits without any delay.

This objection is magnified even more by the Venezuelan Commissioner, who demands not only that the company should prove that all the holders are Belgians, but also that it is the owner of the claim which it presents.

In order to refute the objection of the Venezuelan agent, it is sufficient to determine the nationality of the party claimant.

The Compagnie Générale des Eaux de Caracas is a corporation organized in Brussels on February 3, 1891, before Mase Van Halteren, a notary, as is shown by the copy of the Monitor, which is found in the record.

It is therefore a juridic Belgian person, and in that capacity submits to the Belgian-Venezuelan Commission the fact of the nonperformance on the part of the Venezuelan Government of a contract signed by both parties October 31, 1895.

If the objection of the Venezuelan agent had any merit, that is to say, if it were necessary to deny the benefit of a judgment favorable to the claimant to all the bondholders who were not Belgians, with all the more reason would it have been necessary to claim in all the mixed commissions by separating the stockholders and bondholders of corporations which may have claims pending before them.

Very well, the claims of the German railway and the two English railways have been examined on their merits by the English and German commissions.

The objection to the jurisdiction made by the agent of Venezuela before the Commission is not, therefore, justified.

With respect to the exaggeration which the Venezuelan Commissioner has made, in seeking to make the claimant prove in advance that it possesses all the bonds of the debt issued; it arises from an imperfect idea of the foundation of the claim.

The claim of the company has not been made for the certain number of bonds of the waterworks debt which it may possess, but it has its origin in the contract of 1895, to which the company is a party, a contract which it has executed, and which the Government of Venezuela has not fulfilled; which has given to the first party a cause of action against the second, a right which it is exercising at this moment.

Therefore the proof that the company is the owner of its claim is the contract itself, the text of which and the nonfulfillment of which are undeniable.

Besides, it is well to note the manner in which the company has presented its claim.

The liquidators limit themselves in their memorial to proving the debt which the Government has contracted by reason of the negotiation concerning the waterworks, and have taken good care not to demand that the payment be made to them personally, leaving it entirely to the judgment of the Commission to decide if such a course should be taken or, if it deems it preferable, to make the debt payable to a sound financial establishment which it shall charge with the disbursement to all the bondholders; and consequently the Belgian Commissioner asks that, passing over the objections presented by the defendant, the Commission decide that it has jurisdiction and the claim is admissible.

GRISANTI, *Commissioner* (claim referred to the umpire on question of jurisdiction):

La Compagnie Générale des Eaux de Caracas claims the payment of 10,175,000 bolivars, represented by 20,350 bonds payable to bearer of the *special waterworks debt*, besides 2,967,708.33 bolivars interest on this debt from August, 1897, until June of the present year.

This claim is founded upon the following facts:

By the contract executed on October 31, 1895, La Compagnie Générale des Eaux de Caracas sold and transferred to the Government of Venezuela the contract which it had acquired for developing the distribution of water in Caracas, the ownership of all the works and installations, its properties, and the assets which it had against its creditors, all for the price of 10,792,440 bolivars in bonds of the special debt of the waterworks of Caracas, created by Executive decree of the aforesaid date, October 31, 1895.

This debt is similar to the consolidated debt at 5 per cent created by the law of public credit dated July 8, 1891.

The first and essential requisite which the company should fulfill, and which it has not fulfilled, is to prove in a convincing manner that it is the owner of the claim which it urges — that is to say, that it is the owner of the 20,350 bonds of the special debt which are still in circulation — or, at least, that the owners of these bonds are Belgian subjects, and as these bonds are payable to bearer it can not make other proof than the presentation of these bonds themselves.

These bonds are doubtless owned by individuals of various nationalities, and a great part of them belong to Venezuelan citizens.

Very well, the obscure and irregular manner in which La Compagnie Générale des Eaux de Caracas presents its claims would lead to the absurdity that this Mixed Venezuelan-Belgian Commission constituted to examine and decide Belgian claims — that is to say, claims of the Belgian Government or of Belgian subjects — should examine and decide a claim in which persons of many nationalities are concerned, and it would bring us to a still greater absurdity, if that be possible, if some Venezuelans should appear to be protected in their interests by His Majesty the King of Belgium. This would be a flagrant violation of Article I of the protocol, by virtue of which this tribunal has been created.

The Belgian Commissioner assumes that the Compagnie Générale des Eaux de Caracas has made itself liable with respect to the holders of the bonds of the debt, but besides the fact that this would leave in existence the absurdity already expressed in the foregoing paragraph, this act itself would go to demonstrate that the company is urging a claim which is not owned by it, that it is demanding the payment of a debt which does not belong to it, or at least does not belong to it to the extent of which it is trying to make recovery.

" En fait de meubles la possession vaut titre " is a principle sanctioned by article 2279 of the Belgian civil code, by article 1141 of the French civil code, by article 1126 of the Italian civil code, and by article 1100 of the Venezuelan civil code, and said principle applies to bonds payable to bearer.

568. Le principe que les créances peuvent être revendiquées reçoit exception quand elles sont constatées par des titres au porteur. Cela est admis par tout le monde; cependant le code ne parle pas plus de l'exception que de la règle, mais l'exception et la règle se justifient par les raisons qui ont fait établir la maxime qu'en fait de meubles la possession vaut titre. Pourquoi la possession est-elle considérée comme un titre de propriété quand il s'agit de meubles corporels? Parce qu'ils se transmettent de main en main, sans qu'on dresse acte de la transmission. Or, il en est ainsi des effets au porteur: le nom qu'on leur donne prouve que le payement doit être fait à celui que est porteur de l'effet; il est donc réputé créancier, c'est-à-dire propriétaire. Ainsi il n'y a aucune différence entre ces titres et les meubles corporels en ce qui concerne le mode de transmission, donc ils doivent être soumis à un seul et même principe.

La cour de cassation l'a jugé ainsi par un très ancien arrêt, sur le réquisitoire de Merlin. Dans l'espèce, il s'agissait de vingt-six récépissés d'un emprunt, conçus en forme d'effets au porteur. Ces effets avaient été acquis par une société de commerce; l'un des associés en disposa au profit d'une concubine; les associés les réclamèrent contre le possesseur. La cause de la défenderesse était on ne peut pas plus défavorable; le premier juge se prononça contre elle, mais sa décision fut réformée par le tribunal d'appel de Bruxelles. En principe, dit la cour, les effets au porteur sont réputés être la propriété de celui qui en a la possession, à moins que celui qui les revendique ne justifie qu'ils lui ont été volés ou qu'il les a perdus et qu'ils ont été trouvés par le possesseur. (Laurent, *Principes de Droit Civil*, vol. 32, p. 585.)

If the owner of a bond payable to bearer has not got the right to recover it from its actual possessor, except it may have been stolen or lost, how can it

be just that the Compagnie Générale des Eaux de Caracas should claim from the Government of Venezuela the payment of all the bonds of the special debt of the waterworks of Caracas, without showing that it is the owner of all these bonds?

The Compagnie Générale des Eaux de Caracas is not vested with any legal right to represent the bearers of the bonds of the waterworks debt nor does there exist between it and them any legal relation; and this being so, on what principle of equity and justice can it rely to demand the payment of the total sum of said debt?

The undersigned does not deny that the Compagnie Générale des Eaux de Caracas is a juridic person in so far as it is necessary to accomplish its liquidation, nor that its nationality is Belgian. What he denies is, that this company is owner of the claim which it advances.

For the reasons expressed it is the opinion of the Venezuelan Commissioner that the true creditors of the Government of Venezuela for the waterworks debt are the holders of the bonds; so that the Compagnie Générale des Eaux de Caracas ought to show that it is the legitimate holder of the 20,350 bonds, the payment of which it demands, or to limit its claim to the number of bonds which it has in its possession.

FILTZ, *Umpire:* [1]

The umpire having examined and studied the documents in the record and considering:

That Article I of the protocol of Washington declares that the Commission has jurisdiction to examine and decide all Belgian claims against the Republic of Venezuela which have not been settled by diplomatic agreement between the two Governments, and which may have been presented to the Commission by the Belgian Government or by the legation of Belgium at Caracas;

That the present claim has not been settled by diplomatic agreement between the two Governments, and that it has been presented to the Commission by the agent of the Government at Caracas;

That the claimant company's Belgian character has not been disputed, and that it has not lost it, because among the holders of the bonds which have been issued by the Government of the Republic persons of a different nationality are found;

For these reasons declares that the Commission has jurisdiction and orders that it proceed to decide upon the merits without delay.

ANSWER OF THE VENEZUELAN AGENT ON THE MERITS

Honorable Members of the Mixed Venezuelan-Belgian Commission:

In conformity with the decision rendered by the honorable umpire of this Commission, deciding that it has jurisdiction to examine and decide the claim presented against the Government of Venezuela by the Compagnie Générale des Eaux de Caracas, the writer, as agent of the Republic, proceeds to make answer to the claim upon its merits.

By Article I of the contract entered into by the minister of hacienda and public works, duly authorized by the President of the Republic and by virtue of the authorization given by the National Congress on May 25, 1895, on the one part, and Noberto Paquet, as representative of the aforesaid company, on

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[1] For a French translation see: Descamps - Renault, *Recueil international des traités du XX^e siècle*, année 1903, p. 883.

the other, the latter agreed to cede and transfer to the National Government all the rights vested in it by the contract entered into with the municipality of Caracas on July 11, 1900.

By Article III of said contract the National Government obligated itself to pay as the price of said transfer the sum of 8,625,800 bolivars in bonds of a special domestic debt, at 5 per cent per annum, at par.

By Article IV the company renounced all the rights which it had acquired by the contract of July 1, 1893, relative to the construction of a second pipe line from Macarao to Calvario for the sum of 3,000,000 bolivars which the company ought to have received on that account; and it also ceded the mains existing in Caracas, which it had begun to lay on account of said work, to the National Government, without the latter's having to pay for it, since the price of these was included in the 8,625,800 bolivars provided for in Article III.

By Article V the company also transferred to the National Government all the bills receivable which it held against its customers for water rates and for connections, as well as those against the municipal rents and the Government itself, for the price of 80 per cent of their original amount.

It was stipulated that to effect the payment for said assets, and after having ascertained them, the amount of said special domestic debt of which Article III speaks, and which was sufficient to cover them, should be offered at auction for cash.

By the sole paragraph of Article V the Government reserved to itself the right to buy from the company, at the inventoried price, all its materials in its warehouse not included in those mentioned in Articles II and IV, paying for them in the same manner established for the payment for the assets.

Later, availing itself of the right which it reserved by this article, the Government bought from the company said materials for the sum of 333,311.61 bolivars.

In accordance with the foregoing stipulations the Government issued bonds of the special domestic debt to the value of 10,729,199.44 bolivars in the following manner:

		Bolivars
Price of the transfers agreed upon by Article II and IV of the contract which the company made to the Government		8,625,000.00
Value of the assets, which according to the liquidation made by the minister of public works showed a balance due the extinct company at 80 per cent	471,598.09	
Value of the materials which the company had in its ware-houses and which the Government bought in entirety as per inventory	333,311.61	
Total	804,909.70	
Estimating these amounts at 37.40 and 36.77 per cent, respectively, makes		2,167,199.44
Giving a grand total of		10,792,199.44

It is to be noted that the Government reserved itself the right also to which the company or its successors in interest also bound itself, to call in the bonds of said debt within the term of two years, paying it in gold at the rate of 40 per cent.

Afterwards the Government, by successive amortizations, diminished this sum to the amount of 10,175,000 bolivars.

For several years thereafter the Government was properly attending to the payment of this debt, when it learned that the property of the enterprise purchased was encumbered by a mortgage, of which no mention had been made

in the deed of transfer, and foreseeing the possibility of the setting aside of the sale it ordered the suspension of the payment.

The liquidators of the company alleged that they had effected a cancellation of the 16,700 mortgage bonds for bonds of the debt issued by the Government of Venezuela, with the exception of eight, which might be considered as lost or destroyed, and that by this exchange, agreed to by the holders of the former preferred obligations, had extinguished, by means of the novation of security, the mortgage which guaranteed them.

The attorney-general of the nation, specially commissioned to treat this matter with Mr. Ferdinand Goffart, one of the liquidators of the company, accepted this view, but demanded at the same time the formal proof of the novation alleged, which could not be other than a delivery in the hands of the purchaser of all the preferred bonds called in.

The attorney of the liquidators did not consent to make this delivery except upon Belgian territory, to which the Venezuelan Government could not agree.

The payment of the 61,000 bolivars, which it is alleged in the memorial of claimants was demanded by the Government of Venezuela, was nothing but the equivalent of the registration fees, caused by the cancellation of the mortgage, a formality which ought to be complied with by the company, since it had sold goods which were not unencumbered, and according to the principles of civil law it was and is obliged to cure the defects of said sale.

The matter remained in suspense and has so continued until its presentation to this honorable Commission.

As will be seen, therefore, the fault of the company itself, the grantor, has been the motive for the suspension of the payments of the special debt, created by the Government of Venezuela to cover the price of the sale.

The agreement of October 31, 1895, remains to-day in full force and effect and the claimant can not demand anything but its strict fulfillment. The Venezuelan Government is disposed to accomplish this provided that the formality demanded be complied with. This proceeding is just and equitable.

With respect to the payment of interests on account of delay, which the company demands, the undersigned finds himself obliged to oppose it, since said delay was occasioned by a reason chargeable to the company itself, and was in obedience only to a reasonable and legitimate measure adopted by the Venezuelan Government for the security of its rights.

The writer has thus answered the claim of the Compagnie Générales des Eaux de Caracas, but at the same time he takes the liberty to call to the attention of the honorable arbitrators that it is a precept of international law, generally recognized by all civilized nations, that the recovery on obligations of bonds issued by a State should not give rise to international claims.

Lord Palmerston, in a circular letter addressed to the British foreign agents, in January, 1848, in effect maintains that to trust one's capital to a foreign government is to realize a speculation; to invest in loans made by foreign governments or to buy upon the exchange foreign bonds constitutes a mercantile or financial operation, as any other of that kind; the risk which is inevitable in this latter is also inseparable from the subscriptions to the loans of states; the creditors should never lose sight of the possibility of a bankruptcy, and they should not find fault except with themselves in case they lose their money. (Hall, International Law, 4th ed., p. 294, note.)

The same opinion has been sustained by the well-known publications of Rolin-Jaequemyns, a member of the Institute of International Law. (See Pradier-Fodéré, Public International Law of Europe and America. Vol. I, p. 620 et seq., par. 405.)

OPINIONS ON MERITS

GOFFART, *Commissioner* (claim referred to umpire on its merits):

The umpire having ordered at the session of July 28th, that this case should be determined on its merits, the agent of the Venezuelan Government has set up his various defenses.

These go to show that the Venezuelan Government has suspended the fulfillment of the agreement of 1895 because of fears of eviction resulting from a mortgage which encumbered the real properties acquired; that this mortgage has been extinguished by novation, but that the Government requires the proof of this novation, demanding the delivery of the old bonds into the ministry of public credit in Caracas, after which the Government will resume the payment of the debt.

This argument has been rejected by common accord by the two Commissioners; thereafter, each one of them has stated the final opinion which he holds.

The Venezuelan Commissioner asks that the judgment order that the Compagnie Générale des Eaux de Caracas, in liquidation, should effect the cancellation of the mortgage which encumbers the real properties which it ceded to the Government and that, this formality having been observed, the Government shall resume the payment of the special debt of the waterworks.

The Belgian Commissioner opposes the cancellation of the mortgage as useless, the rights growing out of the mortgage having already been extinguished, this objection becoming thenceforth "simply an objection of a technical nature" which the protocol precludes explicitly from being invoked.

It being established that the agreement of 1895 has provided for the sale on time, in which the vendor has fulfilled its obligations but the vendee has not proceeded in the same matter, the Belgian Commissioner demands that the time be declared lapsed, so far as concerns the Government of Venezuela, and that it be recognized as debtor in the sum of 10,565,199.44 bolivars.

Mr. Umpire, of all the claims submitted to the ten mixed commissions which are actually sitting in Venezuela not one is more simple, more evident, more incontestable than that which we submit to-day to your judgment.

In 1891, there was constructed, in this city, a system for the distribution of water. This system gave general satisfaction. Eight years ago the Government bought said water system, and since that time has received the considerable revenue which it produces.

It is six years since the company has hoped vainly to be paid. Such is the essential, undeniable fact which dominates the argument, a fact which will serve as a guide for your judgment.

I seek to establish in this opinion:

1. That the position of the company is unassailable in law.

2. That it is even less assailable in equity; and I shall terminate in formulating reasons which support the judgment which I propose, which judgment is the only one which can guarantee its legitimate rights to the claimant.

How is the claim of the company juridically presented?

We find ourselves confronted by a contract entered into on October 31, 1895, between the ministers of hacienda and public works on the one part and the representative of the company on the other. This contract was submitted to the ratification of Congress in 1896. In three successive readings it was discussed and approved by the Chamber of Deputies. In three successive readings it was discussed and approved by the Senate. It was regularly proclaimed. The consent of the contracting parties could not be invested with greater or more

solemn formalities. The tie of the legal relation created by the agreement of 1895 is perfect, and does the Commissioner of Venezuela seek to deny it—

but [says he] a mortgage encumbered the real properties of the company. This mortgage is yet recorded in the public register; to comply with Venezuelan law the Government ought, therefore, to be released, after which the agreement would again assume its force.[1]

It is noted by the Commissioner of Venezuela that his opinion is in formal contradiction to the attitude assumed by the Government itself after the proclamation of its decree for the suspension of payment. On September 28, 1897, Doctor Grisanti, then the legal adviser of the company, announced to it that the Government had suspended its payment, alleging the poverty of the treasury, and purposed to resume it as soon as its resources would permit (and they have never permitted it).

It was not until three years later, in 1900, when, perceiving the necessity of justifying its course in one way or another, the Government charged its councilors to give a juridic explanation of its conduct.

After a protracted examination they only find one way to arrive at it. The following decree appeared in the Gaceta Official of November 30, 1900 (see Exhibit No. 1):

UNITED STATES OF VENEZUELA,
MINISTRY OF THE TREASURY AND PUBLIC CREDIT,

Caracas, November 30, 1900.

Resolved, In view of the communication which the citizen minister of public works has addressed to this department, in which he asks that the resolution which is in conformity with civil law be taken, and which he proposes as a safeguard for the rights of the National Government, because of the existence in the office of the public register of this capital of a recorded mortgage on all the properties, rights, and actions of the Compagnie Générale des Eaux de Caracas, prior in date to the sale which it made of them to the Government, and considering:

That from the documents submitted by the minister it appears really that the mortgage was made on June 25, 1891, by Mr. H. E. Boyer, representative of the aforesaid company, upon all its properties, rights, and actions; and that it appears, furthermore, that that mortgage has not been taken up, which causes the National Government to fear a future injury by eviction from the property sold on October 31, 1895, the supreme chief of the Republic resolves:

To suspend from this day the payment of what may be owed to this company with respect to the purchase price, or with respect to the extinguishment of and the payment of interest on the special domestic debt of the waterworks of Caracas until the vendor shall have removed the danger, or until it may give a sufficient guaranty, in accordance with the tenor of article 1475 of the code.

Let this be declared and published by the National Executive.

R. TELLO MENDOZA

Now then, what does article 1475 of the civil code say? It is the reproduction of article 1653 of the Belgian and French codes, which is expressed in these terms:

ART. 1653. If the purchaser is disturbed, or has a just motive for so fearing, by an action, be it on account of a mortgage or be it on account of recovery, he can suspend the payment of the price until the vendor has removed the cause of disturbance, if he does not perfer to give bond, unless it has been stipulated that notwithstanding the disturbance the purchaser shall pay.

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[1] Summary from opinion; see *infra*, p. 345.

Here there has never been any disturbance of possession. The company furnishes authentic proof that all the mortgage bonds, except eight, have been canceled. It offers to deposit in the bank which may be designated 4,000 francs as security, which shall serve to take up these eight bonds at par, which it has not been able to find.

It has, therefore, complied in every way with provisions of the article invoked by the Government. The Government is in no sort of danger. It is a fact to be noted that in making the decree of 1900 the Venezuelan jurists had arrived at a conclusion identical with that reached by the Belgian lawyers.

The noteworthy opinion of Mr. van Dievoet, which is to be found in the record, should be cited in full, but I will quote only the passage most pertinent:

> The only guaranty which the Venezuelan Government, now actually the possessor of the property which had been mortgaged in favor of the bondholders, could demand is the proof of the return of these obligations to the possession of the company which had issued them and their cancellation, no matter how they had been acquired, as, for example, by documentary evidence of their return and cancellation.

Therefore, there is an identity of opinions. According to the view of the Venezuelan Government, as well as that of Mr. van Dievoet, the proof of the cancellation of the bonds is all that we can ask.

The company has furnished it, invested with the character of absolute authenticity. Thenceforth, by the terms themselves of the decree of the President of the Republic, Venezuela ought to resume the execution of the agreement of 1895.

I have, therefore, demonstrated that the action is unassailable in law, even if the example of my honorable opponent did not pass that point, but I have imposed upon myself, in the course of the labors of this Commission, the obligation of examining the claims upon a basis of absolute equity. It is my duty to do it here also.

Does the agreement of 1895 create a legal relation juridically unassailable? No doubt; but is it clearly so in equity? In other words, is the purchase made by the Government well worth the sum which it promised to pay for it? I state without hesitation that it is.

By the agreement of 1895 the Government acquired:

1. The rights owned by the company by virtue of its municipal contract of July 11, 1890 for the exploitation and distribution of water and the construction of a system of sewers.

2. All the works and installations which it had constructed, such as they were at that time — that is, in perfect condition and operation.

3. The right to construct a second main from Macarao to Caracas (contract July 1, 1893) for the sum of 3,000,000 francs, as well as all the pipes at that time brought to Caracas for this purpose.

4. All the bills receivable for water rents at that time owed by individuals or by the authorities.

5. All the supplies of material in the warehouse at an inventory price.

And what did all this represent? That is what we have to show.

Let us take up now the first contract of July 11, 1890.

In the execution of this contract the company took up and exploited the following supplies of water. Macarao, which furnishes 120 liters per second; Catuche, 20 liters per second; total, 140 liters per second, or 12,000 cubic meters per day.

The company was obliged to furnish gratuitously to the municipality 1,000 cubic meters. There remained for sale 11,000 cubic meters per day. The

water system has on the average 5,000 customers, who according to article 15 of the contract, should receive for 100 francs per year 1½ cubic meter per day, or, say, 7,500 cubic meters, equal to 500,000 francs. There remained 35,000 cubic meters in excess, which were sold at the very remunerative price of 50 centimos per cubic meter.

It is to be noted that public establishments, hospitals, offices, hotels, etc., should be served with water all day, and that the excess supply was always consumed.

	Bolivars
On this account there would be a profit of 35,000, at 50 centimos per cubic meter	638,750
More than 5,000 francs already received	500,000
Total	1,138,750

Besides it had a commercial business of sanitary installations, which was worth 60,000 francs per year. It had commenced the construction of sewers (2 kilometers were constructed), and according to the terms of article 17 of the contract the houses of Caracas were obliged to connect themselves with this system and to pay on this account 4 francs per meter of frontage.

Estimating the number of houses at 8,000, and the average frontage at 8 meters. we have a profit of 256,000 francs. Total profits, 1,454,750 francs.

Now, then, according to the last publication of the Government, the expenses of operation did not exceed 57,300 francs. Increasing considerably this sum, and estimating it for the water service at 100,000 francs, and for the sewer system at 200,000 francs, it is found that the expenses would be 300,000 francs; net profits. 1,154,750 francs, which the first contract would have produced if the Government had fulfilled its promises.

But there is a second contract, that of July 1, 1893, by which all waters which might be conducted by means of a second pipe line which was to be constructed should belong to the company. That is to say, 10,000 cubic meters per day or more, which the company was to sell at the excess rate, or 50 centimes per cubic meter annually, producing 1,825,000 francs. Total from both contracts, 2,979,500 francs. And the Government, 200,000 francs.[1] Net profits per year, 2,779,500 francs.

Such are the benefits which the company ought to have realized by virtue of the two excellent contracts which it possessed. Even reducing these profits to one-half, say to 1,500,000 francs, if it be considered that the contracts were for forty years, it will be seen what a prosperous business the company had.

These rights — this business — were what the Government acquired.

After the detailed account which I have just made it will not occur to anybody to say that the rights ceded were not worth much more than the sum of 10,792,199.44 francs which was demanded.

I refrain from giving the reasons which have brought me to this conclusion.

The contract signed in Caracas in 1895 between the Government and the company transferred all its real estate, rights, and actions. These should have been paid for by a certain number of monthly intallments of 50,000 francs each:

1. The net profit in the exploitation of the water system;

2. The excess from the various reserves, or portions of the revenue, destined for the payment of the national domestic debt of 6 per cent.

What has the Government done with these revenues freely set aside?

[1] The increase ought to be compensated by the increase in the consumption of public establishments. — Goffart.

Exactly nine months after the signing of the contract it simply suppressed the second by its law of July 16, 1896, by which law the Government divided its revenues among all its creditors, and no mention was made of the company, just as though it did not exist.

Now, this second guaranty was one of the most important. By the last report published (1901-2) it had yielded a sum of 1,439,000 francs, sufficient in itself to pay off the whole debt in seven years.

The first guaranty still remained — the net profit of the waterworks system.

We have shown how, after six years, the Government had kept it entirely for itself, alleging the poverty of the treasury, but in this respect also an official document exists which shows the application of this guaranty to other purposes to the loss of the company.

By an agreement dated April 24, 1903, entered into between the minister of public works and Mr. Llamozas, the system of waterworks had been granted to Mr. Llamozas without one word being said concerning the prior obligations toward the company, without any more mention being made of it than if it did not exist.

There had been a promise of payment made with the express mention of the resources to be applied thereto. The promise of payment has not been kept. Two official acts have ceded to others the guaranties given to the company.

It is not possible to find a more complete or flagrant breach of a contract.

The Belgian Commissioner asks that judgment be rendered against the Government, and that the debt be declared demandable for the sum of 10,565,199.44 francs.

In brief, the claim of the Compagnie Générale des Eaux de Caracas is so evidently just that it does not seem to leave room for discussion.

The Venezuelan Commissioner has not so considered it. He has sought to confine me to my rights at law, and the law supports my reasoning.

The cause has been submitted to the infallible contest of computation, and the computation shows my right.

From this double proof the proposition, which I announced at the commencement of this argument, is shown with more force — " of all the matters submitted to the examination of the ten mixed commissions, which are actually sitting in Venezuela, not one is more simple, more evident, more incontestable than that which we submit to your judgment ".[1]

GRISANTI, *Commissioner* (claim referred to umpire on its merits):

By a resolution of the National Congress, adopted May 25, 1895 the national Executive was authorized to bring to a close a negotiation instituted with the Compagnie Générale des Eaux de Caracas, for the purpose of acquiring the rights which said company had in the enterprise, and to substitute in the control thereof the Government of the Republic. (Doc. 260, Rep. of the Min. of Public Works, 1896, Vol I, p. 199.)

Therefore the citizen minister of the treasury appointed a commission to examine the matter, composed of Messrs. Augustin Alveledc, A. Valarino, S. A. Mendoza, José Herrera, and Antonio Vallero Lara, all persons of the highest integrity in this city, who made a report under date of the 20th of May which is copied below:

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[1] With this opinion several exhibits were submitted:

I. Extract from the Gaceta Oficial, November, 1900, showing resolutions concerning the mortgage on record in public register's office.

II. Record showing the cancellation of mortgage bonds.

III. Statement showing expenses of operation of the water company.

Bearing in mind the request which you have been pleased to make of us, and being desirous to contribute and to the extent of our good will, to give you a patriotic solution to the question which you have submitted to our judgment, we fulfill our duty in saying to you:

1. That what seems most to conform to the interests of the municipality would be to compel the company of waters and sewers of Caracas to strictly fulfill the original contract in all its parts; but taking into consideration that the modifications afterwards made would place the company in a situation which, though in itself false, would nevertheless enable it to maintain a more or less extended lawsuit, we are of opinion that the rescission of said contract would be the most fitting step that could be taken in order to prevent new dangers from arising against the sacred interests of the community.

2. We believe that the rescission of the contract, and of the one made with the Government for the construction of a new pipe line, ought to be effected on a basis of equitable indemnity composed thus:

(*a*) Of the sum total which the expenses actually realized and incurred by the company in the new works would reach, calculated by experts.

(*b*) Of the sum which the company may have paid in cash to obtain the contract; and

(*c*) Of the sum which in reason ought to be allowed as a remuneration for its works.

3. The sum total thus being fixed which the Government ought to pay to the company on account of rescission, we believe this ought, by preference, to be effected in cash, or, if the condition of the public treasury does not permit it, by a special debt at a moderate rate of interest; since, in the manner indicated in the agreement, which is in bonds of the national debt 6 per cent interest at 40 per cent of their nominal value, we find that every new issue of a debt already created would be contrary to sound economic principles, which would depreciate the value of the floating debt in a severe manner, causing grave injury and which, financially, would burden the public treasury with a very high rate of interest of 15 per cent per annum upon the sum paid.

By a resolution of the minister of public works, dated May 29, Mr. José Herrera y Irigoyen, who was a member of the commission before mentioned, was named to discuss with the representative of the company the details and conditions of the contract, which had to be made, and afterwards Dr. Jorge Nevett, an engineer, was named for the performance of said duty in conjunction with Herrera y Irigoyen who, after several conferences with the representative of the company, Mr. Paquet, addressed to the minister of public works a communication and resolution which appear in the exhibits A and B.

The aforesaid documents proved in a most evident manner that the Compagnie Générale des Eaux de Caracas, by means of its duly authorized representative, Mr. Noberto Paquet, refused to accept the price in gold which would have completed the negotiation with the Government of Venezuela, preferring to accept it in the special debt, and thus the company entered into a speculation in the public debt of Venezuela, engaging in a sort of speculation, risky in the extreme, and the adverse consequences of which it now desires to recover from the Republic.

By the contract of October 31, 1895, the Compagnie Générale des Eaux de Caracas ceded and transferred to the Government of Venezuela all the rights and actions which its contract conferred upon it, in the terms which appear in Exhibit No. 3, for the price of 8,625,000 bolivars in bonds of a public debt created to that end — all of which appears in article 3 of said contract of transfer, which reads as follows:

ART. 3. As a total price of this transfer the National Government shall pay the Company the sum of eight million six hundred and twenty-five thousand bolivars

(8,625,000), which shall be made in bonds in the special domestic debt of 5 per cent per annum at par. The issue of this debt shall be made in the manner prescribed by the decree of this date.

By article 5 of the contract the company transferred also to the National Government its bills receivable against its consumers at 80 per cent of their nominal value, a concession which should also be paid for in said debt.

By virtue of the Executive decree of October 31, 1895, a national debt was created which was called Deuda Especial Interna de las Aguas de Caracas, with interest at 5 per cent per annum, and which was included in the debts which constitute the public internal credit of Venezuela.

The regular payment of this, as well as all the other debts, was interrupted because of the civil war, and as the Government afterwards discovered that the goods, rights, and actions which the company had sold it had been mortgaged, it officially suspended the payment of interests which it owed to the company, the Government relying upon article 1475 of the Civil Code of Venezuela, which is identical with article 1653 of the Civil Code of Belgium, and which reads as follows:

Si l'acheteur est troublé, ou a juste sujet de craindre d'être troublé, par une action, soit hypothécaire, soit à la revendication, il peut suspendre le payement du prix jusqu'à ce que le vendeur ait fait cesser le trouble, si mieux n'aime celui-ci donner caution, ou à moins qu'il n'ait été stipulé que nonobstant le trouble l'acheteur payera.

So far the history of the negotiation. Let us pass to a detailed examination of the different points which it embraces.

When the Government of the Republic demanded the cancellation of the mortgage, the company definitely acknowledged the duty which it was under to satisfy said demand, in a note addressed by Mr. Goffart to the attorney-general of the nation, which reads as follows:

Caracas, *March 11, 1901.*

YOUR EXCELLENCY: I have the honor to notify you that I am authorized by the three liquidators of the Compagnie Générale des Eaux de Caracas to raise the mortgage which encumbers the enterprise of the waterworks and its real estate. Be kind enough to let me know what the Government will do as soon as this mortgage shall be legally satisfied.

By the intercession of this same representative and by a note dated August 20, 1901, the company definitely denied said obligation, which it had, in the above note, so definitely and categorically acknowledged, alleging for such a refusal that the mortgage had been extinguished by the creation of a new security.

You have here the text of the argument contained in a note addressed to the attorney-general of the nation on August 29, 1901:

Ainsi que vous ne l'ignorez pas, Monsieur le Procureur-Général, la Compagnie Générale des Eaux de Caracas en cédant son capital social au Gouvernement du Vénézuéla, et en obtenant l'adhésion de tous les obligataires qui ont échangé les obligations primitives contre le titre de rente vénézuélienne, a opéré aux termes de l'article 1271, page 2 du code civil belge (d'accord en cela avec le code vénézuélien), novation de créance par substitution d'un nouveau débiteur à l'ancien qui est déchargé par le créancier, c'est-à-dire dans l'espèce par tous les obligataires, la novation, vous ne l'ignorez pas, emporte extinction de l'obligation primitive qui est remplacée par la nouvelle dette. Cette extinction est si complète que même les privilèges et hypothèques afférents tombent de plein droit. Il ne saurait y avoir de doute à cet égard; l'article 1278 du code civil est formel; il dit: " Les privilèges et hypothèques de l'ancienne créance ne passent point à celle qui lui est substituée, à moins que le créancier ne les ait expressément réservés".

To answer such a strange argument it is sufficient for me to say, that, in the opinion which the company then entertained a substitution of the debtor had been effected by substituting the Venezuelan Government for it in the obligation to pay the mortgage debt; but such a concept is entirely without foundation. In fact, such a substitution could not have been effected unless the Government should have consented to assume said obligation of the company, and this consent has not been shown.

Now the company alleges that the mortgage has become, extinct because of confusion, an argument weak in the extreme, because such an extinguishment is consummated when the mortgage creditor becomes the owner of the property mortgaged, and in the present case the holders of the mortgage bonds issued by the company have that character, and the owner of the real estate mortgaged is the National Government.

Now the Belgian Commissioner has presented me with a notarial certificate going to prove that the liquidators of the company have annulled and canceled all the bonds except eight, which have not been presented to it.

The only proper and correct method of canceling the mortgage is to register the document of cancellation in the subordinate office of the register of this department, and this for the following reasons:

(1) Because it is thus provided in the Venezuelan law, the only one applicable to the case, the law of Belgium being similar to it. (Law of December 16, 1851, article 92 to 95, both inclusive.)

(2) Because, in conformity with the legislation of Venezuela, real estate situated in the Republic is governed by Venezuelan laws. (Art. 8, Civil Code.)

(3) Because in Venezuela and in all nations the laws which establish the requirements for the constitution and cancellation of mortgages are matters of public policy.

Let us proceed now to examine the claim of the company.

The first thing that arrests the attention in examining the claim of the Compagnie Générale des Eaux de Caracas is that the company does not formulate concretely and concisely the claim which it seeks to bring forward, limiting itself to setting forth in the conclusion of its memorial, as follows:

> The total amount of the special debt of the waterworks of Caracas, created by the decree of November 2, 1895, was 10,792,199.44 bolivars, represented by 21,584 bonds of 500 bolivars each; and the script or coupons 199.44 each, which we leave aside. On the 1st of January, 1901, according to the Yellow Book, the amount which we could claim was reduced in accordance with the demand made to 10,175,000 bolivars, represented by 20,350 bonds. The interest in arrears amounts on the 1st of June next to 2,967,708.33 bolivars, according to the account in Exhibit No. 6, which brings the total amount of the debt to 13,142,708.33 bolivars.

Nor does the agent of the Belgian Government specify the demand, limiting himself in the note which he addressed to this Commission on 18 June last to presenting the claim of the company in Belgian gold or its equivalent in silver for 10,000,000 bolivars, a claim which the undersigned rejects absolutely; wherefore the decision of this matter has been submitted to the umpire, to whom the writer has the honor to address himself.

After all it must be borne in mind that the company has not fulfilled the first and prime requisite of every claimant, which is to prove in a convincing manner that it is the owner of the claim which it presents; that is to say, that it is the holder of all the bonds of the waterworks debt which still remain in circulation.

This point the writer had the honor to submit at a previous session to Mr Filtz, the umpire, who reserved his decision on it for a future occasion.

To-day the writer can say that it is absolutely impossible for the company to furnish that proof, because it is not the owner of all the debt, as is shown most clearly by the paragraph of the memorial of its liquidators, which reads as follows:

On the 1st of June, 1901, according to the Yellow Book, the amount which we could control was reduced, on account of payments effected, to 10,175,000 bolivars, represented by 20,350 bonds.

And this is also shown by the certificate of the manager of the Bank of Caracas, which I present (Exhibit C), which proves that the said institution is the owner of 100,000 bolivars' worth of the waterworks debt, and has on deposit from divers persons, none of whom is the company, nor a Belgian subject, 52,500 bolivars' worth.

If the company were the holder of all the waterworks debt, the payment of which it demands, it could have set out exactly the payment made, of which the Yellow Book of 1901 speaks, and there would not be found in the Bank of Caracas the 152,500 bolivars of bonds of which the certificate of Manager Breca speaks.

This is sufficient to demonstrate the justice of my opinion in maintaining that bonds payable to bearer ought not to be the subject of an international claim, and in case they were, that only their actual holders could demand their payment.

This evidently proves also the gross inaccuracy of the company in demanding the payment of a public debt which does not belong to it, in its entirety, and without proving even that it is the owner of a part of it. Such a claim, if it should be declared well founded, would perpetrate a flagrant injustice against the Republic of Venezuela.

Let us now enter upon another class of considerations.

By the contract of October 31, 1895, the company ceded and transferred to the National Government all the rights and actions which it had acquired by its original contract of July 11, 1890, for the exploitation and distribution of the waters of Caracas, all the rights and actions ceded to it by its contract of July 1, 1893, for the construction of a new pipe line from Macarao, and the bills receivable which it held against its patrons.

The price of all these grants was fixed in the conferences previous to the negotiation at 3,000,000 bolivars in gold, but Mr. Noberto Paquet at that time representative of the company, refused to receive payment in gold, expressing himself in these terms:

I find all the details of the operation satisfactory; but I find myself obliged to make the following observation, referring to Article II: " Not being able to accept the payment in gold, it is also useless to accept the sum of 3,000,000 bolivars which, on the other hand, I insist does not cover the value of the property of the company."

This amount depends upon the rate of interest which is fixed upon the debt in question.

The payment of the grant and the transfer were made, therefore, to the company in bonds of a debt especially created with this object, and which was called the special debt of the waterworks of Caracas, which the company received at 40 per cent of its nominal value, which raised the total price of the bonds to 10,792,000 bolivars.

The foregoing, which is evidenced by convincing documents, shows that the Compagnie Générale des Eaux de Caracas refused definitely to permit payment in gold, a payment which would have terminated once and for all its negotiation with the Government, and preferred to receive it in bonds; the company thus

entering into a speculation in the public debt of Venezuela and running the risks inherent in this speculation.

The company counted on easy gains. It received 8,000,000 and odd bolivars in bonds at 40 per cent for what was valued at 3,000,000 bolivars, and considering the prosperity of Venezuela at that time it hoped, with reason, that that debt, if it did not reach par, would at least be quoted at 50, 60, or 70 per cent.

The company did not count, and nobody counted, on the depreciation of price in our export products, especially coffee, nor upon the revolutions which have devastated the country; and taking undue advantage of this Mixed Commission it demands the extortion that it should be ordered paid 13,142,708.33 bolivars in Belgian gold or its equivalent in silver; that this Mixed Commission should make the transaction more profitable than the company ever dreamed of.

But this can never be, because it involves the most flagrant violation of the protocol which provides, in Article I, that in case of the disagreement of the Commissioners, the umpire shall decide all claims upon a basis of absolute equity.

As has been shown, upon the Government of Venezuela paying the price of the transfer in bonds of the special domestic debt of the waterworks of Caracas — a debt included in the public internal debt of Venezuela and subject to the law of July 8, 1891, every juridic tie between the Government of Venezuela and the company ceased, since the latter received the price in money which the contracting parties had stipulated; and the obligations which the Government contracted by the Executive decree, made on October 31, 1895, only established a juridic relation between the Government of Venezuela and the holders of the bonds of that debt.

In any case the company, no longer as an assignor of these contracts, but as a holder of the part of that debt, would only have the right to demand from the Government of Venezuela the strict fulfillment of the duties which said decree imposed upon it, that is to say:

Articles 1 and 2: To pay, in quarterly installments falling due from the 15th to the 25th of February, May, August, and November of each year, the interest of the special domestic debt of the waterworks of Caracas.

Article 3: That 50,000 bolivars monthly was fixed as the amount of the payment of the interest and extinguishment of the special domestic debt of the waterworks of Caracas. Of this amount there should be offered every six months at auction the surplus which may remain after the payment of the interest corresponding to the half year.

Article 4: The auctions with which the foregoing article deals shall be conducted on the 15th of July and the 15th of December each year, or as soon thereafter as possible, if either of these dates should fall on a legal holiday, and concerning them all the provisions established by the law of July 8, 1891, should be observed.

Sole article: It is within the power of the National Executive to raise the amount which must be offered at auction every six months.

In view of the reasons expressed it is the opinion of the undersigned:

1. That the Compagnie Générale des Eaux de Caracas is under the strict obligation of canceling the mortgage which it placed upon all the real estate of the waterworks company, by a document recorded in the register of Caracas on June 25, 1891, and that that cancellation must be made in conformity with the law of Venezuela; that is to say, in the same form which the mortgage was made.[1]

[1] The company seems to have refused to record the release of the mortgage in the public register's office because of an exorbitant fee proposed to be charged.

2. That it would be a scandalous violation of the protocol, by virtue of which this Commission is constituted, to oblige Venezuela to redeem in gold at its normal value the waterworks debt, which was issued at 40 per cent of said value by an agreement between the Government of Venezuela and the company.

3. That the only right which the company has to the bonds of the waterworks debt, of which it is the holder, is to exact the strict fulfillment of the Executive decree of October 31, 1895, which created said debt; that is to say, the reestablishment of the quarterly payment of interest and the semiannual extinguishment of the debt, and that therefore that right is the only one that ought to be upheld by a judgment based upon the principles of equity and justice.[1]

FILTZ, *Umpire* (decision on the merits): [2]

The umpire, having studied and examined the documents and arguments in the record, and considering:

That as a result of the contract made on October 31, 1895, the Government of Venezuela has constituted itself the successor in interest to all the real estate, rights, actions, bills receivable, and supplies in the warehouse of the Compagnie Générale des Eaux de Caracas, in liquidation;

That by reason of its acquisitions it has acknowledged that it is indebted for the sum of 10,792,199.44 bolivars;

That by said contract of October 31, 1895, and the decree thereto annexed, it has promised to pay the interest and extinguishment of this debt at the rate of 50,000 bolivars per month;

That after having entered into this contract and after having paid, by way of extinguishment, a part of this debt for a certain space of time the Government suspended all payment; considering:

That by reason of the differences relative to the requisite proof that the company owns all the bonds which were delivered to it in place of its assets, that the claim of the Compagnie Générale des Eaux de Caracas, in liquidation, is based upon the failure to fulfill in its entirety the aforesaid contract;

That this contract, insofar as it goes, is the law between the parties, contains in itself the proof that the company is the owner of its claim, and that the Belgian character of the claimant has not been disputed. It is not to be considered whether foreign bondholders can indirectly take advantage of its action; considering:

That the defendant gives as a reason for its failure to fulfill the contract the existence of a mortgage which encumbers the real estate of the company, and demands the cancellation of this mortgage;

That is is clearly proven by the argument that the Government suspended the payment in 1897, alleging the poverty of the treasury, and that its decree

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[1] To this opinion there were annexed several exhibits referred to therein:

Exhibit A. A letter dated July 16, 1895, from Messrs. Herrera and Nevett, the minister of public works;

Exhibit B. A proposition of settlement with the National Government made by Herrera and Nevett on July 15, 1895, together with a letter from Señor Paquet of the same date refusing acceptance of payment in gold;

Exhibit C. A letter from the Bank of Caracas, dated July 24, 1903, stating that in the vaults of said bank there were bonds of the special domestic debt of the waterworks of Caracas to the amount of 152,500 bolivars; not printed herein.

[2] For a French translation see: Descamps-Renault, *Recueil international des traités du XX^e siècle*, année 1903, p. 885.

concerning the danger of eviction arising out of the mortgage was made 30 November 30, 1900; that is, three years later;

That it is proven by an authentic document produced in the arguments that all the bonds issued and guaranteed by this mortgage have been taken up and canceled, with the exception of eight, for which the company has constituted itself a guarantor;

That as all danger of eviction has vanished, by reason of this fact, the necessity for canceling the mortgage is reduced to a mere technical objection, of which the protocol explicitly takes no account;

That the argument of the Commissioner of Venezuela, that the company took the bonds at 40 per cent of their nominal value, is contradicted by the text itself of the contract, in which it has been formally stipulated that these bonds were delivered at par; considering:

That the contract of 1895 created a time obligation, for the fulfillment of which certain revenues of the treasury were set aside and expressly designated;

That. notwithstanding this agreement, another use was made of the revenues so apportioned;

That, so far as concerns the debtor, the time may therefore be considered to have run out;

That, notwithstanding this, it is just that the debtor should have security; that by reason of the fulfillment of the present judgment it should be exempt from all obligations contracted by reason of the contract to which we have alluded, for these reasons, judging upon a basis of absolute equity, decides:

That the Compagnie Générale des Eaux de Caracas, in liquidation, shall deposit within the space of two months, counting from the present judgment, in the vaults of the Société Générale pour Favoriser l'Industrie Nationale of Brussels the sum of 4,000 francs, which shall be exclusively applied to the redemption at par of the eight bonds issued by it, and which it has not been able to recover.

The simple notification by the depository to the Venezuelan Government through the legation of Belgium at Caracas, shall be entirely sufficient to prove the fulfillment of this obligation.

The claim of the Compagnie Générale des Eaux de Caracas, in liquidation, against the Government of Venezuela for the failure to fulfill the obligations expressed in the contract made October 31, 1895, and the decree thereto annexed, is well founded.

The Government of Venezuela is declared to be a debtor in the sum of 10,565,199 bolivars and 44 centimos in gold, payable as is stipulated in Article V of the protocol. This sum shall be delivered to the Société Générale pour Favoriser l'Industrie Nationale of Brussels, which shall make thereof the following use:

The amount of each monthly installment, after reducing therefrom the bank charges, shall be divided by 21,131, and will give as a quotient the amount of extinguishment of each bond corresponding to the past month, an extinguishment which shall be paid to the holder upon presentation of the bond.

At the same time that there shall be divided among the holders the last monthly installment, the bonds shall be withdrawn perforated for cancellation, concerning which an authentic record shall be made, which must be sent to the Government of Venezuela.

The amounts which shall be left after effecting this operation shall be returned to the Government of Venezuela, with the exception of the sum necessary to take up at par the bonds which have not been presented. When the terms of prescription shall have run out this sum shall be returned to the Government of Venezuela.

MIXED CLAIMS COMMISSION
GREAT BRITAIN-VENEZUELA
CONSTITUTED UNDER THE PROTOCOLS OF
13 FEBRUARY AND 7 MAY 1903

REPORT: Jackson H. Ralston — W. T. Sherman Doyle, *Venezuelan Arbitrations of 1903,* **including Protocols, personnel and Rules of Commission, Opinions, and Summary of Awards, etc., published as Senate Document No. 316, Fifth-eight Congress, second session, Washington, Government Printing Office, 1904, pp. 292-479.**

PROTOCOL OF FEBRUARY 13, 1903[1]

Whereas certain differences have arisen between the United States of Venezuela and Great Britain in connection with the claims of British subjects against the Venezuelan Government, the undersigned, Mr. Herbert W. Bowen, duly authorized thereto by the Government of Venezuela and His Excellency the Right Honorable Sir Michael H. Herbert, K.C.M.G., C.B., his Britannic Majesty's Ambassador Extraordinary and Plenipotentiary to the United States of America, have agreed as follows:

ARTICLE I

The Venezuelan Government declare that they recognize in principle the justice of the claims which have been preferred by His Majesty's Government on behalf of British subjects.

ARTICLE II

The Venezuelan Government will satisfy at once, by payment in cash or its equivalent, the claims of British subjects which amount to about five thousand five hundred pounds (5,500) arising out of the seizure and plundering of British vessels and the outrages on their crews, and the maltreatment and false imprisonment of British subjects.

ARTICLE III

The Venezuelan and British Governments agree that the other British claims, including claims by British subjects other than those dealt with in article VI hereof, and including those preferred by the railway companies, shall, unless otherwise satisfied, be referred to a Mixed Commission constituted in the manner defined in article IV of this Protocol and which shall examine the claims and decide upon the amount to be awarded in satisfaction of each claim.

The Venezuelan Government admit their liability in cases where the claim is for injury to, or wrongful seizure of property, and consequently the questions which the Mixed Commission will have to decide in such cases will only be: (a) Whether the injury took place and whether the seizure was wrongful, and (b) If so, what amount of compensation is due.

In other cases the claims shall be referred to the Mixed Commission without reservation.

ARTICLE IV

The Mixed Commission shall consist of one Venezuelan member and one British member. In each case where they come to an agreement their decision shall be final. In cases of disagreement the claims shall be referred to the decision of an umpire nominated by the President of the United States of America.

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[1] The English text of the Protocol may also be found in: *British and Foreign State Papers*, Vol. 96, p. 99; Hertslet's *Commercial Treaties*, Vol. 23, p. 1167; de Martens, *Nouveau Recueil général de traités*, 3e série, vol. I, p. 48.

For a French translation see: Descamps-Renault, *Recueil international des traités du XXe siècle*, année 1903, p. 547.

ARTICLE V

The Venezuelan Government, being willing to provide a sum sufficient for the payment within a reasonable time of the claims specified in Article III and similar claims preferred by other Governments, undertake to assign to the British Government, commencing the first day of March, 1903, for this purpose, and to alienate to no other purpose, 30 per cent in monthly payments of the customs revenues of La Guaira and Puerto Cabello. In the case of failure to carry out this undertaking, Belgian officials shall be placed in charge of the customs of the two ports, and shall administer them until the liabilities of the Venezuelan Government, in respect of the above mentioned claims, shall have been discharged.

Any questions as to the distribution of the customs revenues so to be assigned, and as to the rights of Great Britain, Germany and Italy to a separate settlement of their claims, shall be determined, in default of arrangement, by the Tribunal at The Hague, to which any other Power interested may appeal.

Pending the decision of the Hague Tribunal the said 30 per cent of the receipts of the customs of the ports of La Guaira and Puerto Cabello are to be paid over to the representatives of the Bank of England at Caracas.

ARTICLE VI

The Venezuelan Government further undertakes to enter into a fresh arrangement respecting the external debt of Venezuela with a view of the satisfaction of the claims of the bondholders. This arrangement shall include a definition of the sources from which the necessary payments are to be provided.

ARTICLE VII

The Venezuelan and British Governments agree that, inasmuch as it may be contended that the establishment of a blockade of Venezuelan ports by the British naval forces has ipso facto created a state of war between Venezuela and Great Britain, and that any treaty existing between the two countries has been thereby abrogated, it shall be recorded in an exchange of notes between the undersigned that the Convention between Venezuela and Great Britain of October 29, 1834, which adopted and confirmed mutatis mutandis the treaty of April 18, 1825, between Great Britain and the State of Colombia, shall be deemed to be renewed and confirmed or provisionally renewed and confirmed pending conclusion of a new treaty of Amity and Commerce.

ARTICLE VIII

Immediately upon the signature of this Protocol arrangements will be made by His Majesty's Government in concert with the Governments of Germany and Italy to raise the blockade of the Venezuelan ports.

His Majesty's Government will be prepared to restore the vessels of the Venezuelan navy which have been seized and further to release any other vessels captured under the Venezuelan flag on the receipt of a guarantee from the Venezuelan Government that they will hold His Majesty's Government indemnified in respect of any proceedings which might be taken against them by the owners of such ships or of goods on board them.

ARTICLE IX

The Treaty of Amity and Commerce of October 29, 1834, having been confirmed in accordance with the terms of article VII of this Protocol, the

Government of Venezuela will be happy to renew diplomatic relations with His Majesty's Government.

Done in duplicate at Washington this 13th day of February, 1903.

Herbert W. BOWEN
Michael H. HERBERT

PROTOCOL OF MAY 7, 1903[1]

Whereas, by a Protocol signed on the 13th February, 1903, by his Excellency the Right Honourable Sir Michael Henry Herbert, G.C. M.G., C.B., His Britannic Majesty's Ambassador Extraordinary and Plenipotentiary in the United States of America, and Mr. Herbert W. Bowen, duly authorized thereto by the Government of Venezuela, it was agreed that certain claims by British subjects, including those preferred by the railway companies, against the Government of Venezuela should, unless otherwise satisfied, be referred, under the conditions specified in the Protocol, to a mixed commission, to consist of one British and one Venezuelan member, and that in each case where the commissioners came to an agreement their decision should be final; and that in cases of disagreement, the claims should be referred to the decision of an umpire nominated by the President of the United States of America:

Now the undersigned His Excellency Sir Michael Henry Herbert, G.C.M.G., C.B., His Britannic Majesty's Ambassador Extraordinary and Plenipotentiary in the United States of America and Mr. Herbert W. Bowen duly authorized by the Government of Venezuela, have further agreed as follows:

One member of the commission shall be appointed by His Britannic Majesty's Government and the other by the Government of Venezuela, and the umpire shall be nominated by the President of the United States of America.

If either of the said commissioners or the umpire should fail or cease to act, his successor shall be appointed forthwith in the same manner as his predecessor. The said commissioners and umpire are to be appointed as soon as possible.

The commissioners and the umpire shall meet at Caracas on the 1st day of June, 1903.

Before assuming the functions of their office, the commissioners, and the umpire, if necessary, shall make solemn oath or declaration carefully to examine and impartially decide, according to justice and the provisions of the Protocol of the 13th February, 1903, and of the present Agreement, all claims submitted to them, and the oath or declaration so made shall be embodied in the record of their proceedings. The commissioners, or, in case of their disagreement, the umpire, shall decide all claims upon a basis of absolute equity, without regard to objections of a technical nature, or of the provisions of local legislation.
407

The decisions of the commission, and, in the event of their disagreement, those of the umpire, shall be final and conclusive. They shall be given in writing. All awards shall be made payable in sterling money of Great Britain, or its equivalent in silver at the current rate of exchange of the day.

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[1] The English text of the Protocol may also be found in: *British and Foreign State Papers*, Vol. 96, p. 103; Hertslet's *Commercial Treaties*, Vol. 23, p. 1173.

For a French translation see: Descamps-Renault, *Recueil international des traités du XX^e siècle*, année 1903, p. 592.

The commissioners, or umpire, as the case may be, shall investigate and decide the said claims upon such evidence or information only as shall be furnished by or on behalf of the Governments of Great Britain and Venezuela respectively. They shall be bound to receive and consider all written documents or statements which may be presented to them by or on behalf of the Governments respectively in support of or in answer to any claim, and to hear oral or written arguments submitted by the agent of each Government on every claim. In case of their failure to agree in opinion upon any individual claim, the umpire shall decide.

Every claim shall be formally presented to the commissioners within thirty days from the day of their first meeting, unless the commissioners or the umpire in any case extend the time for presenting the claim for a further period not exceeding three months. The commissioners shall be bound to examine and decide upon every claim within six months from the day of its first formal presentation, and, in case of their disagreement, the umpire shall examine and decide within a corresponding period from the date of such disagreement.

The commissioners and the umpire shall keep an accurate record of their proceedings. For that purpose each commissioner shall appoint a secretary versed in the language of both countries to assist him in the transaction of the business of the Commission.

In the proceedings either the English or Spanish language may be used. Except as herein stipulated, all questions of procedure shall be left to determination of the commissioners, or, in case of their disagreement, to the umpire.

Reasonable remuneration to the commissioners and to the umpire for their services and expenses, and the other expenses of the said arbitration, are to be paid in equal moieties by the Powers parties to this Agreement.

Michael H. HERBERT
Herbert W. BOWEN

PERSONNEL OF THE BRITISH - VENEZUELAN COMMISSION

Umpire. — Frank Plumley, of Northfield, Vt.
British Commissioner. — Herbert Harrison.
Venezuelan Commisioner. — Pedro V. Azpurúa until June 20, 1903, when he was succeeded by — Carlos F. Grisanti.
British Agent. — Gilbert Mellor.
Venezuelan Agent. — F. Arroyo-Parejo.
British Secretary. — Thomas Guyatt.
Venezuelan Secretary. — Emilio de Las Casas.
Umpire's Secretary. — J. Earl Parker, of Washington, D.C.

RULES OF THE BRITISH - VENEZUELAN COMMISSION[1]

I

The British agent shall present to the Claims Commission within the time specified in the protocol, a memorial on each claim, accompanied by documents and proofs.

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[1] For a French translation see: Descamps-Renault, *Recueil international des traités du XX^e siècle*, année 1903, p. 795.

II

The memorial shall be presented in the English language, accompanied by a translation into Spanish.

III

The answers presented in writing by the Venezuelan Commissioner or agent shall be in Spanish, accompanied by a translation into English.

IV

The British agent or Venezuelan Commissioner presenting a document shall, if required to do so, also supply a translation thereof and provide a sufficient number of copies for the use of the Commission.

V

The memorial must specify with precision the sum claimed, clearly stating the currency in which the damage is calculated.

VI

When a memorial is presented, a written receipt shall be given by the secretaries to the British agent. It shall then be inscribed in the appropriate register, a note being made on the memorial itself of the date of its receipt and its number.

VII

The Venezuelan Commissioner shall answer in writing each memorial presented, taking whatever exceptions he may deem necessary, and refuting the proofs of the claimant with such counter proofs as he may think relevant, producing all necessary documents.

VIII

The answer in writing shall be presented with as short a delay as possible, and at most within thirty days of the presentation of the memorial.

IX

The answer of the Venezuelan Commissioner shall be registered, as above, and notified to the British agent, who may reply to it within fifteen days.

X

The reply of the British agent shall be presented and registered, as above, and notified to the Venezuelan Commissioner or agent, who may make counter reply within fifteen days. The counter reply shall be presented and registered, as above, and notified to the British agent.

XI

The British agent may, if he think fit, inform the secretaries that he renounces his right to reply to the answer of the Venezuelan Commissioner or agent. The secretaries shall thereupon notify the Venezuelan Commissioner or agent, who shall in that case have no right to make a counter reply.

XII

As soon as the last notification prescribed by Articles IX and X shall have been made, the secretaries shall inscribe the claim in the list of claims for hearing, and shall forthwith notify the same to the Commissioners or agents of both Governments. The tribunal shall then fix a day for the hearing.

XIII

The umpire shall be present at all formal meetings of the Commission, and his decision upon any point may be invoked at any stage of the case. When this decision is pronounced it shall be entered in the records of the proceedings.

XIV

After hearing the case, if the Commissioners are agreed, the tribunal may give its decision as soon as the same can be put in writing. If the Commissioners disagree, but mutually consider that further investigation is necessary, the tribunal may order such further investigation fixing the time and place thereof, and if the Commissioners can then agree, the decision may be rendered as provided in the first part of the article.

XV

No one may attend the sittings of the tribunal except the agents of the Governments, the official secretaries, and the secretary of the umpire. The claimants or their representatives and other persons may attend if they obtain the authorization of the tribunal in writing.

XVI

The secretaries shall keep, besides the register mentioned in Article VI, a book in which they shall enter a record of the proceedings and the decisions of the tribunal in each case, and another in which they shall enter the minutes of the sittings. These books shall be kept in duplicate, one copy in English and the other in Spanish, and shall be verified and approved and signed by the tribunal. When the tribunal shall have completed its labors, the copies in English shall be delivered to the British agent, and those in Spanish to the Venezuelan Commissioner.

XVII

All documents and records of the Commission shall be considered confidential.

INTERLOCUTORY OPINIONS

CROSSMAN CASE

Meaning of " wrongful seizure " in the protocol

PLUMLEY, *Umpire*:

James Crossman is a native of Cornwall, England, now resident at Puerto Cabello, but at the time of the happening of the events hereinafter stated was a resident of Pueblo Nuevo, Aroa, jurisdiction of the State of Lara, and a British subject.

On the 31st day of December, 1899, that division of the liberal restoration army which was under the command of Gen. Rafael Montilla entered Pueblo Nuevo and went into garrison in the fortress there situated. The dwelling house of the claimant was taken and used by General Montilla as quarters for some of his troops while he so remained in garrison. The exact time which elapsed while he was thus in garrison and in use of such dwelling house as aforesaid does not appear, but during the time an officer of this command took from the claimant his horse, a valuable one, and the saddlery. Also while in such occupancy of the house a gold watch of great value, some clothing, and furniture, which belonged to the claimant and were left in the house by him, were

taken from said house, and the claimant attributes this loss solely to the fact that it was so occupied by Government troops. His alleged damages are 2,500 bolivars; 800 for the horse and saddlery and 1,700 for the other property. There is no statement whether or not the troops quartered in his house were private soldiers, officers, or both. In addition to his own memorial and plea he submits two depositions as his proof in the case.

This claim was presented to the Commission on the 11th ultimo, and the learned agent for Venezuela made answer thereto on the 15th instant, using in part the language following:

In the opinion of the undersigned, the most favorable supposition on behalf of the pretext which the claimant can allege is the smallness of the amount claimed, because the evidence which might be derived from the testimonial justification presented is counterbalanced by the consideration that it was effected without the assistance of the party opposed in the judgment.

It might also be objected that the injurious acts mentioned were of a personal character and that, previously, the individual responsibility of their authors should be prosecuted. The tribunal and the court of Brussels, with the occasion of a claim founded by one Delbrouk of Limbourg, who with the pretext that, on the 8th of August of 1831, soldiers belonging to different corps of the army of Maes had caused him injuries, brought an action against the State for an indemnification. In compensating damages caused by acts of transgression of law, the tribunal said, the action must be brought against those who are civilly responsible for punishable deeds committed by military at their service. (See Fiore, Droit Int. Pub., vol. I, p. 576, note 1.)

In the present case it does not appear confirmed in any way that the troops obeyed superior orders, nor that the nearest military authorities could have avoided the damages done. Therefore the undersigned considers that, even in case the damages alleged by the claimant were true, these constitute a case of *force majeure*, a necessary calamity in view of the exceptionable circumstances under which the country where he resided was, and that the responsibility of Venezuela should not be declared, as an antijuridical precedent would thus be created.[1]

The issue presented raised no question of fact.

On the 17th instant the learned agent for the British Government made a reply to this answer by filing a written objection to the same, as follows:

CLAIM OF JAMES CROSSMAN — PRELIMINARY OBJECTION TO THE ANSWER

This is a claim for wrongful seizure of property. The protocol of 13 February 1903, provides:

"ARTICLE 3. The Venezuelan Government admit their liability in case where the claim is for * * * wrongful seizure of property, and consequently the questions which the Mixed Commission will have to decide will only be:

"(a) * * * whether the seizure was wrongful, and

"(b) If so, what amount of compensation is due."

Therefore, in this case, the only questions open to the Commission are:

(1) Did the seizure take place?

(2) Was the seizure wrongful or not?

(3) If wrongful, how much is due?

Upon the presentation of this preliminary objection to the tribunal, it then being in session, the issue as made was discussed by the honorable Commissioners of this tribunal, and, failing to agree, the same was there and then referred to the umpire for his opinion thereon.

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[1] Opinion of Venezuelan Commissioner not printed.

Concerning the interlocutory question thus raised, the undersigned, umpire by virtue of his appointment under said protocol, is of the opinion which follows:

The umpire has presented to him the alternative of a strict construction of and a close adherence to the minimum issues involved in the matter submitted to him preliminary to the determination of the question of liability on the part of Venezuela, or a broad and general interpretation of the questions permitting answer under the submission as it comes to him from the honorable Commissioners. To take the first alternative would require of the umpire less care and responsibility, and would be thus far gratifying in its aspect, but it would be much less helpful in the determination of the questions involved in this case, and would aid but little in preparing the way for the determination of other causes which may rest in whole or in part upon the fundamental propositions here made. After much careful consideration of the matter and some hesitancy for fear that he was overstepping the purpose and desire of the learned gentleman who first raised these interlocutory matters and of the honorable Commissioners who made final reference of the same to the umpire, he has decided that it was the wish of all these, and therefore his duty, that he should take the more broad and general view of the questions raised and express to the tribunal his opinion thereon.

If in the case before us there has been a wrongful seizure in its full and complete sense, then, in the opinion of the umpire, Venezuela has admitted her liability without reserve, and it follows that the subdivisions of inquiry suggested by the learned agent for the British Government in his preliminary objection are the only questions open for discussion and determination. There are, however, within these subdivisions main lines of inquiry and of consideration which must be passed upon before there can be an affirmative or a negative answer to the main proposition, and the assent of the umpire to these subdivisions as being exclusive rests upon the assumption that these are understood to be included within his list of subdivisions.

1. In a solemn agreement between nations referring to wrongs which one of the signatory parties thereto claims should be redressed by the other and which it is proposed shall be submitted to a tribunal to determine, what is the import and scope of the word " seizure? " Negatively it may be stated that it is not any wrongful taking of the property of a British subject by Venezuela. It does not mean property taken by robbery, theft, pillage, plunder, sacking, or trespass. Affirmatively it may be said that it is limited to a seizing under and by virtue of authority, civil or military. Necessarily it follows that it is always legitimate to inquire in any case raised under the protocol how, when, where, and by whom it was taken or used.

2. Given that a seizure is made out, there is yet to be established that it is wrongful, and therefore the import of the words in their connection and relation as used in the protocol is a necessary matter to determine. There is required in every case a wrongdoer as well as that wrong has been done or suffered. A wrong intent or willful purpose must accompany the act. It is not enough to know that a wrong has been suffered. Not only must the act be willful or with wrong intent, but it must be perpetrated by some one having a right whereby to declare and express a governmental will and intent.

These points, and without doubt others of a kindred nature, are calculated to assist in determining the question, " Has there been a wrongful seizure? " and are therefore relevant, important, and competent.

The meaning of the umpire in what he has here expressed may be illustrated by the case in hand. Was the taking of the horse and saddlery of the claimant

by an officer in General Montilla's command, in the manner and under the circumstances stated and established by the proof, a seizure in its proper sense, taken in its relations as used in the protocol? Is —

> the evidence which might be derived from the testimonial justification presented counterbalanced by the consideration that it was effected without the assistance of the party opposed in the judgment,

as contended by the learned agent for Venezuela in his answer? Is it established that it was taken under superior orders, as questioned in the same answer? The umpire regards both of these points practically similar in their application as well made and necessary to be considered and determined before it can be said that there was or was not a seizure of the horse in the sense in which that word is used in the protocol.

How is it with the gold watch and furniture taken from the dwelling house of the claimant as established by his evidence? Was such taking a wrongful seizure as contemplated by the protocol? If it was a taking of army supplies for the benefit of the army, and of a character and nature proper subjects of military use, it might make an affirmative answer more easy. If it were the wanton and unauthorized destruction or taking of private property by private soldiers not under orders, and property of a character not suited to military use or to the uses of the military, then it could not be called a seizure under the protocol. And especially is this true if it is not shown to be applied to the use of the soldiers of the Government.

An act of pillage, plundering, or sacking is a direct antithesis of an act of seizure. The first implies not only a lack of authority, but an act done in immediate contravention of all authority. It disclaims and denies governmental responsibility, and is in direct opposition to that authority. To seize directly implies authority, warrant, and executive responsibility. In peace it ordinarily requires an officer duly commissioned, armed with a warrant duly issued. In war it likewise requires a condition of authority and power.

It is important in this connection to ascertain from the proof if the gold watch or furniture or any part thereof has been shown to have been in the possession of any of General Montilla's troops, and if anything has been shown in that regard further than the disappearance of the property while his army was garrisoned in the town and had quarters in this dwelling house.

These matters are all involved in the position taken by the answer of the learned agent for Venezuela in the parts heretofore quoted and are therefore matters of issue, and in the opinion of the umpire the facts admit of such issues.

On the other hand, if the umpire has the right conception of the learned agent's contention in the third paragraph of his answer, it is a point not well taken, but the issue there made is expressly excluded by the admitted liability of Venezuela in that part of the protocol quoted by the learned agent for the British Government in his preliminary objection thereto.

There is another view of that part of the case covering the taking of the gold watch and furniture which is raised by the answer of the learned agent for Venezuela in the expression " nor that the nearest military authorities could have avoided the damages done " which, in the judgment of the umpire, is of material importance in the final determination of this case, and under that head it is a proper matter of consideration to determine whether the taking of the house of the claimant by General Montilla as quarters for some of his troops did not place upon him and the officers of his command a special responsibility by proper and sufficient guards to prevent pillage, plunder, robbery, or sacking of the dwelling house of the claimant by his troops or by anyone while he, through his officers, had exclusive possession and control of the house and the

property therein. The measure of duty resting upon the Government, through its officers, in this regard may determine the question of its liability in this case.

The umpire is aware that he has not touched upon many questions that might well be raised to assist in the determination of the issues in this case, and it has not been his purpose to write exhaustively thereon but to pass only upon such points as seemed to him certainly material and probably helpful in the final settlement of the case. It may be stated in general to be the position of the umpire that everything which helps to determine the primary question of a wrongful seizure under the facts and circumstances of this case so related to the Government of Venezuela that it is responsible therefor, and has admitted its liability concerning in Article III of the protocol, are properly before the Commission for its discussion and determination, and whether or not the facts and circumstances of this claim —

> constitute a case of *force majeure*, a necessary calamity in view of the exceptionable circumstances under which the country where he (claimant) resided was, and that the responsibility of Venezuela should not be declared, as an antijuridical precedent would thus be created,

as contended by the learned agent for Venezuela in the conclusion of his answer, or a rightful duty and responsibility be cast upon Venezuela to recompense the claimant for his losses, will all depend upon the answer to the questions involved, in the consideration and decision of which the opinions of the umpire here expressed may be in some degree helpful and determinative.

— — —

De Lemos Case

Meaning of " injury " in the protocol

CONTENTION OF BRITISH AGENT — PRELIMINARY OBJECTION TO THE ANSWER

The Venezuelan agent is not entitled to set up any matter of principle as an answer to this claim, any such answer being against the terms of the protocol of February the 13th, 1903, which expressly provides for such cases:

> Article III. The Venezuelan Government admit their liability in cases where the claim is for injury to * * * property, and consequently the questions which the Mixed Commission will have to decide will only be:
>
> (a) Whether the injury took place, * * * and (b) if so, what amount of compensation is due?

