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Robert E. Brown (United States) v. Great Britain

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by the existing land lines and specified by the Spanish military superior authorities. It was, therefore, according to that report, "indispensable to meet this necessity by replacing the land telegraph lines by submarine cables, which will permit the maintenance at all times of connexion and communication between the strategic points of the island"; and among them, those situated on the south coast between Cienfuegos and Santiago de Cuba were mentioned as being not of less need and importance.

In these circumstances the right of the United States to take measures of admittedly legitimate defense against these means of enemy communication was fully justified; if some compensation was due to the Company for the damage done to the cable, it was for the Spanish Government to make it, always supposing that such compensation had not been already considered in the terms agreed upon under the concessions. In our opinion, not only is there no ground of equity upon which an award should be made against the United States, but equity appears to us to be on the side of the United States in their refusal to pay the damages claimed.

Now, therefore:

The Tribunal decides that the claim be disallowed.

ROBERT E. BROWN (UNITED STATES) *v.* GREAT BRITAIN

(*November 23, 1923. Pages 187-202.*)

INTERPRETATION OF MUNICIPAL LAW BY INTERNATIONAL TRIBUNAL. DENIAL OF JUSTICE. EXHAUSTION OF LOCAL REMEDIES. EQUITY. Proclamation issued on June 18, 1895, by President of South African Republic designating certain tract of land, called Witfontein, as public gold field beginning July 19, 1895. Suspension of proclamation on July 18, 1895, by Executive Council at Pretoria. Application for 1,200 prospecting licences, made under the proclamation by Mr. Robert E. Brown, United States citizen, on July 19, 1895. Licences refused on the ground of suspension of proclamation. Pegging out of 1,200 mining claims by Brown who, notwithstanding refusal of licences, asserted title. Second proclamation issued on July 20, 1895, by State President adjourning opening of Witfontein until August 2, 1895. Suit brought on July 22, 1895, before High Court of the South African Republic by Brown demanding licences to cover 1,200 claims already pegged off. Resolution adopted on July 26, 1895, by Second Volksraad approving withdrawal of first proclamation and issuance of second one, and declaring that no person who had suffered damage should be entitled to compensation. Third proclamation issued on July 31, 1895, by State President further adjourning opening until August 30, 1895. New government regulations for distributing mining claims by lot drawn up on August 15, 1895, and made applicable to Witfontein on August 20, 1895. Alternative claim for damages in the original action filed by Brown in October, 1895. Judgment in Brown's favour on January 22, 1897, the Court setting aside resolution of July 26, 1895, as unconstitutional, ordering issuance of licences, and inviting Brown to pursue alternative claim for damages by motion in the event of his being unable to peg off 1,200 mining claims. Licences for 1,200 mining claims of no practical value issued on February 9, 1897. Damages sought by Brown by motion, notice of which given on December 10, 1897. Chief Justice dismissed from

office by State President on February 16, 1898, under so-called testing law of February 26, 1897. Judgment delivered on March 2, 1898, denying motion, with leave to start new action. No further attempt by Brown to get relief in Courts. *Held* that Brown acquired rights of substantial character under laws and regulations in force on July 19, 1895, and that numerous steps taken by Executive Department, Volksraad and Judiciary with obvious intent to defeat Brown's claims constitute denial of justice. No failure to exhaust local remedies—merely a matter of equity and never a bar under terms of submission—since futility of further proceedings demonstrated.

CONQUEST, ANNEXATION, SUCCESSION OF STATES: PRIVATE RIGHTS ACQUIRED PREVIOUS TO—, PENDING CLAIMS. LIQUIDATED DEBTS, SUZERAINTY. Conquest by Great Britain of territory of South African Republic, annexation on September 1, 1900. *Held* that for wrongs done to Brown by former State Great Britain not liable, neither as a succeeding State (no undertaking to assume such liability, pending claim instead of liquidated debt; no obligation to take affirmative steps to right those wrongs), nor as a former suzerain over South African Republic. Claim disallowed.

Cross-references: Am. J. Int. Law, vol. 19 (1925), pp. 193-206; Annual Digest, 1923-1924, pp. 66-70.

Bibliography: Nielsen, pp. 162-186.

The United States claims £ 330,000, with interest, from Great Britain on account of the alleged denial of certain real property rights contended to have been acquired in 1895, by one Robert E. Brown in the territory of the South African Republic which was conquered and annexed by Great Britain on September 1, 1900.

