REPORTS OF INTERNATIONAL ARBITRAL AWARDS

RECUEIL DES SENTENCES ARBITRALES

Woodruff Case

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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*.