Grisanti, *Commissioner* (claim referred to umpire):

I regret to differ from the British agent's interpretation of the protocol signed at Washington on the 13th of February last, as stated in his preliminary objection in which he states that the Venezuelan agent has no right to introduce any matter of principle in his objections to Mr. Ch. de Lemos' claim.

In my opinion, the Venezuelan Commissioner, as well as the agent of the Republic, always has the right of setting up the philosophical and juridic principles applicable to the case under examination, so that it is morally impossible that Great Britain, which ranks deservedly among the most enlightened nations of the world, should obtain a juridic decision, abstracting therefrom the principles of justice and the postulates of law, which comprise the most precious treasure of civilization.

The Venezuelan and British Claims Commission is a court, and to exclude justice, right, and equity from its deliberations is the same as depriving a man

of the essential attributes of his being, and nevertheless to continue considering him as a man.

The analysis of the language of the protocol strengthens the opinion held by the underwriter.

Article 3 of the protocol says in the second paragraph: " The Government of Venezuela admits their liability in cases where the claim is for injury to or wrongful seizure of property," etc. By this expression it is understood that we rely on some principle, cause, or reason; therefore the claim which has no legitimate foundation, and is not supported by juridic principles which regulate the conduct of civilized countries is inadmissible, and the tribunal of which I have the honor to be a member must reject it. The second clause says " or wrongful seizure of property." The Commission, therefore, has a right to decide with regard to the justice or injustice of embargoes.

The meaning given by the British agent to article 3 of the protocol would convert this tribunal into a mere appraiser of damages, causing it ipso facto to lose its powers of deliberation. I have shown clearly that the Venezuelan and British Claims Commission has the right and is bound to examine and decide in each case whether the claim is legitimate and whether Venezuela is bound to pay it or not; I consequently will proceed to explain the principles and reasons why the claim of Consul Ch. de Lemos is not a just one and therefore inadmissible.

A part of the troops at Ciudad Bolívar, having revolted against the National Government, the latter was under the unavoidable obligation of subduing the insurgents in order to reestablish order and make the people submit to the constitutional order from which they had suddenly withdrawn, which submission was absolutely essential for the well-being of the Republic, and to the security of national and foreign interests. The town was attacked with that object and naturally national and foreign interests were damaged. Among the latter, according to Mr. Consul de Lemos, his wife was injured.

Supposing that such a statement were proved, the Republic would not be compelled to repair the damage caused by the shells on the two houses of the above-mentioned lady. The attack on the city and the subsequent damage occasioned were not a deliberate act of the authorities, but a necessity imposed upon them in an unavoidable manner by the course of events.

Let us consult some renowned authors and eminent statesmen on international law.

363. Les gouvernements sont-ils ou non responsables des pertes et des préjudices éprouvés par des étrangers en temps de troubles intérieurs ou de guerres civiles? Cette question a été longuement discutée et finalement résolue par la négative.

Avant de fournir les preuves pratiques de notre assertion, nous développerons ici sur cet important sujet quelques considérations générales.

Admettre dans l'espèce la responsabilité des gouvernements, c'est-à-dire le principe d'une indemnité, ce serait créer un privilège exorbitant et funeste, essentiellement favorable aux États puissants et nuisible aux nations plus faibles; établir une inégalité injustifiable entre les nationaux et les étrangers. D'un autre côté, en sanctionnant la doctrine que nous combattons on porterait, quoique indirectement, une profonde atteinte à un des éléments constitutifs de l'indépendance des nations, celui de la juridiction territoriale; c'est bien là en effet la portée réelle, la signification véritable de ce recours si fréquent à la voie diplomatique pour résoudre des questions que leur nature et les circonstances au milieu desquelles elles se produisent font rentrer dans le domaine exclusif des tribunaux ordinaires.

364. A l'appui de cette doctrine nous citerons tout d'abord l'opinion exprimée en 1849 par M. le baron Gros, lors de sa mission spéciale en Grèce pour le règlement des célèbres réclamations pécuniaires de Don Pacífico. " En général," disait ce diplomate dans une de ses dépêches au gouvernement français qui a été plus tard

communiquée au parlement anglais, " il est admis en principe, et ce principe est conforme à l'équité, qu'il ne peut exister d'intervention diplomatique dans les différends où *l'autorité locale* ne se trouve pas en cause; c'est aux tribunaux et conformément aux lois du pays que la partie lésée, quelle que soit sa nationalité, doit recourir et demander justice."

Lord Stanley, traitant la même affaire au sein du parlement britannique, s'exprima ainsi: " Je ne crois pas que les gouvernements soient tenus, dans toute la rigueur de ce mot, d'indemniser les étrangers qui ont éprouvé des pertes ou des préjudices par suite de circonstances de force majeure. Tout ce qu'ils peuvent faire dans les cas semblables, c'est de protéger par tous les moyens en leur pouvoir les nationaux et les étrangers résidant sur leur territoire contre des actes de spoliation ou de violence." (Calvo. Le Droit international théorique et pratique. 3e édition, Vol. I, p. 434.)

Fiore, after establishing the principles which ought to guide the responsibility of the State for damage caused to foreigners in its territory, says:

674. Maintenant, nous allons indiquer l'application des règles que nous venons d'exposer à certains cas particuliers. Nous nous occuperons surtout de l'obligation qui incombe à l'Etat de réparer les préjudices soufferts par les particuliers pour les faits de guerre.

La règle générale qui nous paraît devoir servir à résoudre toute difficulté à ce sujet, c'est que la responsabilité des gouvernements par rapport aux étrangers ne peut pas être plus étendue que celle des souverains étrangers à l'égard de leurs propres citoyens. On ne pourrait pas, en effet, prétendre que les devoirs d'hospitalité pourraient limiter l'entier exercice du droit qui appartient à la souveraineté d'employer tous les moyens légaux pour pourvoir à la conservation de l'Etat, ou que les étrangers pourraient obtenir une position privilégiée, être exempts des conséquences fâcheuses des calamités publiques et être garantis de tout dommage qui pourrait résulter de la force majeure et de l'impérieuse nécessité de veiller à la sûreté de la chose publique.

675. Supposons qu'un pays soit agité par la révolution et par la guerre civile, et que le gouvernement pour réprimer le désordre emploie les moyens de répression requis pour sauvegarder les intérêts de l'Etat et qui ne sont pas absolument défendus par le droit international. Si par ce fait les étrangers éprouvaient un préjudice le gouvernement ne pourrait pas être déclaré responsable, ni être tenu de les indemniser du dommage par eux éprouvé. Si un gouvernement négligeait de faire tout le nécessaire pour protéger la propriété et les biens des étrangers, s'il ne s'occupait pas de réprimer les violences et les offences causées par les citoyens, il serait tenu de répondre des conséquences de sa négligence coupable; mais si le préjudice était résulté de la force majeure il n'existerait aucune responsabilité légale. L'action d'un gouvernement ne pourrait pas être paralysée par la nécessité de protéger les droits des étrangers. (Fiore, *Nouveau Droit international public*, 2e ed., vol. I, p. 582.)

1231. Les habitants des pays envahis ou occupés, quoique ne prenant pas une part directe à la lutte, ont été atteints dans leur biens. Ils ont subi des dommages matériels ou des réquisitions, payé des contributions de guerre ou des amendes. Ont-ils droit à une indemnité, et, en cas d'affirmative, à qui peuvent-ils s'adresser pour l'obtenir?

Divisons la question.

Quant aux *dommages* résultant des faits de guerre, des actes de violence et de lutte, des combats, des assauts, des bombardements, des dévastations, des incendies, du pillage, des vols commis par les soldats, etc., etc., aucun recours n'est ouvert pour leur réparation. Le droit international ne peut admettre le principe d'une action. La guerre est pour le simple particulier un cas de force majeure. Elle est pour lui un mal inévitable comme l'est une grêle, une inondation. Il est victime d'un fléau, non d'une injustice, dit Bluntschli. Juridiquement, il n'a droit à aucune indemnité. (Bonfils, *Manuel de Droit international public*, 3e éd., p. 680.)

In 1849 England claimed of Austria compensation for losses sustained by some of Her Britannic Majesty's subjects at the assault of Leghorn, and in this connection Count Nesselrode said (May 2, 1850):

According to the rules of public law, as understood by the Russian Government, it can not be admitted that a State (compelled by a revolt to repossess itself of a town occupied by the insurgents) is bound to indemnify foreigners who may have suffered damages by reason of the attack. The foreigner who settles in a country accepts, voluntarily and in advance, the risks to which the country is exposed, and as he enjoys the advantages which the natives enjoy so also must he share their misfortunes. Foreign and civil war are clearly in the same category. (Calvo, Vol. III, p. 145; Seijas, Vol. III, p. 553.)

It would not be amiss to mention the principles of the law of nations, which have been strengthened by reason of the claims founded upon the bombardment of Valparaiso, March 31, 1866. An Anglo-American firm established there experienced losses due to the burning of their goods from the cannonading. The question arose as to whether they had any right to reclaim indemnity of Spain or Chile for the injuries done. The question was referred to the attorney-general, who decided in the negative. In his opinion he states that the act, although one of extreme severity, was an act of war and can not be said to have been contrary to the laws which regulate it. It is a well-established rule in international law that the alien who resides in a belligerent country can not claim indemnification for the losses suffered on his property due to acts such as those under consideration. The attorney afterwards states the case of the bombardment of *Copenhagen by the English in 1807, in which Great Britain did not allow any claim, although the foreigners of that town suffered very serious losses, and notwithstanding that there had been no previous declaration of war to Denmark nor any justifiable motive for the bombardment.*

He also called attention to the bombardment of San Juan de Nicaragua effected by the sloop *Cyane*, to the detriment of the French residents there — through their minister at Washington — but without the express sanction of the Imperial Government they presented a claim for indemnification. Mr. Marcy, then Secretary of State, replied:

> The undersigned is not aware that the principle that foreigners domiciled in a belligerent country must share with the citizens in that country in the fortunes of war has ever been seriously controverted or departed from in practice. (Marcy, Secretary of State, to M. de Sartiges, Feb. 26, 1857.)

This maxim being the one which was proclaimed in the law of March 6, 1854, with respect to political disturbances; that which was projected in the law of Colombia of April 19, 1865; that which was the purpose of the Convention made by Mr. Toro in Santander in 1861; that which is found adopted by the treaty which this gentleman made with Italy in June of the same year, it is not understood why it has been protested against in some cases. The whole difference consists in the fact that there it was applied to a war between two States and here it is confined particularly to internal disturbances. Moreover all difficulty disappears if it is remembered that the latter either have a certain extent and other circumstances, and they are then called civil war, and they are governed by the same laws as those of international war; or they do not reach this importance, and in this supposition constitute only a private wrong such as an injury, pillage, robbery, for which no nation has ever thought to make other nations responsible. In the controversies which have given rise to the frequent claims made against Venezuela, no rule so just as well as suitable, has ever been invoked. (Report of Foreign Relations of Venezuela, 1869.)

The conduct of governments has been in perfect accord with the principles stated. The United States, in 1851, owing to the claims made by Spain in consequence of the disorders which took place in New Orleans on account of the war that harassed the Republic from 1861 to 1865; England (case above cited), in 1807; Spain, in 1850, owing to the claims of some of her subjects against Venezuela; France, in 1830, 1848, and 1871; Belgium, with regard to her struggles with Holland to obtain her independance, from 1830 to 1832 — none

of these nations has admitted that they were under the obligation of indemnifying aliens for damages caused by the wars sustained in the above-mentioned years.

371. C'est encore ce même principe ou cette même jurisprudence que l'on a vu observer lors du dernier soulèvement de la Pologne, et durant le cours de la formidable lutte intestine qui a déchiré la République des Etats-Unis d'Amérique de 1860 à 1865.

Dans ces deux circonstances un grand nombre d'étrangers ont éprouvé de cruelles pertes, et pourtant aucune nation européenne n'a songé à en faire peser la responsabilité sur les gouvernements respectivement intéressés. (Calvo, *Le Droit international théorique et pratique*. 3e éd., vol. I, p. 438.)

Referring now, more precisely, if possible, to the attack of Ciudad Bolívar, as this was occasioned by an unavoidable necessity, absolutely against the will of the Government, it clearly shows *force majeure*, which exempts the State of all responsibility for damages caused in its dominions.

I consider it very opportune to quote here what Calvo says on this point. It is as follows:

Relativement aux droits de personnes appartenant à une nationalité neutre et résidant sur le territoire d'un belligérant, les jurisconsultes anglais, en 1870, pendant la guerre entre la France et l'Allemagne, exprimèrent l'opinion que les sujets anglais ayant des propriétés en France n'avaient pas droit à une protection particulière pour leurs propriétés, ou à l'exemption des contributions militaires auxquelles ils pouvaient être astreints solidairement avec les habitants de l'endroit où ils résidaient, ou bien où leurs propriétés étaient situées, et qu'ils n'avaient non plus, en toute justice, aucune raison de se plaindre des autorités françaises parce que leurs propriétés étaient détruites par une armée d'invasion.

Une famille de sujets anglais demeurant dans la commune de La Ferté - Imbault, à l'approche des troupes prussiennes hissa le drapeau anglais au-dessus de la porte du château qu'elle habitait, espérant que la présence de ces couleurs neutres la protégerait contre toute violence; mais elle n'en eut pas moins à souffrir de pillage, de menaces et de mauvais traitements de la part de la soldatesque. Elle adressa à ce sujet une plainte à lord Granville, qui lui répondit que, bien que le gouvernement anglais regrettât vivement les tracas et les pertes qu'elle avait éprouvés, il n'était pas en son pouvoir de lui faire obtenir aucune réparation.

Un autre sujet anglais, M. Lawrence Smith, qui habitait Saint-Ouen, s'étant plaint que, quoiqu'il eût arboré le drapeau anglais sur sa maison, des soldats prussiens étaient venus loger chez lui, lui avaient pris toutes ses provisions, avaient tiré une décharge de coups de fusil dans une cave où sa famille s'était réfugiée, avaient mis le feu à sa maison et forcé sa famille de se sauver à moitié vétue dans un bois à travers la neige. Lord Granville répondit que le gouvernement anglais ne pensait pas en droit strict que la famille Smith fût autorisée à demander une indemnité au gouvernement prussien, mais qu'il était évident que la destruction de la propriété était un acte de violence commis par les troupes prussiennes par suite du relâchement de la discipline. En pareil cas il était d'avis que les faits pourraient être portés officiellement à la connaissance du gouvernement allemand, en exprimant l'espoir qu'il jugerait à propos d'ordonner aux autorités militaires de procéder à une enquête et d'ordonner, comme acte de justice, une indemnité pour les dommages commis sans raison. (Calvo, *Le Droit international théorique et pratique*, 3e éd., vol. III, p. 227, sec. 1942.)

Hence the principles of justice prohibit the admission of Consul de Lemos' claim.

There is one more reason for rejecting it; said claim is not legally proved. In the files are to be found as proofs:

First. Consul de Lemos' affidavit made on the 15th of January of the current year in presence of Mr. John Dennis Sellier, notary public. As a general rule

the testimony of a person in support of a fact is not admissible when that person is greatly interested in the establishment of said fact.

Second. The testimony of Benjamin Waithe and Antonio Villalobo, delivered in presence of the Consul de Lemos himself, is absolutely void. The fact is, that said consul can not be a judge of his own cause, and in receiving and authorizing those declarations, he has sought to be one, trying to assume two positions entirely incompatible.

Besides, in the taking of the proofs, the universally acknowledged and respected rule of *locus regit actum*, by which these declarations of witnesses should have been made before a territorial judge, has been violated.

PLUMLEY, *Umpire*:

Charles Herman de Lemos is a naturalized British subject, and at the time of the happening of the events hereinafter stated was, with his wife, Guillermina Dalton de Lemos, resident of Ciudad Bolívar, and His Majesty's consul at that city.

On the 20th, 21st, and 22nd of August 1902, the unfortified parts of Ciudad Bolívar were shelled by the Venezuelan gunboats *Bolivar* and *Restaurador*, throwing some 1,400 to 1,500 shells into the very heart of the city. Guillermina Dalton de Lemos was then the owner of two buildings situate in the said city of Bolívar, one in the Calle Miscelánea and the other in Calle Amor Patria, which buildings were then severally damaged by the said shells striking and breaking upon them, at an estimated damage of £300, for the payment of which this claim is presented to the Mixed Commission.

To this claim the learned agent for Venezuela made answer of June 18, 1903, which was presented to this tribunal on 26 June. In this answer there was no denial that the damage was inflicted substantially as in the claim presented, but these facts were alleged: A garrison in the capital of the State of Bolívar rebelled against the National Government, and the National Government, on account of the persistent rebellious attitude of the revolutionists, ordered the attack named in the claimant's statement in virtue of the right of defense and in fulfillment of its duties as such National Government for the purpose of recovering possession and control of the city, and it was in consequence of this attack and during this bombardment that the two buildings belonging to the wife of Consul de Lemos were injured. The insurrection of the forces at Ciudad Bolívar and the resulting attack on the city by the Government took place at the time when a revolution against the Government broke out in the country. Based upon the facts stated, it was claimed by the learned agent for Venezuela that the action complained of was a necessary and rightful act of the Venezuelan Government under the circumstances and conditions stated, and that the damage to the plaintiff's buildings was a natural and unavoidable damage; that this action of the Venezuelan Government was perfectly justifiable, and that there was in consequence no valid claim against his Government for the damages suffered by the claimant.

The learned agent for Venezuela made a further statement in his answer as follows:

> As regards the claim, it is unacceptable under the light of principles of public law universally accepted. One of the principles is that the foreigner who establishes himself in a country accepts spontaneously beforehand the dangers and eventualities to which said country may be subjected, and in the same way that he partakes of the advantages of the natives, so he must submit to suffer the calamities that the natives suffer. To support arguments to the contrary would be establishing for the foreigner a privilege against the national sovereignty and absolutely unsupportable in accordance with principles of equity.

To this answer, at a sitting of this tribunal of June 26, the learned agent for the British Government made reply by filing an objection thereto as follows:

CLAIM OF DE LEMOS — PRELIMINARY OBJECTION TO THE ANSWER

The Venezuelan agent is not entitled to set up any matter of principle as an answer to this claim, any such answer being against the terms of the protocol of February 13, 1903, which expressly provides for such cases:

" ARTICLE III. The Venezuelan Government admit their liability in cases where the claim is for injury to * * * property, and consequently the questions which the Mixed Commission will have to decide will only be —

(a) Whether the injury took place * * * and

(b) if so, what amount of compensation is due."

At a sitting of this tribunal on the 11th day of July the honorable Commissioner for Venezuela replied in writing to this preliminary objection, insisting that his Government had the right under the protocol and before the Commission always to adduce " the philosophical and juridical principles applicable to the case under examination," and —

that it is morally impossible that Great Britain, which deservedly ranks among the most enlightened nations of the world, should accomplish a juridical act proscribing therefrom the principles of justice, the postulates of law, which form the wealthiest treasure of civilization.

The Venezuelan and British Claims Commission is a tribunal, and to exclude justice, right, and equity from its deliberations is the same as depriving a man of the essential attributes of his being, and, nevertheless, to continue considering him as a man.

The analysis of the dead lettering of the protocol strengthens the opinion held by the undersigned.

Article 3 of the protocol says, in the second paragraph: " The Government of Venezuela admits its responsibility in the cases in which the claim is founded on damages caused to property or on unjust seizure thereof," etc. By *founded* it is understood we rely on some principles, cause, or reason; therefore the claim which has no legitimate base and is not authorized by juridical canons which regulate the conduct of civilized countries is unacceptable, and the tribunal of which I have the honor to be a member must revoke it. The second clause says " or on unjust seizure thereof." The Commission, therefore, has a right to decide with regard to the justice or injustice of embargoes.

The sense given by the British agent to Article III of the protocol would convert this tribunal into a mere appraiser of damages, causing it *ipso facto* to lose its deliberative faculties. I have shown clearly that the Venezuelan and British Claims Commission possesses the right and is bound to examine and decide in each case whether the claim is legitimate and whether Venezuela is bound to pay it or not; consequently I will proceed to explain the principles and reasons why the claim of Consul C. H. de Lemos is not a just one and therefore unacceptable.

On the 15th of July, at a session of the tribunal, the learned agent for Great Britain made an oral reply to the parts of the reply of the honorable Commissioner for Venezuela that have been quoted herein, those being the parts which he considered germane to the preliminary issue by him raised, and reasserted his position as stated in the preliminary objection, and said, among other things, that it was intended in the protocol to do away with the necessity for long discussion on such points as were made in this case, and that the protocol was drawn with a view to its exclusion, and insisting that where in any case —

it was a question as to injury to property it was intended that the only question that was to be raised was to whether the injury took place.

He also said that in the reply of the Venezuelan Commissioner there had been brought in the word " founded," which was not in the protocol as written and

signed by the high contracting parties, and that so much of the position of the honorable Commissioner for Venezuela as rested upon that was not well taken.

Following this oral reply, at the same sitting of the tribunal, the issue as made was submitted to the honorable Commissioners, who after discussion failed to agree. It was then passed to the umpire for his examination and decision.

Upon the preliminary case thus stated the undersigned, umpire by virtue of his appointment under said protocol, holds and decides as follows:

There can be no fair doubt that the language of the protocol contained in Article III and quoted by the learned agent for the British Government limits the discussion and determination of each case falling within its scope to the question of injury to the property of the claimant by the Venezuelan Government and the resultant compensation if injury is found.

As the case stands inquiry is limited to an interpretation of these expressions:

> The Venezuelan Government admit their liability in cases where the claim is for injury to * * * property, and consequently the questions which the Mixed Commission will have to decide will only be:
>
> (a) Whether the injury took place * * *.

The protocol bears proof throughout of the great care in its preparation and especially in the choice of words which with legal exactness and certainty state the several matters it contains. The importance of the document as a solemn agreement between independent nations and, in certain parts of it, the law of this Commission would be a warrant to assume all this; and examination confirms and emphasizes the assumption. It has also the qualities of conciseness, clearness, and brevity. These qualities may and in the part before us do compel a careful study of the text to determine the full force and significance of the language selected.

It is the opinion of the umpire that the word " injury " was chosen because of its legal adaptation and significance and not in its colloquial sense. To think otherwise would be to hold that the seizure of property occupied in the minds of the high contracting parties and should occupy before this Commission a position different from that of injury to property, a holding not consistent, for both are governed by the same general rules and spring from similar general conditions. To make a ruling that any injury to property and none but wrongful seizure of it was the purpose and purport of the protocol does not address itself to sound judgment.

The character of the signatory parties, the importance of the document, the evident care and skill with which it was drawn, its conciseness and precision, its rigor of expression, deny the assumption of a careless and indifferent use of words where care and discrimination was most required. It is therefore the opinion of the umpire that the word " injury " was taken by the signatory parties to import a legal wrong, and in accordance with its fixed and determinate use in law as involving and importing ipso facto an *intentional wrongdoing* on the part of those responsible therefor. This supplies the conditions concerning injury to property which are found in the protocol concerning the seizure of the same, and brings the two to a common level where in the judgment of the umpire they were placed by the high contracting parties. Without this reading of the word " injury " the two parts are dissimilar without reason, and with it they are similar with reason.

To give the word its common use would impel it over any and every damage, hurt, harm, mischief, or loss that might occur to property, whether accidental, incidental, proximate or remote, wrongful or otherwise, with or without intent, good or bad, indifferently and equally. This conclusion could find no basis of sensible acceptance if we had not the assistance of the other part of the clause

where responsibility and admitted liability are limited to wrongful seizure, but with this aid the conviction of its untenability is irresistible.

Seizure of property may be rightful or wrongful according to circumstances, hence it was necessary to define the character of seizure concerning which liability was admitted. The admission was intended to cover wrongful seizure only, and therefore it was so written down. The same limitation was intended in the expression " injury to property " and " injury " was selected because in itself it expressed that limitation. It is not to be considered there was intended a difference in responsibility to attach to these acts, and by the umpire's interpretation there is no difference. Without it there would be great and inexplicable difference.

By giving to this word its meaning in law and applying it to a document of peculiar legal importance drawn and carefully considered by minds of profound scholarship and erudition in law skilled in words accurate and apt, in sentences short, clear, and trenchant, it is certain we can do no violence to the thought. By adopting any other interpretation of the language used it becomes ambiguous, indiscriminative, and inapt.

The umpire regards the section quoted from Article III of the same import and value as though it had been written:

> The Venezuelan Government admit their liability in cases where the claim is for a legal injury to property, and consequently the question which the Mixed Commission will have to decide will only be:
> (a) Whether the legal injury took place * * *.
> (b) If so, what amount of compensation is due.

The question in each case being whether by the law governing the facts in the case there has been such an injury.

The application of this holding to the case pending will admit therein discussion and determination only upon the questions thus involved. Was the shelling of Ciudad Bolivar in all the aspects of the case presented a wrongful or a rightful govermental act?

Was the result to the property of Mrs. Guillermina Dalton de Lemos under all of the facts in the case one which she must endure without recourse as a necessary sequence, or has she fixed responsibility upon Venezuela by some wrongful act or neglect of that country?

An answer to these questions determines the status of this case.

The range of inquiry and of discussion is limited but important.

To the learned and honorable gentlemen composing this Commission the umpire will not assume at this time to specify their limitations with any further particularity. A careful consideration of the question will easily determine for each the bounds within which facts and arguments are relevant, material, and competent.

De Lemos Case (second reference to umpire)

(By the Umpire:)

Evidential value of statements improperly verified

CONTENTION OF BRITISH AGENT

PART I

The umpire has decided that the question for decision in this case is whether the " legal " injury took place, which is then particularized as being the question whether Mrs. de Lemos has fixed responsibility upon the Venezuelan Government by some wrongful act or neglect.

Before determining how the facts of the case are to be applied in answering this question, it is necessary first to inquire what is the standard by which we are to measure whether the act is wrongful or rightful.

In all arbitration under treaty the first and often the only standard is the rules, if any, laid down in the treaty for the conduct of the arbitration and any reservation therein made. The rules of the treaty are the law by which the decisions of the tribunal are to be given.

As long as the treaty lays down definite rules, general principles of international law are irrelevant.

It may here be observed that no point in international law can be said to be entirely free from doubt, so wide is the range and difference of opinion. On the other hand the contracting parties can lay down what they please as the basis of arbitration, and must be taken to have meant what they have said.

In this case the British Government had found it necessary to enforce a blockade of the Venezuelan ports. It was not until the present treaty was signed that arrangements were made to raise the blockade. The treaty must be read in the light of that fact.

What is the standard fixed in this case, and what are the rules laid down?

First of all, in Article III comes a reference of certain claims to arbitration. If that had stood alone the standard to be applied would undoubtedly have been the rules of international law as approved by the tribunal. Had that been what the contracting parties meant they would have said: " The claims shall be referred to the Mixed Commission without reserve."

That they would have done so is plain from the fact that certain claims are referred to the Commission in those words; that is to say, that in those latter claims every principle of recognized international law can be raised by Venezuela as a defense.

As regards the former claims, on the other hand, the Venezuelan Government " admit their liability; " that is to say, they agree not to avail themselves of certain defenses. An admission of liability by a defendant is an undertaking by him not to raise certain defenses otherwise open to him.

When, therefore, a defendant power in an agreement for international arbitration " admits his liability," he thereby implies that he agrees that he is not to avail himself of the principles of international law which might otherwise be considered an answer to the claim.

In the present case the protocol has said: " The Venezuelan Government admit their liability in cases of injury to property," and the question for determination is defined as being, " Has Mrs. de Lemos fixed responsibility on Venezuela by some wrongful act or neglect of that country? "

By what standard is the word " wrongful " to be construed?

It should be construed according to the terms of the protocol; that is, in the light of the words " admit their liability."

In other words, the Venezuelan Government has admitted that, for purposes of this arbitration only, certain acts shall be assumed to be wrongful which might or might not have been judged to be so, according to the rules of international law.

There is nothing unreasonable in this. This treaty was made under pressure of a blockade. Under such circumstances what is more natural than to find that the blockading power has insisted on its own standard of right?

To give other than the above meaning to the words " admit their liability " is to say that an entire section of an international treaty, carefully drawn up, is without meaning and without bearing on the effect of the treaty.

If it be suggested that " admit their liability " means that the Venezuelan Government agrees not to raise as a defense that these specially mentioned

claims are a matter for the law courts, it should be pointed out that if a claim which would otherwise be a matter for ordinary litigation is submitted to arbitration that fact alone means that all other jurisdictions are, as regards that claim, set aside and superseded by the jurisdiction of the arbitral tribunal. Therefore, the further provision that the Venezuelan Government " admit their liability " in the class of claims here referred to arbitration would be superfluous and meaningless.

It now remains to state what was intended to be the meaning of the admission of liability, in the light of the words of Article III, the circumstances under which the treaty was made, and, in cases not covered by express words, the general principles of international law.

The meaning is —

(I) The Venezuelan Government will pay compensation where damage has been intentionally or negligently caused to property by the Venezuelan Government, their agents, or persons employed by them, or by any other person for whose acts they must be held responsible, by reason of negligence, or other special circumstances.

(II) The Venezuelan Government will pay compensation wherever any right of possession or quiet enjoyment of property has been interfered with through seizure by any such persons.

The words in their natural and ordinary sense bear this meaning, and it can not be said that these were unreasonable terms for a blockading power to insist upon, from a country which has been for many years in a continuous state of revolution and unsettled government.

Moreover, to hold otherwise would be to render the whole of Article III, except the bare submission to arbitration, meaningless and superfluous.

The above interpretation should therefore be accepted.

In considering the language of the protocol two facts must be borne in mind.

(*a*) The language in Article III was originally proposed by Great Britain exactly as it now stands, and was accepted without alteration or demur.

(*b*) The rights of British subjects in Venezuela are protected by the following treaties:

(1) Treaty of Bogotá, April 18, 1825, incorporated in —

(2) Treaty of London, October 20, 1834.

In Article III of the protocol the admission of liability is, as regards persons, identical in both cases. As regards acts of injury to property, almost the only possible defense in cases likely to arise would be that of military necessity; this defense would probably be raised in cases of extensive damage, and in such cases British subjects have no special treaty protection; therefore Great Britain, holding certain opinions as to the internal affairs of Venezuela for many years past, thought it right to insist on an absolute admission of liability for the acts of persons for whom the Venezuelan Government might reasonably be liable.

In cases of seizure, British subjects are amply protected by treaty. Seizure, in contrast to injury, can in practice be justified on many and very diverse grounds, from some of which Great Britain might not wish to debar Venezuela. Great Britain, therefore, did not think it either necessary or desirable to insist on absolute liability, but thought it right that each case of seizure not covered by treaty should be judged on its merits, limiting the admission of liability to the same persons for whom Venezuela admitted responsibility in cases of injury to property.

It has been said that the words " injury to property " are not to be taken in their ordinary sense, but in their " legal " sense — that is, with some special technical meaning.

All writers agree that in interpreting treaties, words are to be taken, if possible, in their ordinary meanings.

Words are to be taken to be used in the sense in which they are commonly used. (Wheaton, p. 395.)

Common expressions and terms are to be taken according to common custom. (Halleck, Vol. I, p. 246, citing Vattel.)

It should be noted that in this protocol the word " injury " is only used in conjunction with " property."

There will be no dispute as to the common meaning of the expression " injury to property." It means no more than " damage to property."

If reference is made to Webster's Dictionary it will be seen that in the second passage quoted under the word " injury," it is used in the wide sense of damage, and under the verb " injure " it will be seen that when used in connection with property, the latter is rendered " to damage or lessen the value of, as goods or estate." In classical, then, no less than in ordinary English, when applied to inanimate things, the word is equivalent to damage. It is conceded that no word is to be pressed to include things which would destroy the sense of the whole passage in which they occur.

Injury in English is not the equivalent of " injuria " in Latin, which includes a different element. Except in exceptional circumstances " injuria " is not translated by the word " injury," but by the word " wrong," which word is its equivalent in English law. Moreover, in Roman law, " injuria," which necessarily implies some moral effect on the damaged person, is not, for that reason, joined with inanimate things in the way in which it is used here.

To sum up —

The word " wrongful " must be interpreted by reference to the protocol.

In the protocol the Venezuelan Government admit their liability, and thereby agree that for the purpose of this arbitration, injury, such as is found in the case of de Lemos, is not to be held justified — that is, they agree that for the purposes of this arbitration such injury is to be considered wrongful; therefore, the damage being admitted in principle, the claimant is entitled to an award.

PART II

If this case has to be decided on general principles of international law without any reservation, the decision must depend upon the answer to the question whether the Venezuelan Government can prove justification. In other words the shelling of a town being an act of violence otherwise injustifiable, can the Venezuelan Government prove that the act was a military necessity and so escape the liability otherwise incurred?

In matters such as these the decision must depend on the facts of each particular case, and historical instances of bombardments are of little value, firstly, because it is impossible to ascertain with sufficient accuracy whether the facts were or were not identical with the case under discussion, and, secondly, because incidents which would have been considered right and proper proceedings in warfare at the beginning of the last century and even later would to-day be held most reprehensible.

Fortified places are alone liable to be besieged; towns, agglomerations of houses or villages which are open or undefended can not be attacked or bombarded. (Wheaton, *Elements of International Law*, 3d ed., p. 543.)

If a town is as a whole open, with only one or two defended points (as distinguished from a fortress), and any shelling takes place, it is upon the attacking force to show that —

(1) Imperative necessity demanded the bombardment, and

(2) That the shelling was confined, both as regards direction and amount, to the necessities of the case.

As regards (1) the necessity must be proved to demonstration, and the evidence scrutinized with the utmost rigor, since the bombardment of the unfortified parts of towns is at best a cruel and barbarous proceeding, and repugnant to the principles of modern international law.

On this point reference may be made to Hall's International Law on page 556 (4th ed.), where the shelling of the private houses of even a fortified town during a siege is described as an exceptional proceeding, and clearly disapproved by the author on principle.

It may even be said that so great is the risk of needless and useless suffering and damage to noncombatants from this particular method of using shells, and this may be so widespread and so entirely beyond the control of the commander of the attack, that it is the modern rule of international law to discourage such a proceeding altogether (i.e. the shelling of the open parts of towns), and therefore, though it may be inexpedient to fix criminal responsibility on the commander, yet his government incurs the liability of having to compensate nonbelligerents for injury, should any such occur. There is nothing in the recognized modern authorities to negative the justice of this principle, and it is supported by the fact that governments not unfrequently compensate their own as well as foreign subjects for damage done under such circumstances, showing that compensation in such cases is right and proper.

If, then, a government carries out a bombardment of the kind found here, it must be prepared to show that the State was in imminent danger, that there was no other way of meeting the difficulty, and if shelling be held justified at all, it will have to go on to show that the unfortified parts, as distinguished from the forts, must be mercilessly shelled.

In considering the facts of this case it is to be noticed first of all that this town is not a fortified town in the accepted sense, nor did this shelling take place in the course of a siege (Hall, *loc. cit.*). This being so from 1,400 to 1,500 shells were nevertheless fired into the open parts of the town.

It is submitted that these facts at once fix the Venezuelan Government with liability, as constituting an act not sanctioned by any rule of war.

The Venezuelan Commissioner does attempt to justify the above procedure and does so by urging the plea of military necessity; he has not, however, in any way proved this, and the difficulties in his way will appear upon consideration of the admitted facts.

In this case there was no fortified town and no siege, both of which circumstances are essential, it is submitted, to make a bombardment lawful. The shelling seems to have been for the purpose of harassing the insurgents and peaceful inhabitants indiscriminately, without at the time any prospects of being able to take or even invest the town, and in any case the shelling was in excess of the necessities of the occasion.

It is also a not unimportant consideration that the bombardment was unsuccessful, and the town was not taken in consequence; and in the second place when the town was recently taken, no injury to private property took place. This will be seen from the following passage taken from the official telegram from General Gomez, announcing the capture of the town:

Del bombardeo de nuestra escuadra no hubo ninguna víctima en los habitantes pacíficos ni tampoco daños en los edificios particulares.

These facts go to prove that the shelling, so far from being necessary, was utterly inexpedient and unnecessary, and the natural inference then would be that, even if there were any intention of capturing the town, the attack was made with a force so inadequate to the purpose that, instead of a serious attempt to meet a military necessity, it was a reckless, useless, and unjustifiable resort to a cruel procedure.

The danger of allowing, under such circumstances, the immunity from liability of a government for the acts of its military commanders needs no demonstration, and the disapproval of an international tribunal should be specially emphasized in the case of a country where revolution is the rule rather than the exception.

The Venezuelan Commissioner has quoted at length the work of M. Calvo. As regards the opinions of that author, it is submitted that, although his erudition and powers of research will always render his work valuable, yet his bias as a native of South America renders his judgments unsound on matters concerning civil war and the responsibility of governments.

As regards other authorities quoted or referred to in the answer of the Venezuelan Commissioner, they in no way contradict the present proposition, which is, that though there may be cases where shelling may be carried out under such circumstances that no liability attaches, there are other cases where without question liability does arise; that each case must be judged on its merits, and that upon the facts and circumstances found there the Venezuelan Government are liable for the damages claimed in this case.

As regards the contention that *locus regit actum* and the objection taken to the affidavits, reference should be made to the protocol of May 7, 1903:

> The Commissioners, or, in case of their disagreement, the umpire, shall decide all claims on a basis of absolute equity without regard to objections of a technical nature or to the provisions of local legislation.

GRISANTI, *Commissioner*:

Part I of the British agent's reply is limited to supporting the interpretation which in his opinion must be given to Article III of the protocol of February 13, of the current year, and which openly contradicts the reasonable and proper interpretation given it by the honorable umpire in his very learned decision made on July 24 last. I consider this part of the statement irrelevant, because the decisions of the honorable umpire are definite and conclusive, according to the protocol signed at Washington May 7 last. Nevertheless I shall make some observations with regard to this part.

A treaty must be interpreted in the light of its own clauses, with due consideration of all circumstances preexistent to its execution and coexistent with the same; and this is precisely what the honorable umpire has done in a very masterly way.

The difference of the interpretations lies in the fact that the honorable umpire takes the word " injury " in its juridical meaning, and the learned agent for Great Britain thinks that the ordinary meaning should be attributed to this word.

To show the superiority of the former opinion over the latter, it suffices to compare the reasons set forth in support of each case.

In his award the umpire states:[1]

> It is the opinion of the umpire that the word " injury " was chosen because of its legal adaptation and significance, and not in its colloquial sense. To think otherwise

[1] *Supra*, p. 367.

would be to hold that the seizure of property occupied in the minds of the high contracting parties, and should occupy before this Commission, a position different from that of injury to property, a holding not consistent, for both are governed by the same general rules and spring from similar general conditions. To make a ruling that any injury to property and none but wrongful seizure of it was the purpose and purport of the protocol does not address itself to sound judgment.

The character of the signatory parties, the importance of the document, the evident care and skill with which it was drawn, its conciseness and precision, its rigor of expression, deny the assumption of a careless and indifferent use of words where care and discrimination was most required. It is therefore the opinion of the umpire that the word " injury " was taken by the signatory parties to import a legal wrong and in accordance with its fixed and determinate use in law as involving and imparting ipso facto an *intentional wrongdoing* on the part of those responsible therefor. This supplies the conditions concerning injury to property which are found in the protocol concerning the seizure of the same, and brings the two to a common level where, in the judgment of the umpire, they were placed by the high contracting parties. Without this reading of the word " injury " the two parts are dissimilar without reason, and with it they are similar with reason.

The learned agent for Great Britain states: [1]

It has been said that the words " injury to property " are not to be taken in their ordinary sense, but in their legal sense — that is, with some special technical meaning.

All writers agree that in interpreting treaties words are to be taken, if possible, in their ordinary meanings. " Words are to be taken to be used in the sense in which they are commonly used." (Wheaton, p. 395.)

" Common expressions and terms are to be taken according to common custom." (Halleck, p. 298.)

It should be noted that in this protocol the word " injury " is only used in conjunction with property.

There will be no dispute as to the common meaning of the expression " injury to property." It means no more than " damage to property."

If reference is made to Webster's Dictionary it will be seen that in the second passage quoted under the word " injury," it is used in the wide sense of damage, and under the verb " injure " it will be seen that when used in connection with property the latter is rendered " to damage or lessen the value of, as goods or estate," etc.

Although it is true that the common words used in a treaty should be taken in their ordinary meaning, this rule can not apply to technical terms; to which a meaning can not be attached other than the one they have in the science or art in which they belong.

Dans tous les cas d'amphibologie ou d'équivoque les mots doivent en général être pris dans leur acception ordinaire, dans leur signification usuelle, et non dans celle que leur donnent les savants ou les grammairiens; toutefois, les mots empruntés aux arts et aux sciences doivent s'interpréter suivant leur sens technique et conformément aux définitions données par les hommes compétents. — (Calvo, *Le Droit international théorique et pratique*, 3e éd., vol. I, p. 670, sec. 715.)

Technical terms must [says Bello] be taken in the proper sense given them by the professors of the respective science or art, except when it is known the author was not well versed in the matter. (Principles of International Law, 4th ed., p. 136.)

Can it be maintained with a semblance of reason that the eminent men who wrote and signed the protocol did not have a profound knowledge of the juridic meaning of the technical words they used in it? Such an opinion is inadmissible.

On the other hand, accepting the interpretation of the learned agent for Great Britain, the result would be an inexplicable difference in the cases of the

[1] *Supra*, p. 371.

claim being for the seizure of property and those being founded on injury to the same. In the first instance it is a necessary condition for the fixing of liability on the Government that the seizure be wrongful; in the second place that the liability always attaches, whatever be the nature of the injury, justified or unjustified, intentional or accidental.

The learned agent for Great Britain persists in trying to prove said difference, but he has not succeeded. The principles of law are adverse to him, and it is not possible to struggle against them successfully.

Ninety-eight per cent of all the claims are for injury to property, and according to the idea of the agent for Great Britain, said claims are already decided by the protocol in favor of British subjects. If this were so, what would the functions of this Mixed Commission be? With what object would England have sent out a lawyer of such great learning as His Britannic Majesty's agent, if it were not to argue on the grounds of justice and law? Reason can not conceive a court that does not pass judgment nor a juridic document from which law is excluded.

The interpretation insisted on by the British agent leads to an absurdity, and must therefore be rejected.

It is necessary to set aside every interpretation that might lead to absurdity. (Bello, International Law, 4th ed., p. 136.)

PART II

Ciudad Bolívar revolted at the time when a revolution had broken out against the Government in the whole Republic. The Government was under the unavoidable obligation of reducing the insurgent city, and this they had to carry with the only means at their disposal, which were the war ships at anchor in the port. The attention of the Government was occupied by many and serious events; it was forced to repair actively and energetically to different places to quell the civil war which was devastating the country; it was obliged to redouble its efforts. Perhaps the forces employed were not sufficient to subject the rebel city to the dominion of law; perhaps it was thought that the rebels would not offer such vigorous and indomitable resistance as they did. These circumstances, impossible to be foreseen or avoided, concur in proving, with irrefutable evidence, that the shelling of the city was not a deliberate act of the Government, but an act imperatively demanded by the force of circumstances.

On the other hand, war is nothing but the struggle of force against force, and the events which take place must not be considered as amid the repose and tranquillity of a cabinet, nor in the light of a high juridic philosophy. European and American statesmen have strived in vain, with extraordinary efforts and unremitting zeal, to mollify the conduct of war — it continues violating rights — wasting the treasure of civilization.

From the failure of the assault on the city, the British agent infers that it was not carried out with force proportioned to such an undertaking. The rigid rules of logic are not always applicable to affairs pertaining to war, and it is not possible, in all cases, to reach definite conclusions from the results of battles. History teaches us that military operations, maturely premeditated and executed with the most suitable means to attain a happy end, have failed, and that victory has at times been attained by plans emanating from a diseased and delirious mind.

Neither is it a juridic principle that unfortified cities should not be bombarded. The rule is that every city that offers resistance, be it fortified or not, must be

attacked with the means available, including bombardment; and that it is illegal to attack a city that opens its gates to the foe.

Toute ville qui se défend, peut, quoique ville ouverte et non fortifiée, être attaquée et soumise comme le serait une fortification; mais il faut une résistance sérieuse, une véritable défense se manifestant par des maisons crénelées, des barricades, etc. Quelques coups de fusils sont insuffisants pour autoriser le recours au bombardement. Le siège et les bombardements des places fortes et défendues est une mesure de guerre légitime et même nécessaire. La légitimité de l'agression ne dépend pas du fait de la fortification, mais de la défense à main armée d'une place. Il est illégitime de bombarder une forteresse qui ouvre ses portes. Il est nécessaire d'attaquer une ville ouverte qui est défendue militairement. Il est défendu de bombarder des villes ouvertes qui ne prennent aucune part à la guerre. Toutes les autorités du Droit International sont d'accord là-dessus. (*Manuel de Droit international public*, par Henri Bonfils, 3e éd., 1901, p. 608, sec. 1082.)

In my statement of July 11, last, I maintained, moreover, that the claim is not proved. In fact. Consul de Lemos brings forward as a proof, in the first place, his own testimony. As regards this point, I stated:

As a general rule, the testimony of a person in support of a fact is not admissible when that person is greatly interested in the establishment of said fact.

In the second place, the testimony of Benjamin Waithe and Antonio Villalobo, delivered in presence of the consul, Mr. de Lemos himself, is absolutely void;

and with regard to this testimony the undersigned stated the following opinion:

The said consul can not be a judge in his own cause, and on receiving and authorizing those declarations he has sought to be one, trying to assume two positions entirely incompatible. Besides, in the taking of the proofs, the universally acknowledged and respected rule of locus regit actum has been violated.

If my observations with regard to the testimony presented as proof are carefully read, it will be seen that these observations are not based on dispositions of any determined legislation, but on inferences drawn from a close study of the frailty of human nature. When a man is interested in testifying that a certain act took place his testimony can not inspire firm belief. The United States has fixed wise rules to which the claims against foreign governments are subject, and among them is the one copied below, which is very pertinent to the matter under consideration.

6. All testimony should be in writing and upon oath or affirmation, duly administered according to the laws of the place where the same is taken, by a magistrate or other person competent by such laws to take depositions, having no interest in the claim to which the testimony relates and not being the agent or attorney of any person having such interest, and it must be certified by him that such is the case. The credibility of the affiant or deponent, if known to such magistrate or other person authorized to take such testimony, should be certified by him; and, if not known, should be certified on the same paper upon oath by some other person known to such magistrate, having no interest in such claim and not being the agent or attorney of any person having such interest, whose credibility must be certified by such magistrate. The deposition should be reduced to writing by the person taking the same, or by some person in his presence having no interest and not being the agent or attorney of any person having an interest in the claim, and should be carefully read to the deponent by the magistrate before being signed by him, and this should be certified. (Department of State Circular, March 6, 1901.)

The act of taking the depositions of Messrs. Waithe and Villalobo, done by the consul, Mr. de Lemos, thus usurping functions which belong to the local courts of justice, is an attack upon the sovereignty of Venezuela, and therefore the Venezuelan commissioner hereby protests energetically against the behavior

of the consul, Mr. de Lemos, which behavior constitutes the infringement of laws he was under the obligation of respecting, not only in his capacity as a resident, but also in his capacity as a consul.

It is the opinion of the writer that the claim of Consul de Lemos should be disallowed.

PLUMLEY, *Umpire*:

When this case was sent to the umpire for his decision, it was requested by both Governments that the umpire should take his earliest opportunity to indicate to the tribunal whether he should require more evidence on behalf of the claimant than was placed before him in the papers filed in the case. Answering this proper request the umpire takes this occasion to state his position thereon.

When the case was first presented to the tribunal it contained a memorial, the printed affidavit of Consul de Lemos, and the declarations of Benjamin Waithe and of Antonio Villalobo. Upon the facts therein stated the case rested.

That portion of the affidavit of Charles Herman de Lemos, which states the fact of bombardment of Ciudad Bolívar on the 20th, 21st and 22nd of August 1902, by the Venezuelan gunboats *Bolívar* and *Restaurador*, is a matter of history.

At the time that the preliminary objection of His Britannic Majesty's agent was made there was before the tribunal the answer of F. Arroyo-Parejo, the Venezuelan agent before this tribunal, which was made on the 18th of June, 1903. In this answer is to be found the following:

> The history of this case is as follows:
>
> A garrison in the capital of the State of Bolívar, disloyal to their duties, rebelled against the National Government legally constituted. The Government, not only in virtue of the right of defense, but in the fulfillment of a duty of a pressing nature, on account of the irreconcilable attitude of the revolutionists, ordered the attack of the city, which attack was put into execution by maritime forces on August 20, 21, and 22, 1902. The consequence of the attack, a natural and unavoidable one, was that several houses of the city suffered damages, among them two which belonged to the claimant's wife.

Then follows in the answer propositions of law governing these facts and claiming therefrom immunity to Venezuela as claimed by said learned agent.

To the preliminary objection of His Britannic Majesty's agent the honorable Commissioner for Venezuela made reply, and in such reply the historical facts were admitted and extended in paragraphs 7 and 8, followed by an argument concerning the immunity of Venezuela under such facts, with citations and quotations of authority therefor, and at the bottom of the seventh page and throughout the eight page of said reply the question is raised that the claim is not legally in proof for the reasons therein given.

Article 7 of the rules of procedure provides for the written answer of the Venezuelan Commissioner and states what such answer may and should contain. In effect it requires that there and then be raised all of the exceptions and objections to the testimony, of form or fact, which it may seem necessary to raise at any time in said cause, and to therein set forth in addition the counter facts relied upon by Venezuelan in refutation of the claimant's proofs and to bring into the record with such answer all such evidential facts as are by him deemed important.

Articles 9 and 10 of the said rules provide for the registry of such answer, notice to the British agent, his right of reply thereto within fifteen days, its

presentation and registry and notice to the Venezuelan Commissioner or agent, in whom there is a right of counter reply within fifteen days.

In this case the answer was made by the Venezuelan agent instead of the Commissioner, but it was the answer provided for under article 7 of the rules and was received as such. It conceded all the facts alleged by the claimant and stated the facts upon which Venezuela relied for its protection in the given case, and to these facts brought upon the record by the Venezuelan agent the reply of the British agent was in the way of a preliminary objection raising the questions of law and equity upon the facts stated in the claim and in the answer of the Venezuelan agent, which reply admitted for the purpose of that objection the truth of the facts as stated by the agent of Venezuela in his answer.

When, therefore, there is found in the counter reply of the honorable Commissioner for Venezuela the points referred to above they must be read in view of the concessions as made by the Venezuelan agent in his answer, the logical results flowing from the British agent's preliminary objection, together with the status of the case and the rights of the parties as established by the rules of procedure above referred to.

It was the judgment of the umpire at the time of rendering his interlocutory opinion that it was not competent for, neither was it the intention of, the honorable Commissioner for Venezuela to attack or reverse the concessions and admissions made by the learned agent for Venezuela in his answer, but simply to call attention to the irregularities and informalities of the said testimony. It followed, therefore, that the umpire in such opinion on the first and second pages thereof assumed as admitted facts the claim as made in the affidavit of Mr. de Lemos.

Subsequent to the filing of such opinion by the umpire the learned British agent presented his counter reply to the aforementioned answer of the Venezuelan agent and reply of the honorable Venezuelan Commissioner, and this was followed by the counter reply of the honorable Commissioner for Venezuela, restating his objections to the proof of the claim and quoting in part from his first reply and including a quotation from the rules of the United States of America prescribed for the taking of testimony in such matters. No one, in the opinion of the umpire, would question the wisdom and value of the rule thus quoted.

In said counter reply of the honorable Commissioner for Venezuela he also makes the point that the act of taking the depositions of Messrs. Waithe and Villalobo, effectuated by Consul de Lemos, was in usurpation of functions belonging to the local courts of justice and was thereby an attack upon the sovereignty of Venezuela.

The umpire has thus brought upon the record the matters deemed by him substantial and important in the determination of the immediate question before him, which is: Does he require further evidence on behalf of the claimant in order to be satisfied of the truthfulness of his case?

The historical facts are unquestioned, and to those historical facts may be added the consulship of Mr. de Lemos, his residence and his nativity, as all these matters must be in the knowledge and possession of the Venezuelan Government, since for about twenty-five years he has been the consul of Great Britain resident at Ciudad Bolívar, and under the exequatur issued by the Venezuelan Government.

The matters to be determined from the affidavit of Consul de Lemos are the name of his wife, her ownership of the property in question, the fact that 1,400 or 1,500 shells were thrown into the heart of the city, and that her buildings were injured thereby to the amount of £300.

The declarations of Waithe and Villalobo, in the opinion of the umpire,

amount to no more than a carefully written statement over their respective signatures and are accepted by him as such only. They are not affidavits and they are not formal declarations. Mr. de Lemos could not in this case act in his official capacity and thereby make them such; but they are written documents or statements, and being such they come clearly within the provision of the protocol which provides that the Commissioners or umpire, as the case may be,

shall be bound to receive and consider all written documents or statements which may be presented to them by or on behalf of the Governments, respectively, in support of or in answer to any claim;

and

shall decide all claims upon a basis of absolute equity without regard to objections of a technical nature or the provisions of local legislation.

The evidential value of such statements is left to the decision of the tribunal when it considers them; but there is no question that they are to be received and to be given such value as in the given case they seem to be worth.

The facts testified to by Mr. de Lemos are not obscure in their character, not at all dependent upon his personal knowledge for their establishment, and are easily disproved if untrue. The claimed injury resulted from the bombardment, which is a historical fact, the official particulars of which are unquestionable in the possession of the Government of Venezuela, and it would be impossible to make such claims of injury and not have them susceptible to immediate denial and disproof if untrue, since the damage if it existed was easy to be seen, and if not existent easy to be determined to the contrary. The fact of ownership is a matter of registry as well as of general notoriety in that vicinity, and thus easily susceptible of denial and disproof if untrue. There is nothing about the case as it is presented to the umpire to raise a suspicion of its verity, and there is nothing to suggest any purpose to defraud Venezuela or to mislead the umpire in arriving at a just decision. The case seems to be shorn of such characteristics.

Taking into consideration the elements in this case as presented, including the concessions and admissions of the learned agent for Venezuela, and the fact that neither agent or Commissioner for Venezuela has denied anywhere that the facts are as alleged by the claimant, the ease with which the claim could have been refuted if not well laid, the general reasonableness of the facts asserted, the official position of Consul de Lemos, all tend to eliminate doubts from the mind of the umpire, to give respectability and character to the claim, and to permit him to say that he is satisfied that the facts are as alleged and to find the same to be true, leaving only for determination the questions raised as to the law and equity in the case.

The umpire will here state that it must be considered there was no intended offense to Venezuela in the act of Consul de Lemos in authenticating the declarations of the two witnesses used in this case, since it is to be remembered that from the time of the injury to these buildings until within a few days there have been no courts at Ciudad Bolívar loyal to the Venezuelan Government or representative thereof, and it was expressly stated in open tribunal by the learned British agent that these declarations were thus presented only because of the impossibility of obtaining any evidence through the regular procedure of Venezuelan law. It is in recognition of this state of affairs that the umpire more readily consents to their consideration.

Notwithstanding this holding, if the honorable Commissioner for Venezuela considers that the fact is not that 1,500 shells substantially were thrown into the heart of the city on the occasion of the bombardment in August, 1902; that Mrs. de Lemos is not the owner of the houses in question; that they were not

damaged in the way and to the extent substantially as claimed in the affidavit of Consul de Lemos; that injustice would be done to Venezuela by assuming such to be the facts, and that he desires opportunity to show that such are not the facts, the umpire may deem it necessary on a proper showing to grant an opportunity at this late hour for such proof, and in such event may deem it proper to permit the British agent to fortify his evidence by cumulative and rebuttal proof if he should desire.

SELWYN CASE[1]

Within the limits prescribed by the convention, an international tribunal created thereunder is a tribunal superior to the local courts, and it is not affected jurisdictionally by the fact that a question submitted for its decision is pending in the courts of one of the nations. Such international tribunal has power to act without reference thereto and, if judgment has been pronounced by such court, to disregard the same so far as it affects the indemnity to the individual, and has power to make an award in addition thereto or in aid thereof as in the given case justice may require.[2]

PLUMLEY, *Umpire*:

This case came to the umpire upon the disagreement of the honorable commissioners over the jurisdictional question raised by the Government of Venezuela.

In determining this question it is necessary that the umpire assume the truth of all the assertions on the claim. This is in no sense finding that they are true, but an assumption merely, and wholly for the purpose of this preliminary inquiry, and in event the jurisdiction is held this assumption ceases ipso facto and absolutely.

The grounds of objection to the jurisdiction of this tribunal as stated are three:

(1) That, if this claim is admissible otherwise, it is barred by the fact that a suit is now pending in the local courts, wherein the claimant is the plaintiff and Venezuela is the defendant, based upon the same right of action; and having elected to pursue his remedy there he can not change the forum of his own selection and present his claim to this Commission, especially since there has been no delay in court except through his own inaction.

(2) A certain provision of the contract between the Government and the claimant, because of which contract this claim exists, the language of which provision follows: "Any doubts and controversies that may arise regarding the spirit or execution of this present contract will be settled by the tribunals of the Republic and according to their laws without their being in any case a matter for an international claim."

(3) That this is a claim under a contract and that controversies of a contractual character, excepting the railway claims, are not submitted to this Commission, but instead, injuries to property of British subjects and matters akin thereto, as is to be seen by inspection of the protocol, which by specifically including the railway contractual claims inferentially and impliedly excludes all other contract claims.

Pending a decision in court parties may always agree to submit to arbitration the whole or any substantive part of the matter or matters in issue; and when the award is made it can be pleaded by the defendant in bar of the action in

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[1] For a French translation see: Descamps-Renault, *Recueil international des traités du XX^e siècle*, année 1903, p. 795.

[2] See additional authorities, *infra*, pp. 384, 385.

whole or in part, according as the submission was of a whole or a part of the controversy; or, if the submission is such, it may be reported into court in aid thereof or for its final action thereon, but always to the extent of the submission it supersedes action by the court. (*Amer. & Eng. Encyc. of Law*. 2nd ed., vol. 2, 562-568. Also the notes on these pages for cases cited and decisions quoted in support of this proposition.)

It is the judgment of the umpire that the rule above stated is the same, so far as it touches the question before this Commission, where the arbitration is between nations and the submission concerns private claims.

International arbitration is not affected jurisdictionally by the fact that the same question is in the courts of one of the nations. Such international tribunal has power to act without reference thereto, and if judgment has been pronounced by such court, to disregard the same so far as it affects the indemnity to the individual, and has power to make an award in addition thereto or in aid thereof as in the given case justice may require.

Within the limits prescribed by the convention constituting it the parties have created a tribunal superior to the local courts.

Concerning the particular feature here involved this is the limit there set:

> The Venezuelan and British Governments agree that the other British claims, including claims by British subjects other than those dealt with in Article VI hereof, and including those preferred by the railway companies, shall, *unless otherwise satisfied*, be referred to a Mixed Commission constituted in the manner defined in Article IV of this protocol and which shall examine the claims and decide upon the amount to be awarded in satisfaction of each claim. (Art. III of the protocol of Feb. 13, 1903, and see also par. 1 of the supplementary agreement of May 7.)

It would seem that the claim being otherwise admissible at the time of the making of the treaty, it is not to be affected by anything save its subsequent payment or satisfaction. Whether its is actually pending in court or standing in judgment rendered is not made the test. Instead, and only, the criterion agreed upon is payment or satisfaction.

Under article 7 of the treaty between the United States and Great Britain of November 19, 1794, a Mixed Commission was provided for and given the power to award compensation to claimants who could not obtain it "in the ordinary course of justice."

The especial claims to be considered were those founded on case of illegal and irregular capture or condemnation of the vessels and property of citizens of the United States. In the case of the *Sally*, Hayes, master, which was pending in the admiralty court at the time it was submitted to this Mixed Commission, the British Commissioners objected to its consideration, "as proceedings were still pending before the lords commissioners of appeal. * * * It did not sufficiently appear that compensation might not at the time of concluding the treaty and might not still be had in the courts by judicial proceedings, * * * and that the consideration of the merits of the claim should be postponed until it should further appear that compensation could not be obtained in the ordinary course of justice." The American Commissioners, the umpire agreeing with them, contended to the contrary, and a majority of the Board held in accordance with the latters' contention. The British Commissioners then entered a declaration on the journals of the Board "that they did not think themselves competent under the words of the treaty or of the commission under which they acted to take any share, without the special instruction of the King's ministers, in the decision of any cases in which judicial proceedings were still pending in the ordinary course of justice." And in the course of the discussion of the cases before them it was held in general by the agent for Great Britain that in the class of actions that had been decided in the high court of appeals the Commissioners had no jurisdiction because the sentences of that court were definitive; in the cases still pending before the high court of admiralty and the high court of appeals that the Commissioners had no jurisdiction because, if entitled to

compensation, it might be obtained in the ordinary courts before which for various reasons appeals had not been claimed or prosecuted; that the Commissioners had no jurisdiction because it was in consequence of the neglect of the claimants that they were unable to obtain compensation in the ordinary course of justice.

The matter in dispute was referred by agreement to the lord chancellor, who held that in cases of condemnation in the high court of appeals the decrees must stand so far as they affected the property, but there might exist a fair and equitable claim upon the King's treasury under the provisions of the treaty for complete compensation for the losses sustained by said condemnation. Where there had been decrees of restitution, but without costs or damages, or of condemnation without freight or costs, it might be just that the claimant might receive costs, freight, and damages, and the Commissioners had jurisdiction. In the case where the right of appeal had been lost the claimant might be able in a satisfactory manner to account before the Commissioners for his not having come personally forward with the appeal, and this was undoubtedly a case within the provisions of the treaty. The property could not be restored, but there might be an award, and it must be paid out of His Majesty's treasury. The Commissioners were not a court of appeal above the high court of appeals. They were, however, competent to examine questions decided by the high court of appeals as well as in other cases described in the treaty, and they could give redress, not by reversing the decrees and restoring the identical property, but by awarding compensation.

These decisions were substantially the claims of the American Commissioners and the umpire, so that we have the authority of both England and the United States upon that question. The English authority being a concession against their own pecuniary interests gives it greater force aside from the high judicial character of both the lord chancellor, the American Commissioners, and the umpire. (Moore, 2304, et seq.; 326, et seq.)

Wharton, in his International Law Digest, section 242, volume 2, says:

" It was maintained before the British and American Mixed Commission sitting in London under the treaty of 1794 that a decision of a British prize court estopped the party against whom it was made from proceedings, when a foreigner, through his own government. This was contested by Mr. Pinkney, and his position was affirmed by the arbitration, acting under the advice of Lord Chancellor Loughborough, and is now accepted law."

See the *Alsop* claims, Moore, 1627 - 1628.

See case of the *Neptune*, Moore, 3076 et seq.

See opinion of Mr. Pinkney on the same case, Moore, 3083, et seq.

See Garrison's case in Moore, 3129, decision by Lieber, umpire, in the United States - Mexican Commission, in which appears the following language: " It is objected that the case has been adjudicated by the proper Mexican court and can not be reopened before this Commission; that therefore it ought to be dismissed. It is true that it is a matter of the greatest political and international delicacy for one country to disacknowledge the judicial decisions of a court of another country, which nevertheless the law of nations universally allows in extreme cases. *It has done so from the times of Hugo Grotius.*

In the case of Reed & Fry, United States - Mexican Commission, convention of July 4, 1868, the case was heard of a vessel seized in Mexico by the proper officers and libeled in a court of competent jurisdiction on the charge of violating the revenue laws, and the court decreed confiscation. The Commission heard the case, found that the court should be sustained, and dismissed the claim. This, therefore, is authority on the question of jurisdiction after judgment by a local court. Idem., 3132.

See Bronner *v.* Mexico, Moore, 3134, United States - Mexico, convention of 1868, Sir Edward Thornton, umpire, where the question in issue had been passed upon adversely to the claimant by the courts of Mexico and an award was given in his favor by the umpire.

See case of J. L. & Co., in same Commission, before the same umpire, who considered the merits of the case and disallowed the claim.

In Moore, 3148, case of Young, Smith & Co. *v.* Spain, United States - Spain, convention of November 10, 1879, Baron Blanc, umpire, holds that " article 5 of the agreement of 1871 confers upon this Commission jurisdiction of all claims for injuries

of that character. It makes no exception against those parties who may not have resorted to or *exhausted the remedies* offered by the courts of Cuba. The umpire, therefore, is constrained to hold that this is a proper case for the exercise of the jurisdiction of the Commission, and that he is himself bound to decide upon the merits of the demand presented by the claimants."

"Where the claimant in a foreign country has, by the law of such country, the choice of either the judicial or the administrative branch through which to seek relief and selects the latter, this does not make the arbitrary decision of the latter against him final and conclusive." (Mr. Fish, Sec. of State, to Mr. Nelson, Jan. 2, 1873.)

The same position of the United States with regard to the decision of the courts not being a bar to the claim by a neutral, which was held in the Commission with Great Britain, above referred to, was taken by the United States in claims growing out of the French Revolution, and was conceded by the United States when the relations were with reference to the claims arising from the late civil war (see Wharton, vol. 3, sec. 242, Appendix), and was further insisted upon by Mr. Bayard, Secretary of State, discussing a similar question with Mexico, who claimed that the matter had been duly adjudicated upon and was therefore barred from further consideration. (See sec. 243, p. 974, in vol. 3 of Wharton.)

"It may be said that the claimants, according to the ordinary practice in British courts, had a right of appeal to the lords of appeal, and that, as they did not avail themselves of that right, they must be presumed to have acquiesced in the decision of the admiralty courts. * * * [To this] it may be answered that the claimants have incurred great expense in the prosecution of their rights before the admiralty court and had not the means for carrying the cause further in the form in which it was there presented." (Wharton, vol. 2, sec. 241, p. 677.)

Indeed, since objection No. 1 applied not at all to the merits of the case or its rightfulness as a claim in itself, it may well be regarded as falling within the class of technical objections which this Commission is expressly instructed not to regard by the provisions of the British-Venezuelan agreement of May 7, 1903.

To hold that this Commission has jurisdiction of a claim notwithstanding its pendency in the courts of Venezuela is in harmony with the action of other commissions now sitting in Caracas.[1]

If the pending suit of Selwyn in the local courts is based upon the contract, then, as it appears later in the opinion of the umpire, this claim is fundamentally different from the pending action, and hence from the sole objection that his action is so pending the question of jurisdiction can not be successfully interposed, even if the umpire considered, as he does not, that if the pending action and the claim were alike objection No. 1 must be sustained.

For the reasons above given it is the opinion of the umpire that objection No. 1 can not be sustained.

Concerning the next objection, the umpire bases his decision upon the ground that the claim before him has in no particular to deal with "any doubts and controversies * * * regarding the spirit or execution of" the contract in which such terms appear. His reasons therefor will appear in his statement concerning preliminary objection No. 3.

The fundamental ground of this claim as presented is that the claimant was deprived of valuable rights, of moneys, properties, property, and rights of property by an act of the Government which he was powerless to prevent and for which he claims reimbursement. This act of the Government may have proceeded from the highest reasons of public policy and with the largest regard for the State and its interests; but when from the necessity or policy of the Government it appropriates or destroys the property or property rights of an alien it is held to make full and adequate recompense therefor.

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[1] Rudloff case, *supra*, p. 254.

Pradier-Fodéré (sec. 402) says:

It is the duty of every state to protect its citizens abroad * * *. It owes them this protection when the foreign state has proceeded against them in violation of principles of international law — if, for example, a foreign state has despoiled them of their property.

Vattel says:

Whoever uses a citizen ill indirectly offends the state, which is bound to protect the citizen, and the sovereign of the latter should avenge his wrongs, punish the aggressor, and, if possible, oblige him to make full reparation; since otherwise the citizen would not obtain the great end of the civil association, which is safety. * * * But if a nation or its chief approves and ratifies the act of the individual, it then becomes a public concern, and the injured party is to consider the nation as the real author of the injury. (Book 2, ch. 6, secs. 72 and 74.)

Halleck says:

There can be no doubt with respect to its [the state's] responsibility for the acts of its rulers, whether they belong to the executive, legislative, or judicial department of the Government, so far as the acts are done in their official capacity. (*International Law*, 3rd ed., Vol. I, Chap. XIII, p. 442.)

How much of the claim comes under this head it is not necessary to consider. The question of jurisdiction is determined if in any part the case falls within this class. The umpire has above stated that such is the fundamental feature of this claim, and hence that it is not a matter of contract, and is open to neither of the last two objections of Venezuela.

Holding thus, it does not become necessary, and it is therefore inexpedient, to pass upon the contention of the respondent Government that the protocol does not include matters of contract.

As stated at the outset of this opinion, the umpire does not herein pass at all upon the merits of the claimant's case, but only upon the jurisdictional question, assuming, as he must for such purpose, that the facts are as stated in the reclamation. What in truth the facts are remains to be determined upon the full proofs, which are in no sense prejudiced or predetermined by this opinion. That they may be ascertained and settled by this Commission in equity and justice, the umpire returns the case to the Commissioners for their consideration and action.

ADDITIONAL AUTHORITIES FURNISHED BY UMPIRE PLUMLEY

(1) Wharton, vol. 2, sec. 238, p. 671: The defense of res adjudicata does not apply to cases where the judgment set up is in violation of international law.

(2) Wharton, vol. 3, sec. 329*a*, p. 198 (prize courts): The prevalent opinion now is, that in international controversies a sovereign can no more protect himself by a decision in his favor by courts established by him, even though they be prize courts, than he can by the action of any other department of his government.

(3) Wharton, vol. 2, sec. 238, p. 670: A suit brought in Honduras courts by a citizen of the United States to recover estates in Honduras must be left to the determination of the courts in which it is brought, unless a positive denial of justice be shown. (Mr. Frelinghuysen, Sec. of State, to Mr. Hall, June 18, 1882.)

(4) Wharton, vol. 2, sec. 242, p. 697 (case of Wheelock *v.* Venezuela): A foreigner's right to ask and receive the protection of his government does not depend upon the local law, but upon the law of his own country. * * *

(5) Wharton, vol. 2, sec. 238, p. 670: A collusive or irregular judgment by a foreign court is no bar to diplomatic proceedings by the sovereign of the plaintiff against the sovereign of the court rendering the judgment. (Mr. Evarts, Sec. of State, to Mr. Foster, Apr. 19, 1879.)