The material facts are as follows:

Brown, an American citizen, and a mining engineer by profession, went to South Africa in the year 1894. He became interested in gold mining prospects, and in 1895 devoted particular attention to a piece of property known as the Witfontein farm through which, in his judgment as well as in that of many others, the principal gold-bearing reef of that region was supposed to run. Under the prevailing system governing the disposal and acquisition of mining rights, the State, being the owner of all minerals, subject to certain preferential rights of the land proprietors, was accustomed from time to time by proclamation to throw open for the prospecting and location of mining claims specified tracts of land. Such tracts were thereby formally designated as public gold fields and, in accordance with the terms of the proclamations, any and all persons were privileged to apply for prospecting licenses to be issued by an official designated as the Responsible Clerk of the district in which the land lay.

On June 18, 1895, a proclamation was duly issued by the State President declaring the eastern portion of the Witfontein farm a public digging under the administration of the Responsible Clerk at Doornkop, such proclamation to take effect on July 19, 1895 (memorial, p. 54). There was apparently wide interest in this field, and many individuals and corporations proceeded to take advantage of the proclamation. Brown made elaborate preparations for the opening by placing on the land a large number of agents, and among other things, arranged to transmit by heliograph to Witfontein from Doornkop, about 20 miles away, the news of the actual granting of licences so that his agents might act without delay and stake out claims in advance of all competitors. These arrangements being perfected, Brown himself appeared at the office of the Responsible Clerk at Doornkop at 8.30 o'clock on the morning of July 19, 1895, and made a formal application for 1,200 prospecting licences. The Clerk declined to issue the licences, and postponed further action until

10 o'clock of the same morning, stating that he was awaiting definite advices from the seat of government. Brown thereupon handed to the Clerk a written demand for 1,200 licences (memorial, p. 88). Shortly thereafter, and before 10 o'clock, the Clerk received a telegram from the seat of government announcing the withdrawal of the proclamation under which Witfontein had been thrown open as a public digging. Brown again protested and made a tender of the money for the licences, which was refused. He then heliographed his agents at Witfontein to go ahead and peg out the claims (memorial, p. 61), himself proceeding to the scene where he arrived about noon.

Pursuant to his instructions, 1,200 mining claims were in fact pegged, and Brown subsequently asserted title to them on the ground that the withdrawal of the original proclamation was invalid and that the Clerk had no right to refuse issuance of the licences. Other parties acted in the same manner (memorial, p. 64).

It appears that on the day preceding the opening of Witfontein under the proclamation, to wit: on July 18, 1895, the Executive Council at Pretoria, by resolution, provided for the suspension of the proclamation (memorial, p. 83); and on July 20, 1895, the State President, on the advice of the same Council, caused a second proclamation to be published in the Official Gazette, adjourning the opening of Witfontein for the period of fourteen days, to wit: until August 2, 1895 (memorial, pp. 81-82).

On July 22, 1895, Brown began a suit in the High Court of the South African Republic demanding the licences to cover the 1,200 claims which he had in fact already pegged off (memorial, p. 52).

On July 26, 1895, the Second Volksraad, one of the two legislative chambers of the Republic having jurisdiction over these matters, adopted the following resolution approving the action of the Executive Department in withdrawing the original proclamation and in issuing the second proclamation (memorial, p. 85):

"The Second Volksraad, regard being had to the communication of the Government dated July 26, 1895, in the matter of the provisional suspension of the proclamation of Witfontein, No. 572, district Krugersdorp, Luipaards Vlei, No. 682, district Krugersdorp, and Palmietfontein, No. 697, district Potchefstroom, and regard being further had to the Executive Council resolution, article 516, of today's date, whereby a certain draft resolution is submitted by the Executive Council to the Honourable the Second Volksraad for approval and acceptance;

"Resolves to agree to the proposal of the Executive Council contained in the said resolution and further resolves to accept the said draft resolution as submitted by the Executive Council as the resolution of the Second Volksraad."

On July 31, 1895, a third proclamation was issued by the State President further adjourning the Witfontein opening until August 30, 1895 (memorial, p. 86).

Meanwhile an entirely new plan, for distributing mining claims by lot, was drawn up on August 15, 1895 (memorial, p. 165; answer, p. 213): and on August 20, 1895, the regulations for drawing by lot were made specifically applicable to Witfontein (memorial, p. 168). The claims of Witfontein were accordingly disposed of under the lottery plan.

The defendants in the suit begun by Brown, being the State Secretary and the Responsible Clerk, answered on August 14, 1895, setting up the resolutions and proclamations above referred to (memorial, p. 55). In October, 1895, Brown filed in the same action, a claim in the alternative for damages amounting to £ 372,400. He also filed a replication asserting the invalidity of the proclamations and resolutions relied upon by the defendants (memorial, p. 58). The

defendants then interposed a formal answer to the alternative claim. The case came on for trial November 15, 1895 (memorial, p. 60); and on January 22, 1897, judgment was given in Brown's favour in the following terms:

"BE IT HEREBY ORDERED

"That judgment be and is hereby granted in favour of the plaintiff with the costs of this action."

"The Responsible Clerk at Doornkop is ordered to issue prospecting licenses to the plaintiff on payment of the necessary moneys, in order to be enabled thereunder to peg 1,200 claims on the eastern and proclaimed portion of the farm Witfontein" (memorial, pp. 74-75).

The opinion of the Court was delivered by Chief Justice Kotze (memorial, p. 20). A separate opinion reaching the same conclusion was filed by one of the other members of the Court, Justice Morice (memorial, p. 40). Briefly, the Court held: that the original proclamation was valid and duly published according to law; that it could not be withdrawn or set aside save by a new proclamation duly published in the same manner; that the order suspending the operation of the proclamation not being published in the Official Gazette until the day after the date fixed for the opening, was ineffectual; and that there was consequently no legal warrant for refusing the licenses on July 19, 1895. The concluding paragraph of the opinion by the Chief Justice was as follows:

"The plaintiff is entitled to be placed by the Court in as nearly as possible the same position in which he would have been on the morning of the 19th July, 1895. He has framed his claim, by means of a subsequent amendment, in the alternative, that the Responsible Clerk at Doornkop shall be ordered, upon receipt of the necessary moneys, to issue to the plaintiff a licence for 1,200 prospecting claims upon the proclaimed portion of Witfontein, or otherwise that the sum of £ 372,400 shall be paid to him as and by way of damages. The plaintiff is clearly entitled to the licence, whereby he will be able to peg off 1,200 prospecting claims on the eastern portion of Witfontein. Nothing definite was said during the argument about the measure of damages, and no special grounds have been submitted to us on behalf of the Government, why, in the event of the Court deciding in favour of the plaintiff, it would be impossible for him to proceed to peg off the 1,200 claims, which he has already informally pegged off. The evidence, so far as it relates to this point, leaves no doubt that if the plaintiff had obtained the licence to which he was entitled, he would have been able to have properly pegged off the 1,200 prospecting claims, which as a matter of fact he did peg off. That certain persons also lay claim to some of these 1,200 prospecting claims by virtue of *vergunningen*, is a question which can at some future time be settled between them and the plaintiff and, if need be, decided by the Court. It cannot affect our judgment in this case. Should it appear that it has become impossible for the plaintiff to peg off under the prospecting licence the 1,200 specific claims, either in whole or in part, which he had already pegged on the 19th of July, 1895, it will become necessary for the Court to determine the amount of damages. We can do no more at present, for although the plaintiff is entitled to compensation against the State, by reason of the unlawful conduct of an official acting upon instruction of the Government, the onus of showing, with more or less definiteness and as nearly as possible the amount of the damages lies on him, and the evidence, which he has submitted on this point, is too vague and uncertain to enable us to base any satisfactory calculation thereon. In the event of the Court being called upon to fix the damages later on, further and more satisfactory evidence with respect thereto will, after notice served upon the Government, have to be laid before us. For the present there must be judgment

in favour of the plaintiff, with costs. The Responsible Clerk at Doornkop is ordered to issue to the plaintiff upon due payment of the necessary amount, a prospecting licence for 1,200 claims on the eastern and proclaimed portion of the farm Witfontein" (memorial, pp. 39-40).

Justice Morice, while concurring in the judgment, took the position that Brown acquired no right to specific claims by reason of the actual pegging after the licences had been refused him on July 19, 1895 (memorial, p. 48).

At the time the judgment was rendered, Brown was not in South Africa, and his interests were in the hands of one Oakes, who, in his behalf, proceeded on January 25, 1897, to tender £300 for 1,200 licenses (memorial, p. 93), whereupon, after some delay in order to permit the Responsible Clerk to receive final instructions, on February 9, 1897, the licences for 1,200 prospecting claims good for one month were issued, bearing, however, the following endorsement:

"These claims cannot be removed, as they encroach upon the 'owners' and 'vergunning' cls." (memorial, p. 97).

Under this licence, though the evidence on the point is doubtful, it would seem that the 1,200 claims pegged in the first instance were repegged (memorial, pp. 94-95; further British memorandum, pp. 12, 15).

The customary privilege of renewal being denied, Brown's representative found the licence of no practical value, and was obliged to fall back upon the alternative claim for damages.

At this point it becomes necessary to note the wider significance of the decision in Brown's case. It will have been observed that the resolution of the Second Volksraad above quoted not only approved the second proclamation of the State President, but declared in effect that all peggings under the original proclamation were unlawful and that no person who had suffered damage in the circumstances should be entitled to compensation. It was contended by the defendants that this resolution of a single chamber has the legal force of law, and in this connexion article 32 of Law No. 4 of 1890 was invoked, reading as follows:

"The legal force of a law or resolution published by the State President in the Gazette may not be disputed saving the right of the people to make petitions with regard thereto."

In answer to this contention it was pointed out that under the Grondwet or Constitution of the Republic the terms of the Gold Law under which the original proclamation had been issued could not be altered except by legislative enactment. The issue was thus sharply raised as to whether the High Court had the duty and power to uphold the Constitution by setting aside *legislative* enactments and resolutions in conflict therewith.

In the previous case of McCorkindale's Executors *v.* Bok (answer, p. 263), Chief Justice Kotze himself had denied the power of the Court in this respect, but in subsequent decisions (memorial, p. 25), he had stated that the views expressed in the McCorkindale case would no longer be supported. He now undertook, in an opinion which exhibits great industry and ability, to deal with this constitutional question at length, and reached the conclusion, which accords with American practice, that the Constitution was supreme and that acts in conflict therewith must be declared void by the Court. Even before this decision, and while the case was pending, the President of the Republic had interviewed the Chief Justice and threatened to suspend him from office in the event of his failure to uphold the right of the Executive and Legislative Departments to override the Constitution (memorial, p. 143). There now ensued an amazing controversy between the Court and the Executive. We do not propose to examine the details of this unique judicial crisis. It is sufficient

to note that the result was the virtual subjection of the High Court to the executive power. An obedient legislature immediately enacted, at the demand of the Executive, the so-called testing law, dated February 26, 1897, and effective March 1 of that year, the terms of which were as follows:

"1. As long as the People has not clearly made it known to the satisfaction of the first Volksraad that it wishes to alter the existing condition the existing and future laws and Volksraad resolutions shall be recognized and respected by the Judiciary in agreement with article 80 of the Grondwet (Constitution) of 1896, and the Judiciary has not the competency to refuse to apply a law or Volksraad resolution because such law or resolution is, in the opinion of the Judge, either in form or substance in conflict with the Grondwet, in other words the Judiciary shall not have the competency and has never had it, either by the Grondwet (Constitution) or by any other law to arrogate to itself the so-called testing right.

"2. The Judges, Landdrosts and other members of the Judiciary shall, in future, take the following oath before accepting office:

"I promise and swear solemnly to act faithfully to the people and the laws of this Republic, and in my position and office to act justly, equitably, without respect of persons in accordance with the laws and Volksraad resolution and to the best of my knowledge and conscience; not to arrogate to myself any so-called testing right; not to accept from anyone any gift or favour if I have reason to suspect that it was made or shown to me to persuade me in my judgment or action in favour of the person so giving or favouring, and that in my other capacities than as Judge I shall obey according to law the commands of those placed over me, and, in general, my only object shall be the maintenance of law, justice, and order to the furtherance of the prosperity, welfare, and independence of law and people. So truly help me God almighty.'

"The Members of the High Court and the Landdrosts shall take the oath before the President and Members of the Executive Council.

"3. The Judge who does not act in accordance with article I of this law shall be considered to have committed an official offence as mentioned in article 86 of the Grondwet of 1896.

"4. The President is hereby authorized to ask the present Members of the Judiciary, or to cause them to be asked, if they consider it to be in accordance with their oath and their duty to decide in accordance with the existing and future laws and Volksraad resolutions, and not to arrogate to themselves the so-called right of testing, and further instructs the President to discharge from their office those Members from whom he has received either a negative, or, in his opinion, an insufficient, or within a specified time, no answer at all.

"5. Volksraad resolution shall, in this law, be understood to mean both resolutions of the old Volksraad and resolutions of the First and also of the Second Volksraad, which are in force in virtue of article 31, Law No. 4, 1890, now article 79 of the Grondwet of 1896. 'People' shall be understood to mean the fully enfranchised Burghers of the South Africa Republic.

"6. This law shall not impair rights which may have been obtained by sentences of the High Court before the passing of this law.

"7. This law shall come into operation immediately after publication in the Staatscourant." (answer, pp. 313-315).

The enactment of this law was the prelude of the state of so-called legal anarchy, which endured for approximately a year, and eventually led to the armed intervention of Great Britain and the ultimate annexation of the South African Republic. In this period a vigorous but vain fight for the independence of the

judiciary was made by the bench, the bar, and the press (memorial, pp. 103-145). The Executive authority pursued its main object relentlessly and on February 16, 1898, the recalcitrant Chief Justice was finally dismissed from office by the President, acting under the provisions of the Law of 1897 (memorial, p. 112). One of his associates also resigned, but the other Justices of the Court seem to have accepted the situation. Throughout this controversy the Brown case was referred to as the turning point, and the 1897 law as the actual instrument by which the independence of the High Court was destroyed. At least so far as the "Uitlanders" were concerned there is much justification for the assertion that effective guarantees of property rights had disappeared, and that the capricious will of the Executive had become the sole authority in the land. That these intolerable conditions led directly to the war, in which the independence of the State itself was suppressed, is a matter of history.

In the meantime, reverting to the chronology of this litigation, Brown, being unable to find any other relief, proceeded, by motion in the original action, as suggested by the Chief Justice at the conclusion of his opinion, to bring up the question of damages. Notice of the motion was given on December 10, 1897 (memorial, p. 52). The case did not come on to be heard until March 2, 1898, after the dismissal of the Chief Justice and the reorganization of the Court with Justices sworn to abandon all right to test laws and resolutions by reference to the Constitution. The disposition to defeat Brown's claim at any cost was at once disclosed by the Government's attitude upon this hearing. Although Brown had been invited specifically by the High Court, in the event of his being unable to secure the claims, to proceed upon notice (memorial, p. 40), for the purpose of bringing forward his alternative claim for damages, the Government now contended and the Court decided that such procedure was improper and that the only way in which he could proceed was by the institution of a new suit for damages. It will be remembered that the alternative claim for damages had been made in the action and issue joined upon it. Furthermore, the Court had permitted the same procedure by notice and motion in another suit brought by the Elias Syndicate on almost identical facts. This precedent was waived aside, as appears from the report of the hearing, on the ground that after judgment the Responsible Clerk had, in the Elias Syndicate case, refused to issue the licences for the reason that there was no open land to which they could be made applicable, while in the Brown case the Clerk had, in fact, issued a licence (memorial, pp. 77-79). Another possible distinction was rather vaguely referred to, based upon the difference in wording of the two judgments. The Brown judgment, as above indicated, did not embody the Chief Justice's direction to proceed by notice for the determination of damages, while the Elias Syndicate judgment contained a clause reserving the question of damages (memorial, p. 224). On the strength of these technical distinctions the Court declined to permit Brown to follow the course adopted in the other litigation and suggested by the former Chief Justice; and judgment was delivered denying the motion and imposing costs, with leave to start a new action (memorial, p. 80).

The significance of this disposition of the motion by the reconstituted High Court has been the subject of much argument. Brown's attorneys at the time took the position that the effect of this second order of judgment was to throw him out of court and deprive him of the benefit of his previous judgment. He was advised by counsel that in any new action instituted for damages the Government could plead the Volksraad resolutions, and that the new court would be obliged, under the oath provided in the 1897 law, to give the resolution full effect in any such suit begun at that time. It will be remembered that the Volksraad resolution heretofore quoted specifically provided that no compensation

should be awarded to any person claiming to have been damaged by the withdrawal of the original proclamation; and it was evidently the opinion of counsel that, there having been no judgment fixing the damages in the action wherein the licences were ordered to be issued, and no reference whatever to damages in that judgment, no protection would be afforded Brown under article 6 of the 1897 law, stating that rights obtained by sentences of the High Court before the passing of the law could not be impaired. At any rate, Brown did, upon advice of his counsel (memorial, p. 146), abandon any further attempt to get relief in the courts. The advice was clear and emphatic. Attorney Hofmeyr said:

"Under the practice of our courts it is not open to question that if Brown had availed himself of the leave to issue a new summons the Government would have been entitled by their pleas to reopen the whole question in dispute, and have a retrial of the case, in other words, Brown's judgment of the 22nd of January which had not been appealed against would have been practically reopened. It was quite manifest that the attitude of the Court was distinctly hostile to Brown, and that the judgment was entirely unjustifiable. Such being the case the only conclusion to be arrived at is that it would have been quite impossible for Brown to obtain justice before a court capable of giving such a decision. I therefore advised Brown that in my opinion it was quite useless for him to proceed further with his action or to expect redress from the courts in the Transvaal. In other words, I believe that Brown did everything possible to obtain redress in the Transvaal courts and it was only when it became perfectly apparent that the Court had determined not to grant him redress that he desisted on the advice of his counsel and solicitors from throwing away further money in the prosecution of his claim" (memorial, p. 171).

Mr. Wessels, counsel who argued the motion in Brown's behalf, gave his opinion as follows:

"In my opinion the decision was absolutely incorrect, absolutely against precedent, and perfectly unjustifiable. I now argue this way—if Brown has to encounter such extraordinary difficulty from the Court in a matter of mere formal procedure in an adjective question how much greater difficulty will he not have to encounter when he comes before the Court with a question where precedent is difficult, and where the substantive nature of his action will have to be tried" (memorial, pp. 147-148).

And there the matter rested, save for efforts made to obtain redress through diplomatic channels.

On October 28, 1898, Brown addressed a memorial to Her Majesty the Queen of England in her capacity as suzerain over the South African Republic (answer, p. 357). This document was transmitted to the Secretary of State for the Colonies (memorial, p. 154) and a reply dated December 15, 1898, stated that the proper course for Brown, as an American citizen, was to bring the matter in the first instance to the notice of his own Government (memorial, p. 155). Thereupon a memorial was in turn addressed to the Secretary of State of the United States, but no diplomatic action was taken at this stage, because the war intervened (memorial, pp. 155-156).

After the annexation, and on September 8, 1902, another memorial was presented to the British Governor of the Transvaal Colony (memorial, p. 151).

On July 17, 1902, the Attorney General of the Colony gave an opinion, the material portion of which is as follows:

"It appears to me that Mr. Brown did not exhaust all his legal remedies as he did not issue a new summons as ordered by the Court.

"It is clearly impossible for Your Excellency to comply with his request that licences be issued to him for the claims, as these claims are at present

lawfully held by third persons under the Gold Law, and any interference with the title of the present holders would give rise to a general feeling of insecurity. If Mr. Brown considers he has any legal right to obtain possession of the claims, or that he is entitled to damages, the Supreme Court is open to him and he may take any proceedings he may be advised to" (memorial, p. 158).

The Government of the United States took up the question with the British Government, and on November 14, 1903, Lord Lansdowne from the Foreign Office wrote to the American Ambassador as follows:

"With reference to my note of the 23rd May last I have the honour to inform you that His Majesty's Government have given their most careful consideration to the claim of the late Mr. R. E. Brown, a United States citizen, against the Government of the late South African Republic.

"This claim appears to be based in the first instance on an alleged liability of the late Government of the Transvaal in damages for not granting a concession to Mr. Brown. The Court of the late Government refused redress and Mr. Brown's claim seems in the second instance to be based on an alleged wrong by reason of the corrupt or illegal action of the Court at the dictation of the Executive.

"As regards the first ground, His Majesty's Government are unable to find that it has ever been admitted that a conquering State takes over liabilities of this nature, which are not for debts, but for unliquidated damages, and it appears very doubtful to them whether Mr. Brown's claim could be substantiated at all or in any case for any substantial amount.

"As regards the second ground, it has never so far as His Majesty's Government are aware been laid down that the conquering State takes over liabilities for wrongs which have been committed by the Government of the conquered country and any such contention appears to them to be unsound in principle.

"In these circumstances His Majesty's Government are unable to admit that the late Mr. Brown has any claim under international law against that Government of the Transvaal as successor to the Government of the South African Republic" (memorial, p. 159.)

The claim was included in the schedule for submission to arbitration by this tribunal under clause I, as a claim based on the denial in whole or in part of real property rights.

Two main questions arise on these facts:

First, whether there was a denial of justice in any event; and

Secondly, whether in case a denial of justice is found, any claim for damages based upon it can be made to lie against the British Government.

On the first point we are of opinion that Brown had substantial rights of a character entitling him to an interest in real property or to damages for the deprivation thereof, and that he was deprived of these rights by the Government of the South African Republic in such manner and under such circumstances as to amount to a denial of justice within the settled principles of international law. We fully appreciate the force of the argument to the contrary which has been made on technical grounds. It may well be said that at no time did Brown acquire and hold any title or right to specific mining claims; that at most he was entitled to a licence under which he might have located and become the owner of particular claims; that the actual pegging of claims in his behalf on July 19, 1895, was unsupported by any licence, and therefore had no legal effect; that the judgment of January 22, 1897, established merely his right to a licence and gave him no title to particular claims; that the alternative demand for damages was never liquidated; and that his legal remedies were not completely exhausted inasmuch as he never followed up the claim for damages by taking out a new summons in accordance with leave granted by the order of

March 2, 1898. Notwithstanding these positions, all of which may, in our view, be conceded, we are persuaded that on the whole case, giving proper weight to the cumulative strength of the numerous steps taken by the Government of the South African Republic with the obvious intent to defeat Brown's claims, a definite denial of justice took place. We can not overlook the broad facts in the history of this controversy. All three branches of the Government conspired to ruin his enterprise. The Executive Department issued proclamations for which no warrant could be found in the Constitution and laws of the country. The Volksraad enacted legislation which, on its face, does violence to fundamental principles of justice recognized in every enlightened community. The judiciary, at first recalcitrant, was at length reduced to submission and brought into line with a determined policy of the Executive to reach the desired result regardless of Constitutional guarantees and inhibitions. And in the end, growing out of this very transaction, a system was created under which all property rights became so manifestly insecure as to challenge intervention by the British Government in the interest of elementary justice for all concerned, and to lead finally to the disappearance of the State itself. Annexation by Great Britain became an act of political necessity if those principles of justice and fair dealing which prevail in every country where property rights are respected were to be vindicated and applied in the future in this region.

We do not regard as a decisive factor Brown's failure or inability to acquire specific claims, nor are we inclined to refine over a possible distinction between a right to specific real property, and the right to acquire such a right. We prefer to take a broader view of this situation, and we hold that through compliance with the laws and regulations in force on July 19, 1895, Brown acquired rights of a substantial character, the improper deprivation of which did constitute a denial of justice. Certainly the High Court, in its decision, so regarded them.

We are not impressed by the argument founded upon the alleged neglect to exhaust legal remedies by taking out a new summons. At best this argument would, under the Terms of Submission which control us here, be merely a matter to be taken into account as one of the equities, and could not be considered as in any sense a bar. In the actual circumstances, however, we feel that the futility of further proceedings has been fully demonstrated, and that the advice of his counsel was amply justified. In the frequently quoted language of an American Secretary of State:

"A claimant in a foreign State is not required to exhaust justice in such State when there is no justice to exhaust" (Moore's International Law Digest, vol. VI, p. 677).

On this branch of the case we are satisfied, therefore, that there was a real denial of justice, and that if there had never been any war, or annexation by Great Britain, and if this proceeding were directed against the South African Republic, we should have no difficulty in awarding damages on behalf of the claimant.

Passing to the second main question involved, we are equally clear that this liability never passed to or was assumed by the British Government. Neither in the terms of peace granted at the time of the surrender of the Boer Forces (answer, p. 192), nor in the Proclamation of Annexation (answer, p. 191), can there be found any provision referring to the assumption of liabilities of this nature. It should be borne in mind that this was simply a pending claim for damages against certain officials and had never become a liquidated debt of the former State. Nor is there, properly speaking, any question of State succession here involved. The United States plants itself squarely on two propo-

sitions: first, that the British Government, by the acts of its own officials with respect to Brown's case, has become liable to him; and, secondly, that in some way a liability was imposed upon the British Government by reason of the peculiar relation of suzerainty which is maintained with respect to the South African Republic.

The first of these contentions is set forth in the reply as follows:

"The United States reaffirms that Brown suffered a denial of justice at the hands of authorities of the South African Republic. Had it not been for this denial of justice, it may be assumed that a diplomatic claim would not have arisen. But it does not follow that, as is contended in His Majesty's Government's answer, it is incumbent on the United States to show that there is a rule of international law imposing liability on His Majesty's Government for the tortious acts of the South African Republic. Occurrences which took place during the existence of the South African Republic are obviously relevant and important in connexion with the case before the Tribunal, but the United States contends that acts of the British Government and of British officials and the general position taken by them with respect to Brown's case have fixed liability on His Majesty's Government." (reply, p. 2.)

Again on page 8 of the reply it is said:

"The succeeding British authorities to whom Brown applied for the licences to which he had been declared entitled by the Court also refused to grant the licences, and therefore refused to carry out the decree of the Court which the United States contends was binding on them. And they have steadfastly refused to make compensation to Brown in lieu of the licences to which the Court declared Brown to be entitled, failing the granting of the licences."

The American Agent quoted these passages in his oral argument (transcript of 17th sitting, November 9, 1923, pp. 337-338) and disclaimed any intention of maintaining "that there is any general liability for torts of a defunct State" (*ibid.*, p. 339). We have searched the record for any indication that the British authorities did more than leave this matter exactly where it stood when annexation took place. They did not redress the wrong which had been committed nor did they place any obstacles in Brown's path; they took no action one way or the other. No British official nor any British court undertook to deny Brown justice or to perpetuate the wrong. The Attorney General of the Colony, in his opinion, declared that the courts were still open to the claimant. The contention of the American Agent amounts to an assertion that a succeeding State acquiring a territory by conquest without any undertaking to assume such liabilities is bound to take affirmative steps to right the wrongs done by the former State. We cannot indorse this doctrine.

The point as to suzerainty is likewise not well taken. It is not necessary to trace the vicissitudes of the South African State in its relation to the British Crown, from the Sand River Convention of 1852, through the annexation of 1877, the Pretoria Convention of 1881, and the London Convention of 1884, to the definitive annexation in 1900. We may grant that a special relation between Great Britain and the South African State, varying considerably in its scope and significance from time to time, existed from the beginning. No doubt Great Britain's position in South Africa imposed upon her a peculiar status and responsibility. She repeatedly declared and asserted her authority as the so-called paramount Power in the region; but the authority which she exerted over the South African Republic certainly at the time of the occurrences here under consideration, in our judgment fell far short of what would be required to make her responsible for the wrong inflicted upon Brown. Concededly, the general relation of suzerainty created by the Pretoria Convention of 1881 (reply, p. 26), survived after the concluding of the London Convention

of 1884 (reply, p. 37). Nevertheless, the specific authority of the suzerain power was materially changed, and under the 1884 Convention it is plain that Great Britain as suzerain, reserved only a qualified control over the relations of the South African Republic with foreign powers. The Republic agreed to conclude no "treaty or engagement" with any State or nation other than the Orange Free State, without the approval of Great Britain, but such approval was to be taken for granted if the latter did not give notice that the treaty was in conflict with British interests within six months after it was brought to the attention of Her Majesty's Government. Nowhere is there any clause indicating that Great Britain had any right to interest herself in the internal administration of the country, legislative, executive or judicial; nor is there any evidence that Great Britain ever did undertake to interfere in this way. Indeed, the only remedy which Great Britain ever had for maladministration affecting British subjects and those of other Powers residing in the South African Republic was, as the event proved, the resort to war. If there had been no South African war, we hold that the United States Government would have been obliged to take up Brown's claim with the Government of the Republic and that there would have been no ground for bringing it to the attention of Great Britain. The relation of suzerain did not operate to render Great Britain liable for the acts complained of.

Now, therefore:

The decision of the Tribunal is that the claim of the United States Government be disallowed.

RIO GRANDE IRRIGATION AND LAND COMPANY, LIMITED
(GREAT BRITAIN) *v.* UNITED STATES

(*November 28, 1923. Pages 336-346.*)

PRELIMINARY MOTION: PROCEDURE.—JURISDICTION: POWER OF TRIBUNAL TO DECIDE ON OWN.—APPLICABLE LAW, INTERPRETATION OF MUNICIPAL LAW.—PRIVATE INTEREST IN CLAIM.—PRESENTATION OF CLAIM: PROCEDURE. Lease on May 30, 1896, by American company to English company of irrigation undertaking in New Mexico. Preliminary motion to dismiss claim for absence of British interest and breach of rules of procedure in presentation of case. British objection that no written application made for motion and no written agreement existed between Agents. *Held* that Tribunal has inherent power, and indeed duty, to entertain and, in proper cases, to raise for itself preliminary points going to its jurisdiction. *Held* also that according to applicable American law lease of undertaking not valid and that English company possesses no interest on which claim can be founded. *Held* further that defects in British memorial not such as to furnish adequate ground for preliminary motion. Claim disallowed.

Cross-references: Am. J. Int. Law, vol. 19 (1925), pp. 206-214; Annual Digest, 1923-1924, pp. 180-183.

Bibliography: Nielsen, pp. 332-335.

This is a claim preferred by His Britannic Majesty's Government on behalf of the Rio Grande Irrigation and Land Company, Limited, and founded upon an alleged denial of real property rights.