

REPORTS OF INTERNATIONAL  
ARBITRAL AWARDS



RECUEIL DES SENTENCES ARBITRALES

VOLUME VI

**United Nations Publication**

**Sales No. : 1955. V. 3**

Price : \$U.S. 4.00 ; 28/- stg. ; Sw. fr. 17.00  
(or equivalent in other currencies)

REPORTS OF INTERNATIONAL  
ARBITRAL AWARDS

---

RECUEIL DES SENTENCES  
ARBITRALES

VOLUME VI

**Decisions of Arbitral Tribunal  
GREAT BRITAIN—UNITED STATES  
and of Claims Commissions  
UNITED STATES, AUSTRIA AND HUNGARY  
and  
UNITED STATES—PANAMA**

---

**Décisions du Tribunal arbitral  
GRANDE-BRETAGNE — ETATS-UNIS  
et des Commissions de réclamations  
ETATS-UNIS, AUTRICHE ET HONGRIE  
et  
ETATS-UNIS — PANAMA**

---



UNITED NATIONS — NATIONS UNIES



## FOREWORD

The systematic collection of decisions of international claims commissions contemplated in the foreword to volume IV of the present series of Reports of International Arbitral Awards and already embracing the decisions of the so-called Mexican Claims Commissions, as far as available (vol. IV: General and Special Claims Commissions Mexico-United States; vol. V: Claims Commissions Great Britain-Mexico, France-Mexico and Germany-Mexico), is continued with the present volume devoted to the decisions of the Arbitral Tribunal United States-Great Britain constituted under the Special Agreement of August 18, 1910, the Tripartite Claims Commission United States. Austria and Hungary constituted under the Agreement of November 26, 1924, and the General Claims Commission United States-Panama constituted under the Claims Convention of July 28, 1926, modified by the Convention of December 17, 1932.

The mode of presentation followed in this volume is the same as that used in volumes IV-V. Each award is captioned under the name of the individual claimant, together with identification of the espousing and the respondent governments. Notation is made of the date of the award, any separate concurring or dissenting opinions rendered by the commissioners, and the original report from which the decision was drawn. A head note or digest is offered in each case to facilitate its use in research by practitioners and students of international law. The index found at the end of this volume is based upon such head notes. In view of the fact that the head notes offered in this volume, like those preceding the decisions included in volumes IV-V, are more elaborate than the head notes offered in volumes I-III, the index to the present volume, unlike the one placed at the end of volume III and covering the first three volumes of the series, contains no indications regarding actual decisions given on particular points. It is trusted, however, that through the increased head notes to which the index refers the reader consulting the index will be able to inform himself as quickly as under the system adopted for volumes I-III.

It will be observed that historical notes of the establishment and work of each tribunal, bibliographies relating to each tribunal, and, finally, bibliographical references to discussions of particular cases are included. In addition, if any case has been published in any source other than that from which the instant publication is made, reference has been given to such source or sources.

Since the appreciation of each decision depends not only upon its contents but also upon the terms of the particular *compromis* and the law laid down by it to be applied by the tribunal, the texts of the treaty or treaties under which each tribunal functioned are included.

This volume, like volumes IV and V, was prepared by the Legal Department (since January 1, 1955: the Office of Legal Affairs) of the Secretariat of the United Nations.

---



## TABLE OF CONTENTS

	<i>Page</i>
Foreword . . . . .	v
Table of Abbreviations . . . . .	xiii

### PART I

#### **Arbitral Tribunal (Great Britain-United States) constituted under the Special Agreement of August 18, 1910**

Historical Note . . . . .	5
Bibliography . . . . .	7
Special Agreement :	
Special Agreement for the submission to arbitration of pecuniary claims outstanding between the United States and Great Britain, concluded August 18, 1910 . . . . .	9
Decisions:	
Great Britain <i>v.</i> U.S. (Yukon Lumber case) . . . . .	17
Owners of the <i>Lindisfarne</i> (Gr. Br.) <i>v.</i> U.S. . . . .	21
William Hardman (Gr. Br.) <i>v.</i> U.S. . . . .	25
The Glasgow King Shipping Company (Limited) (Gr. Br.) <i>v.</i> U.S. ( <i>King Robert</i> case) . . . . .	27
Great Britain and Others (Gr. Br.) <i>v.</i> U.S. ( <i>Canadienne</i> case) . . . . .	29
Henry James Bethune (Gr. Br.) <i>v.</i> U.S. ( <i>Lord Nelson</i> case) . . . . .	32
Great Northwestern Telegraph Company of Canada (Gr. Br.) <i>v.</i> U.S. . . . .	35
Sivewright, Bacon and Co. (Gr. Br.) <i>v.</i> U.S. ( <i>Eastry</i> case) . . . . .	36
Representatives of Elizabeth Cadenhead (Gr. Br.) <i>v.</i> U.S. . . . .	40
Owner of the <i>Frederick Gerring, Jr.</i> (U.S.) <i>v.</i> Gr. Br. . . . .	41
Home Frontier and Foreign Missionary Society of the United Brethren in Christ (U.S.) <i>v.</i> Gr. Br. . . . .	42
Owners of the Cargo of the <i>Coquiltam</i> (Gr. Br.) <i>v.</i> U.S. . . . .	45
Owners of the <i>Tattler</i> (U.S.) <i>v.</i> Gr. Br. . . . .	48
H. J. Randolph Hemming (Gr. Br.) <i>v.</i> U.S. . . . .	51
Owners of the <i>Sidra</i> (Gr. Br.) <i>v.</i> U.S. . . . .	53
Owners of the <i>Jessie</i> , the <i>Thomas F. Bayard</i> and the <i>Pescawha</i> (Gr. Br.) <i>v.</i> U.S. . . . .	57
Owners of the <i>Argonaut</i> and the <i>Colonel Jonas H. French</i> (U.S.) <i>v.</i> Gr. Br. . . . .	60
China Navigation Co., Ltd. (Gr. Br.) <i>v.</i> U.S. ( <i>Newchwang</i> case) . . . . .	64
Owners, Officers and Men of the <i>Wanderer</i> (Gr. Br.) <i>v.</i> U.S. . . . .	68

	<i>Page</i>
Charterers and Crew of the <i>Kale</i> (Gr. Br.) <i>v.</i> U.S. . . . .	77
Laughlin McLean (Gr. Br.) <i>v.</i> U.S. ( <i>Favourite</i> case) . . . . .	82
Jesse Lewis (U.S.) <i>v.</i> Gr. Br. ( <i>David J. Adams</i> case) . . . . .	85
George Rodney Burt (U.S.) <i>v.</i> Gr. Br. (Fijian Land Claims) . . . . .	93
Benson Robert Henry (U.S.) <i>v.</i> Gr. Br. (Fijian Land Claims) . . . . .	100
Heirs of John B. Williams (U.S.) <i>v.</i> Gr. Br. (Fijian Land Claims) . . . . .	104
Isaac M. Brower (U.S.) <i>v.</i> Gr. Br. (Fijian Land Claims) . . . . .	109
Eastern Extension, Australasia and China Telegraph Company, Ltd. (Gr. Br.) <i>v.</i> U.S. . . . .	112
Cuba Submarine Telegraph Company, Ltd. (Gr. Br.) <i>v.</i> U.S. . . . .	118
Robert E. Brown (U.S.) <i>v.</i> Gr. Br. . . . .	120
Rio Grande Irrigation and Land Company, Ltd. (Gr. Br.) <i>v.</i> U.S. . . . .	131
Union Bridge Company (U.S.) <i>v.</i> Gr. Br. . . . .	138
Several Canadian Hay Importers (Gr. Br.) <i>v.</i> U.S. (Canadian Claims for Refund of Duties) . . . . .	142
Owner of the <i>R. T. Roy</i> (U.S.) <i>v.</i> Gr. Br. . . . .	147
Adolph G. Studer (U.S.) <i>v.</i> Gr. Br. . . . .	149
Owner of the <i>Horace B. Parker</i> (U.S.) <i>v.</i> Gr. Br. . . . .	153
Owner of the <i>Thomas F. Bayard</i> (U.S.) <i>v.</i> Gr. Br. . . . .	154
Owner of the <i>Sarah B. Putnam</i> (U.S.) <i>v.</i> Gr. Br. . . . .	156
F. H. Redward and Others (Gr. Br.) <i>v.</i> United States (Hawaiian Claims) . . . . .	157
Several British Subjects (Gr. Br.) <i>v.</i> U.S. (Iloilo Claims) . . . . .	158
D. Earnshaw and Others (Gr. Br.) <i>v.</i> U.S. ( <i>Zafro</i> case) . . . . .	160
Luzon Sugar Refining Company, Ltd. (Gr. Br.) <i>v.</i> U.S. . . . .	165
J. Parsons (Gr. Br.) <i>v.</i> U.S. . . . .	165
Successors of William Webster (U.S.) <i>v.</i> Gr. Br. . . . .	166
Cunningham and Thompson Company and Others (Gr. Br.) <i>v.</i> U.S. . . . .	171
Cayuga Indians (Gr. Br.) <i>v.</i> U.S. . . . .	173

## PART II

**Tripartite Claims Commission (United States, Austria and  
Hungary) constituted under the Agreement of November 26, 1924**

Historical Note . . . . .	195
Bibliography . . . . .	197
Agreement:	
Agreement between the United States and Austria and Hungary for the deter- mination of the amounts to be paid by Austria and by Hungary in satisfac- tion of their obligations under the Treaties concluded by the United States with Austria on August 24, 1921, and with Hungary on August 29, 1921 . . . . .	199

## Decisions :

Administrative Decision No. I . . . . .	203
Administrative Decision No. II . . . . .	212
Herbert Payne (U.S.) <i>v.</i> Austria and Hungary . . . . .	230
Mrs. Julius Biro (U.S.) <i>v.</i> Hungary . . . . .	231
William Schneider and Joseph Bleier (U.S.) <i>v.</i> Hungary . . . . .	231
Kurt Hepe (U.S.) <i>v.</i> Hungary and Hungarian Commercial Bank of Pest . . . . .	232
Griff Glover (U.S.) <i>v.</i> Austria and Oesterreichischer-Lloyd . . . . .	233
Joseph Amschler (U.S.) <i>v.</i> Austria and Banca Commerciale Triestina . . . . .	234
Friederike Gottlieb (U.S.) <i>v.</i> Austria and Bohemian Savings Bank . . . . .	234
Alexander Karl Rudolph (U.S.) <i>v.</i> Austria . . . . .	235
Henry Neugass (U.S.) <i>v.</i> Austria and Hungary . . . . .	235
Estate of Alexander Ortlieb (U.S.) <i>v.</i> Austria and Edward Coumont, Executor of Estate of Louis Ortlieb . . . . .	240
Karl Klein (U.S.) <i>v.</i> Austria . . . . .	241
Anton Pentz (U.S.) <i>v.</i> Austria, Hungary, and Austro-Hungarian Bank . . . . .	242
Charles R. Crane (U.S.) <i>v.</i> Austria and City of Vienna . . . . .	244
Benjamin Albert Kapp (U.S.) <i>v.</i> Hungary . . . . .	246
Alexander Tellech (U.S.) <i>v.</i> Austria and Hungary . . . . .	248
Max Fox (U.S.) <i>v.</i> Austria and Hungary . . . . .	249
Grubnau Bros., Inc., and Atlantic Mutual Insurance Company (U.S.) <i>v.</i> Austria and Hungary . . . . .	250
Rosa H. Kohn (U.S.) <i>v.</i> Hungary . . . . .	251
Indian Motorcycle Company (U.S.) <i>v.</i> Austria and Hungary . . . . .	252
Henry Rothmann (U.S.) <i>v.</i> Austria and Hungary . . . . .	253
Louis Zecchetto (U.S.) <i>v.</i> Austria and Hungary . . . . .	259
Louis John Hois (U.S.) <i>v.</i> Austria and Wiener Bank-Verein . . . . .	260
The First National Bank of Boston (U.S.) <i>v.</i> Austria and Wiener Bank-Verein . . . . .	266
Mary Federer, Administratrix of the Estate of John J. Federer (U.S.) <i>v.</i> Austria and Wiener Bank-Verein . . . . .	268
George and Theresa Zohrer (U.S.) <i>v.</i> Austria and Postsparkassen-Amt in Wien . . . . .	272
Transatlantic Trust Company (U.S.) <i>v.</i> Austria and Postsparkassen-Amt in Wien . . . . .	274
Henry Howard Ellison, William Rodman Ellison, and Henry Howard Ellison, Jr., American Partners in the late Firm of John B. Ellison & Sons (U.S.) <i>v.</i> Austria and Leopold Kuranda . . . . .	274
Cyrus Wilfred Perkins (U.S.) <i>v.</i> Austria and Wien-Floridsdorfer Mineraloel Fabrik . . . . .	275
Hugo Dylla (U.S.) <i>v.</i> Austria; John Szanto and Szekeley Varga Katalin Szanto <i>v.</i> Austria; Charles Gasper (U.S.) <i>v.</i> Austria . . . . .	277
Harald Waldemar von Campen (U.S.) <i>v.</i> Austria . . . . .	277
Camilla Short (U.S.) <i>v.</i> Austria and Hungary . . . . .	278