(6) Wharton, vol. 2, sec. 238, p. 679: A claimant in a foreign state is not required to exhaust justice in such state when there is there no justice to exhaust. (Mr. Fish, Sec. of State, to Mr. Pile, May 8, 1872. MSS. Inst. Vene.)

(7) 13 Howard, 115 (Mitchell *v.* Harmony): Private property may be taken by a military commander for public use, in cases of necessity, or to prevent it from falling into the hands of the enemy, but the necessity must be urgent, such as will admit of no delay, or the danger must be immediate and impending. But in such cases the Government is bound to make full compensation to the owner.

(8) 13 Wall., 623 (see Wharton, vol. 3, sec. 328, p. 247): Where private property is impressed into public use during an emergency, such as a war, a contract is implied on the part of the government to make compensation to the owner.

(9) Wharton, vol. 2, sec. 248, p. 710: If the nation disposes of the possessions of an individual the alienation will be valid for the same reason; but justice demands that the individual, be recompensed out of the public money. (Vattel, Book 1, Ch. 22, sec. 244.)

(10) Moore, 3720-3721 (Elliott's case; Lieber, umpire): It was held that General Corona had undoubtedly a right to appropriate Elliott's property if necessary for defense or to devastate it, if the war required it, but the Government must pay.

(11) Wharton, vol. 2, sec. 248, p. 711 (Meade case): On these facts the following conclusions were reached by the Court of Claims:

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A debt due to an American citizen from a foreign government is as much property as houses and lands, and when taken for public use is to be paid in the same manner.

The cases hereinbefore quoted and referred to were considered by the umpire in making up his decision in this case, and are submitted to be incorporated into said opinion as authorities in support of the same. Nos. 1, 2, 3, 4, 5, and 6 go to sustain the position of the umpire as to objection No. 1. Nos. 7, 8, 9, 10, and 11, his position as to objections Nos. 2 and 3.

STEVENSON CASE

An international claim is not barred by prescription when it appears that there has been no laches on the part of claimant or his government in its presentation for payment.

PLUMLEY, *Umpire*:

This case came to the umpire solely on the preliminary objection of the honorable Commissioner for Venezuela that it was barred by limitation. The history of the case discloses that it was presented to the British Mixed Commission sitting at Caracas in 1869; that the Venezuelan Commissioner refused to consider the case in the ground that the proofs were formalized posterior to the date of the convention for the settlement of pending claims. It resulted that this, with several other cases similarly objected to, was withdrawn on the part of Her Majesty's Government, with the express reservation that such withdrawal was to be without prejudice to the claims.

Reference is made to this claim by Her Majesty's minister resident at Caracas in a letter dated at Caracas, April 25, 1872, and addressed to the claimant at Trinidad, in which, after stating the course of the claim before the Commission, this statement appears:

and that since the Venezuelan Government have declared that owing to civil warfare they can not attend to the arrangement or payment of foreign claims.

There is further reference to this claim by the British foreign office May 28, 1888, in a letter addressed to Mrs. Julia Stevenson, of Trinidad, widow of the late claimant, answering what is termed therein as her petition in regard to this claim, of date the 26th of April, 1888, and this extract is taken from such answer:

> I am to inform you that since the withdrawal of this claim from the Mixed Commission of 1869 it has, together with many others, been classed as unrecognized by the Government of Venezuela. These " unrecognized " claims have not been lost sight of by Her Majesty's Government, but it is clear there is no chance of payment of any individual claim being made unless by a general settlement of all, and of this there is at present no prospect. Under these circumstances his lordship regrets that he is unable to hold out any hope of an early settlement.

It appears from the facts gathered with reference to the presentation before the Mixed Commission of 1869 and from the letters from which extracts have been quoted that the Venezuelan Government was in 1869, if not before, fully advised of the existence of this claim and of the details of which it was composed; that the Venezuelan Government had been addressed upon the subject of this claim since the withdrawal from the Mixed Commission, and had announced to the representative of the British Government that, owing to civil warfare, they could not attend to the arrangement or payment of it. By reference to the communication of May 28, 1888, it is learned that, some time subsequent to the communication of 1872 and the date of this last-named letter, this case had been brought up before the Venezuelan Government, and it was found placed among their list of " unrecognized " claims. It is also learned from this later communication that Her Majesty's Government was keeping track of this claim with others of its class and was simply waiting for such time as there could be made a general settlement of all such claims. Pursuant to that purpose, the British Government has taken advantage of this its first opportunity, and has presented the claim agreeably to its plan and its assurance to the claimant's widow.

It also appears that both of these communications were in reply to letters of inquiry or of petition, first from the claimant himself and lastly from his widow.

From this statement of the case as it appears before this Commission there can be claimed with right no laches on the part of either the British Government or of the claimant or his estate.

When a claim is internationally presented for the first time after a long lapse of time, there arise both a presumption and a fact. The presumption, more or less strong according to the attending circumstances, is that there is some lack of honesty in the claim, either that there was never a basis for it or that it has been paid. The fact is that by the delay in making the claim the opposing party — in this case the Government — is prevented from accumulating the evidence on its part which would oppose the claim, and on this fact arises another presumption that it could have been adduced. In such a case the delay of the claimant, if it did not establish the presumption just referred to, would work injustice and inequity in its relation to the respondent Government.

This case presents neither of these features. When first produced before the Mixed Commission of 1869, the claim for $ 13,277.60 for injuries to the Río de Oro estate was alleged to be of date February, 1859, as was also the claim for $ 77,645 on account of the La Corona, Mapirito, and San Jáime estate. The claim of the Bucural estate for $ 43,660.80 was laid as happening in 1863, and the claim of the San Jacinto estate for $ 1,260 was laid in 1869, March 6. So that the earliest claim was about ten years old, the next in order only six years, while the last claim was so late as to have been in fact subsequent to the

convention establishing that Commission. Here was placed before the Government a careful list, in number and character, of the losses suffered, and the different estates on which each separate claim rested, with the dates on which the different claims arose. This gave the respondent Government an opportunity to acquaint itself with the facts and to obtain counterproofs if found available or important. Since the withdrawal of this claim from the Mixed Commission of 1869 there can be no just allegation of laches properly chargeable to either the claimant or the claimant Government. The delay has been either in the inability or the unwillingness of Venezuela to respond to this claim. The occasion of this unwillingness and the reasons why it was placed on the list of " unrecognized " claims are properly matters for proof and consideration before this Commission, but it would be evident injustice to refuse the claimant a hearing when the delay was apparently occasioned by the respondent Government.

The umpire holds, therefore, that the case is properly before this Mixed Commission to be considered on its merits, and it is returned to the Commission for that purpose.

TOPAZE CASE

Award of £ 20 each for officers and £ 10 each for seamen for one day's imprisonment held not excessive

PLUMLEY, *Umpire*:

The *Topaze*, a British steamship, was at Puerto Cabello on the 9th of December, 1902, shortly after the establishment of the British Pacific blockade. At 8 p. m. the captain and crew were taken from the ship by an armed guard to the custom-house without opportunity to put on reasonable clothing or to lock up their berths, and at 10 p. m. they were taken under armed guard and imprisoned in a small and badly ventilated cell, and were compelled to sleep on the stone floor. There were 10 officers and a crew of 20. They were thus confined until 10.30 at night of the next day, and, owing to the bad smells and want of ventilation, many of the crew were ill. No food was provided, and what they had was sent in by friends. They were taken back to their ship under an armed guard, and while absent various articles belonging to the crew were stolen. These facts are taken from the memorial in this cause, and there are no contradictory facts alleged by Venezuela.

Upon these uncontested facts the umpire was requested by the honorable Commissioner for Venezuela to express his unofficial opinion upon the question whether a demand by the British Government for £ 20 each on behalf of officers of the ship and for £ 10 each for the crew in the case as made is an excessive amount.

While it did not seem to the umpire at the time of the inquiry that it was in excess of the ordinary demand in such cases, he thought it important and wise that his answer should be given after reflection and upon some basis of action resting upon similar cases before commissions and the accompanying decisions. Following out that thought, he has made some investigation, and now brings forward the result for the use of the honorable Commissioner for Venezuela.

The umpire has had recourse to Moore on International Arbitrations, and the cases to be given are taken from the different volumes of that work.

(1) H. R. Smith (p. 3310): This was an arrest during the American civil war for treason. He was held fourteen weeks, or ninety-eight days, and before the British-American Commission was unanimously allowed $ 1,540, which is an average of a little less that $ 16 a day.

(2) Williams (p. 3119): Mexican Commission. Imprisoned twenty-five days. Allowed $ 600, or $ 24 a day.

(3) In the case of Parr (p. 3302), before the British - American Commission, it was held that his original arrest and a reasonable detention were lawful, but a detention of four months was not justified. He was unanimously given $ 4,800, or $ 40 a day.

(4) Ashton (p. 3288): Arrested and detained ninety-three days. Discharged without trial. Allowed by the same Commission $ 6,000, an average of about $ 65 a day.

(5) Julius Le More (p. 3311): Arrested by General Butler, while in command at New Orleans, on charge of aiding the enemy. Held forty-three days in custom-house. No claim of bad treatment. Was allowed by the commission $ 4,000, or a little over $ 93 a day.

(6) Crowther (p. 3304): Arrested in Baltimore. Brought before the provost marshal on charge of using seditious language during the civil war. Was held by the provost-marshal eight hours in a hotel. He claimed before the commission to have been talked to in an insulting manner personally and concerning his Government by the provost-marshal. Allowed $ 100.

(7) Montejo (p. 3277): Arrested and detained thirty-nine days. Allowed $ 3,900, or $ 100 a day.

(8) Rozas (p. 3124): Arrested and detained one hundred and forty days. Allowed by commission $ 14,000, or $ 100 a day.

(9) Powers (p. 3274): Arrested and detained forty days. Allowed by commission $ 4,000, or $ 100 a day.

(10) Edwards (p. 3268): Arrested. Detained forty-six days and discharged without hearing. Allowed $ 5,000, or almost $ 109 a day.

(11) McKeown (p. 3311): Arrested by commanding officer for disloyal and seditious language. Held thirteen days. Alleged improper treatment by commanding officer while in detention. Was discharged without a hearing, and was unanimously allowed by the British - American Commission $ 1,467, or about $ 113 a day.

(12) Cauty (p. 3309): Arrested for violating neutrality laws. Charge not sustained, and he was not tried. Held seventy days with no allegation of bad treatment. Allowed $ 15,700, or about $ 224 a day.

(13) Le More (p. 3311): Arrested by General Butler, while in command at New Orleans, on the charge of aiding the enemy. For eleven days he was in prison and obliged to wear a 32-pound cannon ball and 6 pounds of chain; and for thirty-two days following he was detained in the custom-house, making in all forty-three days. Was allowed by commission $ 10,000, or $ 232.50 a day.

(14) Montgomery (p. 3272): Arrested. Detained four days. Allowed $ 1,000, or $ 250 a day.

(15) Patrick (p. 3287): Arrested on false information. Held thirteen days. Allowed by commission $ 5,160, or about $ 397 a day.

(16) Monroe (p. 3300): Detained two days on board steamer and twelve hours in military prison. While he was in the prison his trunk on board ship was broken open, and money, wearing apparel, and other articles were stolen from it. Unanimously allowed by commission $ 1,540 for two and one-half days, or $ 616 a day.

(17) Sartori (p. 3120): Detained in fact four months, but it was held by the umpire that all but two days of that time was under circumstances permitting a detention. For the two days of unjustifiable detention the umpire allowed $ 5,000, or $ 2,500 a day.

(18) Forwood (p. 3307): Arrested in New York upon suspicions that he was aiding the enemy in the American civil war, and without any justifiable fact he was held in the office of the chief of police of New York city four hours. He was allowed by the British - American Commission $ 25,000.

We have here eighteen cases, [1] in every one of which there was a claim more or less well founded that the person arrested was guilty of an offense justifying

[1] For additional like cases see Italian - Venezuelan Commission (Note to Giacopini Case) in Volume X of these *Reports*.

the arrest, and in each case it turned out that the cause was not sufficient in proof to require a hearing. The persons thus arrested were men of more or less substance and character, but none, exclusive of those receiving the two high sums awarded, occupied any particular official rank or position, and the awards in each case meant substantially the measure in the given case of the value set on individual liberty and the indignity to that personal liberty by an unauthorized and unlawful arrest and detention. Excluding the two large sums as not being of particular value in this inquiry and taking the sixteen cases remaining, we find that the average sum allowed is a little over $ 161 a day. Out of the sixteen cases there are four for sums less than $ 100 a day. There are six at $ 100 a day, or approximately that sum, and there are five for more that $ 200. Judged by this analysis of the opinions of other arbitral tribunals, the sum of $ 100 seems to be the one most usually acceptable, while a sum less that $ 100 is quite in the minority.

The purpose of the umpire has been to obtain as nearly as might be the average judgment of arbitral commissions on matters of import similar to the one in question, and aside from that criterion the cases were taken substantially in the order in which they appeared in the work cited, and hence are worthy of reliance as expressing the common finding upon this question by several different commissions.

It will be noted that in the case in hand there was no claim that the parties arrested and detained had themselves committed any offense or done any wrong against the Government of Venezuela, which is a proper feature to consider in estimating the indignity of arrest and detention to the individual and the complaining government.

The umpire believes, therefore, that he can properly advise, unofficially, the honorable Commissioner for Venezuela that a sum not exceeding $ 100 a day is not an excessive demand, but approaches the minimum sum rather than the maximum allowed in cases for illegal arrest and detention, and is apparently the favored allowance by arbitrators.

OPINIONS ON MERITS

Compagnie Générale des Asphaltes de France Case

A Venezuelan consul resident abroad has no right to demand of the captain of a vessel that he procure passports as a condition precedent to the clearing of his ship, and no Venezuelan law on this subject can possibly affect the case, which is governed by international law.

A Venezuelan consul who assumes to collect customs duties at Trinidad on goods to be entered at Venezuelan ports commits an act of Venezuelan sovereignty on British soil, which is an offense to the latter Government.

The refusal of the Venezuelan consul to clear a vessel for Venezuela, on the ground that because of complaints made of him to the colonial authorities at Trinidad his Government had refused him permission to make such clearances, is unlawful, because it is an act which not even a sovereign could perform for such a cause.

Ports in the hands of revolutionists can not be closed by governmental order or decree.[1]

Blockade of such ports can only be declared to the extent that the government declaring it has the naval power to make it effective.

Governments are alike responsible for the acts of their agents, whether such acts be directed or only ratified by silence or acquiescence.

Expenses of translations in preparation of claim allowed.

[1] See Italian - Venezuelan Commission (De Caso Case and Martini Case) in Volume X of these *Reports*.

PLUMLEY, *Umpire*:

The commissioners failing to agree on this claim it came to the umpire for his consideration and decision thereon.

The claimant is an English company, incorporated under the companies acts, having its office at 19 Coleman street, London, E. C., and owning a mining concession which it purchased at Guanipa, in the State of Sucre, Venezuela, upon which it commenced operations in March, 1902, the product being asphaltum or bitumen. In the prosecution of its work of mining it was obliged to depend solely for its laborers and food therefor upon importations from Trinidad, which laborers and food were sent to Guanipa from Port of Spain in sailing craft chartered by the company.

April 15, 1902, the company's attorney at Trinidad applied to the Venezuelan consul at Port of Spain to clear one of the company's sailing craft with a supply of food for the laborers at its mining concession, the goods to be shipped to Guanipa. This such consul refused to do unless he was then and there paid the full duties chargeable in Venezuela on such goods imported into that country, and also the sum of $ 20 for passports which had been on a previous occasion required by such consul to be issued to certain of the company's laborers. Under the compulsion of necessity, in order to prevent suffering among these laborers, and under a protest, the company's attorney paid to the consul the full amount of such duties, and also the required sum of $ 20 for the passports.

June 12, 1902, an agent of the company, a merchant of Port of Spain, asked such consul to clear the company's chartered vessel, the British cutter *Euterpe*, bound for Pedernales, in Venezuela. This the consul refused to do unless paid in advance the import duty payable in Venezuela and $ 20 for passports for persons then taking passage, as required in the previous instance. Again, under the compulsion of urgent necessity, the agent paid such consul said sum of $ 20 for passports and the full sum of said import duties, paying the duties on the ship's stores only, as she was leaving in ballast.

June 30, 1902, said agent again applied to such consul for a similar clearance, and it was granted under and upon the same conditions (except as to passports) as last previously mentioned and upon the payment of the full import duty payable in Venezuela.

On and after the 10th day of July, 1902, such consul refused to clear any vessel at all on behalf of this company, stating as his reason therefor that the company had made complaint to the colonial authorities at Trinidad of his previous action, as above stated, and that the permit enabling him to clear vessels for the mining companies had been withdrawn.

As a result of this refusal the company was unable to make use of its schooner *Euterpe*, lost three months of the charter, and was forced to maintain the crew while the ship was idle. It was also prevented from sending food and supplies to the mines, and the employees at that place, being in the verge of starvation, were compelled to leave their employment and go to Trinidad in open boats, and all mining operations of this company ceased.

It appears in the case that throughout the period from July 10 and afterwards other vessels were cleared by such consul for other mining companies in Venezuela.

The total claim, including cost of preparing the same, is £ 240 18s. 5d.

It also appears in the case that the ports of Pedernales and Guiria were during a part of the time covered by this complaint, if not during all of such time, in the hands of the revolutionists, and the country around about was also in their hands; and the fact that the port of Pedernales was understood by the consul to be in the hands of revolutionists at the time he was applied to, just previous

to the 15th of April, 1902, to clear the boat, was given by him as a reason why he was unable to dispatch the boat, since that was a port where this particular boat would call to pay the customs duties; but he, on being assured that the revolutionists had left Pedernales for Maturín on the 4th of that month, promised to dispatch the boat whenever the agent of the company was ready; but it was following this statement by the consul that the necessary papers were presented to him by the company's agent, and he declined to grant the clearance unless the sum of $ 20 for passports, issued on a previous occasion, was then paid him, and it was immediately following the payment of the $ 20 that the consul then declined to issue the clearance unless the full customs duties, which should be collected at a Venezuelan port, were paid to him in Trinidad in advance. Offers were then made by the agent of the claimant company several times, on the 14th and 15th of that month, to leave the amount on deposit with the consul, with the understanding that if the revolutionists collected anything on account of duties such payment was to be deducted from the amount so placed on deposit; but to this the consul would not consent.

It also appears, from the examination of the blue book, whenever a cargo was taken it had to go to the port of Guiria, as the boat could only enter the port of Pedernales when in ballast; that the proposition to go to Pedernales was on the occasion when the company's boat went in ballast, and because Guiria was at the time in the hands of the revolutionists. For the latter reason the consul refused to make out a clearance for Guiria, and the suggestion of Pedernales was made by the claimant's agent because of such refusal; and the reason the consul gave for demanding the duties at Trinidad was that he was afraid their boat might come across revolutionists, who would collect them. It also appears that the consul on one of these occasions required the agent of the claimant company to make out his papers in blank with permission to the consul to fill in the destination, and that the consul filled in the name of Guanipa, which was, in fact, a virgin forest, having no settlement excepting that of the claimant company, and having no Venezuelan representative there, and although the consul wrote in the papers the name of the commandant of Guanipa, there was no such person there and no government official of any kind.

It also appears, as early as April 23, 1902, that the colonial secretary, by order of the British governor at Trinidad, advised the consul that in demanding customs duties payable on the cargo of such vessels to the Government of Venezuela he had exceeded his powers and had assumed the right to commit an act of Venezuelan sovereignty on British territory.

It further appears that, in connection with refusing the dispatch unless the import duties were payable in advance, it was threatened that unless so paid the vessels would be destroyed as soon as they reached Venezuelan waters by the Venezuelan ship of war then in the harbor of Trinidad. It is also understood to be historic that on June 28, 1902, navigation of the Orinoco was prohibited by presidential decree, and in the same decree the extent of its coast line which embraced its mouth was declared blockaded, and the ports of Guiria, Caño Colorado, and La Vela de Coro were declared closed to navigation.

The honorable commissioner for Venezuela denies pecuniary losses to the company, since the duties were not in fact collected in Venezuela; insists that the refusal of clearance for Guanipa and the demand for passports were lawful, and that in nothing has the company suffered losses or made payment whereby it has a rightful claim against the Government.

The learned agent for the claimant Government does not press the repayment of the sum of $ 20 for passports paid April 15, 1902, and hence this part of the claim is not entertained by the umpire.

The question of passports as presented is not that the captain of the *Euterpe*

asked for them or for their extension on June 12, in which case there would be no question that the consul should receive a proper fee therefor, but the claim is that the consul made the issuing of passports for that occasion and the payment of his fees therefor one of the conditions precedent to his clearance of the boat, and that this requirement it was unlawful for him to make; that such demand was in violation of international agreement and the general laws and principles of commerce, and hence was in fact an illegal extortion of money for which a right of recovery exists.

Concerning passports the umpire understands the law to be that the Venezuelan consul resident at Trinidad has not the authority to issue them to a British subject, and can only countersign them *if requested* so to do; that it was wholly in the right of the captain of the *Euterpe* to sail for any port in Venezuela without having the passports of his passengers countersigned by the Venezuelan consul at Trinidad; that the matter of passports had nothing to do with the clearance of the *Euterpe*, and that it was error for the Venezuelan consul to insist upon their being a condition precedent to such clearance. No law of Venezuela, were there such, could change this right, which does not come from national but from international law. A Venezuelan law, as the umpire understands it, is limited in its application to Venezuelans. This holding as to passports seems to be in conformity with the Venezuelan law published in the Official Gazette at Caracas Monday, June 19, 1899.

To assume to collect in Trinidad import duties on goods to be entered at Venezuelan ports was an act of Venezuelan sovereignty on British soil. It was wholly without right and directly against the right of sovereignty which inhered in the British Government only. It could not be countenanced or permitted by and was a just cause of offense to that Government.

To take the other step and make the payment of these duties on British soil a condition precedent to the clearance by the Venezuelan consul of a British ship bound for a Venezuelan port was a most serious error on the part of such consul.

As between nations, the proprietary character of the possession enjoyed by a State is logically a necessary consequence of the undisputed facts that a State community has a right to the exclusive use and disposal of its territory as against other States, and that in international law the State is the only recognized legal person. (Hall's International Law, p. 48.)

Consular jurisdiction depends on the general law of nations, existing treaties between the two Governments affected by it, and upon the obligatory force and activity of the rule of reciprocity. * * * (Wharton, vol. 1, sec. 124, p. 797.)

A consul of the United States in a foreign port has no power to retain the papers of vessels which he may suspect are destined for the slave trade. (Wharton, vol. 1, sec. 124, p. 798, citing 9 Op. Attys. Gen., p. 426.)

The act of the Haitian legislature referred to can not be regarded as in conformity with that stipulation. It authorizes the consuls of that Republic to charge exorbitant fees on exportations from the United States; among others, 1 per cent on the value of cargo of the vessel. This, besides being illiberal in its character, is tantamount to an export duty, acquiescence in which by this Government would be a concession to that of Haiti of an authority in ports of the United States which has not been conferred on this Government by the Constitution. (Wharton, vol. 1, sec. 37, p. 143.)

In that reply the Haitian minister was informed, with respect to that portion of his note which related to the authentication by the consular officers of Haiti in this country of the invoices of the cargoes of vessels bound to the ports of that country, that the charge of 1 per cent on values for that proceeding is, after the most deliberate consideration, believed to be unduly exorbitant and tantamount to an export tax, which it does not comport with the dignity of this Government to allow to be exacted by any foreign authority within the jurisdiction of the United States.

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The Government of the United States being by its Constitution expressly prohibited from levying an export tax, it can not allow any foreign power to exercise here in substance or in form a right of sovereignty denied to itself.

No denial was made of the right of the Haitian Government at its discretion, so far as this may not have been limited by treaty, to impose duties on the cargoes of vessels from this country arriving in Haitian ports, but it was complained most positively that the present grievance of a consular fee of this character exacted in our ports is in its form derogatory to the sovereignty of the United States and that this character was not removed from it by the Haitian citation of the axioms of political economy that all duties are ultimately paid by the consumer. (Wharton, vol. 1, sec. 37, p. 144.)

[The charge of] 40 cents a head on cattle exported from Key West to Cuba is held by the Government of the United States to be a restriction on commerce of the United States and a burden onerous on American citizens engaged in American commerce, and must have the effect of excluding them finally from the Spanish colonial markets. It is a charge, moreover, upon whatever ground it may be placed, that is in itself anomalous. (Summary from Wharton, vol. 1, sec. 37, pp. 147-148.)

Our complaint is that as our commercial intercourse with Spain is mainly with her possessions in this hemisphere, exorbitant consular charges on United States vessels and their cargoes bound to such ports are virtually an export tax, which assuredly no foreign government can be allowed to exact in our ports, especially as such a power has not been granted to this Government. (Summary from Wharton, vol. 1, sec. 37, p. 156.)

There is but one way in which the proposal to collect 10 cents per ton of cargo from the vessels of the United States in Spanish ports could be regarded as defensible under international law, and that is by abandoning altogether the sophistical contention that it is a consular fee and collecting it as a distinct import tax *levied in Spanish ports* in addition to customs and other import dues prescribed by existing law. If *so levied* and collected on all foreign cargoes *brought within Spanish jurisdiction* without distinction of flag, this Government could not controvert the perfect right of Spain to adopt such a measure, but it could not look with equanimity on any partial measure the practical result of which would be the imposition of a discriminating duty of 10 cents per ton against the cargoes of vessels going from the United States to ports of Spain. (Wharton, vol. 1, sec. 37, p. 156.)

It does not appear to this Government a sufficient or just reparation for a wrongful act admittedly perpetrated by the Spanish officers of the consulate at Key West since 1876 to give orders that hereafter the wrongful tax shall not be collected. The case is conceived to be one where no less a reparation than the return of the illegally collected excess could satisfy either the right pertaining to the United States or the high sense of justice of Spain. It will doubtless be enough for you to call the attention of the minister of state to this point to insure the cheerful correction of the oversight and a prompt offer to refund the overcharge in question. (Wharton, vol. 1, sec. 37, p. 158, quoting Mr. John Davis, Sec. of State, June 23, 1883, to Mr. Foster.)

It is not material to the determination of the two preceding questions to discuss here other points which might be regarded as involved. So far as they have juridical value they will be treated inferentially at least in disposing of the questions next to be considered.

It was not in accordance with commercial usage, international law, or treaty agreement between the British Government and the Venezuelan Government that the Venezuelan consul should refuse clearance to the British ship *Euterpe* for Venezuelan ports because the asphalt company had complained to the colonial authorities of his previous acts. It is true he claimed that because of such complaints his Government had refused him permission to make such clearances. This, if true, would not aid the refusal, because it is an act which even a sovereign power could not rightfully perform for such a cause. But the umpire acquits Venezuela of any such charge. The consul must have misinterpreted his instructions in that regard. To destroy the established and

important business of several companies established under the concessions and with the direct approval of the Government, to imperil the lives of a large number of laborers for such a frivolous reason might seem possible to the consul, but it is without the comprehension of the umpire, and he is confident no such order based upon such a reason ever issued from the hands of the Venezuelan Government.

You will state that this Government does not question the right of every nation to prescribe the conditions on which the vessels of other nations may be admitted into her ports; that, nevertheless, those conditions ought not to conflict with the received usages which regulate the commercial intercourse between civilized nations; that those usages are well known and long established, and no nation can disregard them without giving just cause of complaint to all other nations whose interests would be affected by their violation; that the circumstance of an officer of a vessel having published in his own country matters offensive to a foreign government does not, according to those usages, furnish a sufficient cause for excluding such vessel from the ports of the latter * * *. (Wharton, vol. 1, sec. 37, p. 140, quoting Mr. Conrad, Acting Sec. of State, to Mr. Barringer, Oct. 28, 1852.)

An arbitrary refusal of the Spanish consul at New York to authenticate the signature of the Secretary of State, "an act appropriately belonging to the consular functions," on the ground that "he or his Government had conceived some displeasure toward the persons who have executed some of the papers accompanying the signature of the Secretary," is in contravention of international law and practice. (Wharton, vol. 1, sec. 123, p. 792, quoting Mr. Marcy, Sec. of State, to Mr. Magallon, Jan. 19, 1854.)

There shall be between all the territories of His Britannic Majesty in Europe and the territories of Colombia a reciprocal freedom of commerce. The subjects and citizens of the two countries, respectively, shall have liberty freely and securely to come with their ships and cargoes to all such places, ports, and rivers, in the territories aforesaid, to which other foreigners are or may be permitted to come, to enter into the same, and to remain and reside in any part of the said territories, respectively; also to hire and occupy house and warehouse for the purposes of their commerce, and, generally, the merchants and traders of each nation, respectively, shall enjoy the most complete protection and security for their commerce; subject always to the laws and statutes of the two countries, respectively. (Treaty of Apr. 18, 1825, between the Government of Great Britain and State of Colombia, ratified and confirmed by the Government of Venezuela, Oct. 29, 1834, Art. II.)

Indeed, the honorable Commissioner for Venezuela carefully avoids making any allusion to this statement of the consul and rests his opinion upon the other branch of the consul's contention, namely, that his action was founded on the fact that the port of Guiria was occupied by the rebels, stating that the consul "is forbidden to communicate with authorities imposed by the revolution." Such being the case, the consul must obey. It is also true that on June 28 the National Executive had declared all of these ports closed.

However important it was to Venezuela in its fight for the integrity of its Government to close these ports, it is historic that it was unable physically to establish an effective blockade of any of the ports in question. To close ports which are in the hands of revolutionists by governmental decree or order is impossible under international law. It may in a proper way and under proper circumstances and conditions in time of peace declare what of its ports shall be open and what of them shall be closed. But when these ports or any of them are in the hands of foreign belligerents or of insurgents, it has no power to close or to open them, for the palpable reason that it is no longer in control of them. It has then the right of blockade alone, which can only be declared to the extent that is has the naval power to make it effective in fact. [1]

[1] See the Italian - Venezuelan Mixed Claims Commission (De Caro Case, and Martini Case) in Volume X of these *Reports*.

There is, however, one form of closure which states are not free to adopt. In case they are attempting to put down a domestic revolt, they can not shut up ports in possession of the insurgents by merely declaring them no longer open to trade. Great Britain maintained this position successfully in 1861 against both New Granada and the United States. The Government of each of these countries claimed a right to close, by municipal regulation and not by blockade, certain ports held by revolted citizens. The discussion which followed made it quite clear that such a claim can not be sustained. A state is free to exclude both foreign and domestic vessels from any harbor over which it actually exercises the powers of sovereignty. But when its authority is at an end, owing to insurrection or belligerent occupation by a hostile force, it must fall back upon warlike measures; and the only warlike measure which will lawfully close a port against neutral commerce is an effective blockade (Lawrence, p. 584. Also cites Wharton, International Law Digest, secs. 359, 361. Glass, Marine International Law, pp. 105-107. Also see Hall, p. 727, where there is a note treating at length on this subject.)

It is noticed that the Venezuelan minister for foreign affairs lays much stress upon the fact that the consul of that Government at Trinidad warned some of the steamers not to repair to ports which were in possession of the insurgents, and claims that by going thither, despite the warning, they violated the law, and, therefore, that the Venezuelan Government is exonerated from accountability. Such an act, if it have any force, is obviously tantamount to blockade by proclamation only, an expedient which it might have been hoped was long since as obsolete as it is contrary to the law of nations. (U. S. - Vene. Claims Com., Convention of 1892, p. 454, J. C. B. Davis, Acting Sec. of State.)

The consul's warning and his threat of confiscation were alike unlawful. The danger of giving such warnings, if they are acted upon by the parties warned, is illustrated in the award that was rendered unanimously by the British - American Commission against the United States (United States Commissioner Fraser delivering the opinion) on account of a warning given by an officer of the United States Navy (Edward C. Potter) to a British vessel not to enter the port of Savannah after he had prevented her from entering the port of Charleston, when in fact no effective blockade was then established against Savannah. (See Vol. VI, Papers relating to the Treaty of Washington, pp. 153, 252-254. U. S. - Vene. Claims Com., Convention of 1892, pp. 488-489.)

The United States adheres to the following principles:

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Third. Blockades, in order to be binding, must be effective. (Mr. Seward, Sec. of State, to Mr. Jones, Aug. 12, 1861; Wharton, vol. 3, sec. 342, p. 280.)

The mandate of the Mexican Government was obviously tantamount to a blockade by notification merely, the illegality of which has invariably been asserted by the United States, and has been agreed to by Mexico in the treaty. (Wharton, vol. 3, sec. 361, p. 372. Mr. Forsyth, Sec. of State, to Mr. Monasterio, May 18, 1837, MSS., Mex.)

(England took the same position toward Brazil in 1827. Wharton, vol. 3, sec. 361, p. 372.)

It may be admitted that neither France nor the United States has acknowledged the legality of the blockade of an extensive coast by proclamation only, and without force to carry the same into effect. (Wharton, vol. 3, sec. 361, p. 372. Mr. Webster, Sec. of State, to Mr. Sartiges, June 3, 1852, MSS., France.)

Thus it has ever been maintained by the United States that a proclamation or ideal blockade of an extensive coast, not supported by the actual presence of a naval power competent to enforce its simultaneous, constant, and effective operation on every point of such coast, is illegal throughout its whole extent, even for the ports which may be in actual blockade; otherwise every capture under a notified blockade would be legal, because the capture itself would be proof of the blockading force. This is, in general terms, one of the fundamental rules of the law of blockade as professed and practiced by the Government of the United States.

And if this principle is to derive strength from the enormity of consequences resulting from a contrary practice, it could not be better sustained than by the terms of the original declaration of the existing Brazilian blockade, combined with its subsequent

practical application. (Wharton, vol. 3, sec. 359, p. 353. Mr. Forbes, minister of the United States to Buenos Ayres, to Admiral Lobo, commanding the Brazilian squadron blockading Buenos Ayres, February 13, 1826. Brit. and For. St. Pap.)

Lord John Russell said, " The question is one of considerable importance. The Government of New Granada has announced, not a blockade, but that certain ports of New Granada are to be closed. The opinion of Her Majesty's Government, after taking legal advice, is that it is perfectly competent for the government of a country in a state of tranquillity to say which ports shall be open to trade and which shall be closed; but in the event of insurrection or civil war in that country it is not competent for its government to close the ports that are de facto in the hands of the insurgents, as that would be an invasion of international law with regard to blockade." (Wharton, vol. 3, sec. 359, p. 355.)

This Government, following the received tenets of international law, does not admit that a decree of a sovereign government closing certain national ports in the possession of foreign enemies or of insurgents has any international effect unless sustained by a blockading force sufficient to practically close such ports.

Mr. Lawrence thus states the rule drawn from the positions taken by the administrations of Presidents Jefferson and Madison during the struggles with France and England which grew out of the attempt to claim the right of closure as equivalent to blockade without effective action to that end: " Nor does the law of blockade differ in civil war from what it is in foreign war. Trade between foreigners and a port in possession of one of the parties to the contest can not be prevented by a municipal interdict of the other. For this, on principle, the most obvious reason exists. The waters adjacent to the coast of a country are deemed within its jurisdictional limits only because they can be commanded from the shore. It thence follows that whenever the dominion over the land is lost by its passing under the control of another power, whether in foreign war or civil war, the sovereignty over the waters capable of being controlled from the land likewise ceases." (Wharton, vol. 3, sec. 361, p. 376. Lawrence's note on Wheaton, Pt. III, ch. iii, sec. 28, 2nd annotated ed., 846.)

Professor Perels, judge of the imperial admiralty court in Berlin, in a treatise on international maritime law, published in 1882, holds that there can be " without blockade no closure of a port not in possession of the sovereign issuing the decree." (Wharton, vol. 3, sec. 361, p. 378.)

Mention is made in the memorial that throughout the same period in which the consul was refusing to clear the vessels of the claimant company he was clearing the vessels of other mining companies, subjects or citizens of certain other countries who had concessions or mining interests in Venezuela accessible through the same ports. This might be an important factor, but as the claim is determined on other grounds, it does not become necessary or wise to consider it or to pass upon it.

The umpire holds that the contentions of the claimant government concerning compulsory payment for passports and of duties and damages for detention of the *Euterpe* are well founded, and that the question of responsibility of Venezuela for the acts of their consul at Trinidad is found in the failure of the Government of Venezuela, after knowledge thereof, to make seasonable disclaimer of his acts and seasonable correction of his mistakes. If the respondent Government authorized or directed some of these acts, or only ratified them by silence and acquiescence, its responsibility is the same. In determining the issues raised in this case, especially those following June 28, 1902, the umpire is not passing, in any part, upon the propriety or wisdom of the governmental policy of Venezuela in that regard. He can readily assume that it seemed to those in power that the exigencies of the situation required drastic measures for the preservation of the national life. In such case, however, it must have been appreciated that loss would ensue and that reparation therefor must follow.

A State is responsible for, and is bound by, all acts done by its agents within the limits of their constitutional capacity or of the functions or powers intrusted to them. When the acts done are in excess of the powers of the person doing them the State is

not bound or responsible; but if they have been injurious to another State it is, of course, obliged to undo them and nullify their effects as far as possible, and, where the case is such that punishment is deserved, to punish the offending agent. It is, of course, open to a State to ratify contracts made in excess of the powers of its agents, and it is also open to it to assume responsibility for other acts done in excess of those powers In the latter case the responsibility does not commence from the time of the ratification, but dates back to the act itself. (Hall's International Law, 4th ed., sec. 106, p. 338.)

In case of Saml. G. Adams *v.* Mexico, brig *Geo. B. Prescott.* Here the brig arrived at Tampico, Mexico, shortly after the garrison had declared for the reactionary revolution of Zuloaga, and subsequently General Garcia of the constitutional government besieged and blockaded the place, and as the brig was leaving the port after having paid all port dues he claimed her, demanding that the dues, amounting to $ 38, should be paid to him. In consequence of the refusal of the master to comply with his demand the brig was detained for a number of days. Claim was made before the Commission for the detention, and it was allowed. (Moore's Int. Arb., 3065.)

In case of the *Galaxy*, before the United States - Mexican Commission, convention of 1839. The vessel entered the river Tabasco, in Mexico, intending to proceed up the stream to the city of that name. In consequence of " political disturbances " she was not permitted to do so. The captain and his ship were kept at the mouth of the river from January 1, 1830, till the 5th of February following, by order of the military commandant of the city of Tabasco, " in consequence of political dissension in which the said commandant was engaged with the commandant of the principal bar." The umpire and commissioners joined in allowing for the detention of the vessel and for the detention of the captain. (Moore, 3265.)

In case of the *Only Son.* Mr. Bates, umpire of the mixed commission under the convention between the United States and Great Britain of 1853, awarded $ 1,000 to the owners of the schooner *Only Son* for the wrongful action of the collector of customs at Halifax, Nova Scotia, in compelling the master of the schooner, whose intention was merely to report for a market and proceed elsewhere if circumstances rendered it advisable, to enter his vessel and pay duty on his cargo. The amount allowed was about the amount of the duties paid. In the diplomatic correspondence which preceded the British Government acknowledged its liability to pay any loss sustained by reason of the act of the collector, but claimed that no loss was suffered. (Moore, 3404-3405.)

In the case of the *William Lee*, whaling ship, detained three months by the captain of the port, who refused to give him a clearance. During its detention ship was damaged so that $ 4,000 was required to repair, and the whaling season was over. The Government of Peru admitted their liability for the sum required to repair the ship, and there was added to this by the umpire $ 1,500 for expenses during detention, and interest at the rate of 6 per cent per annum and a certain amount for demurrage, so that all amounted to $ 22,000. (Moore, 3405-3406.)

In the case of the *Labuan,* American and British Claims Commission, treaty of May 8, 1871. On the 5th of November, 1862, ship was in New York laden with merchandise destined for Matamoras. On that day her master presented the manifest to the proper officer of the custom-house at New York for clearance, but such clearance was refused, and refusal continued up to the 13th of December, 1862, on which date it was granted. The memorial claimed that the ship was detained by reason of instructions received by the custom-house officers from the proper authorities of the United States to detain the *Labuan* in common with other vessels of great speed destined for ports in the Gulf of Mexico, to prevent the transmission of information relative to the departure or proposed departure of a military expedition fitted out by the authority of the United States. Damages were claimed in the nature of demurrage at the rate of $ 1,000 per day, thirty-eight days. The Government of the United States claimed a right through necessary self-protection to detain the ship. The counsel for the claimant maintained that the detention of the *Labuan* was, in effect, a deprivation of the owners of the use of their property for the time of the detention for the public benefit; that it was, in effect, a taking of private property for public use, always justified by the necessity of the State, but likewise always

involving the obligation of compensation. He cited 3rd Phillimore, 42, and Dana's Wheaton, 152, n.

The Commission unanimously made an award in favor of the claimant for $ 37,392. (Moore, 3791.)

In the case of the brig *Ophir*. In the mixed commission between the United States and Mexico, under the convention of April 11, 1839. This vessel was detained at Vera Cruz in consequence of an inhibition issued by the local authorities of the territory of the departure of a vessel from the port. This inhibition was based upon the existence of local political disturbance. The umpire awarded $ 400, with interest, for its detention. (Moore, 3045.)

See also Moore, 3119-3120, 3624-3625, 4612-4617; Maxims of Heffter, adopted and found in Woolsey's International Law, 85-86.

It does not appear to this Government a sufficient or just reparation for a wrongful act, admittedly perpetrated by the Spanish officers of the consulate at Key West since 1876, to give orders that hereafter the wrongful tax shall not be collected. The case is conceived to be one where no less a reparation than the return of the illegally collected excess could satisfy either the right pertaining to the United States or the high sense of justice of Spain. (Wharton, vol. 1, sec. 37, p. 158.)

The umpire is not disregardful of the claim of the honorable Commissioner for Venezuela that, since the duties were not, in fact, again paid, the claimant company has suffered no loss, and hence, in equity, has no rightful demand for their repayment; but it is the opinion of the umpire that an unjustifiable act is not made just because, perchance, there were not evil results which might well have followed. The claimant Government has a right to insist that its sovereignty over its own soil shall be respected and that its subject shall be restored to his original right before consequent results shall be discussed. The umpire having found that the requirement of import duties before clearance was an unlawful exaction and a wrongful assumption of Venezuelan sovereignty on British soil, it is just and right, and therefore justice and equity, that these duties be restored to the claimant company.

The honorable Commissioner for Venezuela having objected to an allowance for expenses attending the preparation of this claim the umpire allows only so much thereof as was incurred in making translations for the use of this Commission, which sum he deems just and equitable.

The umpire expresses his hearty appreciation of the able and thorough manner in which this case has been presented to him both orally and in writing by the members of this Commission who have performed that duty for their respective Governments.

The umpire allows interest at the rate of 3 per cent per annum for one year, and holds the respondent Government liable to the claimant Government in the sum of £ 214, for which amount the award may be prepared.

KELLY CASE

Participation in a revolutionary movement so as to deprive the claimant of the right of intervention by his government, must be proved beyond all reasonable doubt in order that it may be pleaded as a valid defense to a claim for the value of neutral property destroyed by government troops.

PLUMLEY, *Umpire*:

This is the case of James Nathan Kelly, a native of the island of Trinidad, a British subject, and who for some thirteen years prior to the 12th of March, 1901, had lived near Río Grande, not far from Guiria, and was a shopkeeper and the owner of a cocoa plantation, and was also the owner of a cutter of about 3 tons. He complains that in January, 1900, some $ 100 worth of goods

were taken by one Tomasito Guerra, at the head of a regiment, understood by the umpire to have been Government troops, and that in January, 1901, the Venezuelan troops under Colonel Rueda, the chief in command being General Faia, came, and this time he was ruined; that he was arrested and taken before a court-martial. While he was gone his shop was broken into, his dwelling house entered, his furniture destroyed, his clothing and jewels taken, as were 40 bags of cocoa and $ 947; that, later, to protect his wife from outrage he sent her under cover of night over the hills and rivers from Río Grande to Guiria on foot, and that she paid her passage money of $ 18 and sailed from Guiria to Trinidad; that he himself was concealed in the woods for nearly a month, when he made his escape to Trinidad, where he still remained at the time of giving his affidavit, December 23, 1902. He claims his losses to consist of —

Cash ($ 150 and $ 947)	$ 1,097
Cocoa, 40 bags, at $ 41 per bag (200 pounds)	1,640
Shop goods	150
Furniture	250

The claimant himself and his wife make their several affidavits. He also introduces the affidavit of one Julio Cortes. By this witness it is stated that the shop was fairly stocked; that Kelly was arrested; that they took away a good deal of cocoa belonging to Mr. Kelly, and that Mr. Kelly had a very fine cocoa estate, which yielded very well. There is no statement by this witness as to the amount, condition, character, or value of the furniture in the house, or that Kelly lost any furniture, and there is no statement by either Mr. Kelly or his wife as the to amount, condition, or character of his furniture or any description of the contents of his shop or what kind of business he was doing as a shopkeeper.

Inspection of the testimony of Mr. and Mrs. Kelly shows serious contradiction on an important matter. He says that at the time of this raid by Colonel Rueda he had 12 bags of dried cocoa in his house, and that this was taken by these troops. He also states that he had 28 bags of dried cocoa in his house, which he was about shipping, which were also *taken by them.* Mrs. Kelly says that at the time of this raid they had 12 bags of cocoa, which were partly under the bed, and which were taken away, and that *on a former occasion* 28 bags, which her husband was about shipping, and which were *then on the beach*, were taken; that these 28 bags were not in the house at this time, but had been placed upon the beach for shipment, and while on the beach were taken — by whom or when she does not say. Her statement is too vague to be of probative value taken alone, but it is absolutely contradictory to that of Mr. Kelly, and if she is to be believed he can not be on that point.

By witnesses on the part of the respondent Government, some of whom treat the case apparently very fairly, it is learned by combining their testimony that the furniture in the house consisted of seven chairs, two cedar tables, two benches, one old bed and mattress on two benches; and it seems to the umpire that their estimate of value at 200 bolivars, or $ 40, is a very liberal estimate. It conforms altogether better with the umpire's judgment as to the probabilities of value than the claim of Mr. Kelly in that regard.

The umpire also thinks that the value placed on the stock of goods in the shop by some of these apparently open-minded witnesses called by the respondent Government is much nearer the actual facts than the claim of Mr. Kelly, and that a valuation of $ 60 is very liberal. But as the umpire understands the claim of $ 150 to cover both the instance of 1900 and of 1901 he is inclined to allow it without reduction.

Since it was the duty of Mr. Kelly to give such a detailed statement of the conditions underlying the claims made as to put the triers of his case into as close a relation to the facts as can be done reasonably, he has entirely failed in this regard both as to his furniture, which he claims was taken or destroyed, and as to the goods which comprised the store of which he claims to have been deprived. It is important in a case of this kind to know whether the goods taken were such as might properly enter into the use of the Government of Venezuela, so that it could be said to be benefited in any way by the taking. From the general trend of the evidence for the defense — and it is there we are obliged to look for all the details and for all the supporting evidence in matters of detail, at least for Mr. Kelly — we find that he is accredited with a plantation substantially as he has alleged, but that he is not accredited with having on hand any large deposit of cocoa at any one time. This does appear, however, that Mr. Kelly was heard to demand of Colonel Rueda a return of 3 bags of cocoa, which he claimed were taken by the troops of this officer while under his command. It also appears there were 9 bags of cocoa, which were taken from his boat at the time he was prevented from making his trip to Trinidad by the advent of the Government steamer *Augusto*, and when returning to the beach he stored his cocoa, evidently awaiting an opportunity to take it to Trinidad when he would not be intercepted by the Venezuelan Government. So that Mr. Kelly is supported through different sources in his claim concerning cocoa to the extent of 12 bags in all, and 12 bags is all that his wife says were taken at this time, and as to the 28 bags there is no evidence excepting the thoroughly contradicted evidence of Mr. Kelly himself that these were ever taken by Government troops.

The evident exaggeration by Mr. Kelly as to his stock of foreign goods and the cocoa makes the umpire very uncertain as to the amount of money which he lost; but as he and his wife support one another substantially as to the $ 947, he stating the precise sum and she saying that it was nearly $ 1,000, and as there is nothing to antagonize that claim either in the claim itself as being improbable, or as being improbable that it should be kept in the house by people who are living remote from a large town or city, and who are well known to be jealous of banks, and as Mr. Kelly and his wife are evidently thrifty people, industrious and saving, so far as the umpire can gather from all the testimony, he is inclined to credit their statement and accept it for the sum of $ 947. He does not find proof satisfactory to him of any other sum of money to be added to this.

The question then arises whether the facts shown by the Venezuelan Government by their witnesses are sufficient to establish practically beyond a reasonable doubt that Mr. Kelly was a revolutionist; that he was so entangled in the political affairs of Venezuela that he had practically denationalized himself, and had rendered it impossible for the British Government to intervene in his behalf.

As this charge is a very grave one, involving acts which are treasonable if he were a citizen of Venezuela, justice and equity require that even in a civil matter the facts themselves and the deductions to be made therefrom should rest upon indubitable proof, and so strong and forceful as to practically do away with all doubt concerning the charge made. Concerning this we have, first, the negative facts, which after all have an affirmative value, of the witnesses for the respondent Government from the vicinity of Mr. Kelly's home, none of whom assert any knowledge that Mr. Kelly had been a leader in revolution or a revolutionist at all. On the contrary they say that they know nothing of that kind, although one or two state that they had heard he was mixed up in political matters, but knew nothing to that effect. So much of the evidence for the respondent Government taken from his own vicinage counts in Mr. Kelly's favor

quite decidedly. Then there is the testimony of the man who says that he saw Kelly as a revolutionary leader with one guerilla, and that Kelly apologized or explained his being in the revolutionary ranks by saying that he had been compelled to do this as he had been robbed by the Venezuelan Government.

The testimony tending to establish the fact of Mr. Kelly's relation with revolutionary matters is to show that he was assisting in the revolution of General Hernandez, and we have the authority of the honorable Commissioner for Venezuela that this revolution began on the 22nd of October, 1899, and ended in June, 1900. This claim for damages is based on the wrongful acts of Government troops in January, 1901; and it appears that after these damages occurred Mr. Kelly hid in the woods for a month, and then took boat to Trinidad, where he remained and where he was at the time of giving his affidavit in this case, which was the 23rd of December, 1902. So that it is absolutely impossible that the witness can be correct in this statement. He either has mistaken his man or he has mistaken the facts. In either case he becomes a doubtful witness, and his testimony is too badly shaken to place any reliance upon it in a matter so important. In the matter of the evidence tending to show that Mr. Kelly made some preparations in association with some of his neighbors to meet with force the anticipated raid from the war sloop *Augusto*, it is sufficient to say that it amounted to nothing. Nothing is shown to have been done, excepting that for a few days or nights they were banded together and took turns on sentry duty; but they made no attacks upon anyone, and, so far as it appears, were not attacked, and their fears were fortunately groundless and their labors happily fruitless. It does appear that there were well-grounded fears that the advent of Government troops, no less than revolutionary troops, meant pillage, plunder, devastation, destruction, and anticipated outrage of their women, instead of protection, peace, security in property and person, which is the relation that the troops of the Government should sustain, so far as possible, in the midst of revolution, and that under such conditions men arm and even shoot in defense of their property and their homes is to be commended, and the umpire finds nothing in this to criticise and nothing in it to extract a single grain of proof that Mr. Kelly was a revolutionist. Again, the witnesses who claim to connect Mr. Kelly with the army of the revolution attach him to General Ducharme and make him so intimately connected with this general as to be the bearer of his dispatches and his confidential personal oral orders, so that it is impossible not to conclude that if Mr. Kelly had been thus associated with him he would have known of the fact. Hence the importance of his testimony, which is that Mr. Kelly was never engaged in any of the political matters of his district and has never been connected with him in any of his revolutionary efforts. The testimony of two other witnesses who claim to know assert possitively that Mr. Kelly was not engaged in any way in the political matters of Venezuela.

Out of this conflicting testimony the umpire can certainly find no fact so settled and so certain as therefrom to establish that Mr. Kelly had been so far engaged in any political matters in Venezuela or so opposed to the Government of Venezuela as to deprive him of his rights as a neutral subject of Great Britain to the intervention of his Government for protection, when such intervention is otherwise permissible.

It is therefore the opinion of the umpire that the claim of Mr. Kelly should be allowed in the sum of £ 297, which amount is the sum allowed for damages to property and 3 per cent interest thereon from the 12th of March, 1901, the date when this claim was first presented to the Venezuelan Government, to October 20, 1903, the date of this award.

AROA MINES (LIMITED) CASE — SUPPLEMENTARY CLAIM

(By the Umpire:)

Damages will not be allowed for injury to persons, or for injury to or wrongful seizure of property of resident aliens committed by the troops of unsuccessful rebels. [1]

Interpretation of the meaning of the words "claim," "injury," "seizure," "justice," and "equity," as used in the protocol.

CONTENTION OF BRITISH AGENT

In supporting the claim of the Aroa mines for damages due to the action of revolutionaries, it is desirable that the position taken up by His Majesty's Government should be clearly stated and explained.

During the events which led to the signing of the protocol of February 13, 1903, and when a decision was necessary as to what demands ought to be made on the Venezuelan Government, the question of damage due to the acts of insurgents naturally became prominent. His Majesty's Government, having carefully considered the past and present circumstances of Venezuela, which are of a very exceptional kind, came to the conclusion that in dealing with claims of this nature two alternative methods were possible:

(1) That foreign claimants should not receive compensation for damage caused by revolutionaries.

(2) That if any foreign claimants received such compensation British subjects should receive the same treatment.

Great Britain enjoys by treaty the advantages of the most-favored nation, and for this as well as other reasons took the view stated above. To show that His Majesty's Government had always consistently held this view, it may be pointed out that in forwarding claims to the Venezuelan Government the British minister had, long before the blockade, always asked that they should be settled on the same principle as might be applied to other nations.

In the view of His Majesty's Government it was preferable that of the two principles stated above No. 1 should be the one adopted, failing this it was essential to secure the alternative, No. 2.

At the same time it was considered that, owing to the light in which revolutions had come to be regarded by the people of Venezuela, there would be nothing contrary to justice in acting upon the latter principle.

The only way to give effect to these views seemed to be to obtain from Venezuela an agreement wide enough to cover the second principle if it should become necessary to act upon it.

His Majesty's Government have throughout acted consistently on these lines and have made no secret of the position taken up by them on the matter.

Accordingly, upon the sitting of the Commission, His Majesty's Government brought foward only such claims as were based upon the acts of the Venezuelan Government itself, without in any way giving up the right to present those of the other category if it should prove necessary. This course was followed until revolutionary awards had been made in favor of French and German claimants.

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[1] This principle was followed in the cases of A. A. Pearse, F. G. Fitt, heirs of Christian Philip, W. N. Meston, W. A. Guy, Fortunato Amar, L. L. Michenaux, and Abdool Currim, which are not reported in this volume. For discussion of principle here laid down see the German - Venezuelan Commission (Kummerow Case), the Italian - Venezuelan Commission (Sambiaggio Case, Guastini Case) and the Spanish - Venezuelan Commission (Padrón Case, Mena Case), in Volume X of these *Reports*.

Since therefore, it was no longer possible to act upon the principle originally favored, it was decided to present to the Commission claims for damages due to the acts of the insurgent forces. These claims are supported upon the ground that the recovery of damages so caused is recognized by the protocol of February 13.

In order to show what the terms of the protocol were meant to include, it is necessary to refer to the circumstances under which the protocol was signed and to what had occurred previously.

His Majesty's Government having for a long time presented to the Venezuelan Government claims due not only to the acts of their own troops, but also to the acts of insurgents, without being able to obtain any redress, were at length compelled, in common with the German Government, to declare a blockade of Venezuelan ports. This blockade was not raised until after the signing, and upon the terms of the protocol of February 13.

This protocol was settled after negotiations between His Majesty's representative and Mr. Bowen as representing the Venezuelan Government. In order correctly to interpret the terms of the protocol regard should be paid to the stage of the negotiations at which the exact words ultimately used first appear, and to the connection in which they are there used.

The first step taken by the Venezuelan Government toward the raising of the blockade was a communication from Mr. Bowen through the Government of the United States to His Majesty's Government, asking that they and the German Government would refer " the settlement of claims for alleged damage to the subjects of the two nations during the civil war to arbitration."

To this a reply was sent by the two Governments, which is here quoted, December 23, 1902:

> His Majesty's Government have in consultation with the German Government taken into their careful consideration the proposal communicated by the United States Government at the instance of that of Venezuela.
>
> The proposal is as follows:
>
> That the present difficulty respecting the manner of settling claims for injuries to British and German subjects during the insurrection be submitted to arbitration.
>
> The scope and intention of this proposal would obviously require further explanation. Its effect would apparently be to refer to arbitration only such claims as had reference to injuries resulting from the recent insurrection. This formula would evidently include a part only of the claims put forward by the two Governments, and we are left in doubt as to the manner in which the remaining claims are to be dealt with.
>
> Apart, however, from this some of the claims are of a kind which no government would agree to submit to arbitration. The claims for injuries to the persons and properties of British subjects owing to the confiscation of British vessels, the plundering of their contents and the maltreatment of their crews, as well as some claims for the ill usage and false imprisonment of British subjects, are of this description. The amount of these claims is apparently insignificant, but the principle at stake is of the first importance, and His Majesty's Government could not admit that there was any doubt as to the liability of the Venezuelan Government in respect of them.
>
> His Majesty's Government desire, moreover, to draw attention to the circumstances under which arbitration is now proposed to them.
>
> The Venezuelan Government have, during the last six months, had ample opportunities for submitting such a proposal. On the 29th of July and again on the 11th of November it was intimated to them in the clearest language that unless His Majesty's Government received satisfactory assurances from them, and unless some steps were taken to compensate the parties injured by their conduct, it would become necessary for His Majesty's Government to enforce their just demands. No attention was paid to these solemn warnings, and, in consequence of the manner in which they were disregarded, His Majesty's Government found themselves

reluctantly compelled to have recourse to the measures of coercion which are now in progress.

His Majesty's Government have, moreover, agreed already that in the event of the Venezuelan Government making a declaration that they will recognize the principle of the justice of the British claims, and that they will at once pay compensation in the shipping cases and in the cases where British subjects have been falsely imprisoned or maltreated, His Majesty's Government will be ready, so far as the remaining claims are concerned, to accept the decision of a mixed commission which will determine the amount to be paid and the security to be given for payment. A corresponding intimation has been made by the German Government.

This mode of procedure seemed to both Governments to provide a reasonable and adequate mode of disposing of their claims. They have, however, no objection to substitute for the special Commission a reference to arbitration with certain essential reservations. These reservations, so far as the British claims are concerned, are as follows:

1. The claims (small, as has already been pointed out, in pecuniary amount) arising out of the seizure and plundering of British vessels and outrages on their crews and the maltreatment and false imprisonment of British subjects, are not to be referred to arbitration.

2. In cases where the claim is for injury to or wrongful seizure of property, the question which the arbitrators will have to decide will only be (a) whether the injury took place and whether the seizure was wrongful, and (b) if so, what amount of compensation is due. That in such cases a liability exists must be admitted in principle.

3. In the case of claims other than the above, we are ready to accept arbitration without any reserve. * * *

It will be seen from this that in the first place all claims are to be submitted to arbitration; that as regards claims " arising from the recent insurrection " where such claims are for injury to or wrongful seizure of property the allied Governments will only accept arbitration on the express terms " that in such cases a liability exists must be admitted in principle." Finally, in the case of other claims arbitration without any reserve is accepted.

It is clear that a meaning beyond the ordinary submission to arbitration must be given to this very pointed and special admission of liability. It admits as not open to discussion some principle which might be open to argument if nothing more than a bare submission to arbitration were found.

As it occurs in this document the meaning is plainly that —

> As regards all claims arising out of the recent insurrection, whether due to their own acts or to those of insurgents, the Venezuelan Government must admit their liability. Otherwise the blockade will not be raised.[1]

These particular terms were never afterwards discussed. In the protocol the Venezuelan Government admit their liability in these very words, and therefore with the same meaning.

There is nothing unreasonable in this. This treaty was made under pressure of a blockade. Under such circumstances what is more natural than to find that the blockading power has insisted upon its own standard of right?

To say that in face of the words " the Venezuelan Government admit their liability " the Venezuelan Government are only to be held liable under accepted and recognized principles of international law is to say that these words carefully and deliberately inserted in an important section of a treaty are without meaning or bearing on the effect of the treaty.

If it be suggested that " admit their liability " means that the Venezuelan Government agree not to raise as a defense that these specially mentioned

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[1] See Appendix to original report, p. 1033. Not reproduced in this series.

claims are a matter for the law courts, it may be pointed out that if a claim which would otherwise be the subject of ordinary litigation be submitted to arbitration, that fact alone means that all other jurisdictions are, as regards that claim, set aside and superseded by the jurisdiction of the arbitral tribunal. Therefore, the further provision that the Venezuelan Government admit their liability would be superfluous and meaningless in the class of claims here submitted to arbitration.

This admission, then, is an acknowledgment on the part of the Venezuelan Government that they take upon themselves liability for all claims of the kind specified arising out of the insurrection, whether done by themselves or by insurgents.

Since injury to or seizure of property is necessarily wrongful in the case of insurgent forces, it is only needful to prove that they took place and arose out of the insurrection, and liability at once attaches to the Venezuelan Government, the only remaining question being one of amount.

It has already been indicated that this liability for the acts of insurgents in the case of a country so circumstanced is a doubtful point of international law, depending as it does upon the question whether the country is " well-ordered to an average extent " (Hall, p. 226), a point difficult and embarrassing to discuss. The admission of liability found here is therefore just such as would be expected under the circumstances.

It is not necessary to pursue the matter further, since, for the present purpose, it is sufficient to rely on the liability admitted in the protocol, without reference to the principles of international law. Attention is called to the point merely to show that His Majesty's Government have not acted in an arbitrary or unreasonable manner.

Upon another ground also this tribunal ought to interpret the words " admit their liability" in the sense above stated.

The treaty between Great Britain and Venezuela contains the following provision:

> In whatever relates to the safety of * * * merchandise, goods, or effects, * * * as also the administration of justice, the subjects and citizens of the two contracting parties shall enjoy * * * the same liberties, privileges, and rights as the most favored nation.

All awards given by the Mixed Commissions are to be paid out of one fund. It would therefore, in view of the above treaty, be a denial of equity if the subjects of any other nation were to be paid sums of money out of this fund upon a more favorable principle than British subjects.

German and French subjects have now obtained awards for damage caused by revolutionaries, which will be so paid.

When, therefore, words have to be interpreted which admit of any possible doubt as to their meaning — though it is contended that no such doubt exists here — regard must be paid first to the treaty, and secondly to the provision of the protocol, that decisions are to be based upon absolute equity. In such a case it is the duty of this tribunal to give to the words the most favorable possible interpretation as regards British subjects if by so doing the treaty rights of British subjects will be the better maintained. Therefore, in view of the treaty, the admission of liability must be read in the sense of a stipulation that, in awarding payments out of the common fund, British subjects shall be paid on as favorable a principle as the subjects of any other nation.

That is, since subjects of other nations receive payments on the ground of the liability of the Venezuelan Government for acts of insurgents, " admit their liability " must be read as conceding to British subjects the right to be paid

on the same principle, i.e., for damages caused by the acts of revolutionaries.

GRISANTI, *Commissioner*:

His Britannic Majesty's learned agent in his last argument confines himself almost exclusively to examining the circumstances and discussions which preceded the signing of the protocol of February 13, 1903, maintaining that the Government of Venezuela is liable for damages caused by revolutionists to British subjects.

The most suitable manner of interpreting a treaty between nations and a contract between private parties is to analyze carefully and minutely, without prejudice, the clauses of the treaty, which are the plain, true, authentic, and solemn meaning intended to be conveyed by the contracting parties, and of the reciprocal duties assumed by them by virtue of their mutual agreement. The examination of the preliminary work only entails the examination of the contentions and arguments which each of the contracting parties made and attempted to maintain, contentions and arguments which must necessarily be at variance and even contradictory, as thus only could the controversy exist. With regard to the preparatory work of legislation, Laurent says:

> En apparence, les travaux préparatoires sont le commentaire authentique de la loi, puisque c'est le législateur lui-même qui nous apprend ce qu'il veut; en réalité, ces travaux nous font seulement assister à l'élaboration de la loi, ils ne sont pas l'œuvre du législateur, mais de ceux qui ont contribué à faire la loi. Le texte seul a une autorité légale. Tout ce qui a été dit pendant que la loi s'elaborait n'est pas la loi, et on ne peut s'en prévaloir pour ajouter au texte, ou pour le modifier en quoi que ce soit, car ce ne sont que des opinions individuelles de ceux qui ont concouru à faire la loi. (Cours Elémentaire de Droit Civil, Vol. I, p. 22.)

This same criterion must be applied to the study of preliminary conferences leading to the negotiation of a treaty, and consequently to those preceding the protocol, confining its application, naturally, to the contracting parties. Because, although it is true that the blockade and cannons of the allied powers greatly strengthened their demands, it is not true that they could enforce their absolute will. Such will had to be held in check, but unfortunately it was not curbed as much as justice demanded.

Now, confining myself to the argument of His Britannic Majesty's agent in regard to the protocol itself, I am sorry to have to say that the meaning he gives to Article III is at variance with the proper interpretations of conventions.

Said article provides that "The Government of Venezuela admit their liability in cases where the claim is for injury to, or wrongful seizure of, property," etc., which clause can only be understood in its legal sense — that is to say, that the Republic answers for injuries caused by the National Government and by such persons as represented it. For Venezuela to assume responsibility for damages caused by revolutionists contrary to the principles of unquestioned justice in the general opinion of statesmen, and in the practice of nations, it would be necessary that it should be so stipulated in the protocol expressly and in the clearest manner; and it is not so stipulated. Justice and equity do not admit of amplifying the clause of the protocol to include and sanction an obligation which is contrary to principle. In case the clause was not plain (which it is) it could not be interpreted in a sense which would burden the party bound (that is, Venezuela) as violating accepted juridic principles. These keep powerful parties within the bounds of law, whereby they support the weaker and maintain the peace of the world.

His Britannic Majesty's agent affirms that Great Britain considered it preferable to strike a medium between these two extremes:

1. That foreign claimants should not receive compensation for damages caused by revolutionists.

2. But that if any foreign claimants received such compensation British subjects should receive the same treatment.

And that, although she considered the first preferable, she adopted a general form which would embrace the second if necessary.

This argument, which is of itself inadmissible, has already been refuted. From the moment two nations enter into a treaty they must agree in the sense and meaning of the same; and it is not right for one of the parties to reserve to itself *in pectore* the privilege of enlarging its scope in performance for reasons independent of the intention of both. It must be observed that this Mixed Commission has been acting since June 1, and it was not until September that His Britannic Majesty's agent decided to present the first claim for revolutionary damages; such determination was made in view of two awards made by the umpires of the Venezuelan-French and the Venezuelan-German mixed commissions. It is therefore evident that these awards caused the British Government to set aside their primary conviction, which was wholly in accordance with justice and equity.

His Britannic Majesty's agent asserts that by virtue of Article IX of the treaty of 1835 between Venezuela and Great Britain the subjects of the high contracting parties shall, in the territory of the other nation, enjoy the same privileges, prerogatives, and rights as those of the most-favored nation. This is true, but said clause can only apply to the matters purposely designated in the article which contains this stipulation, v.g., in everything relating to loading and unloading of vessels; security of merchandise, goods, and articles; the acquisition of goods of all kinds and denominations by sale, donation, exchange, testament, or any other way whatsoever; as also to the administration of justice. The latter point being the only one which, though in a most remote way, might have any connection with the claim in discussion, means only that British subjects in Venezuela, just as Venezuelan citizens in England, have the same warranties, securities, and recourses as other aliens for the protection and maintenance of their respective rights before the courts of justice established by the local laws of each nation. Said clause is not applicable to these mixed commissions, which are of a very extraordinary nature; and if it were, other countries which have agreed with Venezuela upon the provision of the most-favored nation would already have protested against some of the clauses of the Venezuelan-British protocol. On the other hand, as these mixed commissions proceed separately and absolutely independently of one another, and as the persons who constitute them must use their own individual judgment in order to render their decisions according to their own belief and conscience, the decisions of other commissions can not be set up to serve as a guide for those which this Commission will have to make.

The argument contained in the following paragraph is no more forcible:

> All awards given by the mixed commissions are to be paid out of one fund. It would, therefore, in view of the above treaty, be a denial of equity if the subjects of any other nation were to be paid sums of money out of this fund upon a more favorable principle than British subjects.

Equity would be violated in injuring Venezuela, who is held liable to pay claims which are entirely unfounded.

In the preliminary discussion which arose in the case of Consul de Lemos, I demonstrated that publicists, such as Calvo, Fiore, Bonfils, and Seijas, in addition to the statesmen — Lord Stanley, Count Nesselrode, Lord Granville, and Lord Palmerston — are unanimously of opinion that nations are not

liable for injuries sustained by foreigners in times of war, considering such irresponsibility *absolute* when said injuries are caused by revolutionists or by Government functionaries when compelled by the fatality of circumstances, confining the obligation of repairing only willfully committed injuries by the same. I consider it unnecessary to reinsert those quotations, which, moreover, would make this statement extremely long. I might likewise cite the opinions of other publicists and statesmen, but I do not consider it necessary, as the point is not capable of being disputed on the policy and practice of nations. Governments are not obliged to compensate for injuries committed by insurgents. His Britannic Majesty's agent having so understood, has sought to fix the liability from the terms of the protocol.

By virtue of the reasons stated I ask that the supplemental claim of the Aroa Mines (Limited) be declared inequitable and unlawful.

Great Britain has always professed the principle that governments are not liable for damages caused by rebels; Venezuela has likewise upheld the same doctrine at all times, as is shown by the executive decree of February 14, 1873. (Official Compilation of Laws, vol. 5, p. 243, No. 1820, art. 6.)

It is impossible for these two nations to have revoked said principle in the protocol without having expressly and definitely so stated.

PLUMLEY, *Umpire*:

At the beginning of the umpire's opinion upon the important questions involved in this case, he desires to express his sense of obligation to the learned agents and the honorable Commissioners of both Governments for their very able and painstaking presentation of their views upon the points raised, and for their valued assistance in the matter of authorities and documents.

This case raises the question whether the Government of Venezuela shall be held responsible to indemnify the claimants for injuries and losses received at the hands of revolutionists during the last civil war.

Before entering upon an analysis of the case itself there are several matters which may well be considered.

It is insisted upon by the claimant Government and resisted by the respondent Government that the paragraph in Article III of the February protocol, in which occurs a certain admission of liability on the part of Venezuela, is, when properly interpreted and applied, an absolute and unavoidable admission of liability for all claims arising out of the recent insurrection, whether due to their own acts or to those of insurgents.

In the claim of de Lemos, upon the preliminary objection of the learned British agent, raising the question that upon the terms of the protocol of February 13, 1903, " the Venezuelan agent is not entitled to set up any matter of principle as an answer to this claim " because of the said admission of liability in said Article III of the protocol, and that there remained only an inquiry as to the facts, the umpire held in his interlocutory opinion therein (p. 421) —

that the word " injury " was chosen because of its legal adaptation and significance, and not in its colloquial sense.

That (p. 421) —

the word " injury " was taken by the signatory parties to import a legal wrong, and in accordance with its fixed and determinate use in law as involving and importing *ipso facto* an *intentional wrongdoing* on the part of those responsible therefor.

By giving to this word its meaning in law and applying it to a document of peculiar legal importance drawn and carefully considered by minds of profound scholarship and erudition in law, skilled in words accurate and apt, in sentences short, clear, and trenchant, it is certain we can do no violence to the thought. By adopt-

ing any other interpretation of the language used, it becomes ambiguous, indiscriminative, and inapt. * * *

The umpire regards the section quoted from Article III of the same import and value as though it had been written:

"The Venezuelan Government admit their liability in cases where the claim is for a legal injury to property, and consequently the question which the Mixed Commission will have to decide will only be:

"(a) Whether the legal injury took place. * * *

"(b) If so, what amount of compensation is due."

The question in each case being whether by the law governing the facts in the case there has been such an injury. (See p. 422.)

In the case then before the umpire he held (p. 422) that there was open for discussion and decision (a) whether the acts complained of were wrongful or rightful governmental acts, (b) whether the injuries received were a necessary sequence of the existing conditions, or (c) resulted from some wrongful *act* or *neglect* of the Venezuelan Government.

In the claim of James Crossman,[1] which was for the seizure and appropriation by Government troops of certain personal property of the complainant, the learned agent for Venezuela in his answer contended that upon the admitted facts the property was not taken by virtue of the orders of an officer, or because of neglect by the military authorities, but was in fact a necessary calamity of civil war, and that the claimant must be remitted to his action at law against those who were responsible therefor.

To this answer the learned British agent raised a preliminary objection, insisting that by the terms of Article III of the protocol of February 13, the Venezuelan Government had denied to themselves the right to raise the questions of law named in their answer and that in virtue of those admissions "the only questions open to the Commission are: (1) Did the seizure take place? (2) Was the seizure wrongful or not? (3) If wrongful, how much is due?"

In the interlocutory opinion of the umpire in said case, he held[2] that the word "seizure" as used in said protocol did not include property "taken by robbery, theft, pillage, plunder, sacking or trespass." That it was "limited to a seizing under and by virtue of authority, civil or military." That "there is required in every case a wrongdoer as well as that wrong has been done or suffered. A wrong intent or willful purpose must accompany the act." "Not only must the act be willful or with wrong intent, *but it must be perpetrated by some one having a right whereby to declare and express a governmental will and intent.*" The umpire now underscores these words to call especial attention to their force and inclusiveness concerning the question in hand.

In neither of these cases was the opinion of the umpire given in expectation that he would later meet before this Commission the question of responsibility by Venezuela for the acts of unsuccessful revolutionists, since the historic attitude of Great Britain concerning the principle in issue would negative such a proposition, save upon exceptional conditions carefully defined by international law, in the development of which law that Government had borne a very important and honorable part.

Held in their entirety and to their full rigor, the umpire would be compelled by the force of these two opinions to declare *stare decisis* upon the question of admitted responsibility for the acts of unsuccessful revolutionists, in which case such question would stand before this Commission upon the respective merits of

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[1] *Supra*, p. 356.

[2] *Supra*, p. 358.

each claim having only an admitted liability if well founded in law and fact, in justice and equity.

Both of these opinions were given on mature deliberation after careful and painstaking study of the protocols in all of their parts and of such authorities upon the questions under consideration as were at his hand. He did not in the opinions there given cite these authorities or quote therefrom. As briefly as may be, he will now place them upon the record, that he may have them before him to aid in the present determination, and that his honored associates, the learned agents and their respective Governments, may know the authorities he accepted and upon which he relied in coming to his aforementioned decisions.

The intention of the *parties* is the pole star of construction; but their intention *must be found expressed in the contract* and be consistent with rules of law. The court will not make a new contract for the parties nor will words be *forced* from their *real signification.* (Bouvier, *Law Dict.*, vol. 1, p. 429.)

One leading principle of construction is to carry out the intention of the authors of or parties to the instrument or agreement so far as it can be done without infringing upon any law of superior binding force.

In regard to cases where this intention is clearly expressed, there is little room for variety of construction; and it is mainly in cases where the intention is indistinctly disclosed, though fairly presumed to exist in the minds of the parties, that any liberty of construction exists.

Words, if of common use, are to be taken in their *natural*, plain, *obvious*, and ordinary significations; but if technical words are used, they are to be taken in a technical sense, unless a contrary intention clearly appear in either case *from the context.* (Bouvier, *Law Dict.*, vol. 1, p. 416, citing 9 Wheat., 188; 32 Miss., 678; 49 N. Y., 281; 54 Cal., 111.)

Technical. Of or pertaining to the useful or mechanic arts, or to any *science*, *business*, or the like; specially appropriate to any art, *science*, or *business;* as the words of an indictment must be technical. Blackstone. (Webster.)

Technicality. That which is technical or peculiar to any trade, profession, sect, or the like. (Ib.)

In construing written laws, it is the intent of the lawgiver which is to be enforced; this intent is found in the law itself. The first resort is to the natural significance of the words employed, in their order of grammatical arrangement. (Bouvier, *Law Dict.*, vol. 1, p. 1106, citing Cooley Const. Lim., 70; 130 U. S., 670.)

Statutes should receive a sensible construction, such as will effectuate the legislative intention, and, if possible, so as to avoid an unjust or absurd conclusion. (Bouvier, *Law Dict.*, vol. 1, p. 1106, citing 144 U. S., 47.)

Where a law is expressed in plain and unambiguous terms, whether those terms are general or limited, the legislature should be intended to mean what they have plainly expressed, and *consequently no room is left for construction.* (Bouvier, *Law Dict.*, vol. 1, p. 1106, citing 130 U. S., 671; 99 id., 72; 2 Cranch, 399.)

Courts will not assume to make a contract for the parties which they did not choose to make themselves. (Morgan County *v.* Allen, 103 U. S., 498.)

When language is susceptible of two meanings, one of which would work a forfeiture which the other would not, the latter must prevail. (Bouvier, *Law Dict.*, vol. 1, p. 1106, citing 71 Wis., 177.)

When a court of law is construing an instrument, whether a public law or a private contract, it is legitimate, if two constructions are fairly possible, to adopt that one which equity would favor. (Bouvier, *Law Dict.*, vol. 1, p. 416, citing 160 U. S., 77.)

Neither will it be allowed to contravene established rules of law. (Bouvier, *Law Dict.*, vol. 1, p. 124.)

All statutes are to be construed with reference to the provisions of the common law, and provisions in derogation of the common law are held strictly. (Bouvier, *Law Dict.*, vol. 1, p. 416, citing 2 Black, 358; 117 Ind., 447; 4 Mich., 322; 5 W. Va., 1.)

Where words have two senses of which only one is agreeable to the law, that one must prevail. (Bouvier, *Law Dict.*, vol. 1, p. 1106, citing Cowp., 714.)

Construction is against claims or contracts which are in themselves against common right or common law. (Bouvier, *Law Dict.*, vol. 1, p. 429.)

Where the language of an instrument requires construction, it shall be taken most strongly against the party making the instrument. (Orient Mut. Ins. Co. *v.* Wright, 1 Wall., 456, U. S. Sup. Ct.)

A party who takes an agreement prepared by another, and upon its faith incurs obligations or parts with his property, should have it construed most favorably to him. (Noonan *v.* Bradley, 9 Wall., 394, U. S. Sup. Ct.)

What one party to a contract understands or believes is not to govern its construction unless such understanding or belief was induced by the conduct or declaration of the other party. (National Bank of Metropolis *v.* Kennedy, 17 Wall., 19, U. S. Sup. Ct.)

Agreements are construed most strongly against the party proposing. (Bouvier, *Law Dict.*, vol. 1, p. 124, citing 6 M. & W., 662; 2 Pars. Contr., 20; 3 B. & S., 929; 7 R. I., 26.)

The more the text partakes of a solemn compact the stricter should be its construction. (Bouvier, *Law Dict.*, vol. 1, p. 1107.)

Every agreement should be so complete as to give either party his action upon it; *both* parties *must assent* to *all* its terms. (Bouvier, *Law Dict.*, vol. 1, p. 428, citing 3 Term, 653; 1 B. & Ald., 681; 1 Pick., 278.)

The parties must agree or assent. They must assent to the same thing in the same sense. (Bouvier, *Law Dict.*, vol. 1, p. 123, citing 4 Wheat., 225, U. S. Sup. Ct.)

There is no contract unless the parties assent thereto. (Bouvier, *Law Dict.*, vol. 1, p. 429.)

The whole contract is to be considered with relation to the meaning of any of its parts. (Bouvier, *Law Dict.*, vol. 1, p. 429.)

All parts will be construed, if possible, so as to have effect. (Bouvier, *Law Dict.*, vol. 1, p. 429.)

Words are to be taken, if possible, in their ordinary and common use. (Bouvier, *Law Dict.*, vol. 1, p. 429.)

The subject-matter of the contract and the situation of the parties are to be fully considered with regard to the sense in which language is used. (Bouvier, *Law Dict.*, vol. 1, p. 429.)

The law of the interpretation of treaties is substantially the same as in the case of other contracts. (Bouvier, *Law Dict.*, vol. 2, p. 1137, citing Woolsey's Int. Law, 185; 22 Ct. of Claims U. S., 1.)

That the contracting party, who might and ought to have expressed himself clearly and fully, must take the consequences of the carelessness. (Phillimore, Int. Law, ed. 1854, vol. 2, p. 93.)

If two meanings are admissible, that is to be preferred which is least for the advantage of the party for whose benefit a clause is inserted, for in securing a benefit he ought to express himself clearly. (Woolsey, *Intro. Int. Law*, sec. 113.)

"To follow the ordinary and usual acceptation, the plain and *obvious* meaning of the language employed," which Phillimore says is the principal rule of interpretation. (Vol. I, sec. LXX.)

In all human affairs when absolute certainty is not at hand to point out the way we must take probability for our guide. In most cases it is extremely probable that the parties have expressed themselves conformably to the established usage, and such probability affords a strong presumption, which can not be overruled but by a still stronger presumption to the contrary. (Moore, 3621, quoting Vattel.)

When the language of a treaty, taken in the ordinary meaning of the words, yields a plain and reasonable sense, it must be taken as intended to be read in that sense, subject to the qualifications that any words which may have a *customary meaning in treaties* differing from their common signification *must be understood to have that meaning*, and that a sense *can not* be adopted which leads to an absurdity or to incompatibility of the contract with an *accepted fundamental principle of law.* (Hall, *Int. Law.*, 350.)

International law names the source through which the claims of a British subject against Venezuela must come. (Wharton, *Dig. Int. Law*, sec. 215.)

The law of nations is the law of England. (IV Black. Com., 67; Phillimore, *Int.*

Law, vol. 1, ed. 1854, 62 (in brackets), citing Triquet and others *v.* Bath; Peach and others *v.* same; Burrows Rep., 1480, quoting Lord Talbot as there saying: " The law of nations in its full extent was part of the law of England." (Woolsey, *Intro. to Int. Law*, sec. 29.)

The Supreme Court of the United States refuse to construe an act of Congress to be in violation of " the law of nations if *any other possible construction remains.*" (*Betsy*, 2 Cranch, 118, U. S. Sup. Ct., Marshall, C. J.)

An act of Parliament will be so construed, *if possible*, as not to conflict with the rule of international law covering the same subject-matter. Lord Stowell and Doctor Lushington insist that in a prize court an act of Parliament can not control, and if the act of Parliament plainly does conflict it is nugatory. (Holland's Studies in Int. Law, 199.)

The law of nations should be respected by the Federal courts as a part of the law of the land. (The *Nereide*, 9 Cranch, 388, U. S. Sup. Ct.)

The laws of the United States ought not, if it be avoidable, so to be construed as to infract the common principles and usages of nations or the general doctrines of international law. (Wharton, *Int. Law Dig.*, vol. 1, sec. 8, p. 30, citing Talbott *v.* Seaman, 1 Cranch, 1.)

The law of nations is the great source from which we derive those rules respecting belligerent and neutral rights which are recognized by all civilized and commercial states throughout Europe and America. (Wharton, *Int. Law Dig.*, vol. 1, sec. 8, p. 30.)

In what has been stated I have referred exclusively to the international obligations imposed on the United States by the general principles of international law, which are the only standards measuring our duty to the Government of Honduras. (Mr. Bayard, Sec. of State, to Mr. Hall, 6 Feb. 1886.)

The law of nations is the *science* of the law subsisting between nations or states and of the obligations that flow from it. (U. S. *v.* The *Active*, 24 Fed. Cases, 755, quoting Vattel.)

CLAIMS

A claim " is, in a just juridical sense, a demand of some matter, as of right, made by one person upon another, to do or to forbear to do some act or thing as a matter of duty." (Prigg *v.* Penna., 16 Pet., 539, U. S. Sup. Ct.)

In my judgment a claim upon the United States is something in the nature of a demand for damages arising out of some alleged act or omission of the *Government* not yet provided for or acknowledged. As the term imports, it is something asked for or demanded on the one hand and not admitted or allowed on the other. (Moore's Int. Arb., 3623, citing Dowell *v.* Cordwell, 4 Saw., U. S. Cir. Ct., 228, and quoting from Deady, J.)

On a claim against a foreign government for spoliation the demand is founded upon the law of nations and the obligation of the offending government is perfect. (Emerson *v.* Hall, 13 Pet., 409, U. S. Sup. Ct.)

Claim: 1. A demand of a right or supposed right; a calling on another for something due or supposed to be due. " Doth he lay *claim* to thine inheritance? " — Shak. 2. A right to claim or demand; a title to any debt, privilege, or other thing in possession of another. " A bar to all *claims* upon land." — Hallam. 3. The thing claimed or demanded; that to which any one has a right, as a settler's claim (U. S. and Australia). (Webster.)

Claim: 1. A demand of anything as due. 2. A title to any privilege or possession in the hands of another. (Johnson.)

In the Spanish language the word of corresponding meaning is *reclamación.*

" The opposition or contradiction which is made to anything as unjust." This is *reclamatio, oppositio.* (Salvá.)

" The demand made for anything by him who has the *right of property* in it against him who possesses or *denies* it." This is *reclamatio.* (Salvá.)

Reclamación (claim): The opposition or contradiction that is made in words or in writing against anything as *unjust*, or by showing that it contradicts itself; and the claim or demand for anything by him who has the right of property in it against him who possesses it. (Escriche, *Dict. of Legis.*)

Claimant: 1. One who claims; one who demands anything as of *right*; a claimer. 2. A person who has a *right*; to claim or demand. (Webster.)

Claimant: He that demands anything as unjustly detained by another. (Johnson.)

In discussing the scope of the word " claim " in the treaty of 1819 between the United States and Spain, Mr. John Q. Adams, Secretary of State, in his letter to Messrs. White and others, of March 9, 1822, observed that the treaty under the general term " claims " provided for the settlement of claims on contracts as well as claims on *torts*. (Am. St. Papers, For. Rel. VI, 796.)

The term " claims " in the convention must be construed so as to confine it to demands which must have been made the subject of international controversy, or which are of such a nature as, according to received international principles, would entitle them on presentation to the official support of the Government of the complainant. (Moore, Int. Arb., 3615, quoting Sir Frederick Bruce, umpire, U. S. and New Granada.)

We are led to the general rule of law, which has always prevailed and become consecrated almost as a maxim in the interpretation of statutes, that where the enacting clause is general in its language and objects, and a proviso is afterwards introduced, that proviso is construed strictly and takes no case out of the enacting clause which does not fall fairly within its terms. (Supreme Court of the United States in U. S. *v.* Dickson, 15 Peters, 165.)

The rule seems to be: — that qualifying words are, while the general terms of submission are not, to be taken in a restrictive sense, if there is to be any distinction. (Moore, Int. Arb., 3626, citing Vorhees *v.* Bank, 10 Peters, 449; Wayman *v.* Southard, 10 Wheat., 30; Bond *v.* U. S., 19 Wall., 227.)

Fundamentally, however, there is no difference in principle between wrongs inflicted by breach of a monetary agreement and *other wrongs* for which the state, as itself the wrongdoer, is immediately responsible. (Hall, 4th ed., p. 294.)

The mixed commission under the convention with that Republic (Mexico) has always been considered by this Government essentially a judicial tribunal with independent attributes and powers in regard to its peculiar functions. (Daniel Webster, Sec. of State, concerning Mexican - U. S. convention of April 11, 1839.) (Moore, Int. Arb., 1242.)

INJURY

Injury (Lat. *in*, negative, *jus*, a right.) A wrong or tort.

Injuries arise in three ways: First, by nonfeasance, or the not doing what was a legal obligation or duty, or contract to perform; second, misfeasance, or the performance in an improper manner of an act which it was either the party's duty or his contract to perform; third, malfeasance, or the unjust performance of some act which the party had no right, or which he had contracted not, to do.

When the injuries affect a private right and a private individual, although often also affecting the public, there are three descriptions of remedies: * * * second, remedies for compensation, which may be by arbitration, suit, action. * * * (Bouvier, Law Dict., Vol. I, 1044.)

There is a material distinction between damages and injury. Injury is the *wrongful act* or *tort* which causes loss or harm to another. Damages are allowed as an indemnity to the person who suffers loss or harm from the injury. *The word injury denotes* the illegal act, the term damages means the sum recoverable as amends for the wrong. (Bouvier, *Law Dict.*, vol. 1, p. 1045, citing 103 Ind., 319.)

Injury n.; pl. injuries. * * * L. *injuria*, fr. injurious, wrongful, unjust: pret. *in* — not + jus, right, law, justice; cf. F. injure. See *Just*, a.

Injury in morals and jurisprudence is the intentional doing of wrong. (Webster's Int. Dict.)

Damages in law is the estimated reparation in money for detriment or *injury* sustained; a compensating recompense or satisfaction to one party for a *wrong* or *injury* actually done to him by another. (Webster's *Int. Dict.*)

Damages. The indemnity recoverable by a person who has sustained an injury, either in his person, property, or relative rights through the *act* or *default* of another. (Bouvier, *Law Dict.*, vol. 1, p. 491.)

" There is no right to damages where there is no *wrong*. It is not necessary that there should be a tort, strictly so called — a willful wrong, an act involving moral guilt. The wrong may be either a willful, malicious *injury*, as in the case of assault and battery, libel, and the like, or one committed through mere motives of interest, as in many cases of conversion of goods, trespasses on lands, etc.; or it may consist in a mere neglect to discharge a duty," etc.; " or a simple breach of contract," etc.; " or it may be a wrong of another person for whose act or default a legal liability exists," etc. " But there must be something which the law recognizes as a *wrong*, some *breach* of a *legal duty*, some *violation* of a *legal right*, some *default* or *neglect*, some failure in responsibility sustained by the party claiming damages. *For the sufferer by accident or by* the *innocent* or *rightful acts* of *another can not claim indemnity for his misfortune*." It is called *damnum absque injuria* — a loss without a wrong for which the law gives no remedy. (Bouvier, *Law Dict.*, vol. 1, p. 492, citing many cases and law writers.)

The umpire is not of opinion that he would be justified in making an award against the Mexican Government.

The damages and losses alleged by the claimants seem rather to be the result of the inevitable accidents of a state of war than to have arisen from a wanton destruction of property by Mexican authorities. (Moore Int. Arb., 3868, Shattuck's case, Thornton, umpire, Mex. Com., 1868.)

The umpire is further of opinion that the damage done to cotton crops by cavalry passing over them in the neighborhood of the scene of hostilities must be attributed to the hazards of war, and for which the government of the belligerent can not be held responsible. (Moore Int. Arb., 3670, Cole's case, Thornton, umpire, Mex. Com., 1868.)

The umpire is of opinion that when during time of war and in the enemy's country straggling soldiers and marauders go about robbing and destroying property it can not be considered that it is an injury done by the authorities of the country whose troops are invading an enemy's country * * * . The umpire therefore awards that the above mentioned claim be dismissed. (Moore Int. Arb., 3670, Buentello's case, Thornton, umpire, Mex. Com., 1868.)

Damages done to property in consequence of battles being fought upon it between the belligerents is to be ascribed to the hazards of war and can not be made the foundation of a claim against the government of the country in which the engagement took place. (Moore Int. Arb., 3668, Riggs's case, Thornton, umpire, Mex. Com., 1868.)

The umpire is therefore of opinion that the claimant was committing no illegal act in transporting his cotton through Coahuila and Tamaulipas with destination to Matamoras on the 20th of September, 1864, and that as it was seized by Mexican authorities the Mexican Government is bound to indemnify the claimant. (Moore Int. Arb., 1327, Weil case, Mex. Com., 1868.)

The umpire can not doubt that robbery of cattle on the borders of Texas adjacent to Mexico and their transportation across the Rio Grande has been carried on for several years past; but he thinks that the proofs are entirely insufficient and he is not at all satisfied that the robbers were always Mexican citizens and soldiers; that bands of robbers were organized on the Mexican side of the river under the eyes and countenance of the Mexican authorities, or that the sufferers by these plunderers were refused redress by those authorities when they were appealed to in particular instances with regard to specific cattle proved by the owners to have been stolen. * * * The umpire can not see that in the above-mentioned case there are sufficient grounds for holding the Mexican Government responsible for the losses suffered by the claimant, and he therefore awards that the claim be dismissed. (Moore Int. Arb., 3037, Dicken's case, Thornton, umpire, Mex. Com., 1868.)

* * * At this period Halstead entered Mexico without a passport, committing not " a criminal violation of the laws of Mexico " — passports are a matter of police — but an offense for which he was arrested according to the laws of Mexico. He was legally arrested and kept legally in prison for a couple of weeks, but he was held a prisoner for something like four months, plainly not according to right and justice. (Moore Int. Arb., 3244, Halstead's case, Lieber, umpire, Mex. Com., 1868.)

See also Mexican Claims Commission, convention of 1868, the following cases: Moore Int. Arb., 3669, Blumenkron; 3674, Wilson; 3672, Antrey; 3671, Schlinger; 3012, Donoughho; 3021, Wilson; 3027, Laguerene; 3032, Bowley; 3033, Moliere; 3721, Cole; 3722, Mark; 3726, Brach; 3673, Johnson; 3668, Baker.

SEIZURE

Seize. (Law.) To take possession of by virtue of a warrant or other legal authority; as, the sheriff seized the debtor's goods. (Webster's *Int. Dict.*)

Seizure. The act of seizing, or the state of being seized; sudden and violent grasp or gripe; a taking into possession, as the seizure of a thief, a property, a throne, etc. Retention within one's grasp or power: hold; possession; ownership. (Webster's *Int. Dict.*)

Seizure. In practice, the act of taking possession of the property of a person condemned by the judgment of a competent tribunal to pay a certain sum of money, by a sheriff, constable, or other officer lawfully authorized thereto, by virtue of an execution, for the purpose of having such property sold according to law to satisfy the judgment. (54 N. W. Rep. (Wis.), 30.) The taking possession of goods for a violation of public law; as, the taking possession of a ship for attempting an illicit trade. (2 Cra., 187; 4 Wheat., 100; 1 Gall., 75; 2 Wash. C. C., 127, 567; 6 Cowp., 404; Bouvier, *Law Dict.*, vol. 2, p. 976.)

The Constitution of the United States, amendment, article 4, declares that " the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and *seizures*, shall not be violated; and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be *seized*." (Bouvier, *Law Dict.*, vol. 2, p. 969, citing 11 Johns, 500; 3 Cra., 447; Story, Const., 1900; 116 U. S., 616.)

In the conventional agreement between the United States of America and Peru, March 17, 1841, these words are used: " Seizures, captures, detention, sequestrations, and confiscations of their vessels." And the limits placed are to " claims on account of the seizure, damage," etc. (Moore Int. Arb., 4590-4607.)

JUSTICE

Justice. The quality of being just; conformity to the principles of righteousness and rectitude in all things; strict performance of moral obligations; *practical conformity* to *human* or *divine law;* integrity in the dealings of men with each other; rectitude; equity; uprightness.

The rendering to everyone of his due or right; just treatment; requital of desert; merited reward or punishment; that which is due to one's conduct or motives.

Examples of justice must be made for terror to some. Bacon. (Webster's *Int. Dict.*)

Justice refers more especially to the *carrying out of law*, and has been considered by moralists of three kinds: (1) Commutative justice, which *gives every man his own property*, including things pledged by promise; (2) distributive justice, which gives every man *his exact desert;* (3) general justice, which carries out all the ends of law, though not in every case through the precise channels of commutative or distributive justice. (Webster's *Int. Dict.*)

The constant and perpetual disposition to render every man his due. The conformity of our *actions* and our *will* to the *law*

There is properly but one single general rule of right, namely: Give every one his own.

The foregoing are the authorities upon which the umpire rested his opinions in the two aforementioned cases, and the force and effect of which opinions were that the expressions in question were to be given their usual, ordinary, and obvious meaning when employed in claims treaties under accepted and recognized principles of international law, and that the effect and purpose of admitted liability on the part of Venezuela was not to extend the meaning and appli-

cation of " injuries " and " wrongful seizures " beyond their well-established bounds.

The learned agent of Great Britain in the case before us contends that this holding practically emasculates the admission of liability and deprives it of all meaning and bearing in connection with the treaty, and that it can not be presumed that this expression, carefully selected and deliberatedly inserted in an important section of such treaty, was to be treated as without meaning and effect. The learned agent urges that the treaty under consideration was made while a blockade of the Venezuelan ports was in progress and that his Government made the acceptance of liability, in the sense and in the words finally used in the perfected treaty, a condition precedent to the lifting of the blockade; and that this fact is, in his judgment, conclusive in favor of his proposition that Venezuela thereby admitted her liability for all claims arising out of the recent insurrection, whether due to their own acts or to those of the insurgents.

Since there is no mention of civil wars or war of any kind in that part of the protocol, the umpire understands the learned agent's contention to rest upon the position that all injuries to property and all wrongfull seizures thereof are included in Venezuela's admitted liability. That it is, in his present contention, applied to all claims arising out of the insurrection is simply because such claims are the only claims under consideration in this particular case.

The umpire is of opinion that the expression of admitted liability was not used carelessly or without purpose, but was intended to have grave and important effect upon the Commission assembled under the provisions of said treaty. The question is simply this: Is it the effect claimed by the learned agent or some other?

As held by the umpire, there was no ambiguity in the language used, and, as considered by the umpire, there was nothing ineffective in any of the provisions of the treaty. There seemed to him, on the face of its provisions, nothing to interpret, nothing to construe.

But the learned agent contends that, when viewed historically with a wise regard for all the conditions antecedent, proximate, and immediate, construction becomes necessary, and that when properly construed his contention will prevail; that there is, in fact, a latent ambiguity which first arises in the application of the treaty to the facts in hand.

It is held in Bouvier (vol. I, p. 1107, citing 1 Dall., 426; 3 S. and R., 609), that " when there is a latent ambiguity which arises only in the application and does not appear upon the face of the instrument it may be supplied by other proof." That " the journals of a legislature may be referred to if the meaning of a statute is doubtful or badly expressed." (Bouvier, vol. I, p. 417) That in contracts in case of doubt " there must always be reference to the surrounding circumstances and the object the parties intended to accomplish." (Bouvier, vol. I, p. 1107.)

The umpire has therefore carefully reviewed the historical status and the circumstances surrounding the parties at the time the treaty was made.

By the courtesy of the two Governments he is in possession of the Blue Book containing correspondence respecting the affairs of Venezuela, and the Yellow Book of Venezuela, together covering all the time which it is important to include in this inquiry, and it is from these two sources that the umpire has obtained his knowledge of the circumstances preceding and leading up to the blockade and the adjustment of matters between the war powers and Venezuela, finally crystallizing in the respective protocols.

(1) The scene opens with a dispatch from the governor of Trinidad to the British colonial office, of date March 16, 1901, concerning an outrage on British subjects by the *Venezuelan* gunboat *Augusto*, the event having relation also to

Patos Island. Representations concerning the same were made by the British minister resident at Caracas to the Venezuelan minister of foreign affairs prior to March 22, 1901, (No. 3); and, later, a report from the minister of the contemplated steps of the Venezuelan Government in reference thereto.

(2) Outrage on J. N. Kelly, of Trinidad, by *Venezuelan* soldiers, reported to the Marquis of Lansdowne by the British minister resident at Caracas by communication of date March 22, 1901, which outrage occurred during the then recent insurrection in the eastern part of Venezuela. On March 12 the British minister had communicated in writing (No. 6) to the Venezuelan minister of foreign affairs a description of this outrage, the last paragraph of which contains in part the following:

> I will not dwell on the prejudicial effect on the interests of Venezuela herself caused by occurrences of this nature, as I feel sure that your excellency will agree with me in thinking that the injury done — *not by insurgents*, but by *soldiers* of the *Government* — to an inoffensive and law-abiding immigrant — * * *

In connection with the *Augusto* incident, there were claims and counterclaims as to the respective rights of the British Government and of Venezuela in the island of Patos, both asserting sovereignty therein. (See No. 8 and inclosures 1 and 2 in No. 8.)

(3) Communication from the British minister resident at Caracas to the Marquis of Lansdowne, of date April 17, 1901, relating to the alleged burning and plundering of the sloop *Maria Teresa*, the property of a British subject, by a *Venezuelan* gunboat off Guiria during the then late disturbances on the Gulf of Paria and the maltreatment of British subjects in connection therewith, inclosure 9 in No. 11 being a copy of the communication addressed by the British minister at Carcaras to the Venezuelan secretary of foreign affairs. It appears from this communication that the sloop was first taken by the insurrectionary troops at Yrapa and ordered to proceed to Yaguarapaso with revolutionary soldiers, who were landed there. It is also claimed that this service to the revolutionary forces was compulsory, that the master received no compensation therefor, and that the sloop was engaged in lawful traffic. But there was no demand upon the Government of Venezuela because of the compulsory service under revolutionary orders, and these facts were referred to in an exculpatory and explanatory way.

(4) Communication No. 12, from the British minister resident at Caracas to the Marquis of Lansdowne, of date April 17, 1901, referring to the case of John Craig and his vessel, the *sea Horse*, a British subject of Trinidad, for indignities and losses received at the hands of an unnamed *Venezuelan* guardacosta carrying a crew of eight men, whose commander it is alleged landed on the island of Patos, assaulted the subjects of Great Britain, and seized their property while they were peacefully engaged in their lawful avocations. Inclosure 8 in No. 12 is a copy of the communication made by the British minister to the Venezuelan secretary for foreign affairs calling his official attention to the facts and the importance of the Craig case.

In the reply of the Venezuelan secretary for foreign affairs of the same date (p. 27) he reviews the claim of Venezuela to the island of Patos as a part of her territory.

In the statement of Raphael José Ortega (p. 33), referring to the case of the *María Teresa*, it is alleged that this sloop was engaged in clandestine trade and in carrying implements of war to the revolutionists, and also that her captain was in league with them.

In the inclosure No. 20 (p. 35) there is a copy of the communication of the minister for foreign affairs to the Bitish minister resident at Caracas, having

reference to the case of John Craig, in which there is brought forward the charge of complicity in revolutionary matters as a justification for the Venezuelan acts.

(5) Inclosure 1 in No. 24 is a communication from the governor of Trinidad to Mr. Chamberlain, of date October 3, 1901, calling attention to the seizure of the sloop *Pastor* by the *Venezuelan* gunboat *Tutono* off the island of Patos. And as is shown in the communication from the British foreign office to the colonial office, No. 37, of date November 30, 1901, the incidents connected with the seizure, when taken with other like acts in reference to this islands, make them a repeated violation of territory and as indicating a purpose on the part of Venezuela to consider and treat Patos as belonging to it, and therefore calling for a " strong remonstrance against any infraction of the sovereign rights of Great Britain." This was done by the British minister resident at Caracas by his communication to the Venezuelan minister for foreign affairs December 17, 1901, (inclosure 1 in No. 46), and on December 20, 1901, the Venezuelan minister for foreign affairs (inclosure 2 in No. 46, to the British minister resident at Caracas) replies to this communication, asserting that the matters there referred to —

must be considered in connection with the notorious circumstance that Venezuela considers the island in question as its legitimate possession.

(*a*) No. 25 is a communication from the customs to the British foreign office, of date November 8, 1901, concerning the fitting out of the *Ban Righ*, a matter which later assumed great importance in the minds of the Venezuelan Government, and was a cause of much feeling on their part against the British Government. This boat was nominally for the Colombian Government, and was fitted out as a vessel for offense and defense, and was loaded with a considerable quantity of arms and ammunition. At Antwerp it is alleged to have taken on a large quantity of arms and ammunition of French manufacture, and was expected to take on a consignment of shell at Pipe de Tabac, about 20 miles below Antwerp. (See Nos. 37 and 17 of date November 30, 1901.) Later the vessel was taken to Martinique and there turned over to General Matos. (No. 55.) On February 28, 1902, the Venezuelan Government took the position toward the British Government that until the latter would recede from its position of indifference and irresponsibility for the *Ban Righ* the Venezuelan Government could not consider " on bases of mutual cordiality the other matters which reciprocally concern " their respective Governments. On June 9, 1902 (No. 87), the Marquis of Lansdowne wrote the British minister that His Majesty's Government could not admit that there is any connection between the question of the Bolivar Railway and that of the *Ban Righ,* and could not acquiesce in the attempt of the Venezuelan Government to postpone dealing with other pending questions until that of the *Ban Righ* was disposed of.

(*b*) Communication of date November 18, 1901, from General Pachano to the British minister resident at Caracas (inclosure 1 in No. 40), calling attention to the landing of a great quantity of rifles and of cartridges on the island of Tobago and asking for the mediation of the minister in obtaining from the colonial authorities measures to prevent these arms leaving Tobago to the harm of Venezuela.

The governor of Trinidad declined to interfere. (Inclosure 2 in No. 42.)

(6) No. 49, British colonial office to the British foreign office, of date January 25, 1902, calls attention to " the *seizure* and detention by the *Venezuelan authorities* of a colonial British-owned and British-registered sloop, the *Indiana*, in the waters of the Barima River, in Venezuelan territory."

(7) The governor of Trinidad to Mr. Chamberlain, of date April 17, 1902, calls attention to the conduct of Señor Figuredo, Venezuelan consul at Port of

Spain, in connection with the dispatch of vessels from that port to Venezuela. This matter became one of serious importance and disturbance between the two Governments, and resulted in much correspondence between them, but no understanding.

(8) In the communication of the governor of Trinidad to Mr. Chamberlain of date May 12, 1902 (inclosure 1 in No. 88), attention is called to the destruction at Pedernales by the *Venezuelan* gunboat *General Crespo* of the British vessel *In Time*.

(9) Communication of the British minister resident at Caracas to the Marquis of Lansdowne, of date June 30, 1902 (No. 106), calling attention "to the seizure by a Venezuelan man-of-war on the high seas of the British vessel *Queen*," and stating that the attention of the Venezuelan Government had been called to the matter, with a request for information as to the steps proposed by them.

(10) Memorandum on existing causes of complaint against Venezuela by the British foreign office, of date July 20, 1902, No. 108, in which there appear case of seizures by the Venezuelan gunboat *Augusto*, case of the *Sea Horse*, case of the *Maria Teresa*, case of the *Pastor*, case of the *Indiana*, case of the *In Time*, case of the *Queen*. Under each case is a condensed statement of the facts accompanying each alleged outrage, the action of the British Government in connection therewith, and the position of the Venezuelan Government in reference thereto.

There follows, also, in said memorandum of causes for complaint a statement of the action of the Venezuelan consul at Trinidad, in which his offenses are summed up, and the fact also appears that the Venezuelan Government had been notified thereof and that notice had been taken of their communication.

In the same memorandum there occurs this:

> Besides these specific outrages and grounds of complaint there are cases in which British subjects and companies have large claims against the Venezuelan Government. The Venezuelan Government decline to accept the explanations and assurances of His Majesty's Government with regard to the *Ban Righ* as in any way modifying the situation. As a result, the position of His Majesty's legation at Caracas has been rendered for diplomatic purposes quite impracticable, as all representations, protests, and remonstrances now remain disregarded and unacknowledged.

Returning to an earlier date in the correspondence between the British Government and the Venezuelan Government, under date of December 31, 1901 (No. 41), in the communication from the British minister resident at Caracas and the Marquis of Lansdowne, and referring to the fact that Venezuela had proclaimed the vessel *Ban Righ* a pirate, there is found this statement:

> I have warned the Venezuelan Government unofficially that any infraction of *international law* with regard to the life and property of British subjects should be avoided. It is contended by the minister for foreign affairs that *international* law is overruled by the Venezuelan law of piracy.

In the index to the Blue Book there is this summary:

> *Ban Righ.* — The Venezuelan Government offer reward for capture. They declare municipal law overrules international law.

The instructions of the Marquis of Lansdowne to the British minister resident at Caracas, of date July 29, 1902 (No. 110), directing him to make final protest and demand for reparation with a sharp alternative, cover the points named in the foregoing memorandum and no other.

In the statement of the British foreign office to the Admiralty, of date August 8, 1902 (No. 115), there appears this:

For the past two years His Majesty's Government have had grave cause to complain on various occasions of unjustifiable interference on the part of the Venezuelan Government with the life and property of British subjects. The successive instances which have occurred since the beginning of last year are set forth in the accompanying memorandum. * * *

Lord Lansdowne is of opinion that the time has arrived when stronger measures must be resorted to for the purpose of bringing the Venezuelan Government to a sense of their *international obligations*. * * *

I am to add that, in conversation with Lord Lansdowne, Count Metternich, the German ambassador, has suggested that the powers concerned should take part in a joint naval demonstration.

In an extract from the dispatch of Minister Haggard to the Marquis of Lansdowne, of date August 1, 1902, he incloses a copy of the note which he addressed to the Venezuelan Government embodying the instructions conveyed to him by his lordship's telegram of 29th ultimo (No. 110), which note Minister Haggard says he took personally to the acting minister for foreign affairs and carefully translated it to him word for word. This note is of date July 30, 1902 (p. 138), and begins by saying that he has been informed —

by His Majesty's Government that they have had under their serious consideration a succession of cases in which the Venezuelan Government have interfered with the property and liberty of British subjects in a wholly unwarrantable manner.

Then follows an enumeration of the incidents and complaints named in No. 108. The communication closes with the following paragraph:

It is not possible, His Majesty's Government consider, to tolerate a continuance o conduct which, in this last incident, reached a climax; and they have consequently instructed me to record a formal protest with reference thereto and to convey to His Excellency the President and to the minister for foreign affairs, in terms about which there can be no mistake, that, unless explicit assurances are received by His Majesty's Government that such incidents shall not occur again, and that full compensation be paid promptly to the injured parties wherever it be shown to the satisfaction of His Majesty's Government that such compensation be justly due, they will take such steps as they may consider to be necessary to exact the reparation which they have the right to demand in these cases, as well as on account of the claims of the British railway companies in Venezuela as also for any loss caused by the conduct of the Venezuelan consul at Trinidad, for which there is no possible justification.

The reply of the Venezuelan Government (No. 123) was, in brief, that they declined discussing these matters unless at the same time the matter of the *Ban Righ* and their claims against Great Britain on account thereof were taken up for consideration. [1]

The memorandum of the British foreign office communicated to the German ambassador October 22, 1902 (No. 127), opens with the statement that —

His Majesty's Government have, within the last two years, had grave cause to complain of *unjustifiable interference* on the part of the *Venezuelan Government* with the liberty and property of British subjects.

Among other instances alluded to as supporting this statement is found this —

It may be mentioned that there are several British railway companies in Venezuela which have large claims against the Government in respect of services rendered, damage done to property by *Government troops*,

but no allusion to losses from revolutionists.

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[1] British Blue Book (Venezuela, No. 1, 1903), p. 139.

September 1, 1902 (No. 129), the Marquis of Lansdowne is advised by the British minister resident at Caracas of the imprisonment of a British subject, A. Martin Gransaul, at Puerto Cabello by the Venezuelan authorities, and also, on October 22 (No. 130), another dispatch concerning the cutting and maiming of a British subject, John Jones, by the Caracas police.

November 11, 1902 (No. 134), the Marquis of Lansdowne telegraphed Sir M. Herbert, British ambassador to the United States of America, directing him to see Mr. Hay, Secretary of State for that country, and to make him a communication in the following terms:

> His Majesty's Government have, within the last two years, had grave cause to complain of *unjustifiable interference* on the part of the *Venezuelan Government* with the liberty and property of British subjects;

stating, also, that they had sought without result amicable settlement, and that it was felt that a continuance of such conduct could not be tolerated; that they had asked assurances as to the future and reparation for the past, but to no result.

It was on November 13, 1902 (No. 137), that through Count Metternich there was submitted to Great Britain a statement of Germany's claims, and in the first class were placed her claims arising out of the Venezuelan civil war of 1898-1900, amounting to 1,700,000 bolivars approximately. England's first-class claims were the illegal removal and destruction of her merchant ships. In the event of coercive measures becoming necessary the two powers were to make further claims, but there is no reference to acts of revolutionists.

In a communication (No. 140) from the Marquis of Lansdowne to Mr. Buchanan, of date November 17, 1902, concerning a conference had with representatives of the German Government, there is a further statement concerning an agreement with Germany, a recapitulation of the British claims, a reference to coercion if necessary, and then a statement as to the subsequent action of the British Government on receiving the submission of the Venezuelan Government " and on learning that they were prepared to admit their liability on every count." After providing for the immediate payment of the claims in the first class, they —

> would then consent to the heavier claims being referred to a small mixed commission of three members in case the Venezuelan Government should have any considerations to urge in mitigation of the damages claimed. An arrangement of this nature would be equitable as regards the Venezuelan Government, and would, moreover, prevent pressure being exercised in cases, such as might possibly occur, where the Venezuelan member of the commission could prove a claim to be *unfounded* or excessive.

Another note (No. 141) of same date, from the Marquis of Lansdowne to Mr. Buchanan, speaks of the action of the foreign bondholders of Venezuela and their request for the support of their governments; that this request did not come until September; that in consequence their claim was not included in the demand of July, and therefore suggesting that they act with the German Government in representations to Venezuela and in urging her to accept the arrangement proposed.

November 26, 1902 (No. 153), in the communication from the Marquis of Lansdowne to Mr. Buchanan there is a statement of the substance of the German ambassador's communication to him which contained a rehearsal of the claims of the Imperial Government, the first two of which are —

> (*a*) payment of the German claims arising out of the civil wars of the years 1898-1900, amounting to about 1,700,000 bolivars; (*b*) settlement of claims arising out of the present civil war in Venezuela. * * *

The Imperial Government also concur in the further proposal of His Majesty's Government to demand at once from the Venezuelan Government the acceptance *in principle* of all the German and English claims, and to reserve the separate settlement of claims for a mixed commission to be appointed later;

but declining to submit those under paragraph (*a*) to such commission, suggesting also that both Governments present simultaneously an ultimatum —

in which each power should embody its own collective demands, referring at the same time to the demands of the other power.

The communication of the Marquis of Lansdowne to Mr. Buchanan (No. 154) of even date with the last, but referring to a conversation with the German ambassador of date even with the communication, states the points in which the two Governments had not fully agreed.

On December 2, 1902 (No. 161), the Marquis of Lansdowne communicated to the British minister resident at Caracas the contents of the ultimatum to be presented by him to the Venezuelan Government. Among others there are these: He should state that His Majesty's Government —

can not accept the note as in any degree a sufficient answer to your communications, or as indicating an intention on the part of the Venezuelan Government to meet the claims which His Majesty's Government have put forward, and which must be understood to include all *well-founded claims* which have arisen in consequence of the late civil war and previous civil wars and of the maltreatment or false imprisonment of British subjects, and also a settlement of the external debt.

You will request the Venezuelan Government to make a declaration that they recognize *in principle* the *justice* of *these claims*. [And that] * * * as to the other claims they will be prepared to accept the decisions of a mixed commission with regard to the amount and the security for payment to be given.

It was on December 7, 1902, two days before the memorandum hereinafter referred to was submitted to the German Reichstag, that the ultimatum of the British Government and of the German Government were presented, in writing, by their representatives at Caracas to the Venezuelan Government through its secretary for foreign affairs. (See Inclosure 1 in No. 217.) The umpire quotes from the ultimatum of the British Government as follows:

I have the honor to state further that His Majesty's Government also regret the situation which has arisen, but that they can not accept your excellency's note as in any degree a sufficient answer to my communications or as indicating an intention on the part of the Venezuelan Government to meet the claims which His Majesty's Government have put forward and which *must be understood to include all well-founded claims* which have arisen in consequence of the late civil war and previous civil wars and of the maltreatment or false imprisonment of British subjects, and also a settlement of the external debt.

I am to request the Venezuelan Government to make a declaration that they *recognize in principle the justice of these claims*, that they will at once pay compensation in the shipping cases and in the above-mentioned cases and in those where British subjects have been falsely imprisoned or maltreated, and that in respect of other claims they will be prepared to accept the decisions of a mixed commission with regard to the amount and the security for payment to be given.

The umpire quotes from the ultimatum of the German Government (Yellow Book, pp. 37-41),[1] as follows:

The Imperial Government has, in good time, taken knowledge of the note of the ministry of foreign relations of the Republic of Venezuela of the 9th of May last. By that note the Venezuelan Government rejected the demands of the Imperial Government in respect to the payment of the German claims growing out of the

[1] See Appendix to original report, p. 969. Not reproduced in this series.

civil wars from 1898 to 1900, and, in support of its negative attitude, referred to arguments previously advanced. The Imperial Government, even after considering those arguments anew, does not think it can recognize them as probatory.

The Government of the Republic argues, in the first place, that by reason of the domestic legislation of the country, the settlement by diplomatic action of the claims of foreigners growing out of the wars is not admissible. It thus sets up the theory that diplomatic intervention may be barred by domestic legislation. This theory is not in conformity with international law, since the question of deciding whether such intervention is admissible is to be determined not according to provisions of domestic legislation, but in accordance with the principles of international law.

The Venezuelan Government, aiming to demonstrate that the diplomatic prosecution of claims is inadmissible, further cites article 20 of the treaty of amity, commerce, and navigation between the German Empire and the Republic of Colombia of the 23rd of July, 1892. But this argument does not seem to have weight, first, because the treaty is operative between the Empire and Colombia only and, besides, because section 3 of the said article in nowise opposes the diplomatic prosecution of German claims growing out of acts committed by the *Colombian Government or its agents*. * * *

In the first place, the claims originating at an earlier period than the 23rd of May, 1899 — that is, prior to the accession of the present President of the Republic — are not, under the decree, to be taken into consideration, whereas Venezuela will be materially held responsible for the *acts of its preceding Governments*. Next, any diplomatic intervention in the decisions of the Commission is barred, no other resource than an appeal to the high federal court being admitted, notwithstanding the fact that has been proved in various instances that the judicial officers are depending on the Government and, when the occasion arose, have been dismissed from their offices without any formality whatever. * * *

By order of the Imperial Government I have also to ask that the Venezuelan Government will forthwith make a statement in the sense that it recognizes, *in principle*, those claims as valid and that it is disposed to accept the decision of a mixed commission for the purpose of having them determined and guaranteed in every particular.

To these ultimata there was an answer by the Venezuelan secretary for foreign affairs, of date December 9, 1902 (inclosed in No. 217), and from the one addressed to the British minister resident at Caracas the umpire quotes as follows: [1]

Your excellency then enters into the question of the British claims and asks, in the name of your Government, that Venezuela should declare that they are just in principle, and you finally allude to the necessity of paying them and to the common action which the United Kingdom and the German Empire have agreed to exercise in order to compel the Republic to do so. * * *

There is no reason why the Federal Government should not recognize the justice of obligations which are provided for in the national laws, and on this point you may be perfectly sure that the interests in question will be always protected and duly attended to.

With reference to the claims, your excellency would seem to refer definitely to those which you enumerated in a note of the 20th February, 1902, amounting, in your opinion, to 36,401 bolivars. The examining commission created with the agreement of the national legislative body will take them into consideration and will settle them in accordance with justice. The remaining cases which are not answered in the correspondence depend, as far as they can be considered as constituting claims, on facts which have to be proved or defined, and which the competent authorities will attend to or are attending to. And since your excellency speaks of well-founded claims, it does not appear possible that such cases, in their actual condition or legal position, can have the same character as those which are explained in documents which testify to their character and which give an oppor-

[1] See Appendix to original report, p. 985. Not reproduced in this series.

tunity of enlightening the judgment or guiding the decision of the body who will consider them. (As translated in Blue Book, p. 188.)

From the one addressed to the chargé d'affaires of the German Empire resident at Caracas (Yellow Book, p. 41) [1] the umpire quotes:

It takes up, as being the only argument of Venezuela against diplomatic intervention in matters of a certain nature, that which was concretely stated in the reply of May 9, in which the whole doctrine set forth in the previous correspondence was passed by, because a repetition of it was deemed unnecessary. And inasmuch as the very highest principles of international law have precisely been taken for a foundation of the defence of the position of Venezuela presented in the memorandum of March 19, 1901, it was found with extreme surprise that you ascribed to the Government a purpose to consider the question in no other light than that of domestic legislation. When article 20 of the treaty between the Empire and Colombia was cited in the note of May 9, last, it was with no other intention than that of adding supplementary proof to that already adduced in regard to the assent given by Germany to the doctrines upheld by Venezuela.

The three cases now cited as precedents for agreements reached through the diplomatic channel are self-explaining. In 1885 an arrangement was made with France for the payment of allowed claims and the examination of cases dating from much earlier periods; and proof of the fact that the doctrine maintained by Venezuela is therein duly recognized is found in Article V of that convention, whose force has just been fully confirmed. That article inhibits the diplomatic agents of the two contracting parties from intervening in private claims or complaints relating to matters appertaining to civil or criminal justice, unless there should be some denial of justice. * * * If the claims under discussion are just claims, the Federal Executive, as an honored and civilized power, hastens here and now to give the assurance that those claims will be examined and passed upon as such; and inasmuch as the proper board is already organized, there is no occasion for dilatoriness or the slightest departure from the rules laid down by the law in the conduct of the proceedings. In regard to the other particulars, every one of which comes under its regulating law, I need only call attention to the abnormal circumstances created by the war, which are paralyzing any action on the obligations connected therewith. The Government is considering the appointment of a fiscal agent, who, by entering into direct communication with the interested parties, will help in making the satisfaction of those obligations easier and less protracted. It is only hoped that the work of pacification in which the Government is now deeply and earnestly engaged will enable it to reestablish the service of public credit.

The claims growing out of the war, that is still desolating and devastating a part of the Republic, will share fully in all the rights that are established by the law regulating the matter.

To prevent obscurity and to place before his honored associates and the learned agents of their respective Governments the facts which are within the knowledge of the umpire and which are referred to more or less directly in these ultimata and in the replies thereto, he makes a quick detour to a time antecedent to the correspondence hitherto quoted herein; and, beginning with the matters affecting Germany as indissolubly related to the affairs of the British Government in connection with the question before him, refers first to the written statement of the Venezuelan secretary for foreign affairs, of date August 12, 1902, and found in the "Yellow Book," pages 5-11,[2] in which it appears that the United States of America were officially advised that Germany was contemplating "coercive or comminatory action against the Republic of Venezuela" as early as December 11, 1901, and that their reasons therefor were given at that time and were, as then understood by Venezuela —

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[1] See Appendix to original report, p. 971. Not reproduced in this series.
[2] *Idem*, p. 955. Ditto.

based on the refusal of the Venezuelan Government to permit that powers, foreign to the nationals, take part in the examination, classification, or mode of payment of the claims that various German subjects have presented or reserve the right to present for alleged losses or damages sustained during the last wars since 1898. While the text of the memorandum makes unfavorable remarks about the Venezuelan magistrates of the judiciary, whose office it is to pass upon the nature of these claims, it sets forth the resolution of the Imperial Government to present the claims itself, as finally examined, in order that they may be accepted in that form by Venezuela whether willing or not.

In consequence of the above-mentioned publication, the Government of the Republic is now confronted by a document by which it is seriously affected and of whose spirit and tendency it was entirely unaware. * * *

The paper of the German ambassador, once known to Venezuela, can not be allowed to pass without the protest resulting from its contravening maxims of strict equality that international law advocates as a principle of harmony among the states of the civilized world. * * *

The views and arguments advanced by the Republic since the beginning in support of its refusal to accept diplomatic action in the settlement of claims of the Empire have never been refuted, not even incidentally. * * *

In that series of diplomatic notes the Empire rested its case not only on the law of the country, which, as such, gave sufficient force to the argument, but on the best recognized rules of modern international law, on the opinion of eminent European and American writers, on the legislation of other countries, Germany herself, among others, and on the ideas and circumstances which no fair government can ignore when it has to examine claims with due regard to all those concerned. It never was the intent of the Republic, in that correspondence, to impose its will arbitrarily and capriciously, nor did it intend, as the ambassador seems to suppose, to evade sacred obligations in a frivolous manner, but to hold the ground it has stood on since its advent to political life, for natural and judicious reasons. * * *

The Imperial Government, according to the language of the ambassador, wishes to examine and decide for itself and by itself the character, amount, and mode of payment of claims connected with property or interests established in the Republic of Venezuela. The Venezuelan Government, supported by its constitution and the regulations, maintains that such procedure can not be granted to any but the respective national powers. * * *

If by exceptionally waiving the local laws, the matter of claims was allowed to be made one of mere diplomatic action, the simultaneous effect might be a constant injury to the internal sovereignty and a ceaseless threat to the national treasury. * * *

If the class of claims relating to property owned within the territory does not come exclusively under the law of the country, it would behoove the other party to prove t by representing such a statement as would upset all maxims, arguments, and opinions advanced by Venezuela.

This document distributed among the powers closes with a reference to " the organization of the two International Congresses convened on the powerful iniatiative of the Great Republic of the North," to which attention is here called by the umpire that it may be remembered in connection with what he has to say on the same matter further on in his opinion. Concerning the remaining part of the Yellow Book having reference to the correspondence with Germany beginning in April, 1900, and running on to the close of 1902, the umpire for the sake of brevity calls attention without quoting to the fact that it consists of claims upon the part of Germany covering the losses sustained by the great railroad of Venezuela in connection with the civil war up to the close of 1899; of general-indemnity claims growing out of the same war; of the claim of Venezuela that the decree of January 24, 1900, provided for their ascertainment and liquidation; of the refusal of Germany to allow the said decree to influence in any way its attitude " in regard to claims of German protégés," of its objection in detail to the provisions of such decree; of a reasser-

tion on the part of Venezuela of the propriety of the decree, and of the judicial validity of the law of February 14, 1873, regarding the manner of preferring claims against the nation; the arguments of Venezuela in favor of its positions on these questions; of a reference to " the celebrated International American Conference of 1889-90 and approval of the principles then enunciated by fifteen delegates there present; " of lengthy quotations from international law writers in supporting Venezuela's contention, and other matters considered relevant and important to the provision of her constitution making equal civil rights for natives and aliens; which positions are proclaimed and adhered to on the one part and denied on the other through a correspondence covering many pages of the Yellow Book. The right of intervention on the part of Germany in behalf of her subjects is distinctly repudiated by Venezuela as being in " judicial impossibility; " " that such intervention is contrary to the *law* of the *country* and *therefore* inadmissible under the international law; " to which the German Government replies that it holds " that national laws which exclude diplomatic intervention are not in harmony with international law, because, according to the view of the powers of the Republic, all intervention of this character could be barred by means of municipal legislation." (See pp. 28, 29, 30, 31 of Yellow Book, May 9, 1902).[1] This is a communication from the Venezuelan minister of foreign affairs to the chargé d'affaires of the German Empire, closing the correspondence between Germany and Venezuela until the presentation of their ultimatum December 7, 1902, to which reference has already been had.

The British Government, through its minister resident at Caracas, in his communication of April 25, 1901, to the Venezuelan minister for foreign affairs, informs that Government [2]—

that the declaration communicated to the Government of Venezuela by Mr. Middleton, His Majesty's resident minister, in his communication of May 21, 1873, to the effect that His Majesty's Government reserves the right to object to any claim on the part of Venezuela at any future time to having released itself, by its own decree, from responsibility to Great Britain as to the injustice or damages caused to British subjects, for which Venezuela would be bound to give indemnization either by reason of the law of nations in general or by virtue of the provisions of treaties.

To this there is a reply by the Venezuelan minister for foreign affairs, of date May 11, 1901, in which he states in part as follows [3]:

On the other hand, the chief justice believes that no reservation of rights whatever concerning decrees issued in the name of the national sovereignty, and the effects of which include both natives and foreigners, is possible or acceptable. There is no principle of the law of nations, nor any assumption whatever in the stipulation which Venezuela should bear in mind concerning Great Britain, which binds the Government to establish discriminations in the protection of the interests which should be governed by internal legislation.

To the positions here taken the British minister resident at Caracas takes serious exception in his communication of May 13, 1901, asserting that it is in contradiction of the terms of the treaty of 1825, a part of which he quotes, and further on he says [4]:

This constitutes a marked difference which it would have been deemed impossible to deny and which it is impossible to avoid. His Majesty's Government has never admitted, therefore, the contention of the Venezuelan Government, which is of long

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[1] See Appendix to original report, p. 970. Not reproduced in this series.
[2] *Idem*, p. 975. Ditto.
[3] *Idem*, p. 975. Ditto.
[4] *Idem*, p. 976. Ditto.

standing, that the claims of British subjects should be placed on the same footing as those of natives, submitting them to judicial intervention and decision to the exclusion of diplomatic intervention.

On May 25, 1901,[1] the Venezuelan minister for foreign affairs answered the communication last above referred to in a long letter reproducing the arguments of Venezuela in favor of her law of 1873, citing authorities in support thereof, citing the statutes and constitutions of Mexico, Guatemala, Salvador, Nicaragua, Honduras, Colombia, Brazil, Ecuador, Peru, the Argentine Republic, and Paraguay upon the same points; and asserts that the thirty years during which the law of 1873 has been upon the statutes adds much to its dignity and force among nations.

December 25, 1901, the British minister resident at Caracas communicates to the Venezuelan minister for foreign affairs the regrets of His Majesty's Government[2] —

that the Government of Venezuela refuses to recognize the reservations of rights made by His Majesty's Government in the question of British claims in the last and previous communications, concerning the right to object to any claim on the part of the Venezuelan Government at any time, of releasing itself, by its own decree, of responsibility with Great Britain with respect to damages or injuries caused to British subjects by which Venezuela would be bound to make indemnization, either in accordance with international law in general or in conformity with treaty obligations. These reservations include also the refusal of His Majesty's Government to recognize any limitation whatever by the national law of its right in accordance with the general principles of international law.

December 16, 1902 (No. 193), there was a communication from the Marquis of Lansdowne to Mr. Buchanan, referring to a conversation had with the German ambassador concerning the Venezuelan proposal for arbitration, in which he informed the German ambassador —

We were, however, inclined to admit that, whilst it was impossible for us to accept arbitration in regard to our claims for compensation in cases where injury had been done to the person and property of British subjects by the *misconduct* of the Venezuelan Government, it was not necessary to exclude the idea of arbitration in reference to claims of a different kind. We had already provided for the reference to a mixed commission.

On December 17, 1902 (No. 194), Count Metternich communicated to the British Government a memorandum which was communicated to the German Reichstag by Count Bülow on December 9, 1902:

By the civil wars which have taken place in Venezuela during the years 1898 to 1900 and again since the end of last year, numerous German merchants and land owners have suffered serious injury, partly through the exaction of forced loans, partly by the appropriation without payment of supplies found in their possession, especially cattle for feeding the troops, and, lastly, by the plundering of their houses and the devastation of their lands. The total of these damages, as regards the civil wars during the years 1898 to 1900, amounts to, roughly, 1,700,000 bolivars (francs), while for the last civil war damages to the extent of, roughly, 3,000,000 bolivars have already been reported. Some of the injured parties have lost almost the whole of their property, and have thereby inflicted loss on their creditors living in Germany.

* * * * * * *

It may be added that the Germans in the latest civil war have been treated in a particularly inimical manner. The acts of violence, for instance which were committed by the Government troops when they plundered Barquisimeto, were princi-

[1] See Appendix to original report, p. 976. Not reproduced in this series.
[2] *Idem*, p. 979. Ditto.

pally committed at the expense of German houses. This attitude of the Venezuelan authorities would, if not punished, create the impression that Germans in Venezuela were abandoned without protection to the arbitrary will of foreigners, and would be calculated seriously to detract from the prestige of the Empire in Central and South America, and be detrimental to the large German interests which have to be protected in those regions.

It is also here stated that the claim on behalf of the Great Venezuelan Railway, a German enterprise, equals about £ 300,000.

Count Metternich, in forwarding this memorandum to the British Government " points out that the German claims are not only pecuniary, but also based *on the ill treatment* of Germans by *the Venezuelan authorities.* "

This defines and limits the meaning of the claim arising from the civil wars spoken of by the Germans in this connection and elsewhere, and is conclusive in its exclusion of all acts of revolutionaries from the claim and demands contained in its ultimatum submitted to the Venezuelan Government December 7, 1902.

It was on December 17 that the Marquis of Lansdowne informed Sir Michael Herbert, at Washington, that —

the American chargé d'affaires told me to-day that he had received instructions to inform me that the Venezuelan Government now earnestly wished for arbitration, which, in the opinion of the United States Government, seemed to afford a most desirable solution of *the questions in dispute.*

On December 18, 1902, the Marquis of Lansdowne informed Sir M. Herbert at Washington that he had that afternoon informed the United States chargé d'affaires that the cabinet had decided to accept *in principle* the idea of settling the Venezuelan dispute by arbitration and that the German Government was in accord.

It was on December 18, 1902 (No. 199), that the Marquis of Lansdowne communicated to Sir F. Lascelles that the German ambassador had that day informed him of his Government's agreement with Great Britain as to its treatment of the Venezuelan proposal for arbitration, but that his Government desired to make certain reservations similar to what had been previously suggested, and these reservations were submitted in a written memorandum. Paragraph 2 contains the following:

All further demands *contained in* the *two ultimatums* shall be submitted to the proposed court of arbitration. The latter will therefore have to consider not only the claims in connection with the present Venezuelan civil war, but also, as far as Germany is concerned, the demands mentioned in the memorandum laid before the Reichstag of German subjects arising from the nonfulfillment of liabilities incurred by contract by the Venezuelan Government. The court of arbitration will have to decide both *on the material* justification of the demands and on the ways and means of their settlement and security.

There is added:

The Government of the United States of America would be conferring an obligation on us if, by exerting their influence over the Venezuelan Government, they could succeed in persuading the latter to accept these proposals.

* * * * * * *

I told his excellency that I would communicate his statement to the cabinet, which was to meet in the afternoon, and that I had little doubt that, in principle, the two Governments would be found to entertain similar views.

I was able, later in the afternoon, to inform his excellency that the cabinet agreed to arbitration as a means of settling the dispute, subject to the following reservations, which he undertook to communicate to the German Government:

1. The shipping claims are not to be referred to arbitration.

2. In cases where the claim is for injury to, or wrongful seizure of, property, the questions which the arbitrators will have to decide will only be —

(a) Whether the injury took place and whether the seizure was wrongful; and

(b) If so, what amount of compensation is due. That in such cases a liability exists must be admitted in principle.

On December 22, 1902, the Marquis of Lansdowne sent to Sir F. Lascelles a copy (inclosure in No. 207), received from Count Metternich, of the reply which the German Government returned to the proposals made by Venezuela through the United States Government, from which reply certain extracts are here made. There were reserved from arbitration claims —

which originated in the Venezuelan civil wars from 1898 to 1900, and of which details are given in the inclosed memorandum of the *8th December, which was communicated to the Reichstag*. It will be seen that they consist of claims on account of *acts of violence on the part of the Venezuelan Government or their agents*. * * *

All other claims which have been put forward in the *two ultimata* could be submitted to the arbitrator.

The arbitrator will have to decide both about the *intrinsic justification* of *each separate claim*, etc.

In the case of claims in connection with damage done to, or unjustifiable seizure of property, the Venezuelan Government will have to recognize their liability in principle, so that the question of liability will not form the subject of arbitration, but the arbitrator will be concerned solely in the questions of the *illegality* of the *damage* or *seizure*. * * *

The Government of the United States of America would be conferring an obligation on the *Imperial* and *British* Governments if, by exerting their influence over the Venezuelan Government, they could succeed in persuading the latter to accept *these* proposals.

Memorandum communicated to Ambassador White December 23, 1902 (No. 209), stated among other matters that —

His Majesty's Government have in consultation with the German Government taken into their careful consideration the proposal communicated by the United States Government at the instance of that of Venezuela. * * *

His Majesty's Government have, moreover, already agreed that in the event of the Venezuelan Government making a declaration that they will recognize, *the principle of the justice* of the British claims, etc.

January 1, 1903, Ambassador White inclosed to the Marquis of Lansdowne a copy of a telegram, via Secretary Hay, from Minister Bowen, in which there is a signed communication from President Castro, and in which appears —

I recognize, in principle, *the claims which the allied powers have presented to Venezuela.*

Neither the British nor the German Governments were satisfied with this telegram of President Castro, and both insisted on an unreserved acceptance of conditions 1, 2, and 3, which were communicated to Ambassador White December 23, 1902, and on January 5, 1903 (No. 222), the Marquis of Lansdowne communicated to Ambassador White what President Castro's recognition " in principle" meant as understood by His Majesty's Government, and in that connection made a restatement of those conditions and required of President Castro a definite acceptance thereof, which was given of date January 9, 1903, through Mr. Bowen (No. 226), in the language following:

The Venezuelan Government accepts the conditions of Great Britain and Germany.

And the conditions which were thus presented so far as they affect the question now before the umpire, as he understands, were that Venezuela " will recognize the *principle* of the *justice* of the British claims."

Mr. Bowen telegraphs from Caracas to Mr. Hay, January 6, 1903 (Bowen's Pamphlet, p. 9),[1] among other things, that President Castro asserts —

that the claims against him are purely commercial in character; that he acknowledges that he must pay *such of them as are just.*

In the agreement which Mr. Bowen, representing Venezuela, signed January 27, 1903 (Bowen's Pamphlet, p. 15),[2] in regard to the 30 per cent of the total income of the ports of La Guaira and Puerto Cabello, communicated by telegram from Ambassador Herbert to the Marquis of Lansdowne, there appears a statement very significant as to his understanding of the claims to which Venezuela was obliged to respond, viz:

I hereby agree that Venezuela will pay 30 per cent of the total income of the ports of La Guaira and Puerto Cabello to the nations that have claims against her, and it is distinctly understood that the said 30 per cent will be given exclusively *to meet the claims mentioned* in the *recent ultimatums* of the *allied powers* and the unsettled claims of other nations that existed when said ultimatums were presented.

On January 23, 1903 (Bowen's Pamphlet, p. 12),[3] Sir Michael Herbert, at Washington, communicated to Mr. Bowen the demands of the British Government, so far as they referred to the claims included in Article III of the protocol, in the following language:

2. Other claims for compensation, including railway claims and those for injury or wrongful seizure of property, must be met by an immediate payment to His Majesty's Government or by a guaranty adequate to secure them. These claims can be, if desired, examined by a mixed commission.

These conditions were accepted by Mr. Bowen by a note of the same date.

January 24, 1903 (Bowen's Pamphlet, p. 14),[4] the imperial chargé d'affaires at Washington submitted a document to Mr. Bowen concerning the claims of Germany against Venezuela, and in Article II thereof says:

All the other claims which have already been brought to the knowledge of the Venezuelan Government in the *ultimatum* delivered by the imperial minister resident at Caracas, i. e., claims resulting from the present civil war, further claims resulting from the construction of the slaughterhouse at Caracas, as well as the claims of the German Great Venezuelan Railroad for the nonpayment of the guaranteed interest, are to be submitted to a mixed commission should an immediate settlement not be possible.

III. The said commission will have to decide both about the fact whether said claims are materially founded and about the manner in which they will have to be settled or which guaranty will have to be offered for their settlement. Inasmuch as these claims result from damages inflicted on property or the illegal seizure of such property, the Venezuelan Government has to acknowledge its liability in principle, so that such liability in itself will not be an object of arbitration, and the decision of the commission will *only* extend to the *question* whether the *inflicting* of *damages* or the *seizure* of such *property was illegal.* The commission will also have to fix the amount of indemnity.

February 5, 1903, the Marquis of Lansdowne cabled Sir Michael Herbert, ambassador, in part as follows:

A separate telegram is being sent to you which contains the draft of a protocol *embodying the conditions which have already been accepted by Mr. Bowen.*

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[1] See Appendix to original report, p. 1035. Not reproduced in this series.
[2] *Idem*, p. 1039. Ditto.
[3] See Appendix to original report, p. 1037. Not reproduced in this series.
[4] *Idem*, p. 1037. Ditto.

Article III of the protocol thus submitted and Article III of the protocol of February 13, are identical. The language is every word the language of the claimant Government, and it was asserted by that Government (No. 263) to contain nothing not accepted by Mr. Bowen prior to February 5, 1903. What these agreements were has been set out here in substance.

From a careful reading of all the correspondence and conferences between the two allied powers and Venezuela, beginning in April, 1900, and continuing up to and including February 13, 1903, and which appear in the Yellow Book and the Blue Book, and in all the correspondence or conferences appearing in those two books and Mr. Bowen's pamphlet relating to the correspondence and conferences between him as the representative of Venezuela and the three war powers, Great Britain, Germany, and Italy, and in all the correspondence and conferences appearing in either of these documents in which the United States of America had a part, the umpire fails to find a sentence, a word, or a syllabe suggestive of a claim by either of these three powers that Venezuela should respond in damages or be held to indemnities because of the acts of insurgents. On the contrary, Germany had stated their claims to be based on "acts of violence on the part of the Venezuelan Government or their agents," and the statements of Great Britain were not opposed, but wholly consistent therewith.

The high contracting parties knew during the negotiation, and at the conclusion thereof when the protocols of February 13 were signed, that Germany had declared in the most formal and explicit manner, on an occasion not remote and in circumstances of the State not dissimilar, her view of equity and justice concerning the liability of governments for the acts of revolutionaries. This appears in her treaty with Colombia in 1892, where is laid down her view of law, justice, and equity in these words:

> It is also stipulated between the contracting parties that the German Government will not attempt to hold the Colombian Government responsible, unless there be due want of diligence on the part of the Colombian authorities or their agents, for the injuries, vexations, or exactions occasioned in time of insurrection or civil war to German subjects in the territory of Colombia, through rebels, or caused by savage tribes beyond the control of the Government. (Art. 20, sec. 3.)

Italy, the other war power, up to the time of signing the protocol of February 7, 1903, by her treaty with Venezuela in 1861 was bound to treat such matters reciprocally, as appears in the language following:

> In cases of revolution or of interior war the citizens and subjects of the contracting parties will, in the territory of the other, have the right of being indemnified for damages and losses which may be caused to their persons or property by the constituted authorities of the country on the same terms as the nationals would have a right to indemnification according to the laws which prevail in such country. (Art. 4.)

And she had deliberately restated her position on such questions under conditions not dissimilar to those of Venezuela in her treaty with Colombia in 1892, as follows:

> It is also stipulated between the two contracting parties that the Italian Government will not hold the Colombian Government responsible, save in the case of *proven* want of due diligence on the part of the Colombian authorities or of their agents, for injuries occasioned in time of insurrection or civil war, to Italian citizens in the territory of Colombia, through the acts of rebels, or caused by savage tribes beyond the control of the Government. (Art. 21, sec. 3.)

Great Britain had a historical attitude of a similar character on this question, which she had applied in the case of the United States of America in 1861-1865 (see Hall, p. 232). and again not many years since to a country no more well

ordered than Venezuela, namely, to Colombia, in 1885, when a British subject was injured by the burning of Colon, Colombia, and sought the aid of his Government for reparation from Colombia. Under instructions from the British foreign office, the English minister resident stated that the destruction of Colon was due solely to the revolutionists, and that when these events took place " the Government of Colombia was entirely unable to prevent them, even though it afterwards accidentally succeeded in putting down the rebellion." And from these facts it was thought it could not be asserted that his injury " was directly due to the fault of the Colombian Government to the extent of justifying a demand for redress in behalf of those English subjects who, like yourself, have unfortunately suffered losses by reason of the fire." And the conclusion of the matter was that, under instructions of the prime minister, he was informed by the English minister: " I am unable to support your claims against the Government of Colombia." (U.S.-Vene. Claims Commission, convention of 1892, p. 585.)

The umpire desires to call attention specifically to the general attitude of the South American and Central American republics relating to the right of the state by constitutional provision and municipal legislation to cut off the right of the government of the injured citizen to intervene to demand attention to injuries received by their subjects in property and person, who maintain, some of them, that in virtue of such legislation no diplomatic claim can exist, and if one is submitted to an arbitral tribunal a judgment of dismissal must be entered. He assumes, rightfully he believes, that all governments concerned in the matter of which we are now inquiring were fully informed and thoroughly advised concerning the legislation and the attitude to which the umpire refers. That they knew that at the time these protocols were drawn opinions irreconcilable with theirs were held by a very large part of the South American and Central American republics; that these opinions were strengthening rather than abating; that they had taken form in national constitutions and statutes, and in proposed treaties and international agreements.

They knew that at the Pan-American Conference of 1889-90, in a majority report of its committee on international law, among other things it was declared " that foreigners are entitled to enjoy all the civil rights enjoyed by natives, and to all substantive and remedial rights in the same manner as natives," and " that a nation has not, nor recognizes in favor of foreigners, any other obligation or responsibilities than those which are established in like cases in favor of the natives by the constitution and laws." That it was there recommended that these resolutions be adopted as " principles of American international law." They knew these principles there propounded were in sharp and rugged conflict with the law of nations as understood and accepted by Europe and the United States of America. They knew that at the Pan-American Conference held in the City of Mexico in 1901 the delegates representing fifteen of the twenty states which were there assembled reaffirmed the propositions of 1889 and declared again and emphatically that the states do not recognize in favor of foreigners any obligations or responsibilities other than those established by their constitutions and laws in favor of their own citizens, and that the states are not responsible for damages sustained by aliens originating from acts of war, whether civil or national, " except in case of failure on the part of the constituted authorities." From this deliverance both knew that if the constitution and laws of the given state gave no remedies, or illusive ones, to natives for the wrongful seizure of or injury to property, it would be claimed and urged that foreigners must accept the consequences; and that also where the property of aliens had been seized and confiscated for military use by the military powers of the government there was no compensation therefor, regardless of the constitution

or laws of the particular state, and in direct contravention to the generally accepted law of nations applicable thereto.

They knew that there were several treaties projected at this conference all more or less at war with international law as held by Europe; that one country urged a treaty declaring as one of its provisions that " in all cases where a foreigner has claims or complaints of a civil order, criminal or administrative, against a state, no matter what the ground of his allegations may be, he must address his complaint to the proper judicial authority of the state, without being entitled to claim the diplomatic support of the government of the country to which he belongs to enforce his pretensions, but only when justice shall have failed, or when the principles of international law shall have been violated by the court which took cognizance of the claim; " that " in every case where a foreigner has claims or complaints of a civil, criminal, or administrative order he shall file his claim with the ordinary courts of such state; " that no government should " officially support any of those claims which must be brought before a court of the country against which the claim is made, except cases in which the court has shown a denial of justice or extraordinary delay or evident violation of the principles of international law." They knew that to establish such a principle of action would prevent any government from intervention in any case until there had been an exhaustion of all legal remedies and a palpable denial of justice; and that concerning this it was provided that " a denial of justice exists only in case the court rejects the claim on the ground of the nationality of the claimant." A second country would establish an " international court of equity; " but provided that the claimant must first exhaust all legal remedies before the courts of the defendant state where the nature of the claim permitted it to be adjusted by such courts.

They knew that at this conference it was proposed by three of the States in conference that a treaty should be made declaring that the responsibility of the state to foreigners is not greater than that assured to natives; that the government should not entertain diplomatically any demand of a citizen in a foreign country where the claim arises out of a contract entered into between the authorities and the foreigner, or where it has been expressly stipulated in the contract that the government of the foreigner shall not interfere; that the government of a foreigner shall not interfere to support his complaint or claim originating in any civil, penal, or administrative affairs, except for denial or undue delay of justice, or for nonexecution of a final judgment of the courts, or when it is shown that all legal remedies have been exhausted, resulting in a violation of express treaty right, or of the precepts of public or private international law " *universally recognized by civilized nations.*" They knew that the words in quote, if agreed to, prevented any intervention, because of the fact that one of the South American states had by statute declared that no judgment rendered against a foreigner could be held as unjust or a denial of justice, even though the decision was iniquitous and against express law. They knew that the South American and Central American republics, with few, if any, exceptions, were permeated through and through with the seductive doctrines of Calvo, the distinguished Argentine publicist, the fundamental idea of which is that no government may rightfully intervene in aid of its citizens in another country, and that this fundamental doctrine to a greater or les extent had been brought into constitutions and statutes of the different states. They knew that in the constitution of Venezuela, Title III, Section I, article 14, there was to be found this provision, namely:

> Foreigners will enjoy all civil rights which are enjoyed by nationals, but the nation does not hold or recognize in favor of foreigners any other obligations or responsibilities than those which have been established in a similar case in the constitution and in the laws in favor of nationals.

And that in paragraph 2, article 14, there is to be found this:

> In no case may either nationals or foreigners pretend that either nation or states shall indemnify them for damages, prejudices, or expropriations which have not been executed by legitimate authority operating in its public character.

They knew of the Venezuelan law of March 6, 1854, concerning indemnity to foreigners, and the decree of Guzmán Blanco of date February 14, 1873, and that it was protested against by many, if not all, of the leading nations of Europe and by the United States of America; that notwithstanding these protests it was republished by order of President Castro January 24, 1901, and that, as republished, it required " all who bring claims against the nation, whether nationals or foreigners, by reason of *damages* and *injuries* and *seizures* by acts of national employees or of the states, whether in civil or international war, or in time of peace, will bring them " before the high federal court under the rules of procedure laid down in articles 3, 4, 5, and 6 of the decree; that article 8 of the decree provided " that whoever appears in a manifest manner to have exaggerated the amount of the injuries he may have suffered will lose his right to recover and be subject to fine or imprisonment, and if it be altogether false will be mulcted in a fine or sent to prison; " that article 9 of the decree provided " that in no case shall the nation or the state indemnify for losses, *damages*, or *injuries*, or *seizures* which have not been executed by legitimate authorities working in their public character; " that article 10 set a limitation of two years on all actions permissible under the law; that article 11 declared " that all who without public character decree contributions or forced loans or spoliations of any nature, as well as those who execute them, will be directly and personally responsible with their goods for whomever may be prejudiced; " that article 13 repealed the law of March 8, 1854, relating to indemnities above referred to. They knew that President Castro issued an order January 24, 1901, creating a junta to examine and determine the damages claimed by nationals and foreigners against the nation on account of the war initiated May 23, 1899, and limiting the time within which claimants must appear to *three months* from the date of the order, and otherwise their demands were to receive no attention " unless the delay be shown to be occasioned by a superior force." They knew that there was a law of the same date bearing the approval of President Castro, one article of which defined the losses which might be sustained before said junta, namely:

> Losses during the war to private property *not* proceeding from hostile acts for which no one is responsible, nor for the licentious conduct of soldiers who have taken advantage of moments of contention, unless they have been made voluntarily, intentionally, and deliberately by order of superior power in charge of belligerent operation.

They knew that article 140 of the Venezuelan constitution contained this important declaration:

> International law is *supplementary* to national legislation; but it can never be invoked against the provisions of this constitution and the individual rights which it guarantees.

They knew that such laws and constitution were based on the principle of the duty of nationals and aliens to obey the laws of the land wherein they dwell; that there was no injury to person or property unless incurred in violation of the national law; that there was no remedy save in manner and means as provided by that national law; that the alien had no recourse to the country of which he was a subject except for the causes recognized by such national law; that the nation whose subject he is has no right of intervention, except for causes prescribed by the law of the nation where he is commorant or domiciled; that all this is a

right of each nation to prescribe, and of each alien within its domains scrupulously to obey, and of each mother country to respect, regard, and by it to be controlled; that international law may aid, but can never control, dictate, or determine any matter which is in conflict with its own statute law and the national interpretation thereof; that whereas the generally accepted idea of Europe and the United States of America is the supremacy of international law in international matters, Venezuela and many of the other states of South and Central America of kindred thought maintain the supremacy of their own laws in international matters. They knew that before mixed commissions jurisdictional questions were always possible and might be frequent, and that unrestricted by express agreement Venezuela was bound by her laws, organic and other, to interpose objections jurisdictional to every claim not of the class recognized as proper subject-matter of international intervention by her constitution and her laws; that with unrestricted submission, among others, these questions could always be raised, namely:

I. That every claim by an alien for damages and injuries to property and of seizures thereof by national or state employees in time of peace or during the civil wars would be objected to as not within the jurisdiction of the mixed commissions until it had been heard before the junta provided and there had been a clear denial of justice.

II. That in all cases of losses, damages, or injuries to persons or property or seizure of the latter, not executed or caused by the legitimate authorities working in their public character, there would have been a denial of all liability in any manner at any time.

III. That in all cases otherwise admissible under the laws if the claim had run two years before presentation it was barred by their statutes.

IV. That if contributions or forced loans or spoliation had been decreed or caused by any one or more who were not of the public character required, the party injured had only his remedy against him or them who had caused the loss or injury.

V. That in cases arising on account of the war of 1899 there would be, also, the claim that no case was within the jurisdiction, because of the time limit of three months, except on proof that there had been the exception provided in connection therewith.

VI. That losses to property during that war which might escape the other objections would be met with the contention that such losses must not proceed from hostile acts for which no one is responsible, nor from the licentious conduct of soldiers who have taken advantage of moments of contention, nor are they recoverable unless they have been made voluntarily, intentionally, and deliberately by order of superior power in charge of belligerent operations.

For an agreement to arbitrate among nations, as among individuals, is simply a submission of all matters in dispute within the limits named, and there would be jurisdiction, law, equity, and fact as applied to each case. The admission of liability in the protocols prevented the raising of these objections. They knew that these objections, which the umpire has stated as not only possible but probable, had been, in fact, as a whole or in part during the correspondence interposed by Venezuela against the claims of Great Britain and Germany, who together agreed upon the formula in question. (See Yellow Book, pp. 16, 50, 59, and 65.) [1]

[1] See Appendix to original report, pp. 959, 975, 979, 982. Not reproduced in this series.

The umpire assumes that these important treaties were not made without great care and deliberation commensurate to their importance and by officials who were thoroughly and conscientiously able and apt to perform their high functions. In the Supreme Court of the United States of America, in the matter of the *Nereide* (9 Cranch, 419), Chief Justice Marshall says:

> Treaties are formed upon deliberate reflection. Diplomatic men read the public treaties made by other nations and can not be supposed either to omit or insert an article, common in public treaties, without being aware of the effect of such omission or insertion.

The umpire feels confident that the careful review and partial rehearsal of the conditions existing at the time of making these two protocols will convince the most skeptical that the inclusion of the clause in question is not meaningless if its interpretation is established in accordance with the previously expressed opinion in the de Lemos [1] and Crossman [2] cases, and that to so hold leads to an absurd conclusion.

But there are parallel or corollary provisions in the second protocol which in the judgment of the umpire rest upon the same and no other grounds.

> The commissioners, or in case of their disagreement the umpire, shall decide all claims upon a basis of absolute equity without regard to *objections of a technical nature or of provisions of local legislation.*

By a proper application of the usually accepted international law governing such commissions, controlling courts, and defining the diplomatic conduct of nations there could be no question that national laws must yield to the law of nations if there was a conflict.

As a general rule municipal statutes expanding or contracting the law of nations have no extraterritorial effect. (Wharton, vol. 3, sec. 403, p. 652, Digest.)

We hold that the international duty of the Queen's Government in this respect was above and independent of the municipal laws of England. It was a sovereign duty attaching to Great Britain as a sovereign power. The municipal law was but a means of repressing or punishing individual wrongdoers; the law of nations was the true and proper rule of duty for the Government. If the municipal laws were defective, that was a domestic inconvenience, of concern only to the local government, and for it to remedy or not by suitable legislation as it pleased. But no sovereign power can rightfully plead the defects of its own domestic penal statutes as justification or extenuation of an international wrong to another sovereign power. (Mr. Fish, Sec. of State, to Mr. Motley, Sept. 25, 1869; Wharton's Digest, vol. 3, sec. 403, p. 653.)

This position was sustained by the eminent jurists forming the Geneva arbitral tribunal. (See Wharton, vol. 3, sec. 402*a*, p. 645, Digest.)

The effect of the Salvadorean statute in question is to invest the officials of that Government with sole discretion and exclusive authority to determine conclusively all questions of American citizenship within their territory. This is in contravention of treaty right and the rules of international law and usage and would be an abnegation of its sovereign duty toward its citizens in foreign lands, to which this Government has never given consent.

Articles 39, 40, and 41, Chapter IV, of the law in question, purport to define the conditions under which diplomatic intervention is permitted on behalf of foreigners in Salvador whose national character is admitted. I regret that the Department is unable to accept the *principle* of any of these articles without important qualifications. (Mr. Bayard, Sec. of State, to Mr. Hall, Nov. 29, 1886. Wharton, vol. 3, Appendix, sec. 172*a*, p. 960.)

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[1] *Supra*, p. 368.
[2] *Supra*, pp. 356, 365.

It is a settled principle of international law that a sovereign can not be permitted to set up one of his own municipal laws as a bar to a claim by a foreign sovereign for a wrong done to the latter's subjects. (Wharton, vol. 3, Appendix, sec. 238, p. 969.)

Similarly in Wharton, volume 3, Appendix, section 403, page 991.

In Phillimore, volume 1, Chapter II, Section CXVII, it is said:

Under the rights incident to the equity of states as a member of an universal community is placed " the right of a state to afford protection to her lawful subjects wheresoever commorant," and under this head may be considered the question of debts due from the government of a state to the subjects of another state.

The definition of international law, making it under one form of expression and another the rules which determine the general body of civilized states in their dealings with one another, necessarily excludes state statutes from doing the same thing.

They [aliens] are again, as we have seen, entitled to protection, and failure to secure this, or any act of oppression may be a ground of complaint, or retorsion, or even of war, on the part of their native country. (Woolsey's *Intro. to Int. Law*, p. 90, sec. 66.)

(See Hall, *Int. Law*, Chap. II; also Chap. VII, sec. 87.)

The right of states to give protection to their subjects abroad, to obtain redress for them, to intervene in their behalf in a proper case, which generally accepted public law always maintains, makes these municipal statutes under discussion in direct contravention thereto and therefore inadmissible principles by those states who hold to these general rules of international law.

A government has a right not only to exercise jurisdiction over all persons within its territory, but also to see to the good treatment of its subjects when in the territory of a foreign power, and generally that they sustain no injury. (Holland's *Studies on Int. Law*, p. 160.)

It is not, I think, to be presumed that the British Parliament could intend to legislate as to the rights and liabilities of foreigners. (4 K. & J., p. 367.)

In Healthfield *v.* Chilton (4 Burr, 2016) Lord Mansfield held that the act of 7 Anne, c. 12, " did not intend to alter, *nor can alter*, the law of nations."

As " the law of nations " it is, of course, insusceptible of modification by an act of the British Parliament. The act " can neither bestow upon this country any international right to which it would not otherwise be entitled, nor relieve our Government from any of its diplomatic responsibilities." (Holland's *Studies in Int. Law*, p. 195; 3 Phillimore's *Int. Law*, p. 387.)

It is, on the other hand, quite certain that no act of Parliament, or decision given in accordance with its provisions, will relieve this country from liability for any results of the act, or decision, which may be injurious to the rights of other countries. (Holland's *Studies in Int. Law*, p. 199.)

Referring to Venezuelan municipal laws by which they then sought to obviate their international responsibility for the acts of turbulent factions or armed insurgents, Secretary of State Fish says: " To assume, therefore, to dictate that no claim for such losses shall ever be made may be said to be arrogant to a degree likely to be offensive to most governments having relations with a republic so subject to sudden and violent changes in its authorities.

" Upon the whole, the enactments adverted to may be regarded as superfluous in their substance, and in their form by no means adapted to foster confidence in the good will of that government towards foreigners who may resort to Venezuela." (See U. S. - Vene. Claims Com., Convention of 1892, p. 520.)

Municipal variations of the law of nations have no extraterritorial effect. (The *Resolution*, 2 Dall., 1; the *Nereide*, 9 Cranch, p. 389.)

The municipal laws of one nation do not extend, in their operation, beyond its own territory, except as regards its own citizens or subjects. (The *Apollon*, 9 Wheaton, p. 362.)

Recurring then to the proposition made when the umpire referred to this part of the second protocol, there seems to be adequate reason for this unusual provision only in the fact that the respondent government held that its laws were paramount in such matters and would be expected to contend in behalf of its carefully conceived and tenaciously supported theory before the Mixed Commission, and to prevent such contention and to prevent the possibility of a successful contention this clause was inserted. A commission not in terms bound to follow the law of nations might go astray over such a question if unrestricted, and hence the restriction. But it is, equally with the other proposition, open to the objection that, being in accord with public law, it had no place if there were not some reason for its existence — if it did not contain some rule to govern this Commission either not to be found in the precepts of international law or directly opposed to it.

Again, there is the reservation concerning technical objections. The course of commissions has rarely strayed from equity and justice by a too close adherence to technical objections, but there have been frequent interruptions and costly delays because of such objections, and the astute and able lawyers of Venezuela had on several occasions shown their capacity to raise fine distinctions in fact and law, resulting in long and eventually valueless discussion. The claimant Government had known from experience how forcefully such objections could be raised. It proposed to end that trouble at the beginning. Hence the provision:

> They shall be bound to receive and consider all written documents or statements which may be presented to them by or on behalf of the Governments, respectively, in support of or in answer to any claim.

And yet it had not been the practice of commissions in times past — and it is not required by law writers — that there be a strict compliance with the general requirements concerning evidence. But there had been much annoyance and many serious interruptions of the business of commissions and occasional refusal to consider a case because of assumed lack of evidential quality in the proof offered, and hence the provision. Yet neither of these last two provisions were new or novel or opposed to the ordinary practice of commissions or the generally varied rules of public law, but they did represent the views of the claimant Government on those matters, and if inwritten were safe and wise precautions against probable delays, and possible friction, misconception, and misdirection of the tribunal. The law on these points was well laid down by the eminent scholar, diplomat, and jurist, Judge J. C. Bancroft Davis, in the Caldera case, 15 Court of Claims Reports (U. S. A.), 546:

> In the means by which justice is to be attained, the court is freed from the technical rules of evidence imposed by the common law, and is permitted to ascertain truth by any method which produces *moral conviction.*
>
> In its wider and universal sense it [evidence] embraces all means by which any alleged fact, the truth of which is submitted to examination, may be established or disproved. (1 Greenleaf Ev., sec. 1.)
>
> International tribunals are not bound by local restraints. They always exercise great latitude in such matters (Meade's case, 2 Court of Claims, U. S. A., 271), and give to affidavits, and sometimes even to unverified statements, the force of depositions.

The umpire desires it to be distinctly understood once for all that he accepts the statement of the learned British agent that his Government thought the terms of the protocol broad enough to include all injuries and all wrongful seizures, whether caused by Venezuelan authorities or by insurgents. This statement of his is not questioned directly or indirectly; but he does not say, and

it has not been said, that there were not also in the mind of his Government in all of these provisions the protective and restrictive features here suggested. As a matter of fact, these are the plain, obvious, and reasonable grounds for their insertion, and there is not the slightest evidence which the umpire has been able to find that Venezuela knew of any other, thought of any other, or consented to any other grounds or reasons. This is the important question, for when there is found that which Venezuela or her representatives understood and consented to and understood that they consented to then there is found all there is of the treaty.

The position of all international law writers was in substantial accord touching this matter of nonresponsibility of nations for the acts of unsuccessful revolutionists at the time this protocol was signed, as was well known to the parties to the protocols in question.

The sovereign is responsible to alien residents for injuries they receive in his territories from belligerent action, or from insurgents whom he could control or whom the claimant government has not recognized as belligerents.

The umpire will rest his quotations from text writers upon Hall on International Law, pages 231-232, where the law is laid down in the language which follows:

> When a government is temporarily unable to control the acts of private persons within its dominions, owing to insurrection or civil commotion, is is not responsible for injury which may be received by foreign subjects in their person or property in the course of the struggle, either through the measures which it may be obliged to take for the recovery of its authority or through acts done by the part of the population which has broken loose from control. When strangers enter a state they must be prepared for the risks of intestine war, because the occurrence is one over which, from the nature of the case, the government can have no control; and they can not demand compensation for losses or injuries received, both because unless it can be shown that a state is not reasonably well ordered, it is not bound to do more for foreigners than for its own subjects, and no government compensates its subjects for losses or injuries suffered in the course of civil commotions, and because the highest interests of the state itself are too deeply involved in the avoidance of such commotions to allow the supposition to be entertained that they have been caused by carelessness on its part, which would affect it with responsibility toward a foreign state.

In the opinion of Umpire Ralston, in the matter of Salvatore Sambiaggio *v.* Venezuela,[1] before the Italian-Venezuelan Mixed Claims Commission, now sitting in Caracas, there is a valuable collocation of authorities upon this point, to which opinion and the authorities there cited the umpire is pleased to make reference, and, to quote the conclusions of Ralston, umpire, found on pages 2 and 3 of his typewritten opinion:[2]

> We find ourselves, therefore, obliged to conclude from the standpoint of general principle that, save under the exceptional circumstances indicated, the Government should not be held responsible for the acts of revolutionists, because —
>
> 1. Revolutionists are not the agents of government, and a natural responsibility does not exist.
>
> 2. Their acts are committed to destroy the government, and no one should be held responsible for the acts of an enemy attempting his life.
>
> 3. The revolutionists were beyond governmental control, and the Government can not be held responsible for injuries committed by those who have escaped its restraint.

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[1] Volume X of these *Reports*.

[2] Italian - Venezuelan Commission (Sambiaggio Case) in Volume X of these *Reports*.

Held by Duffield, umpire in the German-Venezuelan Mixed Claims Commission, late sitting at Caracas:

> That the late civil war in Venezuela from its onset " went beyond the power of the Government to control. * * * Under such circumstances it would be contrary to established principles of international law, and to justice and equity, to hold the Government responsible." (Claim of Otto Kummerow *v.* Venezuela.[1])

The precedents form an unbroken line, so far as the umpire has been favored with a chance to study them, supporting the usual nonresponsibility of governments for the acts of unsuccessful rebels. It was so held by the eminent Sir Edward Thornton in all cases which he decided as umpire in the United States-Mexican Commission. (Moore, vol. 3. pp. 2977-2980.) So held by the United States-Spanish Commission of 1871. (Moore, vol. 3, pp. 2981-2982.) So held by the United States and British Claims Commission of 1871. (Moore, vol. 3, pp. 2982-2987, 2989.) So held by the United States and Mexican Claims Commission of 1859. (Moore, vol. 3, pp. 2972.) So held in principle by the United States and Mexican Claims Commission of 1868. (Moore, vol. 3, pp. 2900, 2902, 2973.) So held concerning the nonresponsibility of the United States in the civil war of 1861. (Moore, vol. 3, 2900-2901.) So held in substance and effect by the United States-Venezuelan Mixed Commission now sitting at Caracas.[2] Even the cases which were claimed to qualify or oppose this rule and were not specifically attacked by the umpire in the Sambiaggio case above referred to are not opposed to the rule laid down when all of the facts appear.

In the Easton case, before the Peruvian Claims Commission,[3] careful investigation discloses that the Government of Peru had acknowledged that it was liable, in fact and law, to pay the actual loss, and had tendered $5,000 in satisfaction thereof; so that the Commission had before it only the question of amount.

In the case of the Venezuelan Steam Transportation Company against Venezuela there were presented peculiar conditions, in that a part of the damage was inflicted by the " Blues " and part by the " Yellows. " The " Blues " was the de jure government which had been driven from Caracas by the " Yellows," but retained authority and control over certain States, among them the State lying on the west of the Orinoco near Ciudad Bolívar, and, during the happening of a great part of the injuries complained of, were in control of the State of which Ciudad Bolívar is the capital. The " Yellows," being in possession of the national capital, were recognized as the de facto government. Mr. Evarts, Secretary of State for the United States of America, a very eminent lawyer, held that —

> there seems to be just as good ground for taking the organization of the party of the " Blues," so called, as the legitimate government at that time as the forces and managers of the party of the " Yellows." (U. S. - Vene. Claims Commission, 1892, pp. 516-517.)

For injuries inflicted by the " Yellows " the agent of the claimant government asked for damages several times in excess of the entire amount of the award given. Much of the damage claimed as inflicted by the " Blues " was placed upon the de facto Government, the " Yellows," by said agent on the ground of lack of diligence in permitting the " Blues " to remain so long at Ciudad Bolívar and in control of the vessels in question, when they could have been so

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[1] Volume X of these *Reports*.
[2] *Supra*, p. 145.
[3] Moore, p. 1629.

easily dislodged, as was proven when the effort was in fact made. The case can not be held as authority for or against the general rule of international law on this subject.

The umpire holds that this historical review emphasizes and strengthens at every point the position taken by him in the cases of de Lemos [1] and Crossman [2] as to the meaning of the charging words used, interpreting the same from the general purpose, plan, and purview of the protocol itself. It did not seem to him, then, that there could possibly be any uncertainty concerning language apparently so plain and unambiguous to which he gave the only meaning of which it is susceptible *in law*.

From this review of the differences which arose between the claimant government it is found that the ultimatum contained no claim for injuries or damages other than those *well founded in law and fact*. That Germany, its ally, speaking for both, explained that under the language in question there was always the necessity resting upon the claimant government of " intrinsic justification " in each particular case; and that there was always to be decided the question of the legality or illegality of the injuries or seizures complained of. And in silence and tacit acquiescence passed on the statement of Germany, made in careful comparison of views, that its civil-war claims were for acts of violence committed by Venezuelan authorities and her agents. That during the time covered by this review in none of the correspondence or conferences of the allies with Venezuela, or between the allies themselves, or of the allies or Venezuela with the United States Government, or with Mr. Bowen, has the umpire been able to find a sentence, a phrase, or a word directly or indirectly making claim to indemnity for losses suffered through acts of insurgents or directly or indirectly making allusion thereto.

The umpire finds that President Castro understood he was admitting the liability of his Government only for such claims as were " just; " that Mr. Bowen understood he was submitting to arbitration only the matters contained in the ultimatum of each of the allied powers; that the claimant government thought the terms of submission broad enough to include such claims or other claims is not important when considered alone. It becomes important only when it is established that the respondent government knew of and assented to the submission of such claims. The review which has been made does not disclose to the umpire any such knowledge or assent. Rather, he finds not the slightest hint that such a proposition could or would be made or was made to the respondent government by the claimant government or by either of the allied powers. Neither was there anything in the anterior diplomatic action or attitude of the claimant government, or of Germany or of Italy, toward other nations similarly constituted and conditioned, to suggest the possibility, even, of such a claim upon the respondent government, but quite the contrary conclusion was to be drawn therefrom. Hence the umpire holds that the Government of Venezuela did not specifically agree in the protocols to be subject to indemnities for the acts of insurgents.

This leaves the question of liability for the acts of insurgents to rest upon the general principles governing such case.

In the opinion of the umpire it is stated with precision in the treaty of Germany with Colombia in 1892:

It is also stipulated between the contracting parties that the German Government will not attempt to hold the Colombian Government responsible, unless there be due want of diligence on the part of the Colombian authorities or their agents, for

[1] *Supra*, p. 360.
[2] *Supra*, p. 356.

the injuries, oppressions, or extortions occasioned in time of insurrection or civil war to German subjects in the territory of Colombia, through rebels, or caused by savage tribes beyond the control of the Government.[1]

It is also held that the want of due diligence must be made a part of the claimant's case and be established by competent evidence. This is brought out in the treaty of Italy with Colombia in 1892, where the language is " save in the case of *proven* want of due diligence on the part of the Colombian authorities or their agents," and such a requirement is strictly in accord with the ordinary rules of evidence.

If less inequity would result to *all* parties concerned were the British claims allowed than if they were denied it might be necessary to allow them. Reference to the treaties existing between many of the claimant countries and other South American or Central American republics, and of Italy with Venezuela, will settle the question of general equity and will demonstrate that it is only by minimizing the use of the rule of responsibility that we can cause the least inequity. It is, also, easily apparent that if wrong has been done in the cases of Germany and of France it will not be righted by repeating it. The British Government is not in fault because some government has asked and obtained awards for such acts. Its foreign office carefully excluded all claims for acts of revolutionists from the memorials to be presented to the Mixed Commission, and thus prepared they were presented.

The learned British agent is frank and free to assert that his Government preferred that there should be no award in any commission based on such a claim. It is also as apparent as though stated that the British Government expected there would be no such claim made or allowed in any commission. Otherwise they would have admitted the revolutionary feature into their reclamations in the first instance as, according to the learned British agent, they considered such demands rightful to them if granted to any. Certainly, it is not the fault of the umpire of the British-Venezuelan Mixed Commission who held in the de Lemos case that there was responsibility only for illegal acts by the Government or some one acting in its behalf or under its order. It is not the fault of the Italian-Venezuelan Mixed Commission, whose umpire settled the question adversely to such claims before any opinion had been given favoring such claims. The questions of equity by equality and equity by relation of Venezuela to other governments were very strongly before the representatives of the governments, who asked and obtained favorable rulings thereon after the opinions opposed thereto had been declared and filed and after these very governments had established the law and the equities to be in accordance with such denial by their own solemn engagements with similarly ordered republics.

A broader view than is obtained within these ten mixed commissions may well be taken before passing upon this question of equity by equality and by relation. How stands the record? The countries hereinafter named have treaties identical in principle with those of Germany and Colombia and Italy and Colombia:

Italy-Venezuela, 1861;[2] Italy-Colombia, 1892; Spain-Venezuela, 1861;[3] Spain-Ecuador, 1888;[4] Spain-Honduras, 1895; Belgium-Venezuela, 1884;[5]

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[1] Art. XX. (See British and Foreign State Papers, Vol. 84, p. 144.)
[2] British and Foreign St. Papers, vol. 54, p. 1330.
[3] *Id.*, vol. 53, p. 1050.
[4] *Id.*, vol. 79, p. 632.
[5] *Id.*, vol. 75, p. 39.

France-Mexico, 1886;[1] France-Colombia, 1892;[2] Germany Mexico; San Salvador-Venezuela, 1883.[3]

The learned British agent also raises the point that an international rule applicable to "well-ordered States" in regard to the irresponsibility of governments for the acts of unsuccessful revolutionists may not be easily applied to States possessing the history of the respondent Government.

Concerning this point the umpire is content to accept the concrete judgment, practically uniform, of States whose skilled and trained diplomatists have given this question long years of patient consideration. This concrete judgment he has in the treaties made between Germany and Colombia and Italy and Colombia heretofore quoted and between the other countries above cited, as well as by the historic attitude of the British Government and the Government of the United States of America in their diplomatic treatment of these question in relation to countries having the same general characteristics, in this regard, as Venezuela.

There now remains to consider only the "most favored-nation" proposition. Regarding this it is sufficient in the judgment of the umpire to say that Venezuela has granted to no other country any favors in these protocols not granted to the Government of His Britannic Majesty. He says this modestly, but conscientiously, after careful study. He would avoid, if he could, the clash in judgment this statement involves, but he can not do so and be true to his solemn convictions. That there have been interpretations of several protocols with which the present umpire can not agree and with which this opinion will not accord, he admits to be true. But these interpretations were had and the consequent results followed against the earnest protest and vigorous opposition of the Government of Venezuela, and were therefore clearly not favors granted by her.

In considering, determining, and applying the protocols to this case and to all others; in weighing and settling the facts and the law in each case; in meeting and answering every proposition connected with the proceedings of this Mixed Commission the umpire must never lose sight of the most essential part of the protocols which is none other than the solemn oath or declaration which it prescribes. Before we were allowed to assume the functions of our high office we were required by its provisions to make solemn agreement and declaration —

> carefully to examine and impartially decide, according to justice and the provisions of the protocol of the 13th February, 1903, and of the present agreement, all claims submitted to them (us).

While the oath adds to the requirements of administering our trust according to justice the provisions of the protocol, it is not to be presumed or admitted that there is aught in either of those protocols which is contrary to or subversive of its high and principal behest — justice. This, then, is the ultimate purpose and required result of all our inquiries, examinations, and decisions. It is made, as it should be made, the chief cornerstone of this arbitral structure. There is one other and very important rule of action prescribed to govern us in our deliberations: it is that we "shall decide all claims upon a basis of absolute equity." The way is equity, the end is justice. There is no other way and no other end within the purview of the protocol. Not only must each particular case be determined on these two bases, but each part of the protocols relating to this Commission must be interpreted and construed in accordance therewith. If there be two views of some provisions which, although differing, strike the mind

[1] British and Foreign St. Papers, vol. 77, p. 1090.
[2] *Id.*, vol. 84, p. 137.
[3] *Id.*, vol. 74, p. 298.

with equal force and there is a hesitancy which to adopt, the one must be taken which best withstands the application of this supreme test. The protocols will permit no construction of any part which in its adaptation may deviate from the chosen path or lead to a conclusion at war with the required end. All and every part thereof must be read and interpreted with this fact always predominant. If a question arises, not readily to be apprehended, wherein equity and justice differentiate, then the former must yield, because the obligation of the prescribed oath is the superior rule of action.

International law is not in terms invoked in these protocols, neither is it renounced. But in the judgment of the umpire, since it is a part of the law of the land of both Governments, and since it is the only definitive rule between nations, it is the law of this tribunal interwoven in every line, word, and syllable of the protocols, defining their meaning and illuminating the text; restraining, impelling, and directing every act thereunder.

Webster thus defines equity:

> Equality of rights; natural justice or right; * * * fairness in determination of conflicting claims; impartiality.

Bouvier says in part:

> In a more limited application, it denotes equal justice between contending parties. This is its moral signification, in reference to the rights of parties having conflicting claims; but applied to courts and their jurisdiction and proceedings it has a more restrained and limited signification. (Vol. 1, p. 680.)

The phrase, " absolute equity," used in the protocols the umpire understands and interprets to mean equity unrestrained by any artificial rules in its applic-cation to the given case.

Since this is an international tribunal established by the agreement of nations there can be no other law, in the opinion of the umpire, for its government than the law of nations; and it is, indeed, scarcely necessary to say that the protocols are to be interpreted and this tribunal governed by that law, for there is no other; and that justice and equity are invoked and are to be paramount is not in conflict with this position, for international law is assumed to conform to justice and to be inspired by the principles of equity.

> International law is founded upon natural reason and justice. * * * (Wharton, vol. 1, sec. 8, p. 32.)
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> The law of nations is the law of nature realized in the relations of separate political communities. (Holland's *Studies in Int. Law*, 169.)
>
> It is the necessary law of nations, because nations are bound by the law of nature to observe it. It is termed by others the natural law of nations because it is obligatory upon them in point of conscience. (Kent's Com., vol. 1, 2.)
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> The end of the law of nations is the happiness and perfection of the general society of mankind, etc. (*Ib.*)
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> International law * * * is a system of rules * * * not inconsistent with the principles of natural justice. (Woolsey, *Introd. to Int. Law*, secs. 2 and 3.)
>
> The rules of conduct regulating the intercourse of States. (Halleck, chap. 2, sec. 1.)
>
> The intercourse of nations, therefore, gives rise to international rights and duties, and these require an international law for their regulation and enforcement. That law is not enacted by the will of any common superior upon earth, but it is enacted by the will of God; and is expressed in the consent, tacit or declared, of independent nations. * * * Custom and usage, moreover, outwardly express the consent of nations to things which are naturally — that is, by the law of God — binding upon them. (*Ib.*, sec. 6, quoting Phillimore, vol. 1, preface.)
>
> That when international law has arisen by the free assent of those who enter into certain arrangements, obedience to its provisions is as truly in accordance with

natural law — which requires the observance of contracts — as if natural law had been intuitively discerned or revealed from Heaven, and no consent had been necessary at the outset. (Bouvier's *Law Dict.*, vol. 1, p. 1102.)

The rules which determine the conduct of the general body of civilized States in their dealings with one another. (Lawrence, *Int. Law*, sec. 1.)

International law consists in certain rules of conduct which modern civilized states regard as being binding on them in their relations with one another with a force comparable in nature and degree to that binding the conscientious person to obey the laws of his country. (Hall, *Int. Law*, 1.)

In what has been stated I have referred exclusively to the international obligations imposed on the United States by the general principles of international law, which are the only standards measuring our duty to the Government of Honduras. (Mr. Bayard, Sec. of State, to Mr. Hall, Feb. 6, 1886.)

International law in its practical result guides, restricts, and restrains the strong states, guards and protects the weak.

The guide, commonly safe and constant and usually to be followed, is international law. But if in the given case, not easily to be assumed, it should occur that its precepts are opposed to justice, or lead away from it, or are in disregard of it, or are inadequate or inapplicable, then the determination must be made by recourse to the underlying principles of justice and equity applied as best may be to the cause in hand. The umpire will apply the precepts of international law in all cases where such use will insure justice and equity for this reason, if for no other — that well-defined principles and precepts which have successfully endured the test of time and the crucible of experience and criticism are safe in use, and should never carelessly be departed from in order that one may step out into a way unknown to walk by a course unmarked. But these precepts are to be used as a means to the end, which end is justice.

The rule of justice, equity, and law deduced by the umpire and to be applied here is well expressed in the treaties of Germany and Italy with Colombia hereinbefore quoted. Adapted for our use, the rule will read as follows:

> The Government of Venezuela will not be held liable to the British Government for injuries to property or wrongful seizures thereof, or for damages, vexations, or exactions committed upon or suffered by British subjects in Venezuela during any unsuccessfull insurrection or civil war which has occurred in that country unless there be proven fault or want of due diligence on the part of the Venezuelan authorities or their agents.

The Aroa mines supplementary claim is based wholly on the seizure of their property by revolutionary troops without proof of any fault or lack of due diligence on the part of the titular and respondent Government.

Under the rule adopted this claim must be, and is hereby, disallowed, and judgment will be entered to that effect.

BOLÍVAR RAILWAY COMPANY CASE

A nation is responsible for the acts of a successful revolution from the time such revolution began.[1]

PLUMLEY, *Umpire*:

When this claim came to the umpire on the disagreement of the honorable commissioners, as to parts thereof there had been agreed to and allowed by the commissioners the following amounts:

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[1] See also *Supra*, p. 119.

The whole of the claim particularized in —	Bolivars
Appendix A	105,738.59
Appendix B	28,600.24
Appendix C	40,132.59
Appendix D	126,081.27
Appendix E	39,038.81
Appendix F	2,272.50
Appendix G	38,260.75

In the claim particularized in —	Bolivars	Bolivars
Appendix H: Nos. 30, 31, 33, 35, 36, 44, 46, 48, 51, and 57		20,036.93
Appendix K: Nos. 8, 10, 12, 13, 14, and 15		57,148.86
Appendix N:		
Nos. 1, 3, 4, 5, 7, 9, 12-33, inclusive, 36, 37, 39, 40, 41, 45, 46, 48, 49, 52, 54, 56, 65, 66, 69, 74, 76, 77, 78	277,356.58	
Nos. 71, 81, 82	37,500.00	
		314,356.58
Total amount agreed upon by Commissioners		771,667.12

The Commissioners agreed to a disallowance of the following amounts:

In the claim particularized in —	Bolivars	
Appendix J	577.50	
Appendix L	8,837.07	
Appendix N: Nos. 71, 81, and 82	16,976.88	
Total amount of disallowance agreed to by Commissioners		26,391.45
The whole amount of claims agreed to by the Commissioners, both allowed and disallowed		798,058.57

The Commissioners disagreed as to the following amounts:

In the claim particularized in —	Bolivars	
Appendix H	313,576.27	
Appendix K	88,349.96	
Appendix M (disagreement to whole of this claim)	2,215.87	
Appendix N	786,876.44	
The whole amount of claims disagreed to by the Commissioners		1,173,018.54
		1,971,077.11

The Bolívar Railway Company has credited the Government of Venezuela with the following amounts:

	Bolivars	
Weekly payments made by the Government in 1897 and 1898	46,000.00	
Further amounts paid by the Government in 1899	6,360.00	
Payment for patent fuel in 1899	2,272.50	
Allowance for damaged sleepers recovered from the Government troops in Tucacas	58,659.40	
Total amount of credits		113,291.90
Claim as presented to this Commission		1,857,785.21

Under Appendix H, and referring to the disputed items thereunder there are allowed by the umpire the following:

	Bolivars
Nos. 1, 2, and 3, referring to services performed by the railway company in the month of September, 1899, and vouched for by Gen. Ismael Manzanares	20,274.94
No. 4, covering items September 3-30, performed for the Government, and vouched for by Gen. Lopez García, who was a supporter of the titular government of Andrade	39,319.30
No. 5, use of the steamer *Barquisimeto* eighteen days	9,090.00
No. 6, for the use of cars between October 10 and 24, and vouched for by Gen. Lopez García	300.00
No. 7, for the use of the steamer *Barquisimeto* for thirty-one days	15,655.00
No. 8, account accrued under the order of Gen. Carlos Liscano, and vouched for by him between October 20 and 31	5,722.25
No. 9, an account accrued between October 16 and 31 through the order of Gen. Ismael Manzanares, and vouched for by Valentín Torres	26,586.24
No. 10, an account accrued between October 8 and 15, and vouched for by Gen. Lopez García	7,425.00
No. 11, an account accrued between October 1 and 15, under the order of Col. Manuel Vargas	2,454.66
No. 12, an account accrued between October 1 and 15, through the order of Gen. Valentín Torres, and vouched for by E. Medina	12,769.00
No. 13, an account accrued through Gen. Ismael Manzanares	22,313.16
No. 14, an account contracted by the Government through its representative in Tucacas, Lopez García, October 1-17	4,793.67

These accounts accrued during the successful revolution under General Castro, and represent services performed either on his behalf or on behalf of the titular government, and are, therefore, properly chargeable to the present Government. It is not necessary to define each, although the umpire has carefully inspected each account and vouchers covering the same periods and is satisfied that the above statement is correct. He also has the assistance of the telegram of November 4, 1903, sent by R. Gonzalez, P., to Gen. J. M. García Gomez explaining the relation of some of the generals whose names appear and concerning the items above allowed.

	Bolivars
No. 15 is an account contracted by General Guerra on November 3 and 4. He is known to have been in command of the army that attacked the revolting general at Puerto Cabello on November 11, and the umpire will assume that this is a proper charge against the Government	5,302.50
No. 16, for the use of the steamer *Barquisimeto* between November 1-16 inclusive	8,449.56
It is a matter of history that Gen. Antonio Paredes was military governor of Puerto Cabello and its fortifications under Andrade, and continued in such office after the departure of Andrade and the dissolution of his Government. It is understood that he accepted for a brief time General Castro's authority, but that on the 7th of November he repudiated such relations and revolted, fortifying Puerto Cabello, and that an attack was made upon him on November 11-12 by sea and land. Since Parades had no fleet and no occasion for the use of the sea, while the Government had its fleet before Puerto Cabello and was in control of the sea in front of Puerto Cabello, the assumption is very clear that the use of the steamer between points and Puerto Cabello could only be under the employment of the National Government.	
No. 19, accounts contracted between November 18 and 28 by Gen. Valentín Torres, and vouched by Medina	7,183.78

Bolivars

No. 20, for the use of a steam launch under the order of Ramón Fragachen 600.00

This allowance is animated with the same reason as was the allowance in No. 16. This use occurred the 14th day of November, which is included in the time covered by the use of the steamer *Barquisimeto*, and when it is not consistent with the other circumstances to assume that steam launches were being used by the nationalista revolutionaries.

No. 22 is an account contracted by Gen. Valentín Torres, and vouched for by him, between November 1 and 15 . . . . . 18,346.27

No. 23, an account contracted by Gen. Juan Isava, and vouched for in another place by Fragachen 11,855.18

This allowance is under the presumption and belief that at this time he was not in the service of the nationalista revolutionaries, although he was later.

No. 29, an account contracted by Gen. Lopez García between December 28 and 30 . . . . . 4,509.16

No. 34, an account contracted by Gen. Lopez García January 19, 1900 18.80

No. 35½ (this number is the umpire's) is of date January 29 and represents an account presented on that day for 20,546.25 bolivars, less amount received on account of coal, 2,272.50 bolivars 18,273.75

It is assumed that the account, both debit and credit, was satisfactory to the Government or it would have raised a question direct to the Commission concerning that particular item, and if the credit is correct it is right to assume that the debit is to the right party.

No. 37, an account contracted by Gen. Lopez García and vouched for him, covering dates from February 1 to 26 . . . . . 1,358.80

No. 38, for damages caused the company by Gen. Lopez García on a day between February 1 and 28 . . . . . 363.00

No. 39, an account contracted between February 15 and 23 by General Solagnie 2,746.02

The position of General Solagnie to the Government is ascertained by reference to voucher No. 12 in Appendix K, which voucher is countersigned by Gen. P. Gonzalez, and in that voucher there are entries for the month of March, 1900, stating accounts against the Government for the transportation in special trains of General Solagnie, his staff, and troops. The umpire therefore feels safe in placing this account, made at Solagnie's order the month preceding, among the items of Government indebtedness.

No. 40 is another of the same character as No. 39, under the same person's order, covering the date from March 1 to 15 . . . . . 3,081.39

No. 41, an account contracted by the order of General García, covering the same time as No. 40 . . . . . 166.40

No. 42 covers account contracted between March 6 and 31, inclusive, through the order of F. Solorzano 290.43

No. 43 covers accounts between March 7 and 24, inclusive, through the order of F. Solorzano 180.76

The last two allowances are made on the statement before the Commission by the British agent that Solorzano was at this time commander of the garrison at Tucacas, appointed by General Castro himself. This statement was made about a month since, has not been questioned, and the umpire feels safe in accepting it, knowing that it was made in good faith and on what was believed to be correct information.

No. 45, an account contracted between March 1 and 28 by Gen. J. M. Quesada, and vouched for by B. Lopez Fonseca 332.79

This account is thus placed because of the next account accepted by the honorable Commissioner for Venezuela wherein the charge is for an account contracted by Gen. Gonzalez Pacheco and vouched for by Lopez Fonseca. No. 46 being for a single item of April 2, so

Bolivars

immediate to the other, there can be no mistake in regarding No. 45 as well sustained when vouched for by Fonseca.

No. 47, an account contracted by Gen. F. Solorzano and vouched by Juan Felix Castillo 3,424.33

There is no question about the position of Castillo, and the umpire had already settled the relation of Solorzano, which is further sustained in this item by finding him associated with Castillo.

No. 49, of date of April 30, for repairs and materials on account of injuries to the railway and the rolling stock resulting from the use by the Government troops during the war, and vouched for by Lopez Fonseca 12,498.75

No. 50 is an account contracted by Gen. J. Felix Castillo from May 2 to 31, inclusive, and vouched by him 847.21

No. 52 is an account contracted by General Castillo from May 22 to 26, inclusive 17.46

No. 53 is for materials taken from the station of El Hacha by General Aranguren 167.00

The reason for this allowance is the presumption that at this time there was no general revolutionary movement, and in fact it was practically at an end all through that portion of Venezuela. Taking this with the further fact that the Government being well advised of this charge has introduced neither evidence nor denial, the umpire is convinced that it is probably correct.

No. 54 is for transportation in accordance with orders of the minister of war 14.70

No. 55 is for carrying freight under the order of General Castillo . . . 21.16

No. 56 is for transportation through the order of General Castillo between June 1 and 28 . . . . . 167.80

The whole amount allowed by the umpire in Appendix H is . . 266,920.22

Under Appendix K, and referring to the disputed items thereunder, there are allowed by the umpire the following:

Bolivars

Nos. 1 and 2 are for trains, trolleys, and other services of the railway to the Government under the order of General Manzanares, covering the month of September 1899 . . . . . 12,311.81

No. 3 is an account for the use of trolleys, etc., order by Gen. Ismael Manzanares, and vouched by him, covering dates from September 5 to 30 . . . . . 593.50

No. 4 is an account of special trains ordered by Gen. Carlos Liscano, covering dates from October 7 to 28 . . . . . 6,055.82

No. 5 is an account of special trains by the order of General Manzanares, vouched by him, covering dates October 21-25 . . . . . 29,646.29

The accounts up to and including No. 5 cover dates on which the services were performed either for the titular government then existing or for the successful revolution, and in either case are properly chargeable to the present Government.

No. 6 is a detailed account of trains employed under the order of General Manzanares, covering dates November 3 to 14 . . . . . 3,392.12

No. 11. This account was contracted for and on behalf of the troops of Gen. Jacinto Lara and is vouched by General Solagnie 16,567.76

The whole amount allowed by the umpire in Appendix K is . 68,567.30

Under Appendix M: This is a small claim for freight, etc., carried for the Government in the State of Lara in the years 1899 and 1900, and the allowance is objected to because it does not bear evidence of having been first charged to

the Government, and there is a denial of authority on the part of the officials of a State making accounts chargeable to the National Government without especial order to that effect.

The relation of the several States to the National Government is of such intricate character, apparently so intimate that it becomes difficult to discriminate rightfully between the two, if discrimination is possible in such matters. No question is made but that the service was performed in the interest of the State of Lara, and that it was proper service. The umpire knows that the several States are constituted by the National Government and the governors are appointed by the National Government and hold their offices during its pleasure; that a certain income is set aside for the support of these State governments; and from such knowledge as a basis in this regard he is satisfied that, if this account is allowed against the National Government and on behalf of the railway company, the National Government has such a relation to the State of Lara that it may easily recoup the sum if it is not properly chargeable to it, while if disallowed as against the railway company it is wholly remediless. It appears to the umpire, therefore, that it is safe for the National Government and just and equitable to the company that the question should be resolved in favor of the railway company, and the claim is allowed at 2,215.87 bolivars.

Under Appendix N, and referring to the disputed items thereunder there are allowed by the umpire the following;

	Bolivars
Nos. 2, 6, 8, and 10 are for services performed on behalf of the National Government for the transportation of troops, officers, prisoners, munitions and materials of war, all apparently of a character necessary for the use of the Government, and under the order and voucher of Gen. Juan F. Castillo, civil and military chief at Tucacas	362.87
No. 11, service in October, 1900, for transportation of one official by the order of Governor Urbina at Tucacas. It bears the appearance of correctness, carries with it the character of service for which a government may properly be charged, and is vouched by one assuming authority, which is not questioned before this Commission	2.31
The whole amount allowed by the umpire in Appendix N is . .	365.17

The umpire is next to consider, under Appendix H, those accounts which represent services performed on behalf of troops and officers engaged in the second Hernandez revolution. Those accounts are —

	Bolivars
No. 17. Under order of Gen. Avelino Jiménez, November 30	1,839.03
No. 18. Under order of Col. M. Vargas, November 18-29	1,483.25
No. 21. Under order of Col. M. Vargas, November 1-15	10,212.07
No. 24. Under order of Gen. Avelino Jiménez, December 1-15 . . .	17,546.02
No. 25. Under order of Gen. E. Garmendía and vouched by A. Jiménez, December 9	38.00
No. 26. Under order of General Jiménez, December 16-28	12,936.03
No. 27. Under order of General Jiménez, December 29-31	1,455.57
No. 28. Under order of General Jiménez, December 29-31	1,083.58
No. 38. Under order of General Jiménez, January 3, 1900	32.50
The whole amount of these is	46,626.05

There are to be considered also claims of a similar character under Appendix K. These are —

	Bolivars
No. 7. December 2, 1899, which are asserted to be contracts through the civil and military chief of the State of Lara, vouched by E. Garmendía, amounting to	8,234.60
No. 9. A similar account of December 14, amounting to	11,548.06
The whole amount of these is	19,782.66

The umpire is convinced by the charges themselves that they are for services of the nationalista revolution. For this he relies upon the telegram heretofore referred to and upon the internal evidences found in the vouchers themselves. The charge in No. 7 states that it is on account of the " revolution," and that it was contracted through the orders of the civil and military chief of the State of Lara. In voucher No. 9 it is found that this is an account of the liberal nationalista revolution and through the orders of the civil and military chief of the State of Lara in Barquisimeto. The first item of this account is December 4, 1899, and is for a special train to conduct Gen. E. Garmendía and his forces to El Hacha and return to Barquisimeto with comisionados. It will be observed that this is the same day that the same General Garmendía has vouched for the correctness of No. 7. This service in No. 9 first mentioned therein was performed by virtue of a written order attached to the voucher of date December 4, and signed by E. Garmendía, and he follows this with another order of the 10th of December, which is charged of date December 12 or 14, and in either case is for the conduct by train of troops and guns. His are the principal orders supporting this voucher, but there are orders by General Jiménez in this same month supporting this same voucher, showing that it was correctly charged to the revolution liberal nationalista. The umpire therefore entertains no doubt that these two accounts, Nos. 7 and 9, are of the same character, both assisting to oppose the Government of which General Castro was the head.

Concerning these accounts, both in H and K, which were for services rendered by the railway company to the liberal nationalista (or Hernandez) revolution, it is urged with ingenuity and ability by both the learned agent and the honorable Commissioner for the claimant Government that the present Government is responsible for them because they say that while the State of Lara had been of a revolutionist tendency and activity at a time previous, still at the time that General Castro came to that State with his revolutionary forces there was a condition of quiet which was disturbed by his presence and effort, and a large revolutionary force gathered to join with General Castro and fought their way to the capital, resulting in General Castro's headship of the Government, and that the months of disturbance and war which followed in that State and section were the result of this fomentation by General Castro, and that until there was secured peace and quiet under his Government it is a part of his inheritance that he should assume responsibility for those results. They also ably contend for the importance of this and other railways in Venezuela to the nation in the development of its resources, the reliance of the nation upon these railways and the propriety and necessity of assuming a different position to this railway, especially from what might be taken toward other instutions or other classes of property. The umpire is in perfect harmony in regard to the great importance of such national highways to the internal development of the country as well as for its valued uses in case the Government needs to transport rapidly troops toward the scene of disturbance or conflict; but it is his opinion that his discretion goes no further than sound judicial discretion, and that all such arguments

are properly addressed only to the political department of government and not to its judicial department or to those who may act in the limited sphere allowed them who are occupying and fulfilling judicial functions.

It is also the opinion of the umpire that history is not in perfect accord with their position on this question. From the best sources open to the umpire he believes the truth to be that the troops which came from Lara and vicinity, equally with others, came with the supreme purpose of overthrowing the Andrade government, and necessarily expecting if success crowned their efforts that their leader, General Castro, would be the natural head of the government. There are no historic evidences of any dissatisfaction amounting to a revolutionary spirit on their part against his assumption of the headship of the government.

History discloses that Andrade abandoned Caracas on the morning of October 20, starting for La Guaira. at which place he disbanded the men who, remaining faithfully with him, had gone thus far, and he himself took ship for the Antilles; that on the day of his departure General Rodriguez, president of the government council, assumed executive power and named a ministry; then he and General Mendoza and General Castro came to terms, and General Castro entered Caracas in the evening of October 22, 1899, and assumed power on the next day as the supreme chief of the Republic and appointed his cabinet. On that day, as supreme chief, het set at liberty the political prisoners who had been placed in prison by Andrade, and among them Gen. José Manuel Hernandez, who had been leader in the nationalista revolution and was in prison on account of such leadership. It was in making up his cabinet that General Castro made General Hernandez minister of public works, which at the time he did not accept or decline. In the early morning of October 27 General Hernandez stealthily left Caracas, accompanied by Gen. Samuel Acosta with a division of soldiers, and went out through El Valle, on the La Victoria road. October 28 there was circulated in Caracas and elsewhere through the country his proclamation dated the 26th instant, calling upon the country to overthrow the government of General Castro, at the same time declining the office of minister of public works. The watchword of General Hernandez and his followers in his first revolution was the same as was assumed immediately by his followers in this second revolution, and this fact is found so well expressed and so generally understood by intelligent men that the December accounts of the Bolívar Railway Company state that they were made in the service of the liberal nationalista revolution. It is not their claim that it was the liberal restauradora revolution, which was the watchword of General Castro and his followers, referring to the alleged subversion of the constitution by President Andrade, which had given the cause and the occasion for the successful revolution led by General Castro. In the judgment of the umpire that revolution ended with the triumph of its leader and his installation as supreme chief of the Republic. It may be thought that to be a successful revolution it must defend itself against those who dispute the government it had formed, but it did successfully defend and hence establish its right of success as claimed by it when it made its triumphal march into Caracas and proclaimed its chief the head of the Republic.

If the personal responsibility of General Castro in this matter were the question for decision, it might be possible to hold him responsible for the second revolution as growing out of the revolution he had led. Such, however, is not the ground on which successful revolutions are charged, through the government, with responsibility. Responsibility comes because it is the same nation. Nations do not die when there is a change of their rulers or in their forms of government. These are but expressions of a change of national will. " The

king is dead; long live the king!" has typified this thought for ages. The nation is responsible for the debts contracted by its titular government, and that responsibility continues through all changing forms of government until the obligation is discharged. The nation is responsible for the obligations of a successful revolution from its beginning, because in theory, it represented ab initio a changing national will, crystallizing in the finally successful result. The nation did not disturb or foment a revolution in Lara for which it was responsible beyond the point where its will had been expressed and settled in the Government established through General Castro. Success demonstrates that from the beginning it was registering the national will.

This rule was laid down in Williams *v.* Bruffy (96 U.S. Sup. Ct., 176), wherein the court say, speaking of a similar condition—

> such as exists where a portion of the inhabitants of a country have separated themselves from the parent state and established an independent government. The validity of its acts, both against the parent state and its citizens or subjects, depends entirely upon its ultimate success. If it fails to establish itself permanently, all such acts perish with it. If it succeed and become recognized, its acts from the commencement of its existence are upheld as those of an independent nation.

Neither was the nation responsible because General Castro, acting in his public capacity, set free from prison General Hernandez, for it was not done with a purpose to incite a revolution, but to complete and make permanent pacification between factions and to show his loyalty, present and prospective, to the friends of General Hernandez, who as opponents of the Andrade administration had joined their forces with his for its overthrow. The umpire does not find warrant in international law or in the proper application of the principles of justice and equity to the case at hand for holding the present Government of Venezuela responsible for the efforts of General Hernandez, his associates and compatriots, in their labors to destroy it. He holds that as a matter of fact and law it was a distinct and specific revolution based upon distinct and specific ideas of national government and with the avowed purpose of deposing President Castro and installing General Hernandez. It was no longer a battle for the restoration of the constitution, but was along the same lines that were established by General Hernandez and supported by his followers from the first revolution down to and inclusive of the second.

It follows, therefore, that so many of the items of Appendix H and Appendix K as were for services in behalf of this nationalista revolution are disallowed.

The umpire considers next, under Appendix N, the accounts which represent services performed on behalf of the revolution, generally known as the Matos revolution, commencing in the early winter of 1901-2 and closing in the spring or summer of 1903. These accounts are —

	Bolivars
No. 34. Order of E. J. Aular, December, 1901	7,585.12
No. 35. Order of E. J. Aular, January, 1902	9,717.86
No. 42. Order of E. J. Aular, February, 1902	15,569.77
No. 43. Order of E. J. Aular, February, 1902	65.45
No. 44. Order of E. J. Aular, February, 1902	5,033.08
No. 47. Order of General Fonseca, March, 1902	5,754.69
No. 50. Order of General Solagnie, April, 1902	30.29
No. 51. Order of General Solagnie, April, 1902	40,998.62
No. 53. Order of General Solagnie, May, 1902	79,661.78
No. 55. Order of General Solagnie, June, 1902	71,828.86
No. 57. Order of General Solagnie, July, 1902	108,259.10
No. 58. Order of Gen. F. Batalla, August, 1902	58,138.42

	Bolivars
No. 59. Order of Gen. F. Batalla, August, 1902	4,453.57
No. 60. Order of M. F. Bernal, August, 1902	3,831.11
No. 61. Order of M. F. Bernal, August, 1902	362.59
No. 62. Order of M. F. Bernal, October, 1902	561.16
No. 63. Order of General Solagnie, November, 1902	44,160.54
No. 64. Order of M. F. Bernal, November, 1902	1,464.39
No. 67. Order of General Solagnie, December, 1902	59,119.91
No. 68. Order of General Solagnie, January, 1903	57,514.56
No. 70. Order of General Solagnie, February, 1903.	39,177.32
No. 72. Order of General Solagnie, February, 1903.	10,981.87
No. 73. Order of General Solagnie, February, 1903.	34,273.36
No. 75. Order of General Solagnie, April, 1903	71,329.00
No. 80. For use of revolutionary army, May, 1903	37,267.69
The whole amount of these is	767,140.11

It is urged with ability and force by the learned agent and the honorable Commissioner for the British Government that the respondent Government should be held responsible for these accounts because during this time the railway company was denied all protection and compelled to render this service against its will for want of proper protection which dilligence and good government would have provided. They claim that the character of the company's business and its property rights are such as to especially demand the utmost of protection and extreme care and attention on the part of the National Government. They further urge that its importance to the National Government should incite the furnishing of such protection, and, if not furnished, a willingness to reimburse it for its losses. The umpire is of opinion that while there is opportunity for the recognition of these cogent facts and arguments by the Government itself in its public capacity and animated by a broad national spirit, there is no power vested in this tribunal to make orders or establish awards not properly juridical in their character; that this tribunal can not take into consideration questions of national policy, but must confine itself to the determination of whether there has been an international wrong for which the respondent Government is responsible in damage, and that it performs its functions best and safest when it adheres most closely to the principles established by the law of nations. It has then only to determine whether there has been negligence in fact on the part of the respondent Government in such a way and to such an extent as to make it chargeable with the losses which this claimant company has suffered through the demands of the revolutionists.

The umpire has already passed upon this in his historical review of the events which led up to the Matos revolution and the struggle of the National Government for supremacy which followed. This historical review was part of an opinion in the supplementary claim of the Aroa mines, and he there found the fact to be adverse to the contention of the claimant Government, and he now says that in his judgment it can not be charged upon the respondent Government in its supreme struggle for existence it was negligent in its conduct toward this part of its territory. The war upon the National Government was started in the east and in the west substantially at the same time, and with a common purpose and evidently looking towards a common end. The revolutionists pushed their victorious forces toward the capital. The armies of the Government were driven back from the east and from the west as the forces of the revolution pushed their way on. Unfortunately this left in the west the State of Lara and the Bolívar Railway Company bereft of Government forces, and for quite a time the revolutionist troops were strongly intrenched in the sections

in which this railway lies. Along with the presumption which stands by the side of the respondent Government that it will care to do its duty and will do its duty in this regard stand the historic facts that it fought in these sections until defeated and remained until driven out, and it went out not because it was weak and powerless, but because it was overcome by the superior strength of the revolutionary forces. In the judgment of the umpire it did not protect because it could not protect. After the blockade and the brief time necessary for recuperation of national strength, made necessary by the conditions attending and following the blockade, that section of the country had the first attention of the respondent Government, and it threw into that territory sufficient force under capable generals to defeat and drive out the revolutionist army. Hence so much of the claim as is found in the numbers above named in Appendix N is disallowed.

SUMMARY

	Bolivars
Total allowance by Commissioners	771,667.12
Total allowance by umpire	335,842.69
Interest to date of award	119,896.93
Expenses (translations, official authentications, copies for Commission)	1,796.25
Total	1,229,202.99

Judgment may be entered for the sum of £ 48,681.33.

SANTA CLARA ESTATES COMPANY CASE (SUPPLEMENTARY CLAIM)

The titular government has no right to collect taxes on property which have already been paid to a revolutionary government which had gained control over the portion of the national territory wherein the property is located, and taxes so collected must be returned.

PLUMLEY, *Umpire*:

In this case the Commissioners agreed that some indemnity was due to the claimant Government from the respondent Government on account of so much of the damage as occurred to the claimant through the acts of the Government or its authorities or agents; but they did not fix that amount, leaving the appraisement of damages to the umpire, and disagreed wholly as to that part of the claim representing damages and losses to the claimant through the acts of revolutionary forces and authorities.

The facts show that the Santa Clara Estates Company carried on business in the Orinoco district of Venezuela; that from the month of May, 1902, to May, 1903, the district where this property was situated was entirely in the hands of Matos revolutionaries or the so-called revolution of liberation. This body established itself as the government of that section of the country and to a certain extent entered upon the discharge of governmental functions. The business of the company was the raising of live stock on their several estates known as " Santa Clara," " Bombal," and " Guara," all situate in the State of Sucre, in the district of Sotillo. Their losses consists in the taking of their live stock for the uses of the revolution. There is no question that the property was taken in the manner alleged and that the company sustained large losses in consequence. The contention arises through the question whether under the particular circumstances detailed in the case there is ground for ingnoring the ordinary rule concerning the responsibility of the titular government for

the acts of revolutionaries. The learned agent for the British Government claims that it was negligence of the titular government to so long allow its revolted subjects to maintain an independent government; that there is a limit which must be reached within which the Government must reduce the revolutionaries to subjection, declare the independence of the revolted territory, and thereby permit the foreign governments to take the protection of their subjects into their own hands, or accept the liability to pay compensation for the damages suffered at the hands of the revolutionary authorities because of apparant and actual negligence and inactivity. He submits that in this case the first step, that of reduction to subjection, was not taken within a reasonable time; that a whole year beyond that proper limit of time during which the Venezuelan Government were justified in tolerating an independent government, for, he alleges, one determined battle was enough to dispose of the whole trouble; and that since they had not reduced the revolting subjects to subjection, nor permitted their independence, they had incurred responsibility after a reasonable time for the injuries committed by the Government in fact which the titular government allowed to remain and to be in control within the territory in question.

In regard to this argument of the learned British agent it is the opinion of the umpire that more dependence should be placed upon the actual diligence applied by the titular government to regain its lost territory and to suppress the revolutionary efforts than upon the mere question of time taken to accomplish that end; and the umpire recalls that Great Britain contended for seven years against the revolt of the thirteen American colonies before it consented to separation; that the United States of America fought the secession of the Confederate States for more than four years before it regained its revolted territory and had subjected the rebellious citizens to its control. And neither Great Britain nor the United States, notwithstanding the length of time intervening between the revolt and the termination of the same, admitted or discharged any liability to foreign governments for the acts of the revolutionaries in question. Other pertinent illustrations might be drawn from history more remote and more recent wherein a similar rule of nonliability under circumstances where the length of time elapsing between revolt and subjection by the titular government or success on the part of the revolutionary forces was greater than in the present case.

The issue in this regard is to be determined in the answer to this question. Was the length of time during which this independent government existed the result of the inefficiency and negligence of the Government in its general efforts to put down the revolution and to regain its lost territory throughout the whole country of Venezuela, or was it due to the extent, strength, and force of the revolution itself?

A brief résumé of the history of Venezuela for a short time preceding this revolution of liberation, as well as the facts connected with that revolution, becomes necessary.

It is generally accepted that not far from June, 1900 the country had become generally pacified and had accepted the administration of General Castro. Tranquillity prevailed, however, for only a very limited period. It was first seriously disturbed in the latter part of October, 1900, by a revolt at Yrapa, under Gen. Pedro Acosta, which was not suppressed until the following February. In the meantime there occurred the insurrectionary attempt of Gen. Celestino Peraza at La Mercedes. Then in July, 1901, came Gen. Carlos Rángel Carboras from Colombia, where he had been in hiding, aided by Colombian soldiers, and soon gathered in the western part of Venezuela an army of 4,000 men; in the early part of the succeeding August another force

invaded Venezuela by way of Colombia, and in early October there was the revolution of Gen. Rafael Montillo in the State of Lara. About this time Gen. Juan Pietri made an effort to combine the disaffected citizens in and around Caracas. All of these revolts were immediately met and in due time defeated; but they called for military movements in different directions and of considerable magnitude. They occasioned much loss of blood and national treasure, so that when the revolution of liberation, under General Matos, was launched upon the country in the latter part of December, 1901, it is historic that the Government had to enter upon its defense with very limited resources of men and money at its command, while the revolutionary forces were greatly aided financially by General Matos.

Almost simultaneously with the uprising in the east following the proclamation of General Matos there were similar uprisings in the west; there were fierce battles between them and the Government troops, with a general trend of victory toward the revolutionists, and by the latter part of March, 1902, much of the west and the greater part of the east had passed under their control. There were also naval contests favorable to them, and by the middle of May the governor of Trinidad advised the British foreign office that all Venezuelan ports except La Guaira were in the hands of the revolutionists. It was then that General Matos entered the country by the way of Carúpano and began his victorious march toward Caracas; and it was at this time that a portion of the garrison at Ciudad Bolivar revolted under Col. Ramón Farreras, and that city and the State of Guayana soon passed into revolutionary hands. There were also the advancing troops of the revolutionaries from the west to meet the uprisings then occurring in La Guaira, in the valleys of the Tuy, and in Guaripo, and with them to join the Matos forces which were at this time coming from the east; and this union was effected in early October. During all this period there had been constant, able, and strenuous effort on the part of President Castro, his officers and troops, to stay this rapidly rising and forceful tide of rebellion and to beat it back; but it was not until the combined revolutionary forces met him at La Victoria and battled with him for twenty days that he was able to deal them a destructive and disastrous blow. This signal defeat staggered the revolutionary forces and many of them disbanded, while the Government succeeded in regaining from them some of its interior and coast towns.

Close upon the heels of this signal triumph of the Government forces began the incident of the concerted action of the allies, and until the middle of February following all efforts of the Government were stayed and its powers paralyzed by the impending belligerent operations of the allied Governments and the actual state of blockade of all the ports of the country.

Certainly no charge of negligence can be placed against the National Government in this immediate crisis of its history. After the blockade was raised and peace between Venezuela and the allied Governments assured, the National Government assumed offensive operations against the revolutionary forces in the west, and the victory of General Gomez at El Guapo on the 13th, 14th, and 15th of April of the present year resulted in the practical overthrow of the revolution of that section of the country, and after the battle of El Guapo the troops of the Government were at once used in the restoration of the national power in the States of Varacua and Lara, and the defeat of the rebel armies in those sections resulted in their general surrender and the hurried escape of General Matos and his leading generals to Curaçao and the proclamation by Matos, on the 11th of June, at Curaçao, declaring the war at an end. Shortly after this declaration of peace on the part of Matos the Government repossessed itself of all parts of the national territory excepting that portion adjacent to

and within the city of Bolívar, and the attention of the Government was immediately and successfully directed against this last stronghold of the rebellion, and the revolution of liberation was at an end.

A war in which there were in a little over one year twenty sanguinary battles, forty battles of considerable character, and more than one hundred lesser engagements between contending troops, with a resultant loss of 12,000 lives, can hardly suggest passivity or negligence on the part of the National Government toward the revolution; and the umpire is impressed with the fact that such control as the revolutionists obtained in certain portions of the country was owing rather to the financial aid which it received through its chief, Matos, who, with the great body of men under his standard, made a combination for a time irresistible and overwhelming, than to any weakness, inefficiency, or negligence on the part of the titular government. In other words, history compels a belief that the Government did in fact what it has a right to have assumed it would do — made the best resistance possible under all the existing circumstances to the revolutionary forces seeking its overthrow. As previously suggested, it will be noted that the titular government met the revolution of liberation under Matos after several successive lesser revolutions which seriously taxed its military powers in men and treasure and necessarily depleted both; and that for some three months during the revolution its ordinary sources of income through its ports were entirely lost to it, and, while something of a national spirit was aroused by the occasion of the concerted action of the allied governments, its treasury suffered seriously.

It is therefore the opinion of the umpire that there was no undue delay on the part of the Government in the restoration of its power in the district under consideration, and that it was not through the weakness, inefficiency, or passivity of the Government that the revolution of liberation remained in control for the time named, but rather through its inherent strength in men, materials, and money, and in certain assisting circumstances.

The learned British agent would meet the ordinary assumption of dilligence on the part of a government to regain its lost control of territory and to secure its lost control of its inhabitants by the fact that its recent efforts to compel repayment of taxes after these taxes had been once paid to the revolutionary government may be taken as having been contemplated by the Government during its delay in regaining such control; but, as the umpire finds, historically and not by assumption, that there has been no negligence or undue delay on the part of the National Government, the able and ingenious argument of the British agent in that regard can not prevail.

There remains to consider the validity of his contention that since Venezuela is now collecting taxes for the period when the revolutionaries were in control the National Government have thereby incurred a necessary responsibility for not having adequately protected its inhabitants in consideration for the taxes paid.

It is incontestably true that with the duty to pay public taxes flows the right of protection and the conscientious and careful discharge of all imposed public duties by the Government to which this tribute is made; that with the right to demand and exact revenue for the support of government stands the correlative duty to be competent and willing to discharge its public functions and conserve the welfare of the taxpayer, and that the one can not rightfully or lawfully exist in the absence of the other; but we have found it to be historically true that the Government of Venezuela was neither competent nor present to perform in any part its governmental functions at the place and within the period in question. They had wholly lost their sovereignty over this district and it was wholly out of their control and independent of the titular government,

and the attempt to obtain or the obtaining of a second payment of public dues does not disturb the revolutionary status, while the original payment of taxes to the revolutionary government only makes more emphatic its complete control of the situation during the period in question.

While there is no question that the collection of taxes by the Government for the period during which it had lost its sovereignty over the territory in question is indefensible in law, logic, and ethics, the respondent Government is not a pioneer in this respect.

The United States of America may claim priority over them. In the war of 1812 between that country and Great Britain the latter country captured and held thereafter until the declaration of peace the town of Castine, in the State of Maine. After peace had been declared and evacuation had taken place the United States collector of customs for that port claimed a right to exact duties for goods which had been imported through the custom-house while it was in charge of the British Government, and to which latter Government the duties had been paid. The case went to the United States Supreme Court, and, under the title of United States *v.* Rice, is found in 4 Wheaton, 246, Justice Story giving the opinion, from which the umpire makes a brief quotation:

> The sovereignty of the United States over the territory was of course suspended, and the laws of the United States could no longer be rightfully enforced there or be obligatory upon the inhabitants who remained and submitted to the conquerors. By the surrender the inhabitants passed under a temporary allegiance to the British Government, and were bound by such laws, and such only, as it chose to recognize and impose. From the nature of the case, no other laws could be obligatory upon them, for where there is no protection or allegiance or sovereignty there can be no claim to obedience. Castine was, therefore, during this period, so far as respected our revenue laws, to be deemed a foreign port, and goods imported into it by the inhabitants were subject to such duties only as the British Government chose to require. Such goods were in no correct sense imported into the United States. The subsequent evacuation by the enemy and resumption of authority by the United States did not and could not change the character of the transactions. * * * The goods were liable to American duties when imported, or not at all. That they were not so liable at the time of importation is clear from all that has already been stated, and when, upon return of peace, the jurisdiction of the United States was reassumed they were in the same predicament as they would have been if Castine had been a foreign territory ceded by treaty to the United States and the goods had been previously imported there. In the latter case there would be no pretense to say that American duties could be demanded, and upon principles of public or municipal law the cases are not distinguishable. The authorities cited at the bar would, if there were any doubt, be decisive of the question. But we think it too clear to require any aid from authority.

The umpire holds, therefore, that the effect of the respondent Government in claiming and receiving a payment of taxes for a period of time when it had lost its sovereignty over the district in question, and could neither render protection nor receive obedience, is simply to make the respondent Government liable for a return of those illegally exacted taxes, as was held in the Italian-Venezuelan Mixed Claims Commission, now sitting at Caracas, by Ralston, umpire, in the matter of the Kingdom of Italy on behalf of Luigi Guastini,[1] to which reference may be had for a more extended discussion of the principles involved and for important citations and quotations there found.

Such exaction of taxes is without right; but it does not follow that there is an assumption on the part of the Government for the acts of revolutionaries. While the payment of taxes to the revolutionists did import the correlative duty of

[1] See Volume X of these *Reports*.

protection from them, for they were in a position and were bound in right and honor to grant it, there is certain logic in the astute contention of the learned British agent and there is grave error on the part of the officers of the Government if they demand such payment; but these wrongful demands can not change history or reverse international law.

Hence it follows that upon neither of the grounds held by the learned British agent can the losses of the claimant be considered of such a character that the National Government is bound to render him compensation for losses or injuries caused by the action of revolutionary troops; and so much of the claim is disallowed.

For that portion of the claim resting upon the action of the Government forces and authorities the umpire allows the sum of £ 492, which includes such expenses in the preparation of the claim as, in his judgment, should be allowed.

DAVIS CASE

Where goods imported into Venezuela are by mistake or misrepresentation delivered by the customs officials to others than the consignee, the consignor can not maintain a claim against the Government of Venezuela when it appears that the wrongful delivery was only possible through the negligence of the consignor.

PLUMLEY, *Umpire*:

This case came to the umpire through the disagreement of the honorable Commissioners.

The umpire finds the decisive facts to be that Lanzoni, Martini & Co., an Italian company doing business in Venezuela as railway contractors and miners, contracted with Messrs. John Davis & Son, a British firm doing business at Derby, England, on or about the 26th of February, 1901, for certain goods in the line of the claimant company, consisting of oil for miners' safety lamps, lubricating oil, miners' safety-lamp glasses, and the like, and that on the 26th of February, 1901, these goods were shipped by the claimant company to go forward to the port of Guanta, in Venezuela, for the use of the said Lanzoni, Martini & Co. These goods were to be given up to Messrs. Lanzoni, Martini & Co. by the shipping agents of the claimant company in exchange for cash against bills of lading, which later were forwarded with the accounts to Messrs. Ruys & Co., of Amsterdam. for their collection, and on the 11th of April, 1901, the Dutch steamer *Prins Willem III*, from Amsterdam, put in at the port of Guanta, bringing these goods. The certified manifest showed that these goods were sent by Messrs. Hoyman & Schurman, of Amsterdam, to Guanta, consigned to Messrs. John Davis & Son, to the order and account of said company. It further appears that Messrs. Ruys & Co., of Amsterdam, had not succeeded in obtaining the cash of Messrs. Lanzoni, Martini & Co., and it appears that this Amsterdam company, shipping agents of the claimant company, did not forward such bills of lading to any agent or representative of the claimant company in Guanta or Barcelona, or send any instructions, suggestions, or restrictive orders to the customs officer at Guanta concerning the delivery of said goods only on payment therefor or otherwise; but on the 12th of April Messrs. Lanzoni, Martini & Co. applied to the customs officer requesting a certified copy of the consular invoice received by the customs-house stating that they had received no consular invoice, but had received the commercial invoice, and declaring that the goods in question had come for them and their use.

Mr. Lanzoni corroborated his statement by reading to the customs officer, correspondence which his company had had concerning these goods. The

goods were initialed " L. M. & Co.," and Mr. Lanzoni insisted that these were the initials of their company and the mark used on all their imports, and urged upon the customs officer that if his company were not furnished with the certified copy requested it would be impossible to present the manifest within the time limited by law, and the goods would be subjected to its penalties. There was not known to the customs officer in Guanta or Barcelona any mercantile house of Messrs. John Davis & Son, nor was there known to such customs officer any representative of such a company in either Barcelona or Guanta. In fact, no one applied to the customs-house on behalf of the claimant company during the four workdays' period permitted by Venezuelan law for the claiming of the goods before fines would be imposed. The customs officer believing the representations of the Messrs. Lanzoni, Martini & Co., and understanding that company to be creditable and responsible, and having in no way been placd upon his guard against said company in regard to these goods, or requested in any way to protect the interests of the claimant company, the certified copy requested was furnished, and the manifest of Lanzoni, Martini & Co. was admitted and the goods delivered to them. It further appears that through the negligence of the claimant company, or of Ruys & Co., their shipping agents of Amsterdam, there was no one in Barcelona, or Guanta, or elsewhere in Venezuela, in receipt of the bills of lading, advised on behalf of the claimant company concerning said shipment, or in any way authorized to act for them or their shipping agents until after the 4th of July of that year, on which day, as also on the 11th of July, it appears that the claimant company wrote to Messrs. Dominici & Sons, a firm established in Barcelona — the date of the receipt of the letters not appearing — inclosing to them the bills of lading and requesting them to hand over to Messrs. Lanzoni, Martini & Co., after payment, the goods in question; and it was after this date that there first appeared before the customs officer at Guanta any one acting in behalf of the claimant company, when it was ascertained by such representative that the goods in question had a long time previously been delivered to the Messrs. Lanzoni, Martini & Co., as above stated. It also appears that this latter company on then being addressed by these Venezuelan agents of the claimant company admitted that they had the goods and had used part of them and expressed their inability there to make payment, but that the debt would be cancelled or application to the company's office in Rome, Italy. These facts were duly reported by the said Dominici & Sons to the claimant company.

It further appears that the claimant company has made application both to the Barcelona house and the house at Rome of the Messrs. Lanzoni, Martini & Co. to obtain payment, and, failing to obtain such, instructed their agent in Rome to take legal proceedings in order to procure the money due them. The claimant company assert that they and their agents have used all reasonable means to obtain payment and have failed.

The laws of Venezuela concerning imported goods by the authority of the honorable Commissioner for Venezuela are as follows:

> The consignee is the importer of goods shipped abroad and bound for Venezuela. Within four workdays from the time the entrance visit has been paid each one of the importers of foreign goods must present the custom-house with the copy of the certified invoice, together with a manifest in duplicate drawn in the Spanish language, fulfilling all conditions required for invoices, and containing besides the total amount of bales and their value. * * * (Law XVI (Régimen de Aduana para la importación) of the Financial Code of Venezuela, art. 91.)

It is further provided that on the expiration of the four workdays fines are to be imposed, to wit: " For the first day later 100 bolivars, and 10 more for each

following day," and if after sixty days the manifest is not presented the goods shall be treated as abandoned, and the public shall be informed fifteen days beforehand that the goods are to be sold to the highest bidder, if not claimed by the owners, and if at the end of such fifteen days the goods remain unclaimed they shall be sold at public auction with all due legal formalities, and from the moneys thus received the fiscal dues, fines, and other expenses shall be paid.

It follows, therefore, that when the Messrs. Dominici & Sons, agents of the claimant company at Barcelona, made their application to the customs officer, as hereinbefore stated, if the delivery to Messrs. Lanzoni, Martini & Co. had not been made and the law had taken its due and regular course these goods would have been sold at public auction, and there might not have been any sum remaining out of their sale. It is very improbable, in view of the nature of the goods and the lack of general local demand therefor, that there would have been any considerable sum paid for them at public auction, while the duties, the fines, and other charges would have reached a large sum.

So far as is appears to the umpire from the facts before him, the attention of the British foreign office was not called to the particulars of this claim until January 19, 1903, and it was not until the 11th day of April, that the Venezuelan Government was notified of these facts and their attention asked to the same.

From the testimony of Mr. Stephenson, the only sworn testimony in the case on the part of the claimant company, the umpire could have adduced but very few of these facts, and if his testimony had been taken literally by the umpire it would oppose some of the facts as found. But from all the testimony in the case, and largely from the testimony of the respondent Government, he has been able to obtain a connected history concerning the matters in question.

Upon the authority of the honorable Commissioner for Venezuela the umpire quotes another portion of Venezuelan law affecting the action of the customs officer:

> When the importer should not receive the certified invoice, the custom-house will, on his written requisition, furnish him with a copy of the corresponding one received by it with the documents under cover and seal, so as to form the manifest.

In the judgment of the umpire the customs officer at Guanta was led into error, not unnatural, by Messrs. Lanzoni, Martini & Co., largely, if not wholly, through the fact that no one appeared acting on behalf of the claimant company, and therefore the statements of Messrs. Lanzoni, Martini & Co. that they were the importers in fact were easily given credence. The umpire is satisfied that the legal duty of the customs officer was to deliver the goods to the consignees or their lawful order only, and that in delivering the goods to anyone else except to the consignees, or their order, there was a clear mistake; but as this case turns in the judgment of the umpire upon other grounds it is not necessary to pass upon the responsibility of the Government of Venezuela for such mistake. The negligence of the claimant company and of their agents is in justice and in equity more important, and in the opinion of the umpire is in fact decisive. Upon the facts found in this case, had matters taken their ordinary and due course under the laws of Venezuela, there would have been none of these goods in the Guanta customs-house at the time of the first inquiry made thereat by the claimant company in the latter part of July, or early August, 1901. They would all have been disposed of lawfully at auction to the highest bidder, and out of the proceeds of such sale there would have been paid all of the legal charges of the Venezuelan Government connected with the importation, the warehousing, the advertising, the selling of the goods in question, and the legal penalties attaching to the delay. The most that could have been at that time in the hands

of the Government would have been the remainder, if any, after satisfying these legal charges. In the judgment of the umpire there would have been no remainder. It is, therefore, inequitable to now claim of the respondent Government full payment for these goods which were lost wholly through the negligence of the claimant company. For, as the umpire has just stated, if these goods had not been delivered to Lanzoni, Martini & Co. they would have been sold under operation of Venezuelan law before the claimant company appeared at the custom-house through their agents Dominici & Sons.

From these facts the umpire holds that it was negligence on the part of the claimant company under all the facts in this case to not forward the bill of lading with the goods to a responsible Venezuelan resident agent, and that this negligence was the real and primary cause of the conditions which followed, and the least that can be said is that this negligence was directly and proximately contributory to the injuries complained of.

It was still greater negligence to allow more than three months to elapse before forwarding such bills of lading and securing local representation in its behalf.

Again, to justly and equitably charge the respondent Government with the official misconduct of its customs officer there should have been prompt notice to the Venezuelan Government of the claim for indemnity and the facts concerning the claim, so that the respondent Government, if otherwise liable, could have availed itself of its remedy against Lanzoni, Martini & Co. (*a*) through subrogation, (*b*) through the bond of its custom officer, or (*c*) through the property of the customs officer himself; and to delay notice for two years after the happening of the event upon which the claim is based is in itself gross negligence on the part of the claimant company. Upon the theory of the liability of the respondent Government there was such remissness of duty toward it on the part of the claimant company as amounts to laches in justice and equity.

Negligence is:

> The failure to observe, for the protection of the interests of another person, that degree of care, precaution, and vigilance which the circumstances justly demand, whereby such other person suffers injury. (Bouvier, vol. 2, p. 478, citing Cooley on Torts, 630.)
>
> The absence of care according to circumstances. (*Ibid.*)
>
> Such an omission by a reasonable person to use that degree of care, diligence, and skill which it was his legal duty to use for the protection of another person from injury as, in a natural and continuous sequence, causes unintended injury to the latter. (*Ibid.*)
>
> The failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation, or the doing what such a person under the existing circumstances would not have done. (*Ibid.*, citing 95 U. S., 441.)
>
> See Bouvier under the head " Negligence " for further quotations.

Laches is:

> Unreasonable delay; neglect to do a thing or to seek to enforce a right at a proper time; the neglect to do that which by law a man is obliged or in duty bound to do. Unlike a limitation, it is not a mere matter of time, but principally a question of the inequity of permitting the claim to be enforced; *an inequity founded upon some change in the condition or relation of the property of the parties.* (Bouvier, vol. 2, p. 101, citing as to the last part of the quotation 10 U. S. Ap., 227; 145 U. S. (Sup. Ct.), 386). (Italics the umpire's.)
>
> It has been said to involve the idea of negligence; the neglect or failure to do what ought to have been done under the circumstances to protect the rights of the parties to whom it is imputed, or involving injury to the opposite party through such neglect to assert rights within a reasonable time. (Bouvier, vol. 2, p. 101.)

The case, therefore, in justice and equity, should be decided wholly without reference to the actions of the customs-house officer at Guanta, which action, under the circumstances disclosed in this case, could have done the claimant company no harm, and solely with reference to the relations which the claimant company bears to the situation in question.

It therefore becomes the duty of the umpire to disallow the claim, and judgment may be entered accordingly.

FEUILLETAN CASE

In the absence of positive proof of payment of wages by the Government, after admitting an employment by it, and in the face of positive testimony that wages were not paid, the Government was held liable.

Interest allowed on amount due, but expenses of claim disallowed.

PLUMLEY, *Umpire*:

The Commissioners failing to agree, this case comes to the umpire for decision, and was considered and determined in the United States under the agreement between the two Governments permitting the same.

The claimant alleges that he took service as fourth engineer on board the Venezuelan gunboat *Restaurador* on February 27, 1901; that on the 16th of May of the same year he was shipped by Venezuelan authorities on board the gunboat *General Crespo* to La Guaira, there to give evidence in the matter of an inquiry there being had concerning the second engineer of the first-named gunboat; that he arrived in due course at La Guaira on the 18th of May, and gave his statements concerning the matter named; that under instructions of Venezuelan authority he remained in La Guaira, and later he examined the gunboat *Rayo* and made report of her condition, and then acting under orders, repaired the gunboat, and on the 15th of October of that year was transferred to the *Rayo*, serving regularly as third engineer until December, 1901; that then expressing a desire to leave the service he was put under arrest and forced to remain, and did remain, until the 27th of February, 1902, when he was released; that his salary under his first engagement as fourth engineer was 65 pesos monthly; that some time subsequently, while still serving on the *Restaurador*, he was raised to third engineer, at the monthly wage of 75 pesos, but the time when this advancement of wage took place is not stated. He claims that he went to La Guaira under orders and wages, but whether his wages were at 75 pesos, 65 pesos, or some other rate, he does not state. He does not state at what wages he acted as inspector and repairer of the *Rayo*, but he claims that his engagement as engineer of the *Rayo* was at the monthly wage of 60 pesos. For all these services he claims the sum of 492 pesos, alleging that he has never been paid any salary.

Aside from his own statement he furnishes the evidence of one Manuel Flores, who states affirmatively and positively from his own knowledge that the claimant was sent to La Guaira and without having had his wages paid.

The respondent Government contends that the claimant held the position of fourth engineer only on board the *Restaurador*; that he served from the 27th of February, as alleged by the claimant; and that he remained on the *Restaurador* until the 31st of May following, when he deserted the service of the Venezuelan Government, and that nothing remained owing him for his wages.

It is further contended by the respondent Government that there was no action or inquiry had at La Guaira against or concerning the second engineer of the *Restaurador*, and that the allegation of the claimant that he was sent to

La Guaira to make testimony in such cause was " simply a fable." It is further contended by the respondent Government that he was shipped on the boat *Rayo* by the first engineer of that boat, who unofficially employed him as his assistant; that he was paid by this person personally his wages in full during the time of his service on such boat, but that the sum agreed upon was 50 pesos monthly instead of 60, as alleged by the claimant; and that finally, for incompetency and apparent revolutionary sympathy, he was dismissed from the service. The respondent Government alleges that the claimant has been fully paid for all services rendered.

It is impossible from the statement of the claimant to know how much his wages should amount to, as he states two different prices during his service on the *Restaurador* without naming the time when the advance took place, and while claiming to be sent to La Guaira on wages, he does not state at what rate, nor how long such rate of wage continued, nor whether there was a differing price for the inspection and a differing price while he served as repairer, nor does he state whether he was under wages at La Guaira before entering upon the duty of inspector and repairer on the *Rayo*. He does not positively assert that he was not paid the sum his due while waiting at La Guaira and while working upon the boat *Rayo* prior to his engagement as engineer thereon, although, as he makes no statement admitting a payment and makes a general assertion that he was not paid his salary, the fair interpretation of his several statements in this regard is that he was not paid any portion of his due and that he was under certain wages for the entire year.

The umpire finds it impossible to reconcile his statements concerning the time of his employment with the wages due as claimed by him. His wages on the *Restaurador* and up to the 18th of May, when he gave his testimony in La Guaira, as alleged by him, reckoned at 65 pesos a month, amounts to 170 pesos. His wages on the *Rayo* from October 15 to February 27, at 60 pesos monthly, as claimed by him, amounts to about 266 pesos, and the two sums united equal 436 pesos. If he be allowed 65 pesos until May 31, although there seems to be no reason for doing this unless all of his time while waiting is to be charged for, there would be an additional sum of about 26 pesos, making in all about 463 pesos. So much of this, however, is conjectural that it can only be used to show the impossibility of stating his claim in detail with any fair degree of certainty.

Taking the case upon the claim of the respondent Government that he served on the *Restaurador* from February 27 to May 31, at a monthly wage of 65 pesos, and we have substantially 197 pesos as the amount his due for such service. Since the service is admitted the burden rests upon the respondent Government to show by a fair balance of affirmative proof that recompense has been made. Unfortunately for the respondent Government, if their claim of payment is correct, they have not shown it by the statement of any person claiming to know it as a matter of his own personal knowledge nor by inspection of the vouchers or books which should show such payments, and those books and vouchers are asserted to be beyond the reach and without the control or possession of the respondent Government. There is proof that the Bank of Venezuela paid the salaries reported to be paid, but there is no proof that such report contained the name of the claimant for all or any part of his wages, but there is proof that the officers of the boat believed sincerely and so does the admiral of the navy, that such payment was made. However, against the positive assertion of the claimant and his witness, Flores, that no part of his wage was paid while on the *Restaurador*, the umpire fails to find the fact of such payment established, and therefore holds that the sum of 197 pesos and 13 centavos is due to the claimant for such services.

Without any positive claim as to his wage between the 31st of May and the

15th of October and with no supporting testimony of such service and with the impossibility of reconciling such a claim, if it is to be considered as made, with the amount claimed by him as the total sum due, the umpire does not find anything due the claimant for this intervening period.

From the 15th of October onward while engaged on the *Rayo* as engineer, the umpire feels better satisfied in his own judgment to accept the positive testimony of the engineer under whom he served, supported by the testimony of Commodore Pedro Thodo, that the claim was fully recompensed by the engineer himself by whom the claimant was unofficially engaged, as the umpire finds the facts to be. Unlike the case of the *Restaurador*, here the testimony concerning payment is explicit, positive, and of personal knowledge, and when opposed to the somewhat vague and quite indefinite general statements of the claimant are of convincing force and evidential value.

All of the claim not included in the services on the *Restaurador* to May 31 is disallowed.

The claimant is found to be a British subject.

Interest is allowed but expenses are disallowed, and the umpire finds the claimant is entitled to receive from the Government of Venezuela in full discharge of his entire claim the sum of £ 33 13s., and award will be made accordingly.

COBHAM CASE

Claim dismissed without prejudice for want of sufficient proof, it appearing that claimant did not have the aid of skilled counsel in the framing of his evidence. Award made later for £ 100 by consent of Commissioners.

PLUMLEY, *Umpire*:

The Commissioners having failed to agree in this case it has come to the umpire for his determination.

The evidence shows two distinct instances of losses to property and injury thereto and of gross indignities toward and injuries of the person of the claimant.

Concerning the instance of October 26, 1902, resting upon the acts of Col. Guillermo Aguilera, Capt. Pedro Díaz, and their fifteen soldiers, constituting a part of the army of the revolution libertadora, it is impossible to charge responsibility upon the National Government against which these men were at war and over whose conduct it had lost all control. This part of the claim must be disallowed, in accordance with the umpire's opinion of justice and equity and in accordance with his previously expressed judgment before this tribunal. Cruel and unjust as such conduct must appear to all right-minded men, proper reparation is not to be found in mistakenly and therefore wrongfully charging it upon the Government.

Concerning the acts occurring on October 14, 1902, and testified to by H. Fischbach and Ramón Guerra and five others, if these were perpetrated by soldiers and officers forming a part of the army of the Government, it is to be regretted that such fact is not clearly in proof. The charges involved are all of too grave and compromising a character to be accepted without clear, definite, and convincing evidence. As the testimony stands it may or may not mean Government troops. The Government must not be held responsible for such a serious outrage on property and personal liberty by evidence in which upon this essential fact the language is distinctly ambiguous and indefinite. The injuries to the claimant were incurred in and because of his resolute efforts on behalf of his employer's property; and his personal bravery and his loyalty to his trust

incite the umpire to give him all the protection within his power. and had he warrant therefor from the evidence he would be glad to award him ample indemnity. The ambiguity of the claimant's evidence in that part of it which names the troops who did the injury is such that it would not justify the umpire in making an award against the Government in his behalf. But it is undoubtedly true that this evidence was prepared without the aid of counsel skilled in such matters, and it may be that it was intended to establish the fact that Government troops did the injury, and with tender regard for the claimant's rights in this matter, the umpire will exercise his discretion in his behalf and will dismiss that portion of the claim without prejudice in any particular to the claimant, and judgment may be entered in accordance with this holding.

Caracas, November 13, 1903.

Upon further consideration of this case and upon the advice and consent of the Commissioners the umpire awards £ 100, and judgment may be entered accordingly.

DAVY CASE

Venezuela is responsible for the acts of her civil officers, whether they in fact received their commissions direct from the National Government or indirectly and mediately through means and methods previously devised by the National Government for the care and control of the State, county, or municipality to which power had been delegated by that Government to make these appointments and issue commissions; and the National Government must respond in damages for the wrongful acts of such authorities, unless they be speedily and adequately punished for their offense.

The claimant is not bound to seek redress for his wrongs by a civil action in the local courts. He may have recourse to his own Government and that Government has a right to intervene diplomatically on his behalf.

PLUMLEY, *Umpire*:

In this case there was a disagreement on the part of the honorable Commissioners and it came to the umpire to be by him decided.

This matter arose in the spring of 1898 in the State of Bolívar.

In one of the municipalities of that State the jefe civil improvised a court, constituted a pseudo judge, and the two, under assumed authority, observing some of the forms of law, but with apparent malice, without just cause, and in disregard of law, subjected the claimant to most inhuman and barbarous treatment. After which through certain forms of law, but without lawful authority, he was taken into involuntary and laborious service, compelled to depart from his home, and to suffer great hardship for many weeks and to do and suffer all this without any compensation under an unfounded claim that he was working out his bail in the aforesaid unjust cause.

The claimant is a British subject and a skilled workman in the handicraft of a mason.

These unlawful and reprehensible acts performed under the color of authority and under a claim of representing the sovereignty of Venezuela were early reported by the claimant to the British minister resident at Caracas, and by said minister were very soon brought to the attention of the Venezuelan Government. It is to the honor of the respondent Government that from the first it has recognized the gravity of the offense and has not sought to palliate, belittle, or excuse it. President Andrade personnally took up the matter and assured the British Government that criminal proceedings would be instituted and the guilty

parties punished. In the correspondence which was had with the British minister resident at Caracas the President felt compelled to acknowledge the indifference of the local authorities to the case and in that way to explain the delay which had ensued. When the history of Venezuela for the year of 1899 is considered it will not be deemed strange that the central Government was unable to give this particular matter the attention which unquestionably it otherwise would have received. It was in the spring of 1899 that President Andrade gave ample and ready expression of his settled purpose to bring the criminals to justice, but the history of 1899 reveals the reason of his inability to carry out his purpose in that behalf. When the national record of the past four years is read, it will not seem strange that this matter has not received attention. This lack of attention may well be placed to other causes than indifference to or disregard of the rights and wrongs of the claimant.

Before this Commission the honorable Commissioner for Venezuela urged the irresponsibility of the respondent Government for such acts as are here complained of, because of the Federal character of the Venezuelan Government and the limitations which thereby attach to national action. Such was not the position taken by the chief executive of the respondent Government when the question was being pressed diplomatically, and, in the judgment of the umpire, it is not well taken here. Internationally, the National Government is solely responsible for the proper safeguarding of the rights and interest of foreigners, resident or commorant, within its territory. No diplomatic relations exist except as between the respective nations as such. The responsibility in a given case being admitted the duties attaching must be performed, or satisfactory atonement made. Great Britain can not deal with the State of Bolívar. The national integrity of the respondent Government alone would prevent it. Hence the nation itself, in its representative character and as a part of its governmental functions, must meet the complaint and satisfy it. The Federal condition of Venezuela is freed from some of the embarrassing features concerning such matters which pretain to the United States of America as a nation. The United States of America was formed of States already organized, each independent, each sovereign. These States formally yielded to the nation certain of their sovereign rights, but reserved all those not especially delegated. One of the vexed questions in the home country of the umpire has been the line of demarcation existing between the two and in that regard the power of the nation to interfere with the internal policies of the several States. But in Venezuela the States are carved out of the national domain by the national will and formed in accordance with the national wishes. Certain rights and privileges are granted to these States by the central Government, while all not in terms granted, are necessarily reserved to and retained by the nation. It is not conceivable that it, in any part, abdicated its sovereignty over these several States in matters which affect its national honor and which concern its duties as a nation toward other governments. In the opinion of the umpire there can be but one answer to this proposition, which is that there is responsibility on the part of Venezuela for the acts of its civil officers whether they in fact received their respective commissions direct from the National Government or indirectly and mediately through means and methods previously devised by the National Government for the care and control of the State, county, or municipality to whom power had been delegated by the National Government to make these appointments and issue commissions. The creator of these methods and means of internal administration, viz, the nation, must always be responsible to the other government for the creatures of its creation.

It is also urged by the honorable Commissioner for Venezuela that the claimant should find his adequate remedy by civil action through the courts of

Venezuela, directed against the man or men who had done him this harm. He had this right, without question, but in the judgment of the umpire he was not compelled to resort to the courts for his remedy. He had recourse to the Government of which he was a subject, there to obtain his relief through diplomatic channels. The Government of which he is a subject has a right to represent his interests diplomatically and where, as in this case, there has been an agreed submission of the claims of British subjects to a mixed commission created to consider them the tribunal thus constituted has undoubtedly jurisdiction of the parties and of the subject-matter.

It was also the opinion of the honorable Commissioner for Venezuela that the crime was fully atoned when the guilty parties had been prosecuted and punished — a fact which he confidently believed had occurred and of which he felt sure he could give satisfactory evidence before the tribunal. It appeared that preliminary steps had been taken looking to that end, and the evidence adduced at each preliminary inquiry is a part of the testimony used in this case. These preliminary steps had given the President of Venezuela knowledge of the wrong committed, the necessity of punishment commensurate to the offense, and the names of the offenders. The umpire has no question that the honorable Commissioner for Venezuela has been diligent in his efforts to obtain record evidence that there had been both prosecution and punishment of the guilty ones, but it has been without avail, and there is left to the respondent Government only one way to signify its regard for individual freedom, its abhorrence of such proceedings as are detailed in this case, and its desire to remove the stain which rests upon its department of criminal jurisprudence through the untoward and wicked practices of those who engaged in this conspiracy against the person and liberty of the claimant and the honor of their country. Too great regard can not be paid to the inviolability of the one and the sacred qualities of the other. The measure of damages placed upon such a crime must not be small. It must be of a degree adequate to the injury inflicted upon the claimant and the reproach thus unkindly brought upon the respondent Government. These invaded rights were in truth priceless, and no pecuniary compensation can atone for the indignities practiced upon the claimant; but a rightful award received in ready acquiescence is all that can be done to compensate the injuries, atone for the wrong, and remove the national stain.

If justification is sought through precedent for the umpire's conclusions, ample warrant therefor is found in Moore's International Arbitrations, volume 4, pages 3235-3266.

The honorable Commissioner for Venezuela will quickly differentiate between the case before the umpire and a claim based upon mistakes of law or fact or the lawful adaptation to the given person of very arbitrary and even oppressive laws. The case before the tribunal was a purely lawless proceeding under a certain color of law and legal authority and under certain forms of process, but wholly against the law of the land, and was a gross malversation in office and malfeasance by a civil officer, constituted such by the laws of Venezuela, and it is as much an affront to the honor of Venezuela as it is a deliberate indignity placed upon the claimant and an affront to the claimant Government.

The umpire finds the sum claimed in the memorial reasonable, and he adjudges that the respondent Government pay to the claimant Governments as an indemnity on behalf of the claimant the sum of £ 1,000, and award will be made for that sum.

MOTION FOR ALLOWANCE OF INTEREST ON AWARDS FROM THEIR DATE UNTIL THEIR PAYMENT

Under the terms of the protocol interest can not be allowed on the claims from the date thereof until they are paid.[1]

PLUMLEY, *Umpire*:

His Britannic Majesty's agent before the British-Venezuelan Mixed Commission moved that interest be allowed upon all awards at the rate of 5 per cent. per annum from the date of the award to the date of payment, and supported his motion with an able argument. To this motion the honorable Commissioner for Venezuela opposed an able opinion. After careful consideration of the question, the honorable Commissioners finding themselves unable to agree, joined in sending the question to the umpire for his decision.

Interest eo nomine is by contract expressed or implied.

Both the claimant and the respondent Government quote Article III of the protocol to sustain on the one hand the claim for interest and on the other hand to deny it.

It reads as follows:

> The British and Venezuelan Government agree that the other British claims, including claims by British subjects other than those dealt with in Article VI hereof and including those preferred by the railway companies, shall, unless otherwise satisfied, be referred to a mixed commission constituted in the manner defined in Article IV of this protocol, and which shall examine the claims and decide upon the amount to be awarded in satisfaction of each claim.

The learned British agent finds in this paragraph not only a warrant that interest may be awarded, but that it should be awarded in each case at a specified rate until date of payment. This right and duty to award interest is found by the learned British agent in the fact that the award is to be " in satisfaction " of each claim; that the date of payment of the award is uncertain and may not take place for many years; that " when the date of payment of a sum due in satisfaction of a debt is uncertain, it is an universally recognized principle that interest should accrue; " that if interest is not allowed from the date of the award to the date of payment " the Commission will not have satisfied the claim as required by the protocol."

He grants and claims that " the decision of this question must necessarily turn on the exact terms of the protocol constituting the Commission."

From the part of said protocol above quoted the honorable Commissioner for Venezuela finds, on the contrary, that the " powers of this Commission are merely and exclusively confined to awarding each claimant a determined sum " when their claims are found to be just. He also relies upon the terms of the protocol, and not only fails to find therein the warrant for the allowance of interest on awards by the Commission, but holds further that " the clear and precise terms of the protocol bar all discussion on this point."

It will be observed that the Commission is not authorized or permitted to name the time when, the manner by which, or the means through which the award is to be satisfied or paid. Examination of the protocol will show that elsewhere therein the high contracting parties have themselves provided for all this and for security as well. As to a certain class of claims, there is an agreement as to the amount due in satisfaction. In Article III, however, it is agreed that there is a question to be submitted to arbitration, which question seems to be,

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[1] To like effect see Italian - Venezuelan Commission (Cervetti Case) in Volume X of these *Reports*.

What, if anything, is the amount due to the claimant from the respondent Governement on the account as presented? A mixed commission, to be provided for in the next succeeding article of the protocol, " shall examine the claims and decide upon the amount to be awarded in satisfaction of each claim." Have the commissioners, by the terms of the submission, anything to do with the satisfaction of the *award*. Are they asked to consider anything but the quality of each claim, and, if allowed at all, to decide upon the amount which will satisfy it? Is not the word " amount " sufficient in its use? What the claimant Government asks by this motion is that this Commission settle the amount which satisfies the justice of the claim, and also fix a rate of interest which shall attach to that amount and follow it until the award itself is satisfied by payment, and that an agreement to this effect may be found —nay, is found — in the language quoted when considered, as all parts of a treaty should be, in reference to all other parts thereof.

Amount. 1. The sum total of two or more sums or quantities. The aggregate, as the amount of 7 and 9 is 16; the amount of the day's sales.
2. A quantity or sum viewed as a whole. * * *
3. The full effect, value, or import; the sum or total; as, the evicence, in amount, comes to this. (*Century Dictionary*, Vol. I, p. 191.)

It would seem that amount, as it is used in the provision quoted in the protocol, means, and only means, a certain round sum to be awarded in satisfaction of the *claim*, which in itself may include the original sum and interest thereon to the time of the award. The whole question of satisfaction of the award is provided for elsewhere in the protocol. If interest is to be allowed on the basis of a contract, the intent of the high contracting parties to so contract is the thing sought, and it must be gathered, if found anywhere, primarily and principally in the foregoing quotation taken from the protocol. Both claimant and respondent Governments so agree. And the claimant Government makes no reference to any other part of the protocol, resting their claim for interest solely upon said quotation. But do not the provisions of the protocol, as found in the language quoted, limit the action of the Commission to an examination of the claim and a determination of the certain amount in pounds sterling to be awarded the claiman ? Is there to be found in the other parts of the protocol, or in the facts leading up to it and surrounking it, or in some interpretation put upon it by both parties, that which will control the quoted provision and so enlarge its scope as to render it consistent with the position of the learned British agent? It seems to the umpire that the other parts of the protocol show a purpose and plan on the part of the two Governments to settle all details for themselves, excepting the claims submitted in Article III, and by and for themselves to settle the means of payment thereof and the security therefore. It would seem to the umpire, from a careful reading of the protocol, that the only question left open for the determination of the Commission was the question of the claims themselves, and that concerning these claims, they were to determine whether in justice and equity there was anything due and, if so, how much; and, if he were obliged to determine the question unaided by reference to collateral facts or by the use of other proper means, he would be obliged to hold such to be the rule. Will examination of the facts leading up to the protocol and collateral with it remove or more firmly establish this belief? This is to be seen.

In the British Blue Book for 1903, under date of December 18, 1902, page 178, in an extract from a communication of the Marquis of Lansdowne to Sir F. Lascelles, it is said by the marquis that the —

court of arbitration will have to decide both on the material justification of the demands and of the ways and means of their settlement and security.

The Hague Court of Arbitration, and not a mixed commission, was the proposition then under consideration, which distinction is uniformly observed throughout the correspondence between the British Government and the German Government and between the British Government and their officials.

On page 182 of said book there is a communication of the British Government to the United States embassy, where, in paragraph 3 of said communication, it is stated —

the arbitrator will have to decide both about the intrinsic justification of each separate claim and about the manner in which they are to be satisfied and guaranteed.

In this communication the President of the United States or The Hague tribunal was the arbitrator referred to.

On page 183 of said book is found a memorandum of a communication made to Mr. White, December 23, 1902, and paragraph 3 of the reservations contained in said memorandum has this:

It would, in the opinion of both Governments, be necessary that the arbitral tribunal should not only determine the amount of compensation payable by Venezuela, but should also define the security to be given by the Venezuelan Government and the means to be resorted to for the purpose of guaranteeing a sufficient and punctual discharge of the obligation.

In this communication it was understood that either the President of the United States or The Hague tribunal was to be the arbitrator, and it was expected and required of them that they should determine, settle, and provide for these additional propositions.

There is a draft of a letter to the American ambassador at Berlin, found on page 191 of said book, in which the position of the German Government is stated and previous communications are referred to. In the closing part of said letter there is found this language:

Besides which he (President Castro) must especially make clear in what manner he intends to pay the demands contained in that memorandum or to give security for that amount.

On page 208 of said book, number 233, the Marquis of Lansdowne, in a dispatch to Sir Michael Herbert, after referring to other conditions previously named to the ambassador at Washington, makes in the last paragraph this statement:

The question of guaranties for the satisfaction of the remaining claims would also have to be carefully examined, and we were engaged in preparing instructions to you upon these and other points.

From these extracts and, better still, from a careful reading of the entire correspondence contained in said book, it will be seen that the final adjustment between the allied powers, and more especially between Great Britain and Venezuela, was a matter of careful consideration, made especially apparent by the very systematic use of similar language in different communications, from which may be deduced the fact that the protocol itself is in structure and language a work of much care and thought. A careful reading of all the communications contained in said Blue Book will disclose no reference, direct or indirect, to the question of interest, or to compensation for delay in payment, while there is constantly presented a requirement as to the means of payment, and, if payment is not to be made at once, of adequate security therefor. A return to the protocol itself will show in the preamble, " Certain differences have arisen between Great Britain and the United States of Venezuela in connection with the claims of British subjects against the Venezuelan Government."

Article I of the protocol provides, among other things, that the Venezuelan Government recognizes "in principle the justice of the claim," etc. Article II of the protocol provides that "The Venezuelan Government will satisfy at once, by payment in cash or its equivalent," certain classes of claims, and then comes Article III, which provides for the submission to a mixed commission of the class of claims which have been brought before us for an examination and decision as to the amount to be awarded in satisfaction of each claim.

In the instructions from the Marquis of Lansdowne to Sir Michael Herbert, No. 234 of Blue Book, January 13, 1903, on page 212, there appears this statement:

Other claims for compensation, including the railway claims and those for injury to or wrongful seizure of property. * * *

And, near the top of the page —

His Majesty's Government will be ready to accept in satisfaction of these claims either a sufficient cash payment or a guaranty based on security which must be adequate, and which the Venezuelan Government must be bound not to alienate for any other purpose.

Further proposing that —

Before the amount to be actually handed over to claimants of this class is finally decided, a commission, upon which Venezuela would be represented, should be appointed to examine and report upon the amount to be awarded in satisfaction of each claim. * * * Should a cash payment have been accepted by His Majesty's Government, they will be prepared to refund any surplus which may be available after the examination.

It appears from this instruction that when a mixed commission was under consideration it was to follow a settlement on the part of Venezuela either by a gross sum paid to Great Britain, which was by that Government estimated at £ 600,000, or, if not paid at once, the other alternative was a satisfactory guaranty; and in either case it was agreed that an examination of the respective claims for the purpose of fixing the amount due in each claim should be made by a mixed commission; and it was not proposed that they should possess any other power and there was no other duty to rest upon them, except to settle the amount of each claim, which amount, naturally, would be the same whether it was to be paid in cash or was to be adequately secured. This is brought out again in the recapitulation made in this same set of instructions, beginning at the bottom of page 212 of said book:

(*b*) Other claims for compensation, including the railway claims and those for injury to, or wrongful seizure of, property, must be met either by an immediate payment to His Majesty's Government or by a guaranty adequate, in your opinion, to secure them. These claims can, if this be desired, be examined by a mixed commission before they are finally liquidated.

There is no suggestion here as to any power given to, or any potency in, the Commission, except that of examination of the respective claims, in which they were to determine whether the claims were just and equitable, and, if so, to settle the amount. To The Hague tribunal and to the President there were to be given other powers which were to be asserted by them in lieu of the agreement concerning such matters which was effectually made between the allied powers and Venezuela. The President declined to act, and an agreement was finally concluded in which there was an unalienable right given by Venezuela to the powers in and concerning the customs duties received at the two principal ports of Venezuela, so that the alternative proposed, if cash was not immediately paid, was in fact settled in the protocol.

There is another important factor to be considered in arriving at the question of whether interest was in the mind of either of the high contracting parties. Examination of the Blue Book shows that the Marquis of Lansdowne insisted, in association with the other allied powers, that there should be given them preferential treatment over the peace powers in the payment of their claims out of the 30 per cent of customs to be set aside for their liquidation.

Mr. Bowen insisted that Venezuela must give similar treatment to all creditor nations. In connection with the discussion that took place in reference to this question of preference see No. 241 of Blue Book, page 219, of date January 25, 1903, when the Marquis of Lansdowne was informed by Sir Michael Herbert of the anticipated annual income of the two ports of La Guaira and Puerto Cabello, which was set by him at 10,000,000 bolivars, while 29,000,000 bolivars was considered to represent approximately, the claims of the peace powers. In the Marquis's reply of January 26, 1903 (Blue Book, 219), he reduces this income to pounds sterling, and finds 30 per cent to be, approximately, £ 213,000. He estimates the claims of the blockading powers at £ 900,000, and puts the claims of the peace powers in pounds sterling at 1,148,574. He then proceeds to deduce from all these facts, that there could be an arrangement to extinguish the claims of the allied powers in five years, and that this could be done without injuriously affecting the interest of the other creditor powers. The thought of the Marquis of Lansdowne is expressed definitely in No. 254, page 222 of the Blue Book, in his interview with the German ambassador, January 29, 1903.

The German Government had stated that this 30 per cent, in their judgment, should be set apart for the sole purpose of liquidating the claims of the blockading powers; but they were informed by the Marquis of Lansdowne that it seemed worthy of consideration —

> Whether, if the part of the customs revenues was appropriated, not for the satisfaction of the claims of all the creditor powers, but for that of the British, German, and Italian claims alone, we might not be content with rather less than the full 30 per cent referred to. It seemed to us that the allocation of an annual sum sufficient to extinguish our claims in, say, six years, might be enough for our purpose, and we had instructed Sir M. Herbert to discuss the question with his German and Italian colleagues.

Again in No. 256, February 1, 1903, Blue Book, p. 223, in his instructions to Sir Michael Herbert, the Marquis of Lansdowne says:

> An arrangement by which the claims of the blockading powers should be extinguished in six or seven years would, we believe, leave it possible for a *similar settlement* to be made with the *other powers*.

It must be borne in mind that the 30 per cent of the customs revenues of these two ports was the one sole guaranty and means of payment proposed, and it was definitely understood that no better, or other, could be, or would be, offered; and the entire discussion relative to preferential treatment was concerning payment out of the fund thus to be obtained. This may be seen by reference to the Blue Book and the different communications found therein.

To extinguish £ 900,000 in six years would require £ 150,000 each year; this would leave £ 63,000 each year to apply on the claims of the peace powers, aggregating during the six years £ 576,000, and reducing the claims of the peace powers to £ 770,514 at the end of the six years. Then with the full £ 213,000 to be applied each year it would require three years and a half for their complete liquidation, or about nine and a half years in all. Add interest, however, at 5 per cent to the £ 900,000 and the first year's payment to the allied powers would be £ 195,000, leaving £ 18,000 to apply on the claim of the peace powers. Their interest would be £ 57,423, and hence there would be an

increase in their claims that year of £ 39,425. Carry this same plan throughout the six years, lessening each year the amount of interest on the claims of the blockading powers, and increasing each year, by so much, the amount to apply on the claims of the peace powers and the result would be, that, when the six years had ended, the debt to the allied powers would have been paid, and there would be an increase on the part of the claims of the peace powers of £ 59,125, so that their claims at that time would be brought up to £ 1,207,639. Can this situation be reconciled with an intelligent proposition by an intelligent statesman, that the allied powers could be paid off in six years, and substantially *similar* treatment be given the peace powers, and *all* out of the 30 per cent? A situation that actually increased the indebtedness of the peace powers during the entire time in which the allied powers were being paid. It would seem impossible to reconcile such a statement.

As another test, take the hazard that the customs receipts permanently fall off just one-half, and that the debts aggregate as estimated £ 2,048,510. The interest at 5 per cent would be sufficient to exhaust the entire income and the debts would *never* be paid. Is it possible that these able Governments regarded the proposition to set aside these customs receipts as any kind of security if the reduction of one-half thereof would take away all possibility of payment? Again, when the umpire reached Caracas in the spring of 1903, he found that intelligent residents of the city were fearing that the aggregate allowance by the Commissioners would be £ 5,000,000. Were that to prove true and the income remain at £ 213,000, and interest was to be allowed at 5 per cent, the indebtedness would increase at the rate of £ 37,000 each year. With the interest factor in, there is all this uncertainty and possible permanent unliquidation. With the interest factor out, there is a sum constant each year in some amount to reduce the indebtedness and a certainty of final liquidation.

Again, if the very high rate of interest named (high in connection with a secure government indebtness) had been understood as pledged, would either party to the submission at The Hague have involved itself in the trouble and large expense, in the aggregate, to determine which should be obliged first to let go of so good an investment?

Again, when the Marquis of Lansdowne was suggesting that a part of the 30 per cent would answer the demands of the blockading powers and that a part thereof would be sufficient to wipe out their indebtedness in six years, what fraction of the 30 per cent did he have in mind? Without interest, in such case there would be reserved to the allied powers approximately 21 per cent, and there could be tendered to the peace powers 9 per cent during each of the six years. With interest, the allied powers would the first year absorb $27^1/_2$ per cent, and there would then be $2^1/_2$ per cent for the peace powers, with the actual final result suggested that the peace powers would have their indebtedness increased during the six years. While the proposition of 21 to 9 was not of such a character as to offend the other powers, allowing the standpoint of the allied powers to be taken or not, the other proposition could not have been offered or received with dignity, and it is impossible to conceive that it was in the mind of so eminent a gentleman as the Marquis of Lansdowne.

Although the time of payment is not in terms expressed, a certain method of payment, with security, is devised which begins liquidation at once and concludes in from six to ten years according as the claimant Government is or is not a preferred creditor, as it assumes to be. These awards are substantially in that class of debts where by the agreement an option is granted to the debtor to pay on or before a certain time. It is also a secured debt, which quite frequently appeals to a creditor as superior to an unsecured debt bearing interest. Preceding the protocol, the claimant Government insisted upon an immediate

cash payment or satisfactory guaranties. It was given the guaranty. The two Governments, on their own part, made every provision for payment and security and left only to the Commission the examination of the claims presented. To examine and, if allowed, to award upon the claims presented the amount due thereon is the apparent power given to the Commission. In the judgment of the umpire there is no power inherent in a mixed commission to affix interest to the awards beyond the life of the Commission. The recovery of interest on the judgments of a court is a matter of statute, as understood by the umpire. Interest only follows the judgment if so provided by statute. (Thompson *v.* Monrow, 2 Cal., 99; 56 Am. Dec., 318.) If such power is to exist it must be by grant from the parties who created it; and if the awards are otherwise to draw interest it is from other source and other cause than a naked order of the Commission.

In the Claims Commission between the United States of America and Venezuela, under convention of April 17, 1867, the treaty provided that —

> semi-annual interest shall be paid on the several sums awarded at the rate of 5 per cent per annum from the date of the termination of the labors of the Commission. (Moore's Int. Arb., vol. 5, 4810.)

Similarly for the Mixed Commission between the same countries, under convention of December 3, 1886, the same rule as to interest on awards was provided in the treaty. The said treaty also recognized the propriety of allowing interest on the claims, when they were of a proper character. In the American and British Claims Commission treaty of May 8, 1871 (Moore's Int. Arb., vol. 5, 4327), there was, ordinarily, an allowance of interest at the rate of 6 per cent per annum from the date of the injury to the anticipated date of final award. Examination of that treaty will show a corresponding silence on the question of interest on awards, with the protocol under consideration. The United States and Mexican Claims Commission, under convention of February 1, 1869, had very able members as Commissioners, and as umpire during the latter part of the sittings Sir Edward Thornton, who, in the closing part of his labors, passed upon this question of interest, but allowed it only from a certain specific time up to a date usually described as the date of final award. (Moore, vol. 2, 1317-18.)

In the United States and Mexican Claims Commission, under convention of April 11, 1839, the question of interest was disposed of similarly. (Moore, vol. 4, 4325.) Between the same parties, under the act of 1849, interest in the particular case referred to on page 4326 of Moore is denied for the reason given, and in the Spanish Commission of 1871 (Moore, 4327) interest was denied.

It will be noted that in article 6 of the treaty of December 5, 1885, between the United States of America and Venezuela it was especially provided that —

> In the event of interest being allowed for any cause and embraced in such award, the rate thereof and the period for which it is to be computed shall be fixed, which period shall not extend beyond the close of the Commission.

In the convention for the arbitration of the claims of the Venezuela Steam Transportation Company of January 12, 1892, article 5 of the treaty provided that —

> If the award shall be in favor of the United States of America, the amount of the indemnity, which shall be expressed in American gold, shall be paid in cash at the city of Washington, in equal annual sums, without interest, within five years from the date of award.

In the case of the Peruvian indemnity fund left with the Attorney-General of the United States to distribute he held that —

> The charge for interest is rejected, it being incompatible with the principles which appear to have been adopted by the two Governments in concluding the convention.[1]

In the preliminary provision made for the settlement of the civil war claims, so called, immediately between Great Britain and the United States of America, it was especially set out that each Government was required to pay the amount awarded against it within twelve months after the date of the final award, *without interest.* (Moore's Int. Arb., vol. 1, 690.)

In the Chinese indemnity cases found on page 4629 of Moore, 12 per cent interest was allowed to a certain date, covering in most cases the period of three years, and they were induced to give this liberal rate —

> by consideration of the fact that some time must elapse before the complete collection of the indemnity through the Chinese custom-houses could be effected; and they intended to make their awards the final settlement of the question of interest.

In the matter of indemnity for slaves between Great Britain and the United States of America, there was a claim for damages of the nature of interest on the part of the United States against Great Britain. On page 375, volume 1, of Moore, begins the discussion of this claim on the part of Great Britain, and the opposition is divided into three parts:

> (1) Principles of justice and equity; (2) the authority of precedents; and (3) a reasonable and necessary construction of the convention.

And it is urged under the last head, that if the convention intended the creditors to receive damages as well as the value of the slaves —

> it was inconceivable that the power should not have been given to the Commissioners to ascertain by evidence the amount of such damages; and if it was intended that interest should be arbitrarily fixed upon as the standard of damages it was equally inconceivable that the convention should have been silent upon the subject.

It is argued that in the convention between the United States and France of September 30, 1800,[2] there was an express provision for interest, and a similar stipulation in a subsequent treaty between the same parties,[3] and, from these facts, that whenever, in a treaty, the United States meant to stipulate for interest, they took care to include an express provision to such effect. There are other references of a similar character which might be made to Moore, but the umpire forbears.

Where it has appeared that there were objections to interest in the cases quoted, the objection has been to interest on the claims then before the Commissioners. The question of interest on awards to time of payment was not the matter then under consideration.

The Geneva tribunal, from the magnitude of the questions at interest, the quality of the countries involved, and the high character of the agents of the respective governments and of the arbitrators as well, occupies a position of unique importance among even the great arbitrations of the past. That the Geneva tribunal allowed interest on the claims but did not allow any interest to attach to the award, the umpire considers very significant.

The umpire believes it to be safe to hold that this Commission has no power not directly conferred upon it by the protocol.

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[1] Moore, Vol. 5, p. 4595.
[2] Treaties and Conventions between the United States and Other Powers, p. 322.
[3] *Ibid.*, p. 356.

Interest *eo nomine* is a matter of contract. The protocol, the contract in question, does not in terms provide for interest. Neither does the language used import interest; nor is it to be implied from the language used. (16 American and English Encyclopædia of Law, 999; III. Grounds of Allowance of Interest, and notes 2, 3, 4, and cases therein cited; Ib., IV. Contracts to Pay Interest, and notes 8, 9, 10, and cases therein cited; Ib., p. 1001, subhead 4, Construction, (*a*) in General, and notes 2 and 3, and cases there cited; Ib., 1002, subhead 3, Implied Contracts, (*a*) in General, and note 1 on p. 1003, and cases there cited.)

Upon the question of an implied contract and as aiding in determining the question of interest, it may be well to remember that the general practice of nations in cases of submission to arbitration has not been to provide for interest on the awards until date of payment; that to so provide is quite the exception.

There is to be considered also the general rule that nations do not pay interest except when especially written in the contract. Lawrence says in Law of Claims against Governments, etc., page 218:

> Upon ordinary claims the Government is not liable for interest unless by contract so providing. (See note 78 on same page and following pages.)

The force of this general rule is to negative any implied contract between nations to pay interest where there is an agreement between them and nothing is said about interest. (16 American and English Encyclopædia of Law, 1005, subhead Implication Negatived and note 3, and cases there cited; Ib., 1005, subhead (*b*), Knowledge of Custom, and note 5 and cases there cited.)

Damages are sometimes assessed for delay of payment or detention of property at the rate and of the nature of interest, but there is here no default to be considered, and there will not be if the respondent Government in good faith carries out its terms of payment, even if it takes many years to liquidate the indebtedness. (16 American and English Encyclopædia of Law, 1007, subhead (*b*) Express Contracts to Pay Money, (1) In General, and note 4 and cases there cited; Ib., 1013; Ib., 1014, subheads (*a*) and (*b*), notes 5 and 6, and cases there cited; Ib., 1015, note 2, and cases cited.)

As bearing upon the wisdom, propriety, or value of an award of interest to attach and to follow the award, where such an order is not sustained by the clear language of the convention constituting the Commission, and as bearing upon the question of jurisdiction in the Commission to make such an award under such circumstances, the consistent and practically concurrent action of the many commissions composed of distinguished bodies of men, there is great significance on the almost prevailing and constant practice of the rule not to allow interest. Indeed, the umpire has been unable to find a single instance where under substantially the same terms of submission as are contained in the protocol under consideration there has been any such allowance of interest.

The award of the Mixed Commission in respect of British mineral oils claims in France of 1874, produced by the claimant Government as an authority for its motion, does not disturb this proposition of the umpire. The terms of that submission were —

> To settle, as hereinafter directed, questions concerning duties levied in France on British mineral oils, *as well as to consider and report on any other questions which the high contracting parties agree or shall agree to refer to it* — [1]

and, if the umpire reads correctly, interest was only allowed by this Commission in cases where judgments had been pronounced, and for the purpose of meeting the terms of those judgments.

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[1] British and Foreign State Papers, Vol. LXIII, p. 211.

It must also be regarded as of importance that all of the other commissions sitting in Caracas at this time have failed to allow interest on awards — some, probably, because it was not asked for; in others, because it was directly denied as being beyond the power given by protocols. This not only adds the weight of the judgments of the many eminent men who have thus passed upon this question, but throws into the discussion of the question certain features of inequity in case it should be allowed to one only of the claimant Governments. Especially is there force to this thought in connection with Germany and Italy, who, with Great Britain, formed the blockading powers and claim preferential treatment out of the common source provided for the liquidation of all claims. They are to be paid in parts proportionate to the amount of their respective awards, and it is not equitable that Great Britain should have profit in a 5 per cent dividend on awards for six years' delay in payment while Germany and Italy are delayed equally, but without recompense, and the date of the final payment to them be deferred still further because of the increased burden placed upon the common fund by reason of such interest. If the protocol plainly required such an inequity to exist between these two parties the umpire would have no alternative but to make the allowance. These deductions bear largely upon the question of the probable intent when the result of a certain line of action is being considered, and it prevents a judgment, where in the discretion of the umpire it might be allowed if it would produce equity, when in fact it would produce inequity.

As the result of all this consideration the umpire is not satisfied that he has any warrant or authority under the protocol to favorably entertain the motion of the learned British agent in the matter of interest on awards until payment, and he therefore denies the motion.

INTEREST ON DIPLOMATIC DEBT CASE

Venezuela held liable for interest at legal rate on ascertained liquidated amounts acknowledged by her to be due.

PLUMLEY, *Umpire*:

The honorable Commissioners having failed to agree upon either class of claims presented by the memorial in this case, it comes to the umpire for his determination.

The memorial calls for simple interest at the rate of 6 per cent on two classes of claims.

Class 1 is claims agreed to by the Venezuelan minister for foreign affairs and Her Majesty's representative at Caracas, Mr. Edwards, in 1865.

Class 2 is awards made by the Mixed Commission constituted by the Anglo-Venezuelan claims convention of the 21st September, 1868.

I

The British Government has always claimed of the Venezuelan Government interest at the rate of 6 per cent as an integral part of the claims under class 1; but the umpire fails to find that the respondent Government ever formally consented to the payment of any interest until the decree of May 23, 1876, when, as the umpire understands it from the information in hand, 3 per cent bonds were proposed by Venezuela in payment of these agreed claims and also in payment of the awards made by said Mixed Commission. This proposition the

British Government declined to accept, but always insisted that interest at 6 per cent was their due on both classes of claims.

In the opinion of the umpire the claim for interest can not stand upon a contract either expressed or implied, because he fails to find such a contract, and, if allowed, it must be as damages for undue and unreasonable delay in payment, and for default of payment, in the manner and by the means proposed for liquidation when the claims of this class were merged into a stated sum by agreement between the two nations.

The umpire finds that there was an agreement to appropriate for the payment of this stated sum " the proportional sum appertaining to the British claims of the 10 per cent of import duties assigned for that purpose by the law of estimates of public expenditure." The sum thus stated and agreed upon between the two nations was $ 247,935.60. In the year 1869, $ 12,229.85 was paid presumably in accordance with this arrangement as to the share of Great Britain in the percentage of customs duties set apart for debts of this character.

By a decree of the 23rd of May, 1876, this stated sum of $ 247,935.60 was approved by the Venezuelan Congress; but nothing more was paid until 1885, when $ 2,784.75 was paid, and thereafter each year, by successive installments, the debt was gradually reduced, and in 1897 it was wholly extinguished.

From the expressions used in the correspondence between the two Governments the umpire finds that it was understood by both of the high contracting parties that this debt was to be liquidated within five years from the date of said agreement; and he fails to find any agreement between the two Governments, or any consent on the part of the British Government, to any further extension of the time of payment. Whether the means proposed by which payment was to be made would have liquidated the entire sum in five years the umpire has no means of knowing, but that such was the expectation of the Venezuelan Government is clearly manifest from the language of its minister of foreign affairs when he urges for the consideration of the British minister at Caracas that interest ought not to be required on the sum then agreed upon because, among other reasons, France had accepted a settlement of her claims in which settlement there was an agreed delay of five years before final payment and no interest was exacted. There could be no significance to this argument on the part of the honorable minister for foreign affairs if it were not in the mind of both the representatives of their respective Governments that this particular debt was to be liquidated in less than five years. In the absence of any specific understanding a reasonable time for payment would be the implication of law; and whether default is found in failure to liquidate within the five years as the agreed time, or in the failure to pay any considerable part of said sum within twenty years from the settlement, it makes but little difference, for it is impossible not to find that this long delay has far exceeded the contemplation of either of the high contracting parties. Placing the ground for interest on the unreasonably long delay in payment, it becomes necessary to fix the time at which interest for that cause should begin. It is the belief of the umpire that the respondent Government will not regard it a harsh conclusion to set the time for payment on the same day when they first recognized their duty to pay and paid over their first installment on this account. This was in the year 1869.

As has already been said, allowance for interest on the claim must be for the default of the respondent Government and for the undue detention of the sum agreed to be paid to the claimant Government by the respondent Government. Under Venezuelan law, until 1873, contractual indebtedness bore interest at the rate of 6 per cent after default. Neither Government can complain if, until 1873, that rate is adopted here, the first charge for interest beginning at the close of 1869. The amount for the five years 1869 to 1873, both inclusive, is

$ 70,711.70. Some time in the year 1873 the statutory rate under such circumstances became 3 per cent; and there is no hardship to the claimant Government that, in the matter of a pure money indebtedness, it should stand on a par with the claimants whom they then represented. If these claimants had recovered their indebtedness before Venezuelan tribunals they would have been limited to 3 per cent. Venezuelans are so limited.

(See 16 American and English Encyclopædia of Law, p. 1052, subhead 3. Rate as damages. *a.* General rule; legal rate: "When there is no contract for interest, and interest is given as damages strictly, the general rule is that the legal rate is recoverable." See note 3 and cases there assembled.)

The legal rate changing, the rate to be used must be changed to conform. (Ib. 1062. *c.* Interest recoverable as damages. See note 5 and cases there cited.)

The place where the contract is to be performed — i. e., the place where the money is to be paid — governs the interest to be allowed. (Ib. 1088, subdivision *b*. See note 5 and cases there cited.)

When interest is given as damages the law of the place of performance governs. (Ib. 1090, subhead 2. Interest as damages. See note 2 and cases there cited.)

Aliens should be content with the commercial laws of the country in which they are located by choice, for business or other reasons. If they should be content, so should the government of whom these aliens are subjects. Venezuela can not be asked to offer a prize or pay a premium for alien claimants through their governments.

It consorts with the umpire's idea of justice and equity to permit the legal rate in Venezuela to determine the rate recoverable before this tribunal in cases of this character. It follows, then, that beginning with 1874 and continuing until 1897, both inclusive, the allowance for interest is placed at the rate of 3 per cent, or one-half of the sum claimed. This amounts to $ 120,850.77. Add to this the sum allowed from 1869 to 1873, inclusive, $ 70,711.70, and the whole amount under this class is $ 191,562.47.

Aside from the reasons which have thus far been stated there is the same or greater reason in justice and equity for allowing interest on this claim that there has been to allow it in the other cases before this tribunal. The allowance of interest for damages to property, or for contractual claims, considered by mixed commissions has been for a long time a well-settled practice with a large degree of uniformity. So far as the umpire is aware it has been the unquestioned action of all the mixed commissions sitting in Caracas in 1903. It has been the settled practice of this tribunal, where justice and equity seemed to require it. The claim now being considered is in effect an account stated between the two Governments and has a much stronger ground for allowance of interest after default than a claim not agreed to.

The one serious ground of weakness in this claim is that there has been an entire liquidation of the principal sum, or capital, and it is a rule of practically universal application in the courts that where interest is incidental only, as damages for a breach of the contract, payment of the principal ipso facto operates to defeat a demand for interest.

As this same question appears in the same way and must be given the same effect in the claim for interest on awards, discussion and determination thereof will be reserved until after consideration has been given to the other points in the second class of claims.

II

It was especially provided in the protocol constituting the Mixed Commission of 1868-69 that the awards were made to receive "full effect without objection or delay." But there was also a stipulation in the protocol that the awards of

the said Commission, together with the convention itself, should be submitted for approval to the Venezuelan legislature. Because of the revolutionary condition of Venezuela for the next three years this provision could not be carried out until 1873, when a decree of date the 14th of June approved both the convention and the awards.

It is certainly a matter of serious doubt whether, until such decree, the awards made by the Mixed Commission could be regarded as settled and fixed beyond all question. As has been stated, this action was taken by the Venezuelan Congress as soon as it could be done, in consideration of the unfortunate condition of the country during the period intervening. It is the opinion of the umpire that in all these matters up to and including the ratification of the convention and its awards the Venezuelan Government acted in the utmost good faith, without purposed or willfull delay and without actual default. Had the Venezuelan Government then provided for an early payment of the principal sum, in the opinion of the umpire, there could be nothing claimed of Venezuela by the British Government under this part of the memorial; but this was not done.

The conditions here are decidedly different from those attending the protocol of February 13, 1903, and the awards made thereunder. In the latter case the signatory parties agreed in the protocol (*a*) to constitute a mixed commission and settle the several amounts due; (*b*) to provide a specific way for payment out of a certain definite class of Venezuelan income necessarily entailing by its terms a delay of some years before final liquidation. All this is a part of the protocol creating our Mixed Commission.

In the present case now under consideration the protocol creating the Mixed Commission required the ratification above referred to, but provided in effect that when the awards were made and the ratification had there should be given full effect to said awards "without objection or delay." No objections were made. In fact, in everything, the conduct of the Venezuelan Government was so scrupulously regardful of the terms of the convention that it is forced upon the umpire, and must be apparent to all who carefully consider the question, that failure to meet the award with ready payment was solely because of their straitened financial condition resulting from the drain upon their finances through the revolutions which had directly preceded. The umpire understands it to be an admitted fact that Great Britain never acceded to any delay and never consented to any installment method of payment except through allowance of interest to compensate therefor. On September 4, 1873, the Venezuelan Government was informed by the British representative at Caracas that the sums awarded the British claimants under the convention of 1868 had been apportioned among them with interest from the date of the awards at the rate of 6 per cent per annum. To this the Venezuelan Government demurred; but it has always been insisted upon on the part of Great Britain, and the Venezuelan Government is presented with no new claim in the memorial now before this tribunal. The whole amount awarded was $ 312,586.95. The first payment was made in 1873 and there were annual installments thereafter, omitting the year 1879, until 1885, when the last installment was paid and the principal or capital sum was extinguished.

It is the belief of the umpire that this delay constituted a default on the part of the Venezuelan Government; that it was not in accordance with the spirit and purview of the protocol to thus defer the final liquidation of the awards.

This default was not from choice or purpose from necessity. Nevertheless among individuals similarly situated if one should from necessity withhold the money of another he is on all fours with the one who withholds from preference In either case he is held to pay the creditor a reasonable sum for the damages done him through such detention.

As stated under Claim I, there is projected here, as there, the fact that the claimant Government has received in full the principal sum.

The law as laid down in England and the United States in the courts of both countries is well settled in cases of this character. Where interest is not a matter of contract it is not regarded as an integral part of the debt but as a mere incident thereof. In consequence, if the original debt is paid the incident thereof ceases. There is no authority of repute known to the umpire which sustains a contrary contention. The maxim, " Equity follows the law" is also in the mind of the umpire. This maxim would be controlling if in international matters it should apply under a protocol containing such provisions as are found in the one by which this tribunal exists. If it is to control, then the claims under this memorial must be disallowed.

That when the principal thing ceases to exist, things merely incidental thereto, or incidents thereof, cease also, is a logical deduction and may well control in the courts and yet not be controlling between Governments before an international tribunal.

It seems to the umpire that the claimant Government acted with wisdom and with proper regard for the dignity and quality of the respondent Government when it received the payments made as payments on the principal in accordance with the wishes of the respondent Government; and, while presently pressing the claim for interest upon Venezuela, awaited the action of that country in response to the demand instead of applying the payments, as made, first to interest and the remainder, if any, to the principal, as would have been the due course between individuals. The umpire is aware that it has been held by the courts that to accept the principal and yet claim the interest as still due does not affect the rule first stated because the act of receiving is not compulsory but voluntary on the part of the payee.

To the mind of the umpire, however, these rules of the courts concerning litigants and litigation before them are not necessarily correct or safe guides for international tribunals, or for the conduct of nations in their intercourse with one another. The rule which suggests that nations do not ordinarily pay interest to a claimant is based upon the ground that it can not be assumed that a nation is not ready to pay as soon as the debt is determined and the responsibility fixed. Here it is evident that Venezuela was financially unable to make immediate response to acknowledged obligations. It appears to the umpire that the conduct of the claimant Government in continuing to press its demands for interest, but at the same time consenting to receive payment of the principal sum, is to be approved as properly regardful of the dignity of the debtor nation; and that in relying upon presenting her claim for interest as an independent claim she was, in effect, placing both Governments on a level, which was wise and discreet. The umpire, looking to the protocol for guidance, finds ample warrant for an award which produces justice and equity, clearly and indisputably, although it may be at variance with the strict provisions and holdings of the courts. This tribunal is to decide " all claims upon a basis of absolute equity without regard to objections of a technical nature * * * ." In the opinion of the umpire, which he rendered in the Aroa mines supplementary claims on page 67 [1] of said opinion, he expresses his interpretation of absolute equity to be " equity unrestrained by any artificial rules in its application to the given case." On page 5 [2] of this same opinion there are quoted his accepted definitions of " technical " as used in the protocol.

[1] *Supra*, p. 444.
[2] *Supra*, p. 410.

With this mandatory order from both Governments to do justice and equity regardless of objections of a technical nature, the duty of the umpire in this case is made plain. He must ascertain " that which is equally right or just to all concerned" — that which is " equal or impartial jurice " (Century Dictionary; title, Equity.) — and make an award which is " fairness in the adjustment of conflicting interests — the application of the dictates of good conscience to the settlement of this controversy." (Ibid.)

There remains to consider the objection raised by the honorable Commissioner for Venezuela that the award must exclude from the benefit of interest allowance if made, all Venezuelans who have replaced the old claimants as their sole heirs. The reason urged to sustain this position is that this Mixed Commission was " constituted to decide the claims of *British subjects* against Venezuela and that Venezuelans can not legally apply thereto for maintaining their rights." This is a point the force if which, when properly applied, has been acknowledged by the umpire and has met his approval in the claim of Mathison [1] and in the claim of the heirs of Stevenson,[2] but in the case now being considered all rights passed upon by the umpire were vested, respectively, in 1865 and in 1869, when the stated account was agreed to and when the awards were made. This vested right may pass, like other vested rights, to those who in themselves would have no place before this tribunal, but who as the representatives of those having such vested rights may have such place. To hold otherwise would permit Venezuela by delaying payment of these vested rights to avoid payment at all which would not partake of justice or equity. In the Chopin case, quoted in the umpire's opinion in the heirs of Stevenson [3] and found in Moore, volume 3, 2506-2507, it was held that a claim duly presented before a commission became such a vested right that an award could be made for the benefit of unquestioned citizens of the respondent government to take as representatives of one deceased whose right had thus vested.

There are many other cases to be found in Moore where the claims were held within the terms of the convention if vested in a deceased claimant, although the immediate representative would not, on his own part, receive an award.

In the opinion of the umpire this case takes its true status back when the indebtedness was agreed upon between the Governments and the awards were made, and therefore these claims rest upon rights which have vested for more than thirty years.

Interest is but an incident of the original award and takes the right then established in the principal sum. This would have been the case had the interest been discharged from time to time, and it is not equity to give Venezuela any advantage to be derived from its own delay. Such appears to the umpire to be a just, equitable, wise, and salutary rule to apply in this case.

Interest is therefore allowed in this second branch of the memorial at 3 per cent, beginning with 1874 and ending with 1884, both inclusive, amounting in all to $ 39,797.32. The umpire therefore holds that judgment should be entered in both classes of claims in the round sum of £ 46,279, and award will be made accordingly.

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[1] *Infra*, p. 489.
[2] *Infra*, p. 497.
[3] *Infra*, p. 503.

MATHISON CASE

(By the Umpire):

In cases of dual nationality the law of the domicile is the law which governs as to citizenship.

The constitution of 1864 of Venezuela can not be retroactive in its effect so as to constitute one born before that date in Venezuela a citizen of Venezuela; but such was not the effect of said constitution.

CONTENTION OF BRITISH AGENT

In this case the claimant was born in Venezuela on September 14, 1858. His father was the child of British parents and was born in Trinidad. The claimant is therefore by the law of England a British subject. If he is also a Venezuelan it is admitted that he will have no standing before this Commission, since the wrong alleged was done to himself.

The Venezuelan law on the subject is as follows:

Constitution of Venezuela of 1830, article 10 —

The following are Venezuelans by birth: Free men born in the territory of Venezuela.

Constitution of 1857 —

The following are natural-born Venezuelans: All persons born in the territory of Venezuela.

The latter was the constitution in force at the time of the claimant's birth.

It is submitted that this does not and was not intended to apply to persons born in Venezuela of foreign parents, if such persons should be by the law of their parent's country nationals of that country.

If the local law of the country where a man happens to be born is to have the effect of preventing him from enjoying the privileges of his parents' nationality, it must expressly and in clear terms state that intention, otherwise it will be taken not to have intended to produce that effect and to have excluded the case of a man so circumstanced. General words can not be held sufficient to produce such a result.

Upon consideration of the context of the provision above quoted it becomes plain that the constitution gave Venezuelan nationality as a privilege and in no way intended to insist upon it as a compulsory burden.

Constitution of 1830, article 10, section 3:

Venezuelans by birth are those born in foreign countries of Venezuelan fathers while absent on the service of or on account of the Republic, or with the express license of competent authority.

The purport of the constitution of 1857 is the same.

In other words, Venezuelans going abroad, save under special circumstances, lose the privilege of having their children born Venezuelan. That is to say, the Venezuelan legislature regarded nationality in the light of a privilege and had no intention of making the nationals of other countries Venezuelan against their will and did not intend to include the case in question.

It was not till 1864 that it occurred to the legislature to insist that the nationals of other countries should be Venezuelan whether they wished it or not. The contention of the Venezuelan minister, cited on page 3 of the opinion of the Venezuelan Commissioner, is untenable in view of the above section.

It is hardly necessary to explain that the attitude of Great Britain toward this matter has always been the same, viz, that where the law of a foreign country clearly states that the nationals of Great Britain born in that country are to be

nationals of that country while there resident, Great Britain acknowledges the right of those countries to claim them on their own territory. Here, however, the law of the country does not and was not intended to have that effect.

That the earlier constitution was not intended or believed to have the effect alleged by the Venezuelan Commissioner is shown, in spite of subsequent explanations and protestations, by the terms of the later law. (Constitution of 1864.)

ART. 6. The following are Venezuelans: All persons who have been born or who may be born in the territory of Venezuela, *whatsoever may be the nationality of their parents.*

It will be seen that this provision was really meant by its framers to be a *change* in the law, as is evidenced by the attempt to make it retroactive in its effects, a pretention which Great Britain through its minister at once stated that it could not in any way countenance.

Having in view, then, that the words of the earlier constitution are on the face of them insufficient to produce the result contended for, that they were not intended to do so, and that this must be taken to have been the opinion of the framers of the constitution of 1864, there is no conflict of law as regards the nationality. The claimant was born a British subject; the law at the time in force in Venezuela did not have the effect of giving him any other nationality; no subsequent law, therefore, could have the effect of depriving him of the privileges of British nationality, and the British Government are entitled to maintain this claim on his behalf.

GRISANTI, *Commissioner* (claim referred to umpire):

Edward A. Mathison demands of the Government of Venezuela payment of £ 4,966 owing to damages and injuries which, according to his own statement, were caused him by the Government troops.

The undersigned rejects such a claim because said Mathison is of Venezuelan nationality, and therefore has no right to claim before this Mixed Commission. Mathison was in fact born in Ciudad Bolivar in the year 1858, his father being an Englishman, therefore long after Venezuela had assumed its position as an independent nation and declared and inscribed in its constitution the principle *jure soli* by virtue whereof every man born in Venezuelan territory is a Venezuelan by birth.

See the following pertinent extracts:

Constitution of 1830. Title III. On Venezuelans.

ART. 9. Venezuelans are such by birth and by naturalization.

ART. 10. Venezuelans by birth are: The freemen born in the territory of Venezuela.

Constitution of 1857. Title III. On Venezuelans.

ART. 7. The quality of a Venezuelan proceeds from nature or may be acquired by naturalization.

Venezuelans by nature are: All men born in the territory of Venezuela.

Constitution of 1858. Title II. On Venezuelans.

ART. 6. Venezuelans are: First by birth, all those born in the territory of Venezuela; the children of Venezuelan father or mother born in the territory of Colombia, and those of Venezuelan parents born in any foreign country.

Constitutions of 1864. Title I. Section II. On Venezuelans.

ART. 6. Venezuelans are: All those born or that may be born in the territory of Venezuela whatever may be the nationality of the parents.

In the constitutions enacted by the Republic in the years 1874, 1881, 1891, 1893, and in the one actually in force, which is that of 1891, the last extract is textually reproduced.

Under the rule of the constitutions of 1857, 1858, it was claimed by some foreign governments that children who were born in the territory of Venezuela of foreign parents were to follow their parents' nationality, but the Republic always maintained that they were Venezuelans; and in order to avoid such discussions, no matter how unfounded the pretensions of the aforesaid governments might be, the provision contained in article 6, No. 1, of the constitution of 1864, was enacted.

No sooner was the fundamental law published than the chargé d'affaires of France addressed himself to the minister of foreign affairs in Venezuela, stating that his Government had ordered him to ask precise explanations about the meaning of certain provisions contained in the new constitution of the Republic with regard to nationality.

Article 6 [says the chargé d'affaires] reads thus: " They are Venezuelans: First, *all those born or that may be born in the territory of Venezuela, whatever their parents' nationality may be.*"

This paragraph being susceptible of two meanings, the undersigned wishes to know whether the legislature has intended to establish for every person born, or that may be born, of foreign parents in the territory of the Republic, the obligation of embracing, even against his will, Venezuelan nationality, or has only been willing to grant him the right of claiming this nationality in preference to that of his parents.

In this last case, the undersigned can but pay homage to the liberality of the new laws of the Republic, quite in conformity on this point with the provisions of French law.

On the other hand, he should be very sorry to be obliged to seriously protest against nationality being imposed by force on individuals born of French parents, if such be the meaning of the first paragraph, article 6, of the fundamental law of the United States of Venezuela.

Doubtless the provision referred to is not susceptible of two senses, having but one, that which has been expressed in the first place by the honorable French minister. As for the protest, it is absolutely unlawful, in view of the fact that Venezuela, on sanctioning said law, made use of its sovereignty, an essential tribute of every independent nation.

The minister of foreign affairs of Venezuela answered the chargé d'affaires, as follows:

In the former constitutions of Venezuela, it recognized as its citizens all men born in its territory, this declaration standing alone. The Executive power realized and always understood that such an article regarded as citizens, even against their will, all who were born in this country. There was only one case in which the Executive power yielded — that is to say, the one concerning the young man d'Empaire. His resolution, however, as coming from an authority who had no right to interpret the constitution, had only a transitory character, and so it was then submitted to Congress. The affair not being decided at the time of the inauguration of the present Government, this Government consulted the cabinet council, and its opinion maintained the principle of imposed nationality. In conformity with this a pretension of the chargé d'affaires of Spain was then decided. It claimed the native citizenship on behalf of the sons of Spaniards, taking as a precedent the circumstance that the same had been bestowed on descendants of French and English people. Other cases of the same nature were likewise decided by this secretaryship. (Foreign Memorial, 1865.)

At the same time (1865) Mr. Edward, chargé d'affaires of Great Britain, acknowledged the right of Venezuela to dictate the above provision in 1864, alleging only that in that case it was not to be extended to those born prior to it.

The minister of foreign affairs of Venezuela hastened to show that said decision was not retroactive, but explanatory. In truth, the constitutions of 1830, 1857, and 1858 sanctioned the same principle as well as that of 1864, only in this last one the expression is clearer, if possible, so as to make any pretension impossible, however rash, against the Venezuelan nationality forcibly imposed upon persons born in Venezuela of foreign parents.

It is worth mentioning that in the epoch in which Mathison was born the principle *jure soli* was in force in England absolutely, somewhat modified afterwards by the law of 1870.

Jusqu'à une époque toute récente, l'Angleterre était un pays de perpétuelle allégeance. Quiconque était né sur le territoire britannique était sujet britannique, et ne pouvait cesser de l'être sans le consentement du prince. (Ernest Lehr, *Eléments de Droit civil anglais*, 1885, p. 21.)

La loi de 1870 (sec. 4) confirme implicitement le vieux principe du *common law* que tout individu né sur territoire britannique est par ce fait seul sujet britannique. (Idem., p. 23).

And it is to be borne in mind also that England has decided on several occasions some controversies identical with the one arisen on account of Mr. Mathison's nationality in the way I contend to be right.

The diplomatic correspondence of the English Government furnishes us with numerous proofs in this respect.

Sec. 547. En 1842 le gouvernement de Buenos Aires ayant voulut obliger au service militaire plusieurs sujets anglais nés dans la République Argentine, ceux-ci réclamèrent la protection du gouvernement britannique. L'avocat général du royaume uni décida que " l'effet de la loi anglaise ne pouvait aller jusqu'à priver le gouvernement du pays où ces personnes étaient nées du droit de les considérer comme ses sujets naturels, et qu'elles ne pouvaient être protégées contre la loi qui atteignait les sujets du pays, à moins que cette loi ne refusât la qualité de nationaux aux fils d'étrangers." C'était donc au gouvernement argentin que les individus qui se croyaient lésés devait s'adresser.

En 1857 la même question se présenta de nouveau à Buenos Aires, où des sujets anglais nés dans cette ville furent astreints au service de la milice. En réponse à leur demande de protection, Lord Palmerston écrivit à l'Envoyé anglais que le gouvernement de S. M. ne pouvait réclamer de telles personnes comme sujets anglais. (*Le Droit international.* Calvo, t. 2, p. 42.)

Paragraphe 549. L'année suivante nous voyons encore le gouvernement anglais affirmer la même doctrine. Dans une dépêche de Lord Malmesbury à Lord Cowley nous lisons: " Il est permis à tout pays de conférer par des lois générales ou spéciales les privilèges de la nationalité aux personnes qui naissent hors de son territoire, mais il ne peut les leur accorder au détriment du pays où elle sont nées après qu'elles y sont retournées volontairement et y ont fixé leur domicile. En règle générale ceux qui naissent sur le territoire d'une nation sont tant qu'ils y résident soumis aux obligations inhérentes au fait de leur naissance. La Grande-Bretagne ne saurait permettre que la nationalité des enfants nés sur son territoire de parents étrangers soit mise en question. (Calvo, *ibid.*, p. 48.)

In 1843 a question arose between Great Britain and Portugal identical with the one we are studying, and Lord Aberdeen sent the English representative the following instructions:

I have received your official letter, dated the 5th of May, by which you advise me that you have informed the minister of foreign affaires of Portugal that the Government of Her Majesty can not admit even for a moment the right vindicated by the Portuguese Government of considering as Portuguese subjects all persons born in Portugal, notwithstanding their descending from foreigners residing in said country.

I think it necessary for your best information to let you know the opinion of the advocate-general of the Queen on several cases arisen in foreign countries, in which the right you refer to in your official letter has been discussed.

Such opinion is, substantially: That if, according to the written law of this country, all children born out of the King's obedience, whose parents or paternal grandfathers were subjects by birth, are themselves entitled to enjoy British rights and privileges while remaining in British territory, the British statute, however, in its effect can not be extended so far as to deprive the Government of the country where those persons were born of the right of claiming them as subjects, at least as long as they remain in that country. (Seijas, Derecho Internacional Hispano-Americano, Tomo I, p. 340.)

Not by the strength of my reasoning, but by the authority of the texts above cited, I have fully proven that Mr. Edward A. Mathison is of Venezuelan nationality, and being such has no right to resort to this Mixed Commission, making a claim against his own native country. Therefore said claim ought to be disallowed.

PLUMLEY, *Umpire*:

The claimant was born in Venezuela on September 14, 1858. He now resides and has always resided in Venezuela. His father was of British parents and was born in Trinidad. No question is made that by the law of Great Britain one born in another country of a British father domiciled in such foreign country is a British subject. It is admitted that if he is also a Venezuelan by the laws of Venezuela, then the law of the domicile prevails and the claimant has no place before this Mixed Commission.

His claim is for £ 4,766 for damages and injuries received by him through troops of the Venezuelan Government. No question is made that his claim is a just one, providing he brings himself within the jurisdiction of the Commission.

The honorable Commissioners fail to agree, and therefore this case comes to the umpire to be determined by him.

The constitution of Venezuela of 1864, title 1, section 2, subject, Venezuelans, is as follows:

ART. 6. They are Venezuelans: First. All those born or that may be born in the territory of Venezuela, whatever may be the nationality of their parents.

No question is made that the constitution then established by the Republic is textually the same now, and has remained thus ever since 1864.

No question is made by the learned agent for the British Government that, under the constitution of 1864, one born thereafter in circumstances similar to those of the birth of the claimant Mathison would be a Venezuelan citizen, but it is asserted that the constitution existing at the time of the claimant Mathison's birth did not impose Venezuelan citizenship upon the claimant. The interpretation to be given to the constitution of 1857 is decisive of the question in issue, as it is agreed that this is the constitution in force at the time of the claimant Mathison's birth.

The learned British agent contends that the constitution of 1864 can not have retroactive effect so as to constitute one born before that date a citizen of Venezuela by force thereof, and the umpire sustains his contention. The umpire does not understand the honorable Commissioner for Venezuela to claim retroactive force for the constitution of 1864, and understands him to accept the claim of the learned British agent in that regard.

The umpire understands that the honorable Commissioner for Venezuela claims in regard to the constitution of 1864 simply this, that it is exigetical, not additional, and that beginning with 1830 the constitution of Venezuela has had in this regard the same meaning and purport as the constitution of 1864.

It is insisted by the learned agent for Great Britain that to have the effect to deprive him of the nationality of his parents the law of a country where a man

happens to be born must be stated in express and clear terms, and that general words can not be held sufficient to produce such result; and he claims further that the language of the constitution of Venezuela as it was prior to 1864 comes within the force and effect of his objection.

The strength and value of this contention will depend in a great measure upon what is deemed the natural relation of the state to those born within its domain, and conversely the natural relation to the state of one so born. If the state owes to such the protection due to its citizens, and in return has a right to demand from such due allegiance, if this is the natural relation between the two, changed only by artificial rules legislative enactment, or kingly decrees, the language used in any law having reference to such relations will be interpreted to favor the natural status, unless it clearly appears to express a different purpose. On the other hand, if such is not the rule of nature, then an effort by enactment to make it a rule of the state will require very clear and unambiguous language to express such intention, and if ambiguities exist or the expression is weak the interpretation will be against the law which seeks to establish a principle in derogation of a great natural law.

Phillimore, volume 1, chapter 18 (star page), section 328, says:

> First. As to the right of territorial jurisdiction over persons: They are either (1) subjects or (2) foreigners commorant in the land. * * * Under the term subjects may be included both native and naturalized citizens. * * * The native citizens of a State are those born within its dominions, even including, according to the law of England, the children of alien friends.

In a note to Phillimore, Volume IV, page 17, it is said that in Shedden *v.* Patrick, 1 Macqueen's House of Lords' Cases 611, Lord Chancellor Cranworth observes that in England, *independently of statute law* and with certain exceptions, every one *born* abroad is an alien. England holds that the happening of birth within its dominions from parents who are not enemies affixes and imposes an indelible citizenship in that country. See the case of Frost MacDonald in State Trials, 887. Here the respondent left Great Britain in his infancy, but he was born there. He was taken in arms holding a French commission, the latter being the country of his domicile; he was held guilty of treason by the courts of Great Britain.

> Natural allegiance is such as is due from all men *born* within the King's dominions immediately upon their birth. (Blackstone (Cooley's), vol. 1, 369, citing 7 Rep. 7.)
>
> The children of aliens born here in England are, generally speaking, natural-born subjects and entitled to the privileges of such. (Blackstone (Cooley's), vol. 1, p. 373.)
>
> The first and most obvious division of the people is into alien and natural-born subjects. *Natural-born* subjects are such as are born within the dominions of the crown of England * * * and aliens such as are born out of it. The thing itself, or substantial part of it, is founded in reason and the nature of *government*. (Idem, p. 366.)

Such was the rule of the common law. All changes are the result of statutory legislation.

Blackstone contended, volume 1 (Cooley's), page 369:

> That the natural-born subject of one prince can not by any act of his own * * * put off or discharge his *natural* allegiance to the former.

And that this is the principle of *universal law*, citing to sustain this 1 Hale's P.C., 68.

The universality of this principle to the extent of holding the inability of expatriation is, of course, very much questioned, and is only quoted here to show the force which attaches to the incident of birth in establishing one's

citizenship. In all these there are certain well-defined exceptions which, not being necessary to this discussion, are assumed to be in the minds of everyone, and therefore that no especial reference to them is necessary.

Story's Conflict of Law, second edition, Chapter III, section 48, gives as the general rule:

> Persons who are *born* in a country are generally deemed to be citizens and subjects of that country.

That —

> A reasonable qualification of the rule would seem to be that it should not apply to the children of parents who were *in itinere* in the country, or who were abiding there for temporary purposes, as for health, or curiosity, or for occasional business.
>
> When I say that an alien is one who is born out of the King's dominion or allegiance, this always must be understood with some restrictions. The common law, indeed, stood absolutely so, with only very few exceptions. * * * And this maxim of the law proceeded upon a general principle that *every man owes natural allegiance where* he is *born*, and can not owe two such allegiances or serve two masters at once. (Blackstone (Cooley's), vol. I, 373.)

The Century Dictionary says:

> Natural-born citizen. One who is a member of a state or nation by virtue of birth.
>
> Native. One born in a given country as a native of it. Of or pertaining to one by birth or the place or circumstances of one's birth.
>
> Citizen. A native of a city or town. * * * A freeman of a city or town as distinguished from a foreigner or one not entitled to its franchise.
>
> "Surely no native-born woman loves her country better than I love America."
>
> Naturalize. To confer the rights and privileges of a native-born subject or citizen upon.
>
> In ancient Rome citizenship, though most usually acquired by birth, might be obtained by special grant of the state. (International Encyclopædia; title, Citizen.)
>
> Then the chief captain came and said unto him, Tell me, art thou a Roman? He said, Yea. And the chief captain answered, With a great sum obtained I this freedom; and Paul said, But I was *free born*. (Acts xxii, 27-28.)
>
> But Paul said, I am a man which am a Jew of Tarsus, a city in Cilicia, a citizen of no mean city. (Acts xxi, 29.)

> "Breathes there the man with soul so dead
> Who never to himself hath said,
> This is my own, my native land —
> Whose heart hath ne'er within him burned
> As home his footsteps he hath turned
> From wandering on a foreign strand?"
>
> (Scott's *Lay of the Last Minstrel*.)

Allegiance on the one hand and protection on the other ordinarily settle this without difficulty when applied to native-born or naturalized citizens, or mere commorant aliens. Serious questions arise only when the law must be applied to those who are domiciled from choice in a state of which they are not native and in which they have not sought or have not been permitted citizenship.

The necessities and blessings of commerce and the comity now existing between nations have enlarged these conditions and have permitted privileges to each quite beyond those pertaining to such relations in a not remote period. When the proportionate amount of these unattached persons to the great body of native citizens is relatively very small, the danger and the harm to the state is little, if any; but any considerable number, relatively, of persons who partake of the benefits of a country and yet deny to it allegiance and defense, while

claiming from it peculiar protection, become a serious menace and harm to the state of which they are a part. It is not egotism for a country to assume that a man who becomes de facto a citizen by his established domicile, who there erects his rooftree, there selects and locates his wife, and there rears his children, has deliberately chosen that such country shall be for his children their native land, to whom they, if not he, shall owe allegiance. If citizenship is thereby imposed, it is not by the state, but by the parent.

This law of nature, of nativity, furnishes the most ready basis of citizenship, and a law which recognizes it and which denies continuous alienship to successive generations is as general as it is wise and as wise as it is general.

It follows, then, that in the judgment of the umpire a law defining citizenship to mean those who are born in its dominions is so far in accord with the universal trend of law upon such matters, so consistent with a due regard for the higher welfare of the inhabitants of the state, so sympathetic with natural law, that he would find nothing doubtful nor uncertain if it be expressed in general terms. Most certainly he finds no doubt or ambiguity in the expressions:

ART. 9. Venezuelans are such by birth and by naturalization.

ART. 10. Venezuelans by birth are: The free men born in the territory of Venezuela. (Venezuelan constitution, 1830.)

This is not generalization. Using the article " the " before " freemen " makes it specific and certain. It includes all that are born free. It excludes all others and none other. It gives one test only. It defines that one. There is no ambiguity here — nothing which suggests or permits interpretation. It comes within the rule quoted from Vattel in Phillimore (Vol. II, sec. 70):

If the meaning be evident and the conclusion not obscure, you have no right to look beyond or beneath it to alter or to add to it by conjecture.

Nor does the umpire find ambiguity in this:

ART. 7. The quality of a Venezuelan proceeds from nature or may be acquired by naturalization.

Venezuelans by nature are: All men born in the territory of Venezuela. (Venezuelan constitution, 1857.)

Here, also, there is no generalization. The most conclusive and comprehensive word known to the English language does duty here.

The Century Dictionary:

All. The whole quantity of, with reference to substance, extent, duration, amount, or degree, with a noun in the singular, as all Europe, all history, etc.

" All hell shall stir for this." (Shakespeare, *Henry V*, V, 1.)

" All heaven resounded, and had earth been then, all earth had to her center shook." (Milton, *Paradise Lost.*)

The Century Dictionary further says:

The *whole number of with reference to individuals* or particulars take collectively with a noun in the plural; as, all men, all natives, etc.

Nor is this less certain or significant:

ART. 6. Venezuelans are: First, by birth, all those born in the territory of Venezuela; the children of Venezuelan father or mother born in the territory of Colombia, and those of Venezuelan parents born in any foreign country. (Venezuelan constitution, 1830.)

These are identical in scope and largely in language with the fourteenth amendment of the Constitution of the United States, viz:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.

It is well understood and clearly expressed by the learned agent for Great Britain that the expressions used in the different constitutions in Venezuela hereinbefore quoted are to be accepted as they have been interpreted by that country through the proper channels. Being wholly a matter of its own domestic concern it is not questioned that the interpretation which it has placed upon this language is authoritative and must be accepted by all other nations. Upon such matters if the laws of other nations conflict with the laws of Venezuela the laws of such other nation must yield, as they have no extraterritorial effect beyond the amount which the comity of Venezuela may allow. It is the belief of the learned British agent that the provisions concerning citizenship, hereinbefore quoted, from the constitution of Venezuela, and the provisions of the constitution of 1864, hereinafter written, are progressive, not interpretative. It is asserted by the honorable Commissioner for Venezuela that these several provisions are not progressive, that the several constitutions are identical in meaning and purpose, but that the language used is of the nature exegetical to meet the resisting contentions of other nations concerning the meaning of the constitution then existing — to meet those objections and protestations with language which would effectually preclude any such interpretation and stay all such contentions.

As an aid in understanding the spirit, scope, and purpose of the constitution of Venezuela of 1830, 1857, 1858, and 1864, the opinion of its statesmen is also of value. In the case before the American-Venezuelan Claims Commission under the convention of 1866 Commissoner Andrade, whose opinions give evidence of superior mental strength and ability, says (Moore's Int. Arb., vol. 3, 2457):

> By virtue of that right Venezuela declared in her constitutions of 1830, 1857, 1858, and 1864 a Venezuelan citizen by birth every free person born in the territory of Venezuela, such, for instance, as Narcissa de Hammer and Amelia de Brissot,

referring here to the widows who appeared as claimants before the Commissioners in virtue of their derived citizenship through their husbands, who were United States citizens in their lifetime, while the claimants were Venezuelan born, reared, and domiciled.

The honorable Commissioner for Venezuela further asserts that his present contention is in accord with all past interpretation of this point by Venezuela. This last proposition is nowhere and in nowise challenged by the learned British agent, and hence is accepted by the umpire as an admitted fact. Such being the interpretation by Venezuela of its own constitution in this regard it must prevail.

> The law enacted by the supreme power of the state is to be interpreted according to the intention of that one power. (Phillimore, *International Law*, Vol. II, sec. 66.)

Such intention is to be gained by what the country or state enacting the law has said was the meaning if it has made a deliverance through the proper channels upon that subject. If not, then there comes to our aid another principal rule of interpretation.

> Inculcates as a cardinal basis (which) is to follow the plain and obvious meaning of the language employed. (Phillimore, International Law, Vol. II, sec. 70.)

To hold in conformity with the contention of the honorable Commissioner for Venezuela that one born in the country of alien friends is a citizen of the

country of his birth, is to hold in accord with the position of England and the position of the United States of America and is in accord with the wise policy for a state which is growing or anticipates growth by immigration. It can not wisely have a large, foreign, cancerous growth of unaffiliated and unattached population alien to the country, its institutions, and its flag, but in due regard to its own safety it must fix a time when the domicile of the parent's choice shall create a citizen out of the son of his loins born within that domicile. It is the test of nature; it is the test of Venezuela. If citizenship is thereby imposed it is through the father's voluntary, intelligent selection. There must be an end to the citizenship of the national of a country when he is resident and domiciled in some other country. If the father can retain his foreign nationality and impart that to his own son on the soil of the country of his domicile, then may not the son of the son, and so on ad infinitum?

The umpire holds that the constitution of 1864 is but explanatory of the meaning of the constitutions preceding upon these questions of nationality, and, that since 1830, a free man born in Venezuela is a citizen of Venezuela; and that therefore Edward A. Mathison is a Venezuelan and not a British subject, and this tribunal has no jurisdiction over his claim.

It is therefore dismissed without any prejudice to any right which the claimant may have in any other tribunal for the recovery of his claim.

STEVENSON CASE

(By the Umpire):

A woman acquires the nationality of her husband by marriage, but if she continues to reside in the country of her birth after the death of her husband, and the law of such country provides that she is a citizen of the country of her husband during her marriage only, then the law of her domicile will control and she can not be considered as a subject or citizen of the country of her husband.

Where there appears to be a conflict of laws with respect to the nationality of a person, she is deemed to be a citizen of the country in which she has her domicile.

Under the protocol the Commission has no jurisdiction to decide claims of the British nation, as such, against Venezuela. Its jurisdiction is limited to hearing and deciding claims on behalf of British subjects.[1]

Two children resulting from the marriage, who were born on British soil, are, under the laws of England, British subjects, and have a right to claim before the Commission.

The fact that they were in the military service of Venezuela can in no way affect their status as British subjects, and can not amount to a declaration to become citizens of Venezuela, and in no case can it be equivalent to formal naturalization as citizens thereof.

The decease of one of these children after the presentation of the claim and before the award will not defeat the allowance of his claim, as it was British in origin and at the time of its presentation to the Commission. The claim with respect to these two heirs allowed; with respect to the widow and other children, dismissed without prejudice.

CONTENTION OF BRITISH AGENT

This claim is presented by the British Government on behalf of the estate of the late J. P. K. Stevenson.

The circumstances of the claim are already before the Commission. Since the claim was presented by the British Government in 1869 the claimant, a

[1] See Italian - Venezuelan Commission (Miliani Case) in Volume X of these *Reports*.

British subject born in Scotland, has died, and the claim is now presented on behalf of his estate.

The principle upon which the British Government ask compensation is that underlying the diplomatic presentation of all claims of foreign subjects by their governments. Compensation in such cases is demanded and granted in respect of an international wrong, committed to the property of the subject of the demanding state by the state on which the demand is made. The injury done to the subject is an injury to the state and remains unatoned until the claim is satisfied. It is on this theory that the diplomatic support of claims is recognized in international law, and it is the principle upon which the British Government has always acted in such matters. (Cf. Vattel, book 2, ch. 6, quoted in Moore Int. Arb., at p. 2378. The decision in the case of Cassidy (id., p. 2378) exemplifies this principle.)

The claim, then, being a claim on behalf of a British subject in its inception, has not been satisfied. The injury done to the State therefore remains and is not affected by the death of the person injured and the vesting of the estate in another.

As regards the amount recovered this will devolve precisely as the damaged portion of the estate would have done, had it not suffered damage at the hands of the respondent Government.

Such claims as the present come under the terms of the protocol of February 13, 1903. Preamble:

> Whereas certain differences have arisen between Great Britain and the United States of Venezuela in connection with the claims of British subjects. * * *

One of the " differences " mentioned was the injury inflicted on the British Government in connection with this claim, which has been in dispute since 1869. The object with which this tribunal is constituted is by the terms of the protocol, to settle such differences, and therefore in this case to cause the Venezuelan Government to make atonement to the claimant Government for the wrong inflicted upon it in the person of its subject Stevenson.

As the claim also satisfies the conditions of Articles I and III of the protocol, this Commission has jurisdiction to make an award in favor of the claimant Government.

In the view of the British Government the nationality of Mrs. Stevenson and of her children is irrelevant; as, however, the conclusions drawn by the Venezuelan Commissioner appear to be inaccurate, his opinion ought not to remain unanswered.

The facts, which are not in dispute, are as follows:

Stevenson was an Englishman, but Mrs. Stevenson was, before marriage, a Venezuelan. The names, ages, and places of birth of the children may also be taken to be as stated by the Venezuelan Commissioner.

It will not be seriously disputed that Mrs. Stevenson became, by the law of both countries, a British subject by her marriage and that there was at that time no provision in the law of either country to modify or qualify the completeness of that status.

When a person has completely acquired a particular nationality (British) no subsequent legislation of a foreign country (Venezuela) can devest him of that nationality or of any of its privileges unless he goes through the prescribed form of naturalization in that country. By the law of both countries Mrs. Stevenson became, in 1855, a British subject for the rest of her life (unless remarried, which is not the case here).

The Venezuelan law of 1873, though possibly effective in giving a double nationality to any widow whose marriage with a British subject should have

taken place after that date, could have no effect as regards those already married.

As regards the children, the first six are British subjects according to the argument in the case of Mathison, to which the tribunal is respectfully referred.[1]

The two last, Juan and Guillermo, are British subjects by the laws of both countries. It is not disputed that the remainder are Venezuelans on Venezuelan territory.

The fact that a person takes a civil or military appointment under a foreign government does not affect his nationality, and it has never been held to do so.

GRISANTI, *Commissioner*:

The claim of J. P. K. Stevenson was submitted to the Venezuelan-British Mixed Commission which sat at Caracas in 1869. The Commissioner on the part of Venezuela refused to consider it, believing it was not within the jurisdiction of the Commission to do so, and the British Commissioner undoubtedly acknowledged this objection as right, for he withdrew the claim with the reservation that such withdrawal was without prejudice to the right of the claimant.

Said claim is presented anew before this tribunal, and the undersigned proceeds to give his opinion in regard thereto.

J. P. K. Stevenson married in Port of Spain, in 1855, Mrs. Julia Arostegui, she having been born in Venezuela in 1838 of parents who also were natives of the Republic. Stevenson had twelve children from his marriage, as follows: María, Hilaria, Agustina, Julia, Elena, Juan, Norman, Cecilia, Alejandrina, Corina, another Juan, and Guillermo. They were all born in Venezuelan territory (Maturín), except the last two, who were born in Trinidad, but have held public posts in Venezuela — Juan civil posts and Guillermo military ones. J. P. K. Stevenson died in Maturín about the middle of April 1882.

The British Government now presents the claim on behalf of the heirs of Stevenson, who are his widow and surviving children. The Venezuelan Commissioner hereby rejects said claim on the ground that the said heirs, being Venezuelans, have no right to claim before this Commission, which is called upon to examine and decide claims of British subjects.

Mrs. Julia Arostegui, as before stated, was born of Venezuelan parents in Venezuela, and is therefore a Venezuelan. If by the English laws the lady acquired British nationality, she regained her Venezuelan nationality by virtue of her widowship, in conformity with article 19 of the Venezuelan Civil Code of 1881, in force when Stevenson died. Said article reads as follows:

> The Venezuelan woman who marries a foreigner shall be considered as a foreigner with respect to the rights peculiar to Venezuelans, provided that by so marrying she acquires her husband's nationality whilst she remains married.

This provision is the same as that of the Civil Code of 1873 and that of 1896, at present in force.

If by the British law the woman who marries an Englishman acquires British nationality and retains it so long as she acquires no other, and it be considered that a conflict has arisen as to Mrs. Stevenson, between said law and the above-mentioned provision of the Venezuelan Civil Code, the conflict should in justice be resolved, giving the Venezuelan law the preference. And, indeed, the ties which bind Mrs. Arostegui de Stevenson to Venezuela are many and close; it was here she and her parents were born, as also ten of her children; it is here her husband is buried; her affections all are centered in Venezuela, and likely

[1] See *supra*, p. 485.

enough she knows no other land which is not Venezuelan territory, excepting Port of Spain. Her marriage was solemnized at Trinidad because, the bridegroom being a Protestant, the priest of Maturín declined to marry them.

I shall now consider the nationality of her children. With regard to María, born in 1856; Hilaria, in 1858; Agustina, in 1860; Julia and Elena, in 1863; and Juan, in 1864; I hold that they are Venezuelans, and refer to the arguments contained in my opinion in reference to the claim of Mr. Edward A. Mathison.[1]

I consider that no discussion whatever is possible as to the Venezuelan nationality of Norman, born in 1865, Alejandrina, in 1869, and Corina, in 1871. Juan and Guillermo, born in Trinidad in 1873 and 1881, have mixed in the political affairs of Venezuela, and have held public offices; the former a civil and the latter a military position; both having been, therefore, deprived of the right to claim British protection.

In the verbal discussions with His Britannic Majesty's honorable Commissioner he has held that, as the British Government presented this claim in the year 1869 and it was withdrawn, they have now the right to present it anew, whatever be the nationality of its present owners. I have rejected such argument as being antijuridical, as the British Government is acting on behalf of the claimants, and they, being Venezuelans, such representation is unacceptable.

On the strength of the reasons assigned the Venezuelan Commissioner rejects entirely this claim.

I herewith produce three telegrams [2] referring to this case, addressed to the assistant Venezuelan agent, Dr. J. I. Arnal, two of which are from Gen. José Victorio Guevara, president of the State of Maturín, and the other one from Gen. L. Varela, jefe civil y militar of the State of Guayana. I am expecting other proofs, which I shall present as soon as received.

PLUMLEY, *Umpire*:

This case first came to the umpire on the disagreement of the honorable Commissioners concerning the objection of the honorable Commissioner for Venezuela that the claim was barred by limitation, which objection was overruled by the umpire, as set forth in his opinion in the same case of date October 16, 1903,[3] and the cause was returned to the honorable Commissioners to be considered on its merits.

The honorable Commissioners in their consideration of the merits of the case find no important disagreements as to the facts, but they do differ widely in their application of the law to the facts.

The admitted facts are that in 1859 J. P. K. Stevenson, since deceased, suffered recoverable injuries at the hands of the Venezuelan Government —

	Pesos
On the Rio de Oro estate to the amount of	13,277.60
On the La Corona Mapirito and San Jáime estate	77,645.00
	90,922.60
In 1863 on the Bucaral estate	43,660.80
In 1869 on the San Jacinto estate	1,260.00
Total	135,843.40

[1] *Supra*, p. 486.
[2] These telegrams refer to the place and time of birth of the claimants.
[3] *Supra*, p. 483.

J. P. K. Stevenson was at this time, had always been, and on the date of his death was a British subject domiciled in Venezuela. He died in Venezuela in 1882.

In 1855 the said J. P. K. Stevenson, then domiciled in Venezuela, married, at Port of Spain, Trinidad, Julia Arostegui, a Venezuelan by birth and domicile, who still survives him and is one of the parties in interest in this claim. This marriage was solemnized in Trinidad because the priest at their home in Venezuela declined to officiate, the groom being a Protestant. Of this marriage there were born to them, who still survive and are parties of interest in this claim, María, born in 1856; Hilaria, in 1858; Agustina, in 1860; Julia and Elena, in 1863; Juan, in 1864; Norman, in 1865; Cecilia, in 1867; Alejandrina, in 1869; Corina, in 1871; Juan, in 1873; and Guillermo, in 1881. Save the last two, all were born in Venezuela and have always had their domicile in Venezuela. The last two were born in Trinidad, but since 1881 they also have been domiciled in Venezuela and are said to have held offices, civil and military, in that country under the National Government. The domicile of the widow before and during her marriage and since has been in Venezuela.

Interest on this claim is asked as also expenses.

Upon these facts the honorable Commissioners disagree in judgment and the case has therefore come to the umpire for decision.

The umpire would first acknowledge to the learned agent for Great Britain and the honarable Commissioner therefor and to the honorable Commissioner for Venezuela his indebtedness for the very thorough, careful, and able manner in which the claims and counterclaims of the respective Governments have been laid before him. This presentation has in a great measure simplified the work of the umpire, and he is correspondingly grateful.

The claimant Government contends that it is not important to inquire into the citizenship of the widow and children of the deceased for the reason that it being acknowledged that the said J. P. K. Stevenson was a British subject and that this claim matured during his lifetime settle the question of jurisdiction in this tribunal. It is urged by the claimant Government that the injury having occurred to a British subject and an indignity having been committed through him against the British Government by the respondent Government it can not be atoned until full recompense has been made and that the true status of the case is found not in the citizenship of the representatives of the deceased at the time of the protocol, but in the unremoved indignity to the British Government. This position of the claimant Government is not assented to by the respondent Government, which insists that the jurisdiction of this tribunal turns upon the question whether the beneficiaries, the widow and heirs of Stevenson, are or are not in any part British, and they deny such nationality as to all and insist that the widow and children are all Venezuelans.

Venezuela was the domicile of J. P. K. Stevenson through long years of choice and settled purpose. It was the domicile of himself and his family at the time of his death. It was the domicile of origin in the case of Mrs. Stevenson. It was the domicile of origin in the case of all the children save two. This domicile of origin on the part of the children continued their domicile of choice, as well, after they became adults. As to the two born out of the country, it became with them a domicile of choice after they reached their majority. The domicile of the widow continued as it had always been — Venezuela. In Venezuela is found the home of her parents, her own birthplace, the old family rooftree, the graves of her family, and of her kindred and all of the tender associations which cluster around the home of one's youth. Here she found her husband; here her children were born; here she erected her own family altar; here remained the friends of her childhood, and here were all her children when

her husband died; here were all the familiar scenes which had become woven into the warp and woof of her life, and were therefore a part of her life, and it is not strange that here she remained. There is not the slightest evidence that she ever had a thought of allegiance to Great Britain or ever suggested to her sons in their strength that their hearts should be fixed in loyalty to the British sovereign and their hands ready for his defense. Her relation as subject of Great Britain was wholly by affinity, so far as appears, and when the connecting link between her and Great Britain was broken in the death of her husband her citizenship came back to her domicile not only by the law of Venezuela but as her natural selection. There is nothing to suggest that Mr. Stevenson ever yielded personal service, had any personal loyalty, or did aught that was due in the way of allegiance to his native country. Apparently, in every respect but that of de jure, he had become a Venezuelan. To hold that under these circumstances the children were born British subjects and the wife constituted a British subject after the death of her husband against the law of Venezuela, organic and statutory, seems forced and unnatural. It seems to the umpire that the conditions of domicile of such great length and constancy as in this case have an important bearing on the ultimate rightful solution of this question. According to Boullenois, quoted in Story's Conflict of Laws, page 1697, it is safe to stand upon the proposition —

First. To follow the general principles which declare that the person will be affected by the state and condition which his domicile gives him. Secondly. Not to derogate from those principles, except where the spirit of justice requires it.

If the position assumed by the learned British agent is correct, that the act of 1873 was the beginning of a claim by Venezuela that her daughters when married to a foreign subject thereby partook of the husband's nationality only during the lifetime of the husband, it could hardly be taken as retroactive or null. The law existing at the time when her widowhood begins and her rights as widow vest will be effective, unless, indeed, as urged by the learned British agent, the country of the husband would not permit that her citizenship being once fully established, and exclusively, in that country, that the law of the land of her nationality could vest her of such vested citizenship. The force of this contention, if she were then domiciled or resident in the land of her husband's nationality, or in any land other than that of her nationality, it is not necessary to discuss. When applied as in this case, in the judgment of the umpire its force is largely weakened if not entirely spent. Her very marital relation in Venezuela the legitimacy of her children, her rights of property in the estate of her husband, are all determined by the laws of Venezuela, which, while recognizing the privilege of one of her daughters to become the wife of a foreign subject, consent or refuses to consent, at her pleasure, to the passing of the citizenship of such wife into the nationality of the husband; and when Venezuela consents thereto qualifiedly she has the sole and exclusive right to settle her own interior policy in that matter, and to decree the extent of such qualification. This position gains peculiar force in this case, where, for eight years after the law of 1873, the husband, with his wife and family, continued their domicile in Venezuela through his continuing choice and election.

In the cases of Lucien Lavigne and Felix Bister before the Spanish Commission of 1871 in its sitting of 1878, the act of the Congress of the United States of February 19, 1855, was under consideration.

This act provides that —

Persons heretofore born or hereafter to be born out of the limits and jurisdiction of the United States, whose fathers were or shall be at the time of their birth citizens of the United States, shall be deemed and considered and are hereby declared to be citizens of the United States. (10 Stats. at L., p. 604.)

Held in those cases that this law could not operate so as to interfere with the allegiance which such children may owe to the country of *their birth when they continue in its territory*. (Moore, *Int. Arb.*, vol. 3, p. 2454.)

Under substantially identical conditions with the case now under consideration the question before this tribunal was passed upon by the Commission sitting in virtue of the convention between the United States and Venezuela of December 5, 1885. The questions were very ably discussed, and it was unanimously held that the Commission had no jurisdiction of the claim. The claimants were women born in Venezuela, widows of United States citizens who had resided in Venezuela during their married life, had had children born to them in Venezuela, and had continued to reside with their children in that country after the death of their respective husbands. By the laws of the United States, in virtue of their marriage they and their children also were citizens of the United States, their fathers having been citizens of the United States. (Moore, Int. Arb., vol. 3, p. 2456-2461.)

In Shanks *v.* Dupont (3 Peters, 243), the United States Supreme Court held that when the marriage is within the jurisdiction of the sovereign and the residence there, the sovereign is interested in the subject of allegiance, and it can not be dissolved without his consent so long as the wife remains within the jurisdiction.

Had Mr. Stevenson taken his wife within the dominions of Great Britain to reside, and had he there remained and died, leaving her domiciled there, and were she asserting a claim before this tribunal as one still domiciled in Great Britain or its dependencies, in the opinion of the umpire the law of Great Britain might well be taken as the controlling law and she be held to be a citizen of Great Britain as against Venezuela, notwithstanding the law of Venezuela reëstablishing her citizenship in that country after the death of her husband. In the opinion of the umpire, where, as in this case, there appears to be a conflict of laws constituting Mrs. Stevenson a British subject under British law and a Venezuelan under Venezuelan law the prevailing rule of public law, to which appeal must then be taken, is that she is deemed to be a citizen of the country in which she has her domicile; that is, Venezuela.

Bluntschli, *International Law*, section 374, says:

> Certain persons may, in rare instances, be under the juridiction of two or even a larger number of different states. In case of conflict the preference will be given to the state in which the individual or family in question have their domicile; their rights in the state where they had no residence will be considered suspended.

Twiss, *Law of Nations*, page 231-232, says:

> According to the law of nations, when the national character of an individual has to be ascertained, the first question is, in what territory does he reside? * * * If he resides in a given territory permanently he is regarded as adhering to the nation to which the territory belongs and to be a member of the political body settled there.

In the case of Elise Lebret, before the French and American Commission, Judge Aldis says:

> In case of conflict of laws, as neither country can claim superiority over the other, the only reasonable way of settling the difficulty is to hold him subject to the laws of the country where he resides. The British act of 1870 and the Italian Code of 1866 recognize residence as the turning point in such cases. In Alexander *v.* The United States, No. 45, before the British and American Claims Commissioner (Hale's Report, pp. 15, 16), where the claimant was by British law a British subject and by American law an American citizen, it was held that his claim as a British subject could not be allowed, for that would be giving the laws of one country (Great Bri-

tain) superiority over the laws of the other (the United States). See the opinion of Judge Frazier, in which Count Corti concurred. (Moore's *Int. Arb.*, vol. 3, p. 2505.)

That the national character of a married woman is always that of her husband is modified by the holding that such is the case when the domicile of the wife had continued to be that of the husband's nationality. (Moore's *Int. Arb.*, vol. 3, p. 2505.)

The duty to regard as of superior force, in a case like the present, the law of domicile of the claimant is in accord with the expression of Lord Aberdeen in his communication to the British minister to Portugal, in 1845, in which he said: [1]

I think it necessary, for your best information, to let you know the opinion of the advocate-general of the Queen on several cases arisen in foreign countries in which the right you refer to in your official letter has been discussed. Such opinion is substantially that, if according to the written law of this country, all children born out of the King's obedience whose parents or paternal grandfathers were subjects by birth, are themselves entitled to enjoy British rights and privileges while remaining in British territory, the British statute, however, in its effect, can not be extended so far as to deprive the government of the country where those persons were born of the right of claiming them as subjects, at least, as long *as they remain in that country.*

See quotation from Commissioner Grisanti's opinion in Mathison case.[2]
The learned agent for Great Britain contends that in this case —

The principle upon which the British Government asks compensation is that underlying the diplomatic presentation of all claims of foreign subjects by their government. Compensation in such cases is demanded and granted in respect of an international wrong committed to the property of the subject of the demanding state by the state on which the demand is made. The injury done to the subject is an injury done to the state and remains unatoned until the claim is satisfied. It is on this theory that the diplomatic support of claims is recognized in international law. And it is the principle upon which the British Government has always acted in such matters. (Cf. Vattel, book 2, chap. 6, quoted in Moore's Int. Arb. at p. 2378.) The decision in the case of Cassidy (id., p. 2380) exemplifies this principle.

The claim, then, being a claim on behalf of a British subject in its inception has not been satisfied. The injury done to the state thereby remains and is not affected by the death of the person injured and the vesting of the estate in another.[3]

This places the claim for an allowance before the Commissioners not on the status of the claimants before this Commission as determined by the protocol of February 13, 1903, but rather on the unatoned indignity to the claimant Government through the injuries wrought upon Mr. Stevenson by the respondent Government in his lifetime.

Had Mr. Stevenson been unmarried and without heirs ascending, descending, or collateral, the indignity would sill be unatoned; but could there be a claim of a British subject before this tribunal under the protocol and there be no British subject living to be a beneficiary? Subsequent to the happening of those indignities to the British Government through J. P. K. Stevenson, if he had joined the revolutionists and fought the Republic of Venezuela the indignity to the British Government would have remained unatoned, but could the claim survive before this Commission?

Similarly, if, subsequent to the events complained of, Mr. Stevenson had renounced his British allegiance and had become a naturalized citizen of

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[1] Seijas, *Derecho Internacional Hispano - Americano*, t. I, p. 340.
[2] *Supra*, p. 488.
[3] *Supra*, p. 495.

Venezuela; or if, subsequently to said events, he had removed from Venezuela to the United States of America, for instance, and there sought and obtained citizenship by naturalization, what would have been the status of this claim before this Commission? Had this claim been assigned by Mr. Stevenson in his lifetime, or by the widow and heirs subsequent to his death, to a Venezuelan citizen at any time prior to February 13, 1903, would it have had standing before this Commission? In these hypothetical cases the right to reclamation turns upon the act of forfeiture by the claimant or his representatives which deny the right of the parent country to intervene. May it not as well turn upon the death of all those for whom Great Britain has a right of intervention? Is it not essential to jurisdiction in this Commission that the right to intervention shall exist at the time of the happening of the events complained of and at the date of the protocol creating this Commission?

The umpire cites the claim of M. J. de Lizardi against Mexico before the United States and Mexican Commission under convention of July 4, 1868. Lizardi was dead. The claim was presented by his niece, Doña María de Lizardi del Valle, wife of Don Pedro del Valle. It was not shown to what nation her husband belonged, but he was not a citizen of the United States. She was the legatee of the deceased. There was before the Commission the question of jurisdiction arising through her acquired nationality by marriage. Sir Edward Thornton, the umpire, in giving his opinion, said in part:

> As therefore, Mr. Lizardi's niece is not a citizen of the United States, and as she would be the beneficiary of what award the Commissioners might make, the umpire is decidedly of the opinion that the case is not within the jurisdiction of the Commission. Even if the uncle, Mr. Lizardi, had been a citizen of the United States, which the umpire does not admit, whatever may have been the merits of the case the jurisdiction of the Commission would have ceased on the death of Mr. Lizardi. (Moore's *Int. Arb.*, vol. 3, 2483.)

In Calderwood, Executrix, against The United States (Moore's Int. Arb., vol. 3, 2485-2486), before the American and British claims commission, treaty of May 6, 1871, there was the case of a claimant who was the widow of a British subject resident in Louisiana who had, in his lifetime, a rightful claim against the United States. The claimant, but for the acquired allegiance, through marriage, to the British Crown, was a citizen of the United States. Counsel for the United States demurred to the claim for want of jurisdiction in the commission, denying to the claimant British citizenship after the death of her husband. To this demurrer the counsel for Great Britain made reply that the United States had no law providing for readmission to American nationality of one who had become alien through her marriage. The case evidently turned upon this point. Certainly it turned upon the question of citizenship of the claimant, and a majority of the commission held her still a British subject, overruled the demurrer of the United States, and sustained jurisdiction in the commission. The point which the umpire would make from this case is that, by unanimous consensus of opinion on the part of this eminent board, consideration of the claim was to be had or refused solely upon the question of citizenship of the claimant; not at all upon the indignity suffered by the Government of Greta Britain and which continued unatoned.

In the case of Elise Lebret, previously referred to in this opinion, counsel for the United States claimed the following to be the true rule of construction in such case:

> 5. * * * When the treaty pledges compensation by France to citizens of the United States, if refers to those persons only whose citizenship in the United States is not qualified or compromised by allegiance to France; and that when the treaty

pledges compensation by the United States to citizens of France reference is made to those persons only who are not only citizens of France, but who are also not included among the citizens of the United States. It can not be assumed of either Government that it is intended to compensate persons whom it claims as its own citizens, and that through the agency of another government. (Moore, vol. 3, 2491.)

In the commission between the United States and France under convention of January 15, 1890, there was presented the claim of Oscar Chopin *v.* The United States. It was presented on behalf of himself and three other heirs of Jean Baptiste Chopin, who was a French citizen, a resident of Louisiana, and died in 1870, leaving as a part of his estate this rightful claim. The four heirs, including Oscar, were born in the United States, but they had resided in France more or less, and there were such facts as justified the commission in giving an unanimous award for a certain sum, which they did not undertake to distribute, notwithstanding that Oscar Chopin himself, deceased before the making of the award, leaving a widow and five children, all born in the United States. In Boutwell's report, page 83, the result is stated, and with this comment by this eminent gentleman and lawyer: [1]

It may, however, be assumed fairly that the commission were of opinion that the children of Jean Baptiste Chopin, although born in this country, were citizens of France, and that inasmuch as the death of Oscar Chopin occurred after the ratification of the treaty and after the presentation of the memorial, his right to reclamation had become so vested that it descended to his children independently of the question of their citizenship in France.

Another point to be observed is that the counsel for France withdrew so much of the claim as represented the interest of one of the four heirs of Jean Baptiste Chopin, she having married a citizen of the United States, thus clearly recognizing on his part the principle that the right of recovery was governed by the lawful interest of the beneficiaries and not in the original indignity to France, which still remains wholly unatoned. (Moore, vol. 3, 2507.)

Concerning the agreement between the United States and Spain of February 12, 1871, for the settlement of the claims of citizens of the United States or of their heirs against the Government of Spain, in an interchange of notes between General Sickles, representative of the United States at Madrid, and Mr. Sagasta, Secretary of State for Spain, the instructions of Mr. Fish, the Secretary of State for the United States, and an eminent lawyer, were communicated to the Spanish Government in the following language:

The President contemplates that every claimant will be required to make good before the commission his injury and his right to indemnity * * * and it will be open to Spain to traverse this fact or to show that from any of the causes named in the circular of the Department of State of the United States of October 14, 1869, the applicant has forfeited his acquired rights. (See Moore, vol. 3, 2564.)

Attention is again called by the umpire to the claims of Narcissa de Hammer and Amelia de Brissot, heretofore, referred to in this opinion and found in Moore, volume 3, 2457. This commission was very ably constituted. The opinions of each of the commissioners are remarkable for erudition and wisdom and have genuine weight in the reasonableness of their conclusions and the reasons which they give therefor. The claims of these two women appealed with peculiar force to the tribunal. They were widows of American citizens who were shot dead by Venezuelans while in the strict performance of their duty and without fault or wrong on their part. The indignities to the United States had been in no

[1] House Ex. Doc. No. 235, Forty-eighth Congress, 2nd session.

part atoned for and they were clear, unquestioned, and of a most serious and aggravating character. But in the opinion of each member of the tribunal its jurisdiction turned not on the original indignity to the United States but on the status of the claimants before the commission. Commissioner Little said in part:

The question of citizenship here is not a Federal or municipal one. Inasmuch as the legislation of the two countries of these subjects does not conduce to the same result in this case, that of neither can be looked to as determinative of the issue. This must be resolved from the standpoint of the public law. Thus considered, I think Mrs. Hammer and Mrs. de Brissot are not citizens of the United States within the meaning of the treaty. (Shanks *v.* Dupont, 3 Peters, U. S., 243.) Their claims must, therefore, be dismissed for want of jurisdiction. This, of course, is not saying that the United States has no cause for reclamation on the account of the killing of her citizens — Captain Hammer and Mr. de Brissot. It is only holding that under the terms of the convention the question is not submitted to us. It would be to go beyond the limits of just interpretation and to enter the forbidden domain of judicial legislation to say that claims on the part of citizens means or includes claims growing out of the injuries to citizens. (Moore, 2459-2460.)

Commissioner Findlay said in part:

I quite agree with Commissioner Andrade that Mrs. Hammer and Mrs. de Brissot can not be considered citizens of the United States invested with the right of prosecuting a claim against the Government of Venezuela. (Moore, 2460.)

And, after making this statement, he proceeds with an argument valuable, to read, and concludes with the sentence following:

On the whole I think that we have no jurisdiction as to these particular claims.

In the memorial of Don José María Jarrero, under act of Congress March 3, 1849, to adjust claims of United States citizens against Mexico (Moore, 2324), it appeared that the original claim was in favor of a citizen of the United States, but that before the conclusion of the treaty between Mexico and the United States resulting in this commission it had been assigned to a Mexican citizen. The commission dismissed the claim, stating, among other things:

It matters not that the claim was American in its origin. It had ceased to be American at the date of the treaty, and the holder of it could not invoke the interposition of our Government for his protection.

In the case of L. S. Hargous *v.* Mexico, claims commission under convention of July 4, 1868, Thornton, umpire, gave the opinion dismissing the assigned claim, holding that the assignee must stand on the qualities of the claim. His opinion is worthy of careful study in connection with the principles involved by the case in this tribunal, and is found in Moore's International Arbitration, volume 3, page 2327. See also the Importers' case, Moore, volume 3, page 2331.

In Moore's International Arbitrations, volume 3, page 2388, there appear extracts from the published notes of the board of Commissioners, under the convention with France of July 4, 1831, where these rules were laid down as governing the board.

It was, of course, indispensable to the validity of a reclamation before the Commissioners that it should be altogether American. This character was held by them to belong only to cases where the individual in whose rights the claim was preferred had been an American citizen at the time of the wrongful act, and entitled as such to invoke the protection of the United States for the property which was the subject of the wrong and where the claim up to the date of the convention had at all times belonged to American citizens.

Again:

It was necessary for the claimant to show not only that his property was American when the claim originated, but that the ownership of the claim was still American when the convention went into effect. * * * Nor could a claim that lost its American character ever resume it if it had heretofore passed into the possession of a foreigner or of one otherwise incapacitated to claim before the Commission.

In the United States and Peruvian Claims Commission, which met at Lima, January 12, 1863, Mr. Benson, a United States citizen, had a claim against Peru, which he had previously assigned for value to one José F. Lasarte, a Peruvian citizen residing in the city of New York. Benson presented his claim to the Commissioners as a debt against Peru, saying nothing about the assignment; and Lasarte in the meanwhile presented the same claim, as assignee of Benson, as a claim of the United States. As a result the Commissioners dismissed the claim of Benson on the ground that he had parted with his interest to Lasarte, and had therefore no standing before the Commission. Concerning Lasarte it was held that he had no valid claim against the United States, because it was not a pending claim of a citizen of Peru against the Government of the United States. Mr. Lasarte's claim against the United States was Mr. Benson's claim against that country, and it was impossible to maintain that the interposition of the United States with Peru in favor of Mr. Benson can be made to answer the solicitation of interposition against itself. (Moore, 2390).

See the case of Julius Alvarez against Mexico, opinion rendered by Sir Edward Thornton, umpire, and delivered October 30, 1876 (Moore, 1353); by the same umpire (note on pp. 1353-1354), in the case of Herman F. Wulff *v.* Mexico, No. 232, as follows:

* * * The umpire is asked to amend his award of June 18, 1875, by making it absolute in favor of the administrator instead of conditional upon proof that the recipient shall be a citizen of the United States. The umpire can not acquiesce in the arguments put forward by the counsel for the claimant, whoever that claimant may be. He is of opinion that not only must it be proved that the person to whom the injury was done was a citizen of the United States, but also that the direct recipients of the award are citizens of the United States, whether these beneficiaries be heirs, or, in failure of them, creditors. The heirs are certainly benefited by being able to pay the debts of their deceased relative, even though the whole of the award may be swallowed up by the creditors. If there be no heirs and only creditors, the umpire is of the opinion that even those creditors who are the immediate recipients of the award must prove that they are citizens of the United States. The umpire thinks that the Commission can make no award except to corporations, companies, or private individuals who are citizens either of the United States or of the Mexican Republic, respectively.

Moore, 1353, lays down the rule thus:

On the other hand, where the nationality of the owner of a claim, originally American or Mexican, had for any cause changed, it was held that the claim could not be entertained. Thus, where the ancestor, who was the original owner, had died, it was held that the heir could not appear as claimant unless his nationality was the same as that of his ancestor. The person who had the " right to the award " must, it was further held, be considered as the " real claimant " by the Commission, and whoever he might be must " prove himself to be a citizen " of the Government by which the claim was presented.

That in such a matter as is now under consideration by the umpire the claimant Government is not proceeding primarily to punish for the governmental indignity named, but is rather acting as an international representative on behalf of the private interests of its subjects, gains force when we consult the language of the proposed general treaty for arbitration between Great Britain

and the United States negotiated on behalf of their respective Governments by Hon. Richard Olney, Secretary of State, for the United States, and Hon. Julian Pauncefote, envoy extraordinary and minister plenipotentiary of Great Britain on January 11, A. D. 1897. Article VII of that treaty provides:

> If before the close of the hearing upon the claims submitted to the arbitral tribunal, constituted under Article III or Article IV, either of the high contracting parties shall move such tribunal to decide, and thereupon it shall decide, that the determination of such claim necessarily involves the decision of a disputed question of principle of grave general importance affecting the national rights of such party, as distinguished from the private rights *whereof it is merely the international representative*, the jurisdiction of such arbitral tribunal over such claim shall cease, and the same shall be dealt with by arbitration under Article VI.

The attention of the umpire has not been brought to an instance where the arbitrators between nations have been asked or permitted to declare the money value of an indignity to a nation simply as such. While the position of the learned agent for Great Britain is undoubtedly correct, that underlying every claim for allowance before international tribunals there is always the indignity to the nation through its national by the respondent government, there is always in Commissions of this character an injured national capable of claiming and receiving money compensation from the offending and respondent government. In all of the cases which have come under the notice of the umpire — and he has made diligent search for precedents — the tribunals have required a beneficiary of the nationality of the claimant nation lawfully entitled to be paid the ascertained charges or dues. They have required that this right should have vested in the beneficiary up to and at the time of the treaty authorizing and providing for the international tribunal before which the claim is to appear. That it was then vested has been held as sufficient, and subsequent events have been held as not devesting this vested right. This, however, is as far as any tribunal of repute has gone.

To have measured in money by a third and different party the indignity put upon one's flag or brought upon one's country is something to which nations do not ordinarily consent.

Such values are ordinarily fixed by the offending party and declared in its own sovereign voice, and are ordinarily wholly punitive in their character — not remedial, not compensatory.

It is one of the cherished attributes of sovereignty which it will not usually or readily yield to arbitrament or award. Herein is found a reason, if not the reason, why such matters are not usually, if ever, submitted to arbitration.

Inspection of the protocol of February 13, 1903, between Great Britain and Venezuela discloses in the preamble the occasion of arbitrating the existing differences and their scope, as follows:

> Whereas certain differences have arisen between the United States of Venezuela and Great Britain in connection with the claims of British subjects against the Venezuelan Government.

Article III submits to arbitration certain of these claims of British subjects, reserving those dealt with in Article IV. Whence it follows that nothing being submitted to this tribunal except the claims of British subjects, nothing else can be heard. An arbitral tribunal between nations is one of great power within the terms of its creation, but absolutely powerless outside thereof. Nothing can be within its terms except such as is there by the clear and express agreement of the high contracting parties. The umpire fails to find in the solemn covenant creating this tribunal any authority given it to pass upon any other than claims of British subjects, or, in other words, and affirmatively, he fails to find that it has

authority to pass upon matters resting solely in unatoned indignities to the claimant Government. Hence he holds it necessary to consider the questions raised by the honorable Commissioner for Venezuela, denying that any of the claimants in this case are British subjects or were such February 13, 1903.

The British Government contends, as in the Mathison case,[1] (*a*) that all the children born before the adoption of the constitution of 1864 are British, (*b*) that the two born in Trinidad are British, and (*c*) they admit that the four born in Venezuela after 1864 are Venezuelans while in Venezuela. They also contend that under the laws of Venezuela existing in 1853 and continuing to 1861 the wife of J. P. K. Stevenson, by the laws of both countries, became a British subject by her marriage and retained such nationality after his death without regard to domicile, subject to being defeated only (*d*) by subsequent marriage to the subject of a different nationality, (*e*) by actual naturalization in some other country; and that the law of Venezuela establishing a different status for the domiciled widow of a foreigner, passed after her marriage, but before her husband's death, does not affect such relation. That the Venezuelan law of 1873 and the Venezuelan constitution of 1861, for a woman married thereafter to the subject of a foreign country, relegates her to her original nationality after the death of her husband, if then domiciled in Venezuela, is not seriously questioned so far as the obligations of Venezuela are concerned.

The respondent Government claims, as in the Mathison case, that the constitution of 1864 differs only exegetically from previous provisions in their constitution, beginning with 1830, and that always the respondent Government had claimed to be citizens all born under her flag, of whatever nationality their parents. There are well-recognized exceptions to this rule, but they need not be named here, as they are not relevant to this discussion.

The umpire sustains this claim of the respondent Government consistently with his holding, and for the reasons and upon the authorities given, in the Mathison case (q.v.). In the opinion of the umpire, if Mrs. Stevenson ever became a subject of Great Britain when in Venezuela it was not by the marriage in 1855, but by virtue of the marriage relation in 1873 under the Venezuelan law passed that year, heretofore referred to. Did she become a subject of Great Britain, while in Venezuela by virtue of the act of 1873; and if she did, did she retain that nationality after the death of her husband, under the facts and the law of this case? This is the first question of importance. That she was a Venezuelan, born in Venezuela and of Venezuelan parentage and always domiciled in Venezuela, both before and after marriage and since her husband's death, is not questioned. That the women of Venezuela, except as qualified by the law concerning marriage, take and retain citizenship under the same rule and conditions as men can not successfully be questioned. If Mrs. Stevenson became a subject of Great Britain at the time of her marriage with her husband — then and always a British subject during their married life — it was because of the force of the general international law and not because of any enactment of Venezuela up to that time. It can not be successfully contended, in the opinion of the umpire, that Venezuela was compelled to relinquish her claim to the citizenship of Mrs. Stevenson so long as they remained domiciled in Venezuela. What was the law of citizenship in Venezuela in 1855? Clearly, so far as it has appeared in this tribunal, and so far as the umpire has had opportunity to investigate, it was a law fixing citizenship upon *all those* born within her territory. If at this time the law of Great Britain gave to the wife of a British subject British nationality without reference to their domicile, it did not affect the status

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[1] *Supra*, p. 485.

of such a wife in Venezuela as affecting Venezuelan interest while domiciled there.

In the judgment of the umpire, the act of 1873, followed by the constitution of 1891, was a concession of privilege and of comity in accordance with the general trend of opinion throughout the civilized world. A study of the language used will show its general permissive quality, enlarging the privileges of a married woman under such circumstances by the removal of the restrictions theretofore existing rather than the establishment or the assertion of new rights in Venezuela. As a whole, it was a surrender of things theretofore claimed. Theretofore the law, organic and statutory, in Venezuela was, once a citizen always a citizen, so far as the effect of marriage upon the citizenship of a woman is concerned. As changed, it released the Venezuelan claim of citizenship upon such while they remained married, provided the country of which the husband was a subject extended to her the privileges of a subject or a citizen, because of such marriage. If the husband's country did not give that privilege, then she was not to become a citizen of that country. If not a subject to that country, to what country was she subject? Clearly, a Venezuelan subject or citizen. She was to remain subject to the country of her husband's citizenship while she remained married. After the dissolution of her marriage, of what country was she a subject? Clearly, the intention was that her citizenship reverted to Venezuela. If, prior to 1873, she was hopelessly without the control of Venezuela and no longer of that country, in virtue of her marriage in 1855, Venezuela, by her act of 1873, was writing an absurdity. If until then there had been no recognition of a right of citizenship in another country attained by marriage to a subject of that country, then the law is written with unusual force and cunning. It is expressive and apt. The umpire prefers the opinion that in 1855 Mrs. Stevenson did not have the consent of Venezuela to any change of citizenship in virtue of her marriage to a British subject, and that in 1873 the law was changed so as to give such consent, certainly to those thereafter married.

Hence it follows that when Venezuela gave her consent to a citizenship, limited and qualified by subsequent events, to a woman marrying a subject of a foreign country, which country granted her citizenship because of such marriage, Venezuela gave such citizenship subject to the limitations and qualifications expressed in such law, and if thereby Mrs. Stevenson became a British subject it was to continue to her, so far as Venezuela should recognize it, only during her married life, and on the death of her husband she became again a citizen of her native land, then and always the place of her domicile. Hence the contention of the learned agent of Great Britain, which is presented with great force and learning, is held not to apply to the case in hand, because there never had been unqualified British citizenship in Mrs. Stevenson. The law of 1873 did not take away rights which had already attached to Mrs. Stevenson in the way of British citizenship, but rather it for the first time recognized and permitted such citizenship in any degree on the part of Venezuela.

This holding as to the law of Venezuela previous to 1873 and since is not inharmonious with the established laws of other and very important countries. The tenacious grasp of a country upon her native-born citizens is not peculiar to Venezuela; she has able and powerful contemporaries. Indeed, if the umpire is not misinformed, the honorable claimant Government for a long time denied the right of any of her subjects to expatriate themselves, however anxious they might be to do this and however solemn might be the proceeding which invested them with their new nationality. This holding as to the effect of the law of 1873 prevents the necessity of entering upon the discussion of the claim put forward that once British citizenship has fully attached no succeeding law of Venezuela could be allowed to take it away. The effect of this holding is

to decide that British citizenship never attached to Mrs. Stevenson by consent of Venezuela and in a manner to affect her interior policy, only while Mrs. Stevenson remained the wife of Mr. Stevenson. In the opinion of the umpire, then, the widow of J. P. K. Stevenson, from the moment of his death and during her entire widowhood, is, and as to Venezuela has been, a Venezuelan. Logically he holds to the same effect concerning the children of the late J. P. K. Stevenson who were born in Venezuela.

The reasons which control the umpire in his decision as to the citizenship of the widow of Mr. Stevenson and of the children born in Venezuela do not apply to Juan and Guillermo, both of whom were born in Trinidad. They were born on British soil of a British father and of a mother who, by virtue of her marriage with a British subject acquired his citizenship, which remained until the death of her husband.

It is not claimed that they were born *in itinere* nor under other circumstances negativing the general rule. Hence they are of British origin. It remains to determine whether in virtue of anything which has transpired since their birth they have lost their British nationality and their right of intervention by the British Government in their behalf.

Juan, in 1896, was an amanuensis in the office of the city secretary or city clerk in the city of Maturín at a small monthly wage. This was when he was 23 years of age. He is shown to hold no other civil position or to have participated otherwise in the affairs of Venezuela.

Guillermo, in 1898, when he was 17 years of age, was an aid-de-camp on the staff of one of the generals of the Venezuelan Government. It is not shown that he ever held any other position, civil or military, or in any other way mixed in the affairs of the National Government.

They were not Venezuelan citizens by birth. This is admitted. By the constitution of Venezuela they who are alien born can only obtain citizenship through naturalization. They have never been naturalized. Service in military and civil life is in no sense an equivalent for naturalization. It confers no citizen privileges or benefits. It confers no right upon them to claim of Venezuela the immunities and protection of a citizen. It permits no claim on the part of Venezuela for compulsory service by them. By the treaty of Great Britain with Venezuela, as British subjects they were especially exempt from all military demands and requisitions in property and person. Such service as is here shown might suggest on their part a leaning toward Venezuelan citizenship, but it would be no more than a suggestion. It certainly was not so forceful and suggestive as a formal declaration of intention to become a citizen as is provided in the United States naturalization laws. According to Van Dyne's Citizenship of the United States, page 77 —

> International claims commissions to which the United States has been a party have universally decided, whenever the question has been presented, that mere declaration of intention gave the person no standing before a commission as a citizen of the United States.

See also Moore, International Arbitration, pages 2549, 2550, 2553. See again Van Dyne's Citizenship, pages 78-81, wherein observe the claim of George Adlam *v.* The United States, before the Claims Commission under the treaty of Washington, May 8, 1871, between the United States and Great Britain, which is a case very much in point. The same case is also found in Moore.[1] These two sons are not Venezuelans. They were born British subjects; they are still such. They have not broken their neutrality by acts opposed to the Government.

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[1] Pp. 2552-2553.

They have been law-abiding and helpful, not harmful, to the land of their domicile. The claim in question had its origin in a British subject, J. P. K. Stevenson. At his decease it came by descent to the widow and the legitimate children of Mr. Stevenson. As held by the umpire herein, it lost its original status in regard to the widow and children born in Venezuela. It retains its original status in the persons of the two sons, who were born British subjects.

From the testimony received from the respondent Government since the umpire returned to the United States of America, there appears, casually, a statement that Juan had deceased recently. Since no reference is made to this fact by the representative of the respondent Government, the umpire has a right to assume that such Government regards the incident of his death not to disturb the status fixed in him at the time of the presentation of this case to the Mixed Commission. The Chopin case, found in Moore, International Arbitration, page 2506, is full warrant for such a conclusion. Such would be the opinion of the umpire independent of the Chopin case. It meets the requirements, viz: (*a*) British citizenship at the time of the origin of the claim; (*b*) British citizenship at the time of the presentation of the claim before the Commission. When thus presented, a right to recovery vested in those then having a lawful claim.

The decision of the umpire is therefore unaffected if since then Juan has deceased.

The claim of the widow and of the children, who are held herein to be Venezuelans, is disallowed without any prejudice to their rights as Venezuelans before any proper tribunal. Under the Venezuelan law of distribution, as it was at the time of the death of J. P. K. Stevenson, the widow and the children each take an equal share of his estate. There are, then, thirteen equal shares into which this claim is divided. Two of these shares are allowed. For a portion of the time covered by this claim the legal rate of interest in Venezuela was 6 per cent; for the remainder of the time it was 3 per cent. Beginning at the time the claim was presented to the Claims Commission of 1868-69 interest has been calculated at the legal rate. There is no proof that the respondent Government had been informed previously of the claims of 1859 and 1865. Those of 1869 originated after the convention creating that Claims Commission. Certainly the respondent Government could make no compensation until a claim had been duly presented, and hence it could not be, until then, in default. Interest as damages begins only after default.

The award will be made for £8,940.

PUERTO CABELLO AND VALENCIA RAILWAY COMPANY CASE

A government is not liable for damages suffered by property which is situated in the track of war.

Where an agreement in a contract existed to refer all controversies to local courts, not more than the legal rate of interest can be allowed on amounts due the company when the Government insisted that such amounts were incorrect and the company had no resort to the local courts.

PLUMLEY, *Umpire*:

This is a claim presented by the British Government for and on behalf of the Puerto Cabello and Valencia Railway Company, asking an award of £319,381 4s. 9d. on account of arrears of guaranty and accrued interest thereon, together with a small sum due for freight.

This case came early before the Mixed Commission, but its consideration was deferred for some time that a settlement might be secured between the company and the Government which would obviate the necessity of its determination by this tribunal. When it became evident that the parties could not reach a point of agreement the honorable Commissioners, with the efficient aid of the learned agents of both Governments, undertook to reach a decision. After careful and painstaking effort it was found impossible by the honorable Commissioners to reconcile their serious differences and the case was sent to the umpire for him to decide.

He acknowledges his indebtedness to the claimant company and its efficient secretary, to the learned British agent and the honorable Commissioner for Great Britain for the careful preparation and presentation of the several claims of the company and of the proofs in support of the same, both direct and collateral; also his like indebtedness to the respondent Government, its learned agent and its honorable Commissioner for a like painstaking presentation of the points in defense and the proofs to sustain them. But, notwithstanding the wisdom thus assembled in his aid, the umpire has found the consideration of the various questions in issue to be quite complex and not at all easy of safe and wise solution. He has given the matter his most careful, persistent thought and has brought to bear upon the various questions involved such authorities and precedents as were at his hands and has reached conclusions which he conscientiously believes to be approximately just and equitable.

The Puerto Cabello and Valencia Railway Company (Limited) was organized to take over a concession made to Messrs. Cutbill, Son & De Lungo and to their associates or successors by the Government of Venezuela, of date February 24, A. D. 1885, which concession was negotiated of that date by Gen. Guzmán Blanco, ambassador extraordinary of the United States of Venezuela, then resident in the city of London, England, and was approved and confirmed by the Congress of the United States of Venezuela sitting in Caracas on the 18th day of April, A. D. 1885.

Article 4 of said concession stipulated that the Messrs. Cutbill, Son & De Lungo and their associates and successors would organize a joint stock company (limited) for the construction and the working of the railroad provided for in said concession from Puerto Cabello to Valencia and to construct the same complete for the sum of £820,000.

Article 3 of the said concession settled the width between the rails and provided for the equipment of the road with locomotives, carriages, and wagons indispensable for the complete traffic, and having the solidity and modern quality of railroad construction, and having also the station houses and goods sheds indispensable for its use and for the line of the railway. The right to construct and to operate this railway was an exclusive one for ninety-nine years from the date of its completion. The Government also conceded free importation of all the materials, machinery, tools, implements, and provisions which might be required for the construction, maintenance, and working of the railway; freed its property during the said ninety-nine years from all taxes or like contributions of all and every kind; freed its employees from all military service; conceded 150 meters of land on each side of the line of the railroad where the lands were public, and gave right of eminent domain over lands of private ownership, and permitted a free cutting of all timbers required for the construction of the railway in the forests belonging to the nation.

Article 19 of the concession provided that —

> All questions arising in respect to the fulfillment of this contract will be determined by the competent tribunals of Venezuela.

Article 12 of the concession provided that —

The railway company shall have the benefit of the guaranty of 7 per cent on the total sum of £820,000 above referred to, which can be issued in ordinary shares and in bonds in the proportions most convenient to the company. The said guaranty to begin on the completion of the railway, ready to be opened for public traffic.

As a part of this concession the Government subscribed in ordinary shares at par to the amount of £160,000.

The claimant company was incorporated under the companies acts, 1862 to 1883, and was registered in England on the 26th day of September, 1885. Its capital is £820,000, of which amount the Venezuelan Government subscribed for £160,000 in the share capital and continued to hold these shares until March, 1896, when it sold them to the Southwestern of Venezuela (Barquisimeto) Railway Company, reserving its interest in all dividends accrued or accruing to that date.

The transfer of the concession by Cutbill, Son & De Lungo to the said railway company was made on the 29th day of September, A. D. 1885.

The share capital of the company was divided into 46,000 shares of £10 each. The balance of the capital was provided for by the issue of debenture bonds to the amount of £360,000; £20,000 of these were not issued in fact, but were retained in the treasury of the company, where they still remain, as the umpire understands it.

The railway was opened to public traffic and the guaranty began according to its terms on April 1, A. D. 1888, although the work of construction had not then been completed. The total amount expended in the contract of construction of the railway and equipment was £782,216 17s. 6d., leaving of the £820,000 the sum of £37,783 2s. 6d. The capital expenditure was increased from time to time, and, as is shown by the company's balance sheet of December 31, 1902, had amounted to £790,899 3s. 7d., leaving £29.100 16s. 5d. unexpended, of which the sum of £20.000 had been reserved by the company for working capital.

The respondent Government being in arrears upon its guaranty and having made representations to the claimant company of its inability to meet the agreement at 7 per cent, by mutual concession, hereinafter to be referred to in detail, on May 26, 1891, the guaranty was reduced from 7 per cent to 5 per cent per annum and the arrears up to December 31, 1890, inclusive, were discharged by the respondent Government.

For the year 1893 only, the company shows receipts in excess of the sum claimed by it in discharge of the guaranty of the respondent Government.

In addition to the questions arising under said guaranty, there is raised the question of liability or nonliability by the respondent Government for injuries received by the property of the railway company in the successful revolution of 1892 and the unsuccessful revolution of 1898.

The claim for a deficit of railway receipts to be made good to the company through the Government guaranty begins with the year 1891, and concludes, so far as this Commission is concerned, December 31, 1902. Connected with this question of guaranty is the disputed point of the right to the respondent Government to its share of the net earnings of the claimant company, when the guaranty of the Government is met, during the time the Government was a shareholder in said claimant company. The respondent Government also contends that this guaranty does not cover the £20,000 reserved as working capital.

REVOLUTIONARY CLAIMS

It was settled for this Commission by the opinion of the umpire in the claim of the Bolivar Railway Company [1] that the respondent Government, subject to certain exceptions, was liable for the acts of successful revolutionists and for the acts of the titular government as well, the liability in either case being predicated upon the same state of evidential facts. The facts stated, constituting the cause of complaint of 1892, appear to come within this established rule of liability; hence it does not become necessary to take these sums away from the accounts and they are allowed as and of the annual accounts as presented. It is quite possible that if the umpire had before him the specific details of expenditure he might find it necessary to point out certain parts as being allowed distinctively on the ground of the responsibility of the Government for its own acts and the acts of successful revolutionists outside of its guaranty, and there might be some item that would be disallowed as not coming within either feature of the case; yet, viewed as a whole, being destitute of any such detailed information, he will pass the whole as a rightful charge, as above stated.

Concerning the sums charged of March 29 and of June 28, 1898, it is to be said that had these injuries been received at the hands of the Government, or of successful revolutionists, they might be allowed; but as the result of the acts of unsuccessful revolutionists, which is the character in which they appear before the umpire, they can not be allowed. As the property destroyed is clearly a part of the plant — a part of its capital expenditure — it does not come under the guaranty and therefore the Government is not liable under that head. Hence this amount must be deducted from the accounts of 1898.

The claim of November 11, 1899, falls within the general rule of nonliability for damages which occur in the track of war, or during battle, or bombardment, and can not be allowed. Being a part of the plant itself and therefore a part of the company's capital expenditure, it falls within the class referred to in the preceding paragraph and is, likewise, not within the guaranty. There is, therefore, no governmental liability under this claim, in either aspect, and it is disallowed.

THE £20,000 DEBENTURE BONDS NOT ISSUED

Concerning the question whether the guaranty of the respondent Government was upon the fixed and certain sum of £820,000, or was upon the actual constructional expense, it may be said, that, fortunately, the Government and the railway company early concurred in their interpretation of this very general expression in the concession so far as to make clear that both held it to be a guaranty that the enterprise would yield annually a net revenue of 7 per cent on the capital expenditure necessary to the completion of the railway and its indispensable equipment, but whether that expenditure was fixed and determined in advance, or whether it was not to exceed a certain sum, seems to be the question undetermined and in dispute. As an estimate it was too high. It was agreed that the capital should be obtained through the issue of shares and bonds in such proportions of each as best suited the interests of the company. It is contended by the Government, and such has been its contention certainly since 1896, that the nonissued £20,000 of bonds are not entitled to the benefit of the guaranty.

If there had been no settlement and arrangement in 1891, the umpire would have no serious difficulty in sustaining the Government's contention. It is clear to the mind of the umpire that by the first arrangement it was a guaranty

[1] *Supra*, p. 445.

at 7 per cent upon the essential capital expenditure, which was not to exceed £820,000. There is evidence that such was the better judgment of the directors of the railway company.

On May 26, 1891, there was made a new agreement between the claimant company and the respondent Government founded upon a new consideration, namely, upon mutual concessions. In consideration, among other things, that the Government would pay upon the fixed sum of £820,000, the railway company consented to reduce the guaranty to 5 per cent per annum, and in consideration that the railway company would consent to such reduction the Government consented to accept the fixed sum £820,000 as the basis of reckoning. This is the umpire's interpretation of their agreement, which is in terms as follows:

ARTICLE I. In view of the difficulties which have presented themselves, and of those which might present themselves in the future, with regard to the payment of the 7 per cent guaranteed by the Government of Venezuela to the Puerto Cabello and Valencia Railway Company, inasmuch as the said guaranty weighs very heavily on the country, and this company being perfectly organized, the Puerto Cabello and Valencia Railway Company agrees that from the 1st of January of the present year of 1891, the Government of Venezuela only guarantees an interest of 5 per cent annually on the sum of £820,000, which is the fixed capital in the original contract, and upon which the guaranteed interest has up to now been calculated. Consequently article 12 of the 24th February, 1885, remains annulled, relative to the 7 per cent.

To remove any question upon this point, to settle favorably to itself a mooted question of this importance, was one of the very important considerations for the large concession here made by the claimant company.

Solely because of this agreement and of the consideration entering into the same, it is the judgment of the umpire that the fixed sum of £820,000 was then made the certain and established basis upon which to reckon said guaranty.

WORKING EXPENSES UNDER A GUARANTY

It having been determined by the apparent agreement and acquiescence of both of the parties to the contract that the guaranty stated in such general terms in the concession was in fact a guaranty of net revenue, it becomes important to determine what charges are to be included in working expense and, therefore, to be deducted from the gross receipts in order to leave that net annual revenue which it is guaranteed shall equal £41,000. In principle there is apparent agreement. In details of application of this principle there is apparent serious disagreement.

The claimant company, through its efficient secretary, has supplied the Mixed Commission with the annual, or semiannual accounts of about 80 different railroads situated in various parts of the world, railroads both large and small, guaranteed and unguaranteed. These accounts were furnished in order that the tribunal might, through inspection and comparison, ascertain, if such was the fact, a general method of railroad bookkeeping and a general placing of certain expenses to the different accounts, as, for instance, working expense, and under that head the respective subdivisions to contain in the revenue account both the income and the expenditures from all the different sources and occasions of each. The umpire has availed himself of this large area of opportunity, and has carefully examined them with reference to the different classes of expenditure and the proportionate charge to capital, gross income, and length of railway. He appreciated at the start that a small railway would have, relatively, a larger charge for oversight and management than a

larger railroad, and the inspection which he has made proves his anticipations to be correct.

From some of these railway accounts he has been unable to determine the length of the railway in miles, and in a few instances he has not been sure of the proper exchange to be reckoned, and therefore he has not taken them into consideration. In regard to the average expense per mile of railway, placed by the different accounts to general charges or equivalent expressions, he has assembled 50 railway accounts, has ascertained the number of miles in each of these 50 railways, and the expense per mile existing under the head of " general charges." The railways so analyzed by him have varied in extent from 21 miles to many thousand. The highest charge per mile under this head has been £274 per mile and the lowest found was £16. The average expense under this head is a little less than £80. There are 34 miles of railway belonging to the claimant company, and at this charge per mile the " general charges " would be £2,720. The " general charges " allowed by the umpire range from £6,070 in 1891 to £3,234 in 1902 and the average expenses per mile from a little more than £172 in 1891 to a little more than £95 in 1902. As the average found for the 50 railways, as above stated, is £2,720 for 34 miles of railway and the average per mile is £80, it is readily to be seen that the lowest allowance made by the umpire is in excess of the average.

The " general charges " allowed by the umpire, as explained in another part of this opinion, divided by 34, the number of miles of railway, giving the expense per mile under that head, will be here stated:

1891	£6,070	÷ 34 =	£178+
1892	4,861	÷ 34 =	143−
1893	4,791	÷ 34 =	141−
1894	5,298	÷ 34 =	155+
1895	4,549	÷ 34 =	133+
1896	5,275	÷ 34 =	155+
1897	4,499	÷ 34 =	132+
1898	4,273	÷ 34 =	125+
1899	4,023	÷ 34 =	118+
1900	3,557	÷ 34 =	104+
1901	3,535	÷ 34 =	104−
1902	3,234	÷ 34 =	95+

This makes for the twelve years an average of £132 to the mile and an average allowance for the 34 miles of £4,488.

The umpire will now name the railways which he has examined and used to obtain this average if " general charges " per mile as hereinbefore stated. He will state the companies both by number and by name. Should he have occasion hereinafter to refer to these different companies or any of them he will employ the number only. These numbers are, of course, of his own adoption, although they correspond to the numbers placed before the different accounts by the secretary of the claimant company up to and including No. 53; thereafterward the numbers used by him and by the umpire do not correspond.

No. 1. The Great Eastern Railway Company.
No. 2. London, Brighton and South Coast Railway Company.
No. 3. Great Central Railway Company.
No. 4. Midland Railway Company.
No. 5. Great Western Railway Company.
No. 6. The Great Northern Railway Company.
No. 7. London and Southwestern Railway Company.
No. 8. Lancashire and Yorkshire Railway Company.

No. 9. London, Tilbury and Southend Railway Company.
No. 10. Breton and Merthyr - Lydfil Junction Railway Company.
No. 11. Alexandra (Newport and South Wales) Docks and Railway.
No. 12. Isle of Wight Central Railway.
No. 13. Great Northern Railway Company (Ireland).
No. 14. East Indian Railway Company. Guaranteed by British Government.
No. 15. Assam - Bengal Railway Company. Guaranteed by British Government.
No. 16. South Indian Railway Company (Limited). Guaranteed by British Government.
No. 17. The Barsi Light Railway Company (Limited).
No. 18. Bengal - Dooars Railway Company.
No. 19. Bengal Central Railway Company (Limited). Guaranteed by British Government.
No. 20. The Bengal and Northwestern Railway Company (Limited).
No. 21. Rohilkund and Kumson Railway Company (Limited). Guaranteed by British Government.
No. 22 to No. 24 inclusive. The Nisam's Guaranteed State Railways Companies (Limited).
No. 25. Bengal Nagpur Railway Company (Limited). Guaranteed by British Government.
No. 26. Bengal Company (Limited). Guaranteed by British Government.
No. 27. Indian Portugal Guaranteed Railway Company (Limited).
No. 28. Burma Railways Companies (Limited). Guaranteed by British Government.
No. 29. Demerara Railway Company. Guaranteed by Great Britain.
No. 30. Quebec Central Railway Company.
No. 31. Egyptian Delta Light Railway Company (Limited). Guaranteed by Egypt.
No. 32. Sungoi (Malay Ujong Peninsula) Railway Company (Limited). Guaranteed.
No. 33. Canadian Pacific Railway Company.
No. 34. Grand Trunk Railway Company.
No. 35. New York, Ontario and Western Railway Company.
No. 36. Missouri, Kansas and Texas Railway Company.
No. 37. The Mexican Southern Railway (Limited).
No. 38. The Western Railway of Habana (Limited).
No. 39. Macuta Railway Company (Limited). Guaranteed.
No. 40. The Cuban Central Railways (Limited).
No. 41. Leopoldina Railway Company (Limited). Guaranteed.
No. 42. The Interoceanic Railway of Mexico.
No. 43. Espirito Santo and Caravellas Railway Company (Limited). Guaranteed.
No. 44. Salvador Railway Company (Limited). Guaranteed.
No. 45. Lima Railway Company (Limited).
No. 46. The Dorada Railway Company (Limited).
No. 47. Alegeciras Railway Company (Limited).
No. 48. Great Southern of Spain Railway Company (Limited).
No. 49. The Zafra and Huelva Railway Company (of Spain).
No. 50. Alsoy and Candia Railway and Harbor Company (Limited).
No. 51. The Ottoman Railway Company, from Smyrna to Aden.
No. 52. West Flanders Railway Company. Guaranteed.
No. 53. The Metropolitan Railway Company (Limited).
No. 54. Bohia Blanca and Northeastern Railway Company (Limited).
No. 55. Argentine Great Western Railway Company (Limited).
No. 56. The Northwestern of Uruguay Railway Company. Guaranteed.
No. 57. The Great Western of Brazil.
No. 58. The Midland Uruguay Railway Company (Limited). Guaranteed.
No. 59. The Central Uruguay Railway of Montevideo (Limited).
No. 60. Buenos Ayres and Pacific Railway Company (Limited).

No. 61. La Guaira and Caracas Railway Company (Limited).
No. 62. The Bolivar Railway Company (Limited).
No. 66. Venezuelan Central Railway Company (Limited).
No. 69. Atchison, Topeka and Santa Fe Railway Company.
No. 70. Chicago, Burlington and Quincy Railroad Company.
No. 71. New York Central and Hudson River Railroad Company.
No. 72 to No. 75, inclusive. Pennsylvania Railroad Company.
No. 76. Reading Company.
No. 77. Baltimore and Ohio Railroad Company.
No. 78. Erie Railroad Company.
No. 79. Lehigh Valley Railroad Company.

Nos. 32, 38, 39, 40, 42, 43, 44, 45, 46, 49, 50, 52, 53, 54, 55, 56, 57, 60, 61, 62, 63, 65, 66, 67, 68 were not used in determining the average general charges per mile of railway, either because the mileage was not given or that for some other reason it was not available to the umpire's use in that respect.

Inspection of the accounts of these different railway companies was made for the purpose of ascertaining in detail their charges to revenue account in comparison with the different items so charged by the claimant company. With quite possibly some errors, the following results were obtained:

No. 1. There were no charges to revenue account for depreciation and no charge for renewals as such.

No. 2. There were no charges for depreciation or for renewals as such in revenue account, and general insurance was paid out of net revenue.

No. 3. There were no charges for depreciation or for renewals as such in revenue account.

And the same may be said of Nos. 4, 5, 6, 10, 11, 12, 14, 15, 16, 17, 18, 19, 20, 21, 22 to 24, inclusive, 25, 26, 27, 28, 32, 35, 36, 42.

Of No. 7 the same may be said as of No. 3, so far as revenue account is concerned; but in net revenue there is found a reserve for renewals.

In No. 8 there is no charge for depreciation, but an amount is set aside out of revenue for renewals.

No. 9 sets aside in revenue account an amount for depreciation of locomotives, carriages, and wagons as a special fund, and sums are set aside to renew permanent way, to construct station buildings and to make additions and improvements to stations and signals.

In No. 13 interest was paid on the reserve fund from net revenue, and no insurance was charged against the general revenue account.

No. 30 is destitute of charges, the same as No. 3, and places cost of ballasting, compensating claims, etc., in net revenue.

No. 38 has no charge for depreciation and does not place renewals in current expense.

No. 40 is the same as No. 3 in regard to depreciations and renewals, but places the amount for exchange in net revenue.

In No. 41 it is stated that there is no charge for depreciation of furniture; " it is paid for when it occurs." The loss or profit of exchange is placed in net revenue " when it occurred."

No. 44 has a charge in revenue account for depreciation of furniture and the difference in exchange, but not for renewals.

No. 46 places a charge for depreciation of furniture in net revenue.

No. 47 places a charge for depreciation of furniture, and also a difference in exchange in net revenue.

No. 49 places its loss on exchange in revenue account.

No. 50 charges for depreciation of rails and rolling stock for the year in revenue account; also charges off against that account bad debts, loss on its exchange, and interest on debenture bonds, etc.

No. 51 charges interest, commission, and exchange against the revenue account.

No. 64 charges loss on exchange and furniture depreciation to net revenue, and has no charge for renewals as such.

No. 65 charges loss on exchange and commissions, etc., in net revenue, but has no charge for depreciations or renewals as such.

No. 66 puts loss on exchange in current-revenue account.

If the umpire has not erred in his examination, the following railways are those having guaranties from the British Government, viz: 14, 15, 16, 19, 21, 25, 26, 28, and 29; and if he is not in error there are guaranties by other governments in Nos. 22 to 24, 27, 31, 32, 41, 44, 56, and 58.

The umpire has carefully analysed the accounts of all these companies, excepting a few not easily reducible to pounds sterling, and has compared " gross receipts " with " general charges," as well as " capital expenditure " with the same, and he is made to know from these examinations that the average per cent charged is much less in these companies than is the per cent allowed by the umpire in these two regards in the allowance which he has made for " general charges " during the years over which his inquiry extends, in connection with the claimant company's " gross receipts " and " capital " on the one hand and " general charges " on the other.

The examination of the accounts of these different railways in regard to the class of expenditure which has been regarded as proper to be charged to capital expenditure instead of to revenue account, or even to net revenue, shows that the different companies have had a wide area of plan and method, but that the usual rule is not to charge to revenue account anything in the way of construction, although it may be of a minor character. Among the items charged to capital expenditure taken from the accounts of these different railway companies are found the following, namely: New engines, carriages, gas fittings for carriages, screw couplings for cattle wagons, continuous brake works, additional machinery, additional cartage stock, widening lines, additional works at stations, new docks, enlargement of stations, extension of shops, additional siding, new works, remodeling of goods yard, engine shed, offices, additional improvement of water supply sheds, reconstruction of viaducts, conversion of brakes, automatic machinery, tools for companies' workshops, cottages, enlargement of yards, heating apparatus, lighting, fencing road crossings, increasing waterway, deepening foundation of bridges, repairing damages by floods, ballast and permanent way, bridge of two spans of 30 feet to each span in place of one span of 20 feet, two horse boxes, alterations and additions to tramways, buildings, custom warehouse, surveys, new culverts and cattle guards, medicine chest, engineers' instruments, office furniture, lights, barges, tugs, water service, turntable, receiving shed, drainage, water meters, additions to boilers, paving new yard, oil tanks, water tank, new signals, drinking trough, extension of cross siding, alteration to sidings, extension of telephone wires, installation of electric lights in coaches, new level crossings, bell signals for level crossings, strengthening bridges, renewal of line.

As a part of the documentary evidence introduced by the claimant company are letters from the secretaries of the various South American railway companies for the most part guaranteed, together with a copy of a part of the concession made by Chile to guaranteed railways and the Republic of Uruguay concerning the same.

In the letter of the secretary for the Brazil Great Southern Railway Company (Limited), of date April 28, 1903, he speaks of London office expenses, maintenance of way, works, and station, and repairs of rolling stock as being approved by the Brazilian Government, which Government is guarantor of

that railway in terms very largely like the guaranty in question. It will be observed that there is no statement that renewals of these different kinds of property were either claimed or approved by the Brazilian Government. In regard to exchange he says:

Notwithstanding the great depreciation of the milreis the Government insists upon the accounts being kept at the par value (2s. 3d.).

The Government of Chile gave a railway concession to Mr. Gustave Lenz in 1884, and a portion of that concession is made a part of this documentary evidence. From that part of the Chilean concession which is submitted it is learned that there is a guaranty of 5 per cent per annum, at a certain fixed exchange value, for twenty years on the fixed and certain sum of $30,000 for every kilometer of the line delivered for public use and that when the net proceeds exceed this 5 per cent the excess goes to the Government treasury to aid in reimbursing the Government for the sums paid out under said guaranty. These net proceeds are settled at 40 per cent of the gross proceeds for the first ten years and at 45 per cent for the remaining ten years. But by far the most important and valuable single document submitted by the claimant company, outside of its own reports and papers, is the document containing the " Regulations for fiscal intervention in railways guaranteed by the State," prescribed by the Republic of Uruguay.

Article 7 of said regulations states the books which the companies must keep for the exclusive service of the bookkeeping relating to the Government, and to that end these requirements are made:

a. The traffic receipts, according to the monthly reports which are sent in from the station, and other operations which may be regarded as receipts from the working of the line.

b. The expenses of working, which will include wages and salaries due to the staff, consumption charges, and those for materials and labor employed in the repairs of the line, and their maintenance in a sufficient state for service.

It is understood that every class of construction which may imply improvements of the line, as also other extraordinary expenses foreign to the working will be considered as capital expense, and consequently ought not on any account to figure in its ledger. (See art. 18 of law of 27th August, 1884, and also arts. 25 to 28, inclusive, to these regulations.)

(The italics are in the original.)

In article 24, under chapter 8, supplementary, there are found the following provisions:

The charges for maintenance and working, to which paragraph *b* of article 9 refers, will comprise:

First. All the ordinary and extraordinary repairs which may be of a necessary character.

Second. Taxes of all kinds paid by the companies to the state, and custom-house duties, should there be any.

Third. The general estimate of employees on salary or by day, including the London board.

There are excepted from these charges:

First. The interest and amortization on arrangements made by the companies, and especially those which the latter may have made for the carrying out of works, in cases where the capital guaranteed by the state has been insufficient.

Second. Amounts invested in favor of establishments which do not exclusively pertain to the working of the railway.

ART. 25. From the working account there will also be excluded the expenses which may pertain to capital account (cuenta de capital) and first establishment charges (primer establecimiento), as, for example:

The finishing of works, whether noted or not in the official report of the provisional approval of the works or at the time of delivering the lines over for working.

The expenses which may result from works executed in a notoriously defective and insufficient manner, or which may have to be rebuilt or added to within a very short time after opening the line to public service.

Works destined to secure drainage, the construction of which had been delayed until the line had commenced working.

Cuttings which may have to be consolidated and widened.

Embankments whose slopes may have to be cased.

Works situated in the proximity of level crossings (art. 18 of the reglementary decree of September, 1884), and which have not been made before opening the line for traffic.

The erection of palisades or barriers (art. 17 of decree named), the execution of which may have been omitted before handing the line over to public service.

The fencing (art. 30 of the same), which may have been omitted.

ART. 26. The charges more or less directly necessary for the working up of traffic and which, by article 18 of the law of 27th of August, 1884, refer to the *improvements which ought to be computed as net revenue* (should they figure in the accounts) are the following, commissions excepted:

Works for widening stations, laying second lines or sidings, increase of rolling stock, construction of engine sheds, construction of repairing sheds, construction of roofs of goods sheds.

The installation of water stations (*tomas de agua*) for the engine service, with tanks or deposits.

The installation of turntables and cranes in the stations which may not have them at present.

There are also comprised in this category:

All classes of reconstruction, such as larger water tanks, change of turntables, cranes of larger dimensions, and every class of work it may be necessary to reconstruct with new or different materials.

All these changes correspond to capital account.

To avoid a double employment of the account for original installation, the amount corresponding to provisional installation will be charged to maintenance.

ART. 27. The companies will give previous notice to the control office of all classes of work to be executed, whether as repairs or constructions required to keep the line in an efficient state for service, such as works of art in general, raising embankments, ballasting the line, etc., for which purpose they will send the plans of said works and the estimates, with full details, to the control engineers.

ART. 28. Without the previous approval of the control engineer in writing, all works provided for in the foregoing article which may be effected on the line will be considered as improvements, or for the private convenience of the companies, and consequently will not enter into the category of working expenses.

In addition to this documentary evidence and with reference thereto the umpire has consulted the authorities accessible to him which bear upon such matters, and after careful reading and thought he has decided to adopt the following as correctly stating the working basis, viz:

The phrase " net earnings " has been defined as " the excess of the gross earnings over the expenditures *defrayed in producing them*, aside from and exclusive of the constructing and equipment of the works themselves." (23 Am. Eng. Encycl. of Law, 1st ed., 612.)

Citing Bradley, judge, in Union Pacific Railroad Company *v.* U. S., 99 U. S., 402. Also, citing Belfast, etc., R. Co. *v.* Belfast, 77 Me., 445, where Peters, chief judge, defines the net earnings of a railroad as —

The gross receipts less the expenses of operating the road to earn such receipts.

Interest on debts is paid out of what remains — that is, out of the net earnings.

* * * When all liabilities are paid, either out of the gross receipts or out of the net earnings, the remainder is the profit of the shareholders to go towards dividends, which in that way are paid out of the net earnings. (2 Cook on Corporations, 5th ed., 1165, sec. 546, note 5, citing in said note St. John *v.* Erie Railroad, 10 Blatch., 2 71 279; s. c. affd. 22 Wall., 136; Warren *v.* King, *108 U. S., 389.*)

A distinction quite usually recognized is made in the books between net revenue and net profits. Out of the former floating debts are to be paid and the interest thereon and interest on the funded debts. Out of the former a reserve is made for depreciation and for renewals; allowances for losses are set aside, and all permanent improvements of roads and rolling stock, or of additions thereto, or extensions thereof are paid when not charged to capital expenditure.

On consideration of the evidence adduced and herein referred to, on consideration of the law applicable to such matters herein referred to, and in virtue of his duty to decide all questions submitted in accordance with justice and equity, the umpire decides that in this case the proper test to be used to determine what are or are not working expenses is found in answer to the question, Is it an expense which aided in or was a necessary incident to the production of the gross receipts? Such expenses, when deducted from the gross receipts, will show the net earning for any given year. Whatever of expense, whatever of payment made which does not fall within the fair scope of this test must be charged elsewhere than to working expenses. There may be large net revenues and yet there be no dividends, because of the necessary payments therefrom, and the wise, prudential setting aside of sums of money as reserves for renewals, extensions, and betterments, all which may be provided for, if such be the will and policy of the shareholder, out of net revenues, but none of them are working expenses in the sense to be used here and are not, as against the respondent Government, to be chargeable to the gross receipts. With the plant all provided in advance, did the given expense aid, or was it properly incurred, in gaining gross income? If yea, then it may be rated as working expense; if nay, then it can not be.

In many — indeed, in most — particulars, this has been the plan of bookkeeping pursued by the claimant company, but there are some exceptions. The company has reserved out of net revenue a fund to provide for additions to its rolling stock; it has established a renewal fund and has supplied it from the net revenue; it has paid the interest on its debenture bonds out of net revenue; out of the same fund it has cared for its doubtful assets; it has paid its income tax and some of its traveling expenses out of net revenue. But, on the other hand, it has also placed in working expense a certain annual charge for renewal of locomotive and a certain annual charge for depreciation of furniture; it has charged to working expense money paid for insurance of the property of the company; it has charged similarly payments made on account of exchange between Venezuela and England of the money earned by the company in Venezuela; it has charged to this same account all of the expense of the company in England, and during a portion of the time, at least, it has charged to working expenses the cost of its agency at Caracas.

Were it not for the question of guaranty which rests upon net revenue as the determinable quantity of its annual responsibility it would not be of serious importance whether this or that should be placed to working expense or deducted from net revenue; but as the matter stands before the umpire this question assumes great importance.

In the judgment of the umpire it is not what shall be deducted before a dividend may be declared and is determinable by no such standard. It is, what are the revenues in hand for all purposes after deducting that, and that only,

which is properly chargeable to operating expenses? The test which the umpire will employ has already been stated and is found in this expression:

> Net earnings are properly the gross receipts less the expenses of operating the road to earn such receipts.

Those expenses of operating which aid or are intended to aid in its earnings, which result from endeavors to earn, or which are essential to the existence of the company are the only expenses to be charged to gross receipts against this guaranty.

Apply this rule to the accounts of the company as presented in the abstracts of expenditure on revenue accounts.

There first appears a charge of " repairs of station and building." It is the opinion of the umpire that there can be no fair question concerning the propriety of this charge. These buildings and stations were furnished as a part of the capital expenditure and now aid in producing the gross annual income; they are one of the means whereby the patronizing public have convenient access to the cars and proper protection for themselves and their freights. Betterments and improvements should not be included, and presumably they are not. The language employed would exclude such. These repairs are necessary to keep up their efficiency, to continue their valued service. Unless these are kept in a fair state of preservation the company would be unable to properly serve the public and must lose at least a measure of its patronage. Having furnished them as a part of its capital expenditure the company may make to them ordinary repairs out of its gross income, because such repairs come properly and easily within the established test.

Then come "repairs and removals to permanent way." Under this general charge is found maintenance, ballasting, clearing landslides, rails, fastenings, and sleepers. If these charges cover only ordinary repairs necessary to the running of the road, they come under the same rule already promulgated concerning repairs to stations and buildings. Examination of some of the early charges, especially for sleepers, rails, and fastenings, excites wonder that so large a sum should be so soon required in the respect named, and suggests strongly that these repairs so soon made might well have been to take the place of unfit materials when first laid down; but no such inference can properly be drawn to be acted upon and the umpire is relieved from any duty in this regard, as the objection of the Government does not rest at all upon such a state of facts, but rests instead upon the hypothesis that as charged they are not proper working expenses. Hence, while if he had the details before him and they were specifically objected to, the umpire might find that some of the items charged under this head were of the nature of betterments and improvements and so not chargeable here; without these details and without such specific objections it remains for him to decide upon the charges as they appear, and as charged he finds that since they are essential to the earnings of the gross income, since the expenditure is incidental to and connected with the continuing efficiency of the plant, since such repairs must have been in the mind of the guarantor as expenses incident and essential to the maintenance of the enterprise, they are properly chargeable to the gross receipts. A similar line of reasoning cares for repairs and renewals of bridges, walls, culverts, and drains, to locomotive, carriage, and wagon repairs, to water supply, to workshop, and to repairs to machinery and tools. The wages of the operatives, employees, foremen, and clerks in these several lines and in the more immediate operation of the railroad do not permit of question, if the guaranty is allowed to rest, not upon the gross income, but upon gross income less operating expenses.

Similar reasons apply to the charge for telegraph expenses. Under the

head of general charges, that which has already been said applies with equal force to the administrator and staff and storekeeper and staff. An efficient superintendence and direction of the energies of the subordinates; a careful prevision and supervision of its affairs are easily most important factors in the gross earning of the company, on the husbanding of its resources, in the safeguarding of its line and of its property, in the marshaling and management of its business. It will be borne in mind in all these matters that no details are before the umpire. It is the general character of the charge alone with which he has to deal. Being such, and such only, he must hold the charge last above referred to be proper and necessary in the development and management of the company's business and as easily passing the established test. For these there must be an office or offices, hence office expenses are allowed; for the conduct of its business there must be stationery, telegrams, and postage, and these are allowed. To incite and procure patronage reasonable advertisement is no doubt necessary, and it is allowed. There must of necessity be some traveling expenses. If the question were as to amount and the details were before the umpire some of the annual charges in this regard might well be carefully examined. For instance, in 1891, when these expenses mounted to £713 1s. 6d., or about £21 to the mile, or over £2 to the day, including Sundays. But there are no details before the umpire and he can only deal with general features. Superintendence of a railroad, care for its line, its properties, and the like require more or less traveling, and they are therefore a proper charge against the gross income.

The umpire understands the charge for medical attendance to be for services rendered to employees and passengers, if accident and injury occur. If this is a correct view, and he has no doubt that it is, then he considers such expense as a wise use of the gross income and as easily passing the adopted test.

Similarly the law charges. No suggestion is made that they have to do with other than the incidental matters which necessarily arise in the operation of a railway from year to year, and they are therefore in aid of its gross income. In protecting the company against unjust claims, in giving advice to promote wise action on the part of its officers, in asking and passing upon its current contracts a good lawyer could and presumably did greatly aid and protect the company, enhance its prosperity, and either increase its earnings or prevent their unlawful diminution. Therefore this charge in the Valencia account passes the required test. " Sundry expenses " and " compensations and allowances " having been before the Government in many annual accounts, and meeting with no specific objection, are rightfully assumed by the umpire to be not open to objection and are rightfully considered by him as containing items in detail not objectionable to the Government and of a character beneficial to the company in aid of its annual receipts or as necessarily incidental to its earnings. It would certainly be unfair to the company to assume to the contrary when the question easily could have been raised and the character of such of those charges as were objectionable have been exploited before him for his consideration and decision.

Under the head " General charges, London," the remarks made under the head of " General charges, Valencia," may be held to apply here, and so printing and stationery, office rent and cleaning, advertisement, postage, and telegrams pass the required test. The Government must have reckoned in reference to such expense when it made its guaranty. The company being a British company it necessarily must have its office in England, hence reasonable rent and care thereof are proper charges. In the absence of proof, or even suggestion, to the contrary, the umpire, in fairness to the company, must hold the presumption that those were in aid of income.

Traveling expenses in England do not appeal to the umpire as susceptible of

any such finding, and, so far as they are specifically stated, he will feel bound to disallow them, as they apparently fail to come within the established test.

The charges for directors, auditors, trustees, and other offices in London are disallowed. It is true that the concession provided for the organization in London of a joint-stock company to construct and to operate this railway. Such being the agreement, there is an assumed contract to permit the necessary and reasonable annual expense attending the corporate existence of such company. This reasonable annual expense must be measured by the importance of the railway and the size of its annual income. It has done a small business only, and the general charges of London and Valencia are too large for the business. Gross income bears pretty nearly all its fair share of the burden when it cares for the services which produce it. This production is all necessarily Venezuelan in its character, quality, quantity, and origin. Management in Venezuela has a direct and important bearing upon gross income. Official service in London is of no value to that income any further than it is essential to the existence of the company. The greater part of these official cares in London deal only with the wise administration of net revenue as between the company and its creditors, between the company and its shareholders, in regard to reserves, renewals, and dividends, and therefore the greater part of such expense should be placed upon the department which causes it or which it serves. The umpire has learned from the inspection he had made of other guaranteed companies, even including those of Uruguay, that some of this expense is allowed as against gross income, and were there only this question to consider he would allow a certain round sum for each year. But he is conscious that he has allowed a considerable amount each under working expense which should have been charged either to net revenue or capital expenditure. He could make no deductions, for he had no details. He has decided to make a set-off of the amount covered by this head to meet such allowances, feeling that thereby he does no injustice and establishes no noxious precedent.

Insurance is for the protection of the capital of the company. It is a wise provision against serious loss of its capital. If fire occurs and destruction follows, the charge for rebuilding, in the judgment of the umpire, could not be placed in working expense as against the Government's guaranty. The means of reconstruction must be found in such cases in net revenue or in capital expenditure. Hence, the annual expense to protect net revenue or capital account must be charged against the account it protects, which is not gross receipts, and it is therefore not a part of working expense. It does not at all aid in the production of gross income. It utterly fails to pass the required test, and as against the Government and its guaranty must be disallowed.

Exchange is subject to the same objection in the main. It is true that so far as it was incurred in payment for stores and for materials and the like, where such payments were made to secure a cheaper article and at a lesser expense, it might well be considered, and might well have been charged as a part of the cost of those materials and stores; and if the umpire had such charges before him properly segregated from the general sum, he would be pleased to allow them. Inspection, however, will determine that, as a rule, the greater part of this exchange was not incurred in the payment for stores from abroad. The whole amount of stores got in all lines in 1891 amounted to £5,410 7s. 6d., and if there be added all of the London general charges which are allowed herein against working expense the sum is £6,341 12s. The balance to net revenue account that year was £32,008 9s. If we add to £6,341 12s. the sum of £1,943 10s., which is the amount disallowed in the London general charges, there is a total sum of £8,285 2s., which added to the net revenue account makes, approximately, the sum sent to London, viz. £40,294 11s. This assumes that all stores

were bought abroad. The share in the exchange expense for such stores that year would be, approximately, as 40 to 5. The whole exchange charged is £140 18s. 9d. The exchange for stores therefore would be, approximately, one-eighth of this, or a little over £17, which is upon the assumption, as stated before, that all stores were bought abroad. If the umpire knew that such was the case he could allow this sum of £17, but as he knows nothing as to where the purchases were made he can make no correct division, and he is again compelled to disallow all, because he has not the details and because, in principle exchange, as a whole, is objectionable as a charge upon working expense. It is a proper charge upon the account which it aids, which is not gross receipts, save as to an inconsiderable and indeterminable part.

In the judgment of the umpire, depreciation of furniture has no more place here than a general charge or several special charges for depreciation of the entire plant. That such depreciation exists, notably as to locomotives, rolling stock, ties or sleepers, rails, bridges, and the like, depreciations which can not be met by repairs, the same as in the matter of furniture, is apparent. None of these, however, are charged to working expense, nor should they be, nor should these be so charged. It is not an expense; it does not represent a cash outlay. It has not, in fact, lessened the gross income. It belongs with other proper reserves, to be set aside by the directors out of net revenue.

As between the income and the shareholder it is well placed; as between the company and its guarantors it has no place.

The same stricture is to be made upon the charge in the locomotive department for locomotive renewals. A proper provision for a foreseen demand is a prudential act; but it is to be so charged off, not as a part of the working expense, but out of net revenue in the reduction of net profits. It may come in before the division of net profits as dividends; but it is not a working expense; it is not a cash outlay; it is a retention of money by the company in its treasury to provide for a cash expenditure some time to be made. It has no place as against the Government as a guarantor.

The charge for the drawing office which appears in some of the accounts does not appeal to the umpire as being a proper charge under working expense. It must have reference to designs or plans for new structures and new property, for betterments, extensions, or improvements of the railway plant. It can not be in aid of repairs of machinery or of plant. So it appears to the umpire, and hence he disallows it. If any part of the charge was for work in aid of the gross income or was a proper charge against it as herein defined, the umpire regrets that it was not more clearly expressed. As it is stated, it is outside of the test adopted and can not be allowed as a proper charge against the guarantor.

As a part of the London expense all law charges are objectionable to the umpire as not being capable to assist in the production, or to protect the production, of the gross income of the company. Undoubtedly these charges were proper as against the company and would be a proper tax upon its net revenue, but they do not seem to have part in working expense as against the guaranty.

A similar conclusion is forced upon the umpire in regard to the Venezuelan agency fees. The work of this agency appears frequently before the umpire in the papers before him as representing the company in interviews with the Government in endeavors to agree with it and to secure from it the amount of the guaranty which the company claimed to be due. Shall the company charge against the Government the expense which it has incurred in such matters? In such case the Government would be bound to determine whether it would be better to yield its contentions at once or to pay the expense of both attack and defense. Clearly this charge had no part in the production of the

gross income, or any part in protecting it, nor was it an incident necessarily connected therewith, but has evidently only to do with what occurs between gross income and subsequent results. To the company it is a proper charge, and the expense was proper, but it is not a proper charge against the Government as a guarantor.

In the London general charges there appears one for inspection of stores, which seems in principle a correct charge, against gross income, as it has apparently to do with a proper care for the materials through whose use the income materializes. That it is too much or too little is not the question raised before the umpire. It being in his judgment correct in principle, it is allowed.

Summarizing under this head, the umpire allows as proper working expenses all charges appearing under "No. 7 A, maintenance of ways, works, and stations;" all charges under "No. 8 B, locomotive department," except "locomotive renewals", all charges under "No. 9 C telegraph expenses;" all charges under "No. 10 D, traffic expenses;" all of "No. 11 E, general charges, Valencia," except "insurance, exchange, depreciation of furniture, drawing office, and agency;" all of "No. 12 F, general charges, London," except the first item of "directors," etc., "traveling expenses and law charges." That which is excepted under these general heads are held not to be proper charges against gross receipts as a part of working expense when considered in reference to determining the deficit properly chargeable in any year to the Government under this guaranty.

Neither locomotive renewals, agency fees, nor law charges in London account were in any of the charges prior to the settlement of 1890.

The Government, through its honorable Commissioner, admits a liability of £73,000 10s. 3d. and denies a liability for any sum of a greater amount.

INTEREST UPON THE UNPAID DEFICITS

On the one hand the claimant company demands interest at 5 per cent on each annual balance, and on the other hand all interest is denied. The respondent Government insists that the nonpayment of the guaranty is the fault of the claimant company in denying and resisting the reasonable claims and objections of the respondent Government; that it has always been ready to pay the sum due when ascertained; that there has been no default on its part in fact; that it was the undetermined balance and nothing else; that the courts of Venezuela have always been open for the determination of that balance, that the claimant company as a part of the concession and guaranty had agreed that the Venezuelan courts should settle all matters of agreement before them, and therefore that the delay is the fault wholly of the claimant company and not at all that of the respondent Government, and that therefore interest, as damages, is not to be charged against it; that there is no claim that there was or is any agreement to pay interest.

There is no inconsiderable force to this argument of the honorable Commissioner for Venezuela. The umpire finds that there were just objections to the account as presented and to the claims as made, and he is well satisfied that no interest should be allowed in a punitive sense.

But by the laws of Venezuela interest on overdue accounts may be allowed at 3 per cent when there is no agreement concerning interest in the contract. If interest is to be allowed here, it is on the ground that the claimant company has been without the use of certain sums of money of which use the respondent Government has had a corresponding benefit. Equity would require compensation for such use in order to secure a fair and perfect balance between the

two parties. When the claimant company secured the concession and the guaranty it undoubtedly knew the lawful rate of interest in Venezuela when no rate was prescribed in the contract. If it were then unwilling to content itself with such lawful rate in case of default or delay of payment, it should have secured a stipulation for a more favorable rate. That it did not do this must be taken as sufficient proof that it rested content upon the lawful rate. Again, the respondent Government knew its lawful rate of interest at the time of entering upon such contract of guaranty, and in therein providing that all questions in dispute should be determined by its courts, where only the lawful rate could be considered and adjudged, it in effect secured a stipulation that both of the contracting parties were to abide by the lawful rate. Always since 1896 the attitude of the respondent Government toward these accounts has been as now. During all this time there has been opportunity to the claimant company to have recourse to the courts for a settlement of the questions in dispute. Denial of justice through these courts can not be assumed. That the company preferred instead to obtain its alleged rights through diplomacy and agreement is clearly its privilege; but its action has an important bearing upon the rate of interest to be allowed when more than the law rate is asked. To the reasons which have governed the umpire in his previous decisions upon the rate of interest where there was no agreement that the courts of Venezuela should settle the matters in dispute, there is here added the very important effect of such an agreement upon the question of whether the lawful rate should prevail.

The umpire decides that interest at the rate of 3 per cent per annum, the lawful rate, is to be reckoned from the time when default began to the time of this award. As some time must elapse after the year has closed before the exact conditions can be transmitted to the Government, as a reasonable time must then elapse for inspection, explanation, final audit, and allowance, and as there then must be a reasonable time before, in due course of procedure, the warrant in payment can issue, the umpire fixes as the sufficient time for all this one year after the account closes before default begins.

DIVIDENDS CLAIMED BY THE GOVERNMENT

The respondent Government claims the allowance of dividends on £160,000 up to and including December 31, 1895. Its contract with the Southwestern of Venezuela (Barquisimeto) Railway Company (Limited) making sale of said shares especially reserved such right; hence the purchasing company has no claim upon and no right to any profits which may have been earned in any way, or which may accrue to the claimant company in consequence of the payment by the Government of its guaranty covering the period named. It is inequitable that the purchasing company should be enriched over and above its fair contract in that regard; neither is there equity in permitting the remaining £300,000 of share capital to have all of the profits belonging to the entire share capital to the loss of the respondent Government who by paying its guaranty carries into the company's treasury the profits to be divided. As stated by the learned agent for Great Britain, although it is not a universal method it seems a better one where dividends are to be paid that they be paid to those who are registered as shareholders at the time when dividends are declared.

The reasons for this are such as are stated by the learned agent, and they are controlling in the mind of the umpire; yet there is something very incongruous and manifestly unfair in requiring Venezuela to make good an annual net income based upon the entire capital when £160,000 of this is the property of that Government; to compel it to reckon its liability to indemnify its own

property and still have no interest in the proceeds. The anomaly, the incongruity, and the inequity of this has grown upon the umpire to such an extent and effect that he is impelled through his sense of right and justice to make a more equitable, seemly, and honorable arrangement. He regards it the contractual duty of the respondent Government to make good its obligations to the company to the extent even of paying the entire sum of £41,000. But when the amount necessary to do this in any year is determined, and when all proper sums having been charged off by the directors there appears a clear net profit out of which dividends may be declared, then let it be determined what per cent may be so divided, and ascertain the share of the Government therein upon this £160,000. The sum thus obtained shall be deducted from the amount which otherwise the respondent Government would pay under its guaranty and the remainder shall be the amount due on such guaranty in that year. This will save to Venezuela her equity. It will not harm the Southwestern of Venezuela (Barquisimeto) Railway Company, as it took the shares subject to the right of the respondent Government in the profits of those years; it will do no harm to the claimant company, for it has only to charge off as satisfied the sums which would otherwise be placed to the credit of those shares and make its dividends upon the remaing shares in the same manner and to the same effect as it proceeded to do with the earnings of the company in its action of 1891, where, in accordance with the terms of the settlement of May 26, of that year, the Government waived as a part of the consideration for the concession all interest in and right to the dividends which might be declared out of the net revenues of the company up to and including December 31, 1890. The remaining capital gets all of its interest in the profits of those years, while as concerning Venezuela, serious wrong, injustice, and inequity is prevented. To illustrate, take the conditions of 1892. To obtain the true net revenue for this purpose, as estimated by the umpire, deduct from the amount charged in the claimant company's account for working expenses for that year as follows:

	£.	s.	d
Locomotive renewals	500	0	0
Paid for insurance	149	15	4
Depreciation of furniture	100	7	10
London expenses, in part	1,873	0	0
Total deduction	3,213	19	2
The working expenses, as stated in the account for that year, are	36,602	2	0
Reduce this by said	3,213	19	2
And working expenses are held at	33,388	2	10
The gross receipts named in the account were	40,473	4	4
Subtract therefrom these working expenses	33,388	2	10
And there is obtained the sum of	7,085	1	6
To this is to be added the sum of found on the credit side of No. 5 net revenue account for 1892.	116	1	8
The result is the total net revenue, viz'.	7,201	3	2
On the debtor side of the said No. 5 net revenue account there is charged interest on debenture bonds	23,800	0	0
Income tax	467	0	0
In all which is the sum to be paid out of the net revenue when enriched by the Government's guaranty.	24,267	0	0

As soon as the umpire has taken from working expenses, as stated in the company's accounts, the sum of £3,213 19s. 2d., and that sum, less £ 500 for

locomotive renewals, viz, £2,713 19s. 2d., must be added to expenditure of net revenue, as stated in said accounts, viz. £24,267, and there is then a total charge upon that account of £26,985 19s. 2d. The guaranteed net earning is £41,000. Subtracting therefrom the entire expenditures on account of net revenue, viz, £26,985 19s. 2d. and there is obtained the sum of £14,014, which sum is net profits and available for dividends.

This is a little more than 3 per cent on £460,000, the entire share capital; stated more exactly, it is .03046 plus. This per cent calculated upon £160,000, Venezuela's interest in the share capital, and the result thus obtained is the equity of Venezuela in these net profits, namely, £4,873 12s. Toward the net revenue the company contributes the difference between its working expense and its gross receipts, which, as determined by the umpire, is £7,084 1s. 6d. To this may be added £116 1s. 8d., which is found on the credit side of No. 5, as above stated, and there is then had £7,200 3s. 2d. as the sum total of net revenue produced by the company, which, taken from the guaranteed revenue of £41,000, gives the sum for which Venezuela is responsible, viz., £33,799 16s. 10d. From this may be deducted the sum found to be Venezuela's interest in the net profits for that year, viz, £4,873 12s., and in this final remainder of £28,926 4s. 10d. there is expressed the sum for which the respondent Government was liable in 1892. To this sum add interest from December 31, 1893, to the date of the award.

(NOTE. — The £500 for locomotive renewals deducted by the umpire is not added to net revenue expenditure as are the other deductions because (*a*) unlike them it was not at this particular time an expense, but a part of a fund reserved; (*b*) when it was in fact expended it was not to renew or even to replace existing locomotives, but to purchase an additional one; (*c*) it may be properly charged to capital even if expended in renewals in fact during the five years for which the Government remained a shareholder, as the life of an ordinary locomotive is rated above eight years, and no locomotive was in use on this railway until the spring of 1892, and the interest of the respondent Government as a shareholder is reckoned only to December 31, 1895; (*d*) from all of the facts it seemed inequitable to be added to net revenue expense in order to obtain the respondent Government's interest in the revenue remaining.)

Aside from the years 1891-1895 the several amounts due from the respondent Government on account of its guaranty are ascertained in substantially the same manner as in 1892, as above set forth.

Those in 1891 and 1892 will now be specifically set forth, beginning with the year 1891.

From the working expense as stated by the claimant company in its abstracts of expenditures in revenue account, page 14, 15, 16, and 17, there are to be deducted the following:

	£	s.	d.
Locomotive renewals	500	0	0
Insurance	149	15	0
Exchange	140	18	9
Depreciation of furniture	87	19	4
Drawing office	42	0	7
London expenses, in part	1,943	10	0
Deducting this sum of	2,864	3	8
from the entire working expenses as stated by the company, viz'	32,359	4	3
and there is found the sum of	29,395	0	7
which is the true working expense of that year as settled by the umpire. Deducting this sum from the gross receipts which are	64,267	13	3

	£	s.	d.
and the net earnings are established at	34,872	12	8
The credit side of net revenue contains the items of transfer fees and interest amounting to	55	1	3
which, added, make the total net revenue, viz	34,927	13	11
This sum taken from the guaranty of	41,000	0	0
gives as a difference the sum of	6,072	6	1

The debtor side of "No. 5, net revenue account," year of December 31, 1891, has the following:

	£	s.	d.
Debenture interest	23,800	0	0
Income tax	456	11	0
Traveling expenses	180	0	0

To this must be added the amount taken by the umpire from working expenses, less £500.

	£	s.	d.
Locomotive renewals, viz.	2,364	3	8
and there is found	26,800	14	8
which is the sum to be paid out from net revenue before net profits can be considered. This sum deducted from the guaranteed net revenue of	41,000	0	0
leaves the net profits available for dividends, viz.	14,199	5	4
The per cent per pound is obtained and applied as in 1892, with a result that	4,938	14	0
is to be deducted in behalf of Venezuela from the difference as obtained, viz: from	6,072	6	1
and it is found that	1,133	12	1
is the sum guaranteed for that year by the Government of Venezuela to the claimant company, it being the actual deficit after allowing Venezuela its fair equity in the net profits of that year. As the year 1893 will show a surplus of earnings over expenditures, interest will be allowed on the sum just obtained from December 31, 1892, to December 31, 1893, at 3 per cent per annum, which is, substantially	34	3	0
Making a sum total December 31, 1893, of	1,167	15	1

The year 1893 was peculiar in that there was no deficit. For this year there must be deducted from the account as stated by the company —

	£	s.	d.
Locomotive renewals	500	0	0
Insurance	166	8	4
Exchange	249	18	9
Depreciation of furniture	91	16	2
London expenses, in part	1,703	0	0
Making a sum of	2,711	3	3
which, taken from the gross expenses as stated, viz.	41,390	4	9
leaves the sum of	38,679	1	6
as the gross expense allowed by the umpire for that year. Reduce the gross receipts for that year, namely	82,488	17	2
by this sum and there is found the net earnings, namely	43,809	15	8
There is to add to these net earnings the transfer fee found on page 12 of accounts, viz.	2	5	0
and there is the total net revenue for the year of	43,812	0	8

There was retained for use a part of the net revenue because the guaranty had not been paid and there was nothing set aside for renewals; hence, in this calculation, to arrive at the equity of Venezuela, no deduction need be made but the whole of the net profits may be used in determining and settling the accounts of Venezuela with the claimant company. The net profits are determined by deducting from the net revenue which is, as last above written, £43,812 0s. 8d., the sum set aside on the debit side of " No. 5, net revenue account for the year ending December 31, 1893," namely, debenture interest, £23,800, income tax, £311 13s. 1d., and the amount taken from gross expenses by the umpire, less locomotive renewals, being £2,211 3s. 3d., making the sum of £26,322 16s. 4d., which leaves as net profits the sum of £17,489 4s. 4d.; in which Venezuela has an equity to the amount of £6,080.

The deficit of 1891, with interest for one year added, as found by the umpire was £1,167 15s. 1d.; to this add the deficit of 1892, £28,926 4s. 10d., and there is a combined sum of £30,093 16s. 11d. From which deficit take the ascertained equity of Venezuela above stated, viz. £6,080, and there is the sum of £24,013 16s. 11d., on which interest at 3 per cent is to be cast from December 31, 1893, to the date of the award.

The guaranty for 1894 liquidates at £11,594 4s. 5d. Interest from December 31, 1895, at 3 per cent, to day of award.

(NOTE. — The reserve for doubtful debts mentioned on the debit side of No. 5, net revenue account, is added in making up the debts to ascertain net profits.)

The guaranty for 1896 liquidates as £4,051 12s. 6d. Interest at 3 per cent per annum from December 31, 1896, to date of award.

(NOTE. — Income tax return is added to transfer fees and interest on the credit side of No. 5, net revenue account, of this year. Balance of the cost of engine No 10, £1,618 13s. 1d., is not added to the debit side. It should be placed to capital expenditures, as against the Government guaranty.)

After 1895 the quity of Venezuela in the net profits ceased and thence forward it is only important to carefully scan and correct if need be, the charges made to working expense.

It appears from the report of the directors in the year 1895 that —

> Considerable improvements were effected in improving the waterways and preparations were made to move a portion of the line at Mater Piedra from its present proximity to the river to a position less likely to suffer from floods in the future.

In the report of the directors for 1896 it is said that " the improvements at Mater Piedra, referred to in the report for 1895, have been completed and others are in progress," but examination of the financial statements of both years shows in neither any charge to capital expenditure or to net revenue accounts, and there is no reference to improvements as such under the head of " maintenance of way, works, and stations." Although in fact these expenditures are probably included under that head in each of these years the umpire can only say that if they had been shown to him as so appearing in working expense he would have transferred them in 1895 to capital expenditure as against Venezuela that thereby her equity in the profits might have been protected, and in 1896 to net revenue account as against Venezuela that her guaranty might have been thereby equitably protected.

If their policy be to hold their capital to a fixed sum and to improve gradually and make better the railroad in its way and equipment out of the net earnings of the plant as against its shareholders it is of no particular importance whether these charges are placed against gross assets or net revenue. Against the guarantor, however, it is of importance; and in the opinion of the umpeir such improvements can not be made a tax upon the revenue obtained through the

guaranty. The peculiar inequity of any such charge is apparent when, as in this case, there is a guaranty upon a sum which they estimated to be the cost of equipment and construction, but which is in fact an overestimate to the amount of £34,818 1s. 5d., as appears by report of December 31, 1883, and there was unused of this, as appears from the report of December 31, 1902, £21,100 16s. 5d. In the agreement of May, 1901, the claimant company reduced the per cent of the guaranty from 7 to 5, but as one of the conditions and considerations of such deduction it held Venezuela to the letter of the guaranty as to amount. It behooves the company to be careful to respond to the spirit of the original agreement in dealing with betterment and improvements.

Cook, in his work on Corporations, fifth edition, pages 1166, 1167, 1168, 1169, 1170, and notes, as cited by the umpire, is full authority for each and every position taken by him in reference to these accounts. Depreciations, renewals, and reserves as such should never be made a part of the working expenses. All betterments and improvements must be charged upon capital or net revenue, and upon the one or the other as the peculiar conditions of each may require. That any of these should be charged to working expenses is not even discussed. The working principle there suggested is that nothing be charged to capital unless the productivity or earning capacity is by such expenditure increased. Following this principle, Cook places additional equipment a proper charge to capital. Let it always be understood that the umpire does not presume to instruct the claimant company in its method of bookkeeping or in its management of its business. He only is to determine how far those methods are right and just as affecting the guaranties of the respondent Government and its equity as a shareholder in the divisible profits of the company when such guaranty is made good.

In 1896, making from working expenses as charged in the accounts of that year the same character of deductions as made in 1895, in all £3,220 7s., from the working expenses as charged, which were £30,675 19s. 1d., and there is found the true working expense of £27,455 12s. 1d. These gross working expenses deducted from gross receipts, viz, £60,472 18s. 6d, and the net earnings of the year of 1896 are established at £33,017 5s. 5d. This sum deducted from the guaranteed amount, viz, £41,000, shows the sum due from the Government on account of its guaranty to be £7,982 13s. 7d., upon which interest is to be reckoned at 5 per cent per annum from December 31, 1897, to the date of the award.

Proceeding in the same manner as to the accounts of 1897 and the amount due under the guaranty for that year is found to be £17,411 13s. 2d., to which is to be added interest from December 31, 1898, at 3 per cent per annum to the date of the award.

In 1899 the amount due under the guaranty is made less than it would otherwise be by the additional deduction of the amount charged in the account for injuries received at the hands of the revolutionists, which the umpire has disallowed and which therefore must be taken out of the amount. The final result is that £26,896 11s. 4d. is the amount due on the guaranty for that year and interest is to be reckoned at 3 per cent per annum from December 31, 1899, to the date of the award.

The guaranty for 1899 liquidates at £19,245 18s. 10d., and interest is to be reckoned at 3 per cent per annum from December 31, 1900.

The guaranty for 1900 liquidates at £26,769 7s. 4d., to which interest is to be added at 3 per cent per annum from December 31, 1901, to the date of the award.

For 1901 the amount under the guaranty is £32,828 13s. 4d., and interest is to be added at 3 per cent per annum from December 31, 1902, to the date of the award.

For 1902 the sum is £36,967 9s. 6d., and interest is to be added at 3 per cent per annum from December 31, 1903, to the date of the award.

The agregate sum found to be due from the Government of Venezuela to the Government of Great Britain on account of and for the benefit of the claimant company on account of its guaranty is in the aggregate, as to principal sum, £207,722 11d., and is in the aggregate as to interest £24,022 7s., making the total sum due from the respondent Government to the date of the award £231,794 7s. 11d.

The umpire does not add to this the sum called for on freight account, because if it were to be treated as paid by this award it must be added to the gross earnings of the year 1902, and in that event the guaranteed sum would be made less by just so much as the amount of the freight so added to the gross earnings. If the umpire is not in error, all of the sums for which the respondent Government stands as guarantor it could require the company to earn if it had a sufficient amount of business of its own to equal what otherwise would be the deficit in the gross earnings of the compapy for any year. Hence it matters not, excepting as there would be in such case increased working expense, and therefore a larger sum to be earned in gross to produce a net of sufficient sum, whether the Government pays for freight and passengers or pays it out as guaranty, only when, as in this case, the working expenses are already charged, and hence are not to be increased, whether the Government pays in terms for traffic or solely upon guaranty.

The award will therefore be made for the sum of £231,794 7s. 11d.

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