	<i>Page</i>
Jacob Margulies (U.S.) <i>v.</i> Austria and Hungary . . . . .	279
Emil Frenkel (U.S.) <i>v.</i> Austria . . . . .	282
Erna McArthur (U.S.) <i>v.</i> Austria . . . . .	285
Elizabeth Filo and Bertha Salay (U.S.) <i>v.</i> Hungary . . . . .	286
John Ujvari (U.S.) <i>v.</i> Hungary . . . . .	289
Adolfo Stahl (U.S.) <i>v.</i> Hungary . . . . .	290

### PART III

#### **General Claims Commission (United States and Panama) constituted under the Claims Convention of July 28, 1926, modified by the Convention of December 17, 1932**

Historical Note . . . . .	297
Bibliography . . . . .	299
Conventions:	
Claims Convention between the United States of America and Panama of July 28, 1926 . . . . .	301
Convention between the United States of America and Panama of December 17, 1932, modifying Claims Convention of July 28, 1926 . . . . .	305
Decisions:	
Agnes Ewing Brown (U.S.) <i>v.</i> Panama . . . . .	307
Walter A. Noyes (U.S.) <i>v.</i> Panama . . . . .	308
Lettie Charlotte Denham and Frank Parlin Denham (U.S.) <i>v.</i> Panama . . . . .	312
Francisco and Gregorio Castañeda and José de León R. (Panama) <i>v.</i> U.S. . . . .	313
Juan Manzo (Panama) <i>v.</i> U.S. . . . .	314
James Perry (U.S.) <i>v.</i> Panama . . . . .	315
Gust Adams (U.S.) <i>v.</i> Panama . . . . .	321
Charlie R. Richeson, George Klimp, James Langdon, <i>et al.</i> , and W.A. Day (U.S.) <i>v.</i> Panama . . . . .	325
Cecelia Dexter Baldwin, Administratrix of the Estate of Harry D. Baldwin, and Others (U.S.) <i>v.</i> Panama . . . . .	328
John W. Browne (U.S.) <i>v.</i> Panama . . . . .	333
Lettie Charlotte Denham and Frank Parlin Denham (U.S.) <i>v.</i> Panama . . . . .	334
Mariposa Development Company and Others (U.S.) <i>v.</i> Panama . . . . .	338
José María Vásquez Díaz, Assignee of Pablo Elías Velásquez (Panama) <i>v.</i> U.S. . . . .	341
Guillermo Colunje (Panama) <i>v.</i> U.S. . . . .	342
Juan Añorbes (Panama) <i>v.</i> U.S. . . . .	344
José Azael Ruiz (Panama) <i>v.</i> U.S. . . . .	345
Caroline Fitzgerald Shearer, Administratrix of the Estate of George Fitz- gerald (U.S.) <i>v.</i> Panama . . . . .	346

	xi	<i>Page</i>
Hampden Osborne Banks, Hazel E. Hiltbold, Lewis Crandall Golder, and Richard Joseph Lee (U.S.) <i>v.</i> Panama . . . . .		349
William Gerald Chase (U.S.) <i>v.</i> Panama . . . . .		352
Marguerite de Joly de Sabla (U.S.) <i>v.</i> Panama . . . . .		358
Abraham Solomon (U.S.) <i>v.</i> Panama . . . . .		370
Panama and Abundio Caselli (Panama) <i>v.</i> U.S. . . . .		377
Panama and José C. Monteverde (Panama) <i>v.</i> U.S. . . . .		381
Compañía de Navegación Nacional (Panama) <i>v.</i> U.S. . . . .		382
<b>Table of Cases</b> . . . . .		387
<b>Index</b> . . . . .		391





## TABLE OF ABBREVIATIONS

Am. J. Int. Law Annual Digest	<i>The American Journal of International Law Annual Digest and Reports of Public International Law Cases</i>
British Yearbook Friedensrecht	<i>The British Yearbook of International Law Friedensrecht. Ein Nachrichtenblatt über die Durchführung des Frie- densvertrages</i>
Jahrb. des V. L.N.T.S. Malloy	<i>Jahrbuch des Völkerrechts League of Nations, Treaty Series United States Department of State. Treaties, Conventions, Internatio- nal Acts, Protocols and Agreements between the United States of Ame- rica and other powers, 1775-1937. (Washington, Government Printing Office, 1910-1938.) 4 Volumes.</i>
de Martens, N.R.G.	de Martens, G. Fr., <i>Nouveau Recueil Général de Traités</i>
State Papers	<i>British and Foreign State Papers</i>
U.K. Treaty Ser.	<i>United Kingdom, Treaty Series</i>
U.S. Treaty Ser.	<i>United States, Treaty Series</i>
Z.a.ö.R.u.V.	<i>Zeitschrift für ausländisches öffentliches Recht und Völkerrecht</i>

---



PART I

ARBITRAL TRIBUNAL  
(GREAT BRITAIN-UNITED STATES)  
CONSTITUTED UNDER THE SPECIAL  
AGREEMENT OF AUGUST 18, 1910



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

---

**SPECIAL AGREEMENT: August 18, 1910.**

---

**ARBITRATORS: Henri Fromageot (France), President (1913-1914, 1923-1924), Alfred Nerincx (Belgium), President (1925-1926), Chandler P. Anderson, American Arbitrator (1913-1914), Robert E. Olds, American Arbitrator (1923-1924), Roscoe Pound, American Arbitrator (1925-1926), Sir Charles Fitzpatrick, British Arbitrator (1913-1914, 1925-1926), E. A. Mitchell-Innes, British Arbitrator (1923-1924).**

---

**REPORT: American and British Claims Arbitration under the Special Agreement concluded between the United States and Great Britain, August 18, 1910, Report of Fred. K. Nielsen, Agent and Counsel for the United States. (Government Printing Office, Washington, 1926.)**

---



## HISTORICAL NOTE

The Tribunal instituted under the Special Agreement, concluded between Great Britain and the United States of America on August 18, 1910, historically takes the third place among the Commissions for the settlement of claims between the two nations. The first of these was the Commission provided for in the Convention of February 8, 1853,<sup>1</sup> and whose jurisdiction, though very wide, was limited to claims which arose since the signature of the Treaty of Ghent of December 24, 1814. The second was the Commission set up under the Treaty of Washington of May 8, 1871,<sup>2</sup> and which had exclusively to decide upon claims arisen out of acts committed during the American War of Secession. The present Tribunal was created to adjudicate the pecuniary claims which had remained unsettled under the previous arrangements, as well as those which had arisen in the meantime. An unsuccessful attempt to settle the differences which more particularly concerned the United States and Canada had been made in 1898 by the United States-Canadian Joint High Commission.

Negotiations leading up to the Special Agreement of August 18, 1910, began in 1906. The most pressing problem discussed was the so-called "Fisheries Question" concerning the rights of American fishermen under the Treaty of October 20, 1818, between Great Britain and the United States, and the alleged violation of these rights by Canadian and Newfoundland authorities. It was decided to submit the question of the legality of the Canadian and Newfoundland acts to the Permanent Court of Arbitration under the general arbitration treaty concluded between Great Britain and the United States on April 4, 1908. It was furthermore agreed that other claims outstanding between the two nations and later to be determined would be submitted to a special arbitral tribunal which, if necessary, after the Permanent Court's award in the "Fisheries Question" would also decide upon individual fisheries claims.

On September 7, 1910, the Permanent Court of Arbitration handed down its decision in the North Atlantic Coast Fisheries case, the effect of which was to make Newfoundland liable for damages in a number of matters. Negotiations were then reopened with a view to the determination of the claims to be submitted to the Arbitral Tribunal. A First Schedule of Claims, never followed by other schedules, was drafted in pursuance of Article 1 of the Special Agreement and signed on June 6, 1911. On July 6, 1911, the Terms of Submission were agreed upon. Special Agreement, Schedule of Claims and Terms of Submission were approved by the United States Senate on July 19, 1911. On April 26, 1912, the exchange of ratifications took place.

Sessions of the Arbitral Tribunal were held at Washington from May 13-17, 1913, at Ottawa from June 9-18, 1913, and at Washington from March 9-May 1, 1914. A session intended to take place at Paris in the beginning of August, 1914, had to be postponed in connexion with the war. The decisions

<sup>1</sup> Malloy, vol. 1, p. 664; State Papers, vol. 42, p. 34; de Martens, N.R.G., 3rd series, vol. 16, part 1, p. 490.

<sup>2</sup> Malloy, vol. 1, p. 716; State Papers, vol. 61, p. 40; de Martens, N.R.G., 3rd series, vol. 20, p. 698.

of which by then the drafting and discussion had been completed were, in agreement with both Governments, announced by President Fromageot at Paris after the war's end, on December 8, 1920, without a formal meeting of the Tribunal. In 1923, the Tribunal resumed its regular meetings. The last claim was decided upon by the Tribunal's award of January 22, 1926.

The total amounts awarded by the Tribunal are U.S. \$ 239,506.20 in 19 British claims, and U.S. \$ 84,113 in 32 United States claims, the other British and United States claims having been dismissed or disallowed.

---

## BIBLIOGRAPHY

- Special Agreement of August 18, 1910; U.S. Treaty Ser., No. 573; U.K. Treaty Ser., 1912, No. 11; State Papers, vol. 103, p. 322; de Martens, N.R.G., 3rd series, vol. 6, p. 361.
- "The British-American Pecuniary Claims Arbitration", Editorial Comment, Am. J. Int. Law, vol. 5 (1911), pp. 1033-1036.
- "The American and British Pecuniary Claims Arbitration", Editorial Comment, Am. J. Int. Law, vol. 7 (1913), pp. 575-580.
- Chandler P. Anderson, "American and British Claims Arbitration Tribunal", Editorial Comment, Am. J. Int. Law, vol. 15 (1921), pp. 266-268.
- Sir Cecil Hurst, K.C.B., K.C., "British-American Pecuniary Claims Commission", British Yearbook, vol. 2, 1921-1922, pp. 193 *et seq.*
- "American-British Claims Arbitral Tribunal", Current Note, Am. J. Int. Law, vol. 19, (1925), p. 363.
- "American-British Arbitral Tribunal", Current Note, Am. J. Int. Law, vol. 20 (1926), pp. 140-141.
- Fred. K. Nielsen, American and British Claims Arbitration under the Special Agreement concluded between the United States and Great Britain, August 18, 1910, Report of—, Agent and Counsel for the United States (Washington, Government Printing Office, 1926).

*See also* the list of official documents relating to this arbitration published in J. ter Meulen and A. Lysen, Bibliothèque du Palais de la Paix, deuxième supplément (1929) au catalogue (1916) (Leyden, 1930), pp. 626-635.

---



### Special Agreement

## SPECIAL AGREEMENT FOR THE SUBMISSION TO ARBITRATION OF PECUNIARY CLAIMS OUTSTANDING BETWEEN THE UNITED STATES AND GREAT BRITAIN

*Signed August 18, 1910; ratifications exchanged April 26, 1912<sup>1</sup>*

Whereas the United States and Great Britain are signatories of the convention of the 18th October, 1907, for the pacific settlement of international disputes, and are desirous that certain pecuniary claims outstanding between them should be referred to arbitration, as recommended by article 38 of that convention:

Now, therefore, it is agreed that such claims as are contained in the schedules drawn up as hereinafter provided shall be referred to arbitration under chapter IV of the said convention, and subject to the following provisions:

ARTICLE 1. Either party may, at any time within four months from the date of the confirmation of this agreement, present to the other party any claims which it desires to submit to arbitration. The claims so presented shall, if agreed upon by both parties, unless reserved as hereinafter provided, be submitted to arbitration in accordance with the provisions of this agreement. They shall be grouped in one or more schedules which, on the part of the United States, shall be agreed on by and with the advice and consent of the Senate, His Majesty's Government reserving the right before agreeing to the inclusion of any claim affecting the interests of a self-governing dominion of the British Empire to obtain the concurrence thereto of the Government of that dominion.

Either party shall have the right to reserve for further examination any claims so presented for inclusion in the schedules; and any claims so reserved shall not be prejudiced or barred by reason of anything contained in this agreement.

ARTICLE 2. All claims outstanding between the two Governments at the date of the signature of this agreement and originating in circumstances or transactions anterior to that date, whether submitted to arbitration or not, shall thereafter be considered as finally barred unless reserved by either party for further examination as provided in article 1.

ARTICLE 3. The Arbitral Tribunal shall be constituted in accordance with article 87 (chapter IV) and with article 59 (chapter III) of the said convention, which are as follows:

"ARTICLE 87. Each of the parties in dispute appoints an arbitrator. The two arbitrators thus selected choose an umpire. If they do not agree on this point, each of them proposes two candidates taken from the general list of the

<sup>1</sup> Source: Fred. K. Nielsen, *American and British Claims Arbitration under the Special Agreement concluded between the United States and Great Britain, August 18, 1910, Report of—, Agent and Counsel for the United States* (Washington, Government Printing Office, 1926), pp. 3 *et seq.*

members of the Permanent Court, exclusive of the members appointed by either of the parties and not being nationals of either of them; which of the candidates thus proposed shall be the umpire is determined by lot.

“The umpire presides over the tribunal, which gives its decisions by a majority of votes.”

“ARTICLE 59. Should one of the arbitrators either die, retire, or be unable for any reason whatever to discharge his functions, the same procedure is followed for filling the vacancy as was followed for appointing him.”

ARTICLE 4. The proceedings shall be regulated by so much of chapter IV of the convention and of chapter III, excepting articles 53 and 54, as the tribunal may consider to be applicable and to be consistent with the provisions of this agreement.

ARTICLE 5. The tribunal is entitled, as provided in article 74 (chapter III) of the convention, to issue rules of procedure for the conduct of business, to decide the forms, order, and time in which each party must conclude its arguments, and to arrange all formalities required for dealing with the evidence.

The agents and counsel of the parties are authorized, as provided in article 70 (chapter III), to present orally and in writing to the tribunal all the arguments they may consider expedient in support or in defense of each claim.

The tribunal shall keep record of the claims submitted, and the proceedings thereon, with the dates of such proceedings. Each Government may appoint a secretary. These secretaries shall act together as joint secretaries of the tribunal and shall be subject to its direction. The tribunal may appoint and employ any other necessary officer or officers to assist it in the performance of its duties.

The tribunal shall decide all claims submitted upon such evidence or information as may be furnished by either Government.

The tribunal is authorized to administer oaths to witnesses and to take evidence on oath.

The proceedings shall be in English.

ARTICLE 6. The tribunal shall meet at Washington at a date to be hereafter fixed by the two Governments, and may fix the time and place of subsequent meetings as may be convenient, subject always to special direction of the two Governments.

ARTICLE 7. Each member of the tribunal, upon assuming the function of his office, shall make and subscribe a solemn declaration in writing that he will carefully examine and impartially decide, in accordance with treaty rights and with the principles of international law and of equity, all claims presented for decision, and such declaration shall be entered upon the record of the proceedings of the tribunal.

ARTICLE 8. All sums of money which may be awarded by the tribunal on account of any claim shall be paid by the one Government to the other, as the case may be, within eighteen months after the date of the final award, without interest and without deduction, save as specified in the next article.

ARTICLE 9. Each Government shall bear its own expenses. The expenses of the tribunal shall be defrayed by a ratable deduction on the amount of the sums awarded by it, at a rate of 5 per cent, on such sums, or at such lower rate as may be agreed upon between the two Governments; the deficiency, if any, shall be defrayed in equal moieties by the two Governments.

ARTICLE 10. The present agreement, and also any schedules agreed thereunder, shall be binding only when confirmed by the two Governments by an exchange of notes.

In witness whereof this agreement has been signed and sealed by the Secretary of State of the United States, Philander C. Knox, on behalf of the United States, and by His Britannic Majesty's Ambassador at Washington, the Right Honorable James Bryce, O.M., on behalf of Great Britain.

Done in duplicate at the City of Washington, this 18th day of August, one thousand nine hundred and ten.

[SEAL] Philander C. KNOX  
[SEAL] James BRYCE

### SCHEDULE OF CLAIMS

FIRST SCHEDULE OF CLAIMS TO BE SUBMITTED TO ARBITRATION IN ACCORDANCE WITH THE PROVISIONS OF THE SPECIAL AGREEMENT FOR THE SUBMISSION TO ARBITRATION OF PECUNIARY CLAIMS OUTSTANDING BETWEEN THE UNITED STATES AND GREAT BRITAIN, SIGNED ON THE 18TH DAY OF AUGUST, 1910, AND THE TERMS OF SUCH SUBMISSION

CLASS I. Claims based on alleged denial in whole or in part of real property rights.

#### AMERICAN

Webster, Studer, R. E. Brown, Samuel Clark.

#### BRITISH

Cayuga Indians, Rio Grande.

#### *Fijian Land Claims*

Burt, Henry, Brower, Williams.

CLASS II. Claims based on the acts of the authorities of either Government in regard to the vessels of the nationals of the other Government, or for the alleged wrongful collection or receipt of customs duties or other charges by the authorities of either Government.

#### AMERICAN

#### *Fishing Claims*

##### Group 1

#### *Against Newfoundland:*

Cunningham & Thompson (18 vessels): Masconomo, Arbutus, Anglo-Saxon, Quickstep, Nourmahal, Puritan, Talisman, Norma, Norumbega, Aloha, Ingomar, Jennie B. Hodgdon, Arkona, Arethusia, Independence II, S. P. Willard, Corona, Saladin.

Davis Bros. (10 vessels): Oregon, Margaret, Theo. Roosevelt, L. M. Stanwood, Georgie Campbell, Blanche, Veda McKnown, E. A. Perkins, Kearsarge, Lena & Maud.

Wm. H. Parsons (12 vessels): Corsair, Grace L. Fears, Argo, Lizzie Griffin, Independence, Independ-

#### BRITISH

#### *Shipping Claims*

Coquitlan, Favourite, Wanderer, Kate, Lord Nelson, Canadienne, Eastry, Lindisfarne, Newchwang, Sidra, Maroa, Thomas F. Bayard, Jessie, Peschawa.

#### *Canadian Claims for Refund of Hay Duties*

Peter Anderson, Charles Arpin, Nathaniel Bachelder, Magloire G. Blain, Toussaint Bourassa, continuing partner of Bourassa and Forrester; Pierre Bourgeois, William Burland & Company, Charles S. Rowe, surviving partner; Frederick Catudal; L. N. Charlebois, heir and assignee of Denis N. Charlebois; Joseph Couture; Wilfrid Dorais, heir of Louis T. Dorais, John and Francis Ewing, John Ewing, surviv-

AMERICAN (*continued*)

ence II, Dreadnought, Robin Hood, Helen G. Wells, Colonial, Alice M. Parsons, Mildred V. Lee.

Gorton-Pew Co. (37 vessels): A. M. Parker, Priscilla Smith, Senator Gardner, Corsair, Vigilant, Harry A. Nickerson, Gossip, Flirt, Ella G. King, Helen G. Wells, Ramona, Massachusetts, Ellen C. Burke, J. J. Flaherty, Geo. R. Alston, Maxine Elliott, Vera, Orinoco, Miranda, Madonna, Atlanta, Gov. Russell, Mystery, Jas. A. Garfield, L. I. Lowell, Dora A. Lawson, Tattler, Alice R. Lawson, Olga, J. R. Bradley, Fannie Smith, Rob Roy, Smuggler, Essex, Athlete, Valkyria, Septre.

W. H. Jordan (6 vessels): Lewis H. Giles, O. W. Holmes, The Gatherer, Hattie E. Worcester, Goldenrod, Joseph Rowe.

Orlando Merchant (16 vessels): Avalon, Constellation, O. W. Holmes, Golden Rod, Grayling, Joseph Rowe, Harvard, Mary E. Harty, Harriet W. Babson, Richard Wainwright, Henry M. Stanley, Lewis H. Giles, Lottie G. Merchant, Oriole, Clintonia, Esperanto.

Jerome McDonald (3 vessels): Preceptor, Gladiator, Monitor.

John Pew & Sons (5 vessels): A. E. Whyland, Essex, Columbia, Orinoco, Scepter.

D. B. Smith & Co. (12 vessels): Smuggler, Lucinda I. Lowell, Helen F. Whittier, Dora A. Lawson, Carrie W. Babson, Golden Hope, Fernwood, Sen. Gardner, Maxime Elliott, J. J. Flaherty, Tattler, Stranger.

Sylvanus Smith & Co. (7 vessels): Lucille, Bohemia, Claudia, Arcadia, Parthia, Arabia, Sylvania.

John Chisolm (5 vessels): Admiral Dewey, Harry G. French, Monarch, Judique, Conqueror.

Carl C. Young (3 vessels): Dauntless, A. E. Whyland, William E. Morrissey.

BRITISH (*continued*)

ing partner; Joseph Jean Baptiste Gosselin, heirs of Joseph A. Lamoureux. deceased.

AMERICAN (*continued*)

- Hugh Parkhurst & Co. (6 vessels):  
Rival, Arthur D. Story, Patrician,  
Geo. Parker, Sen. Saulsbury, Diana.
- A. D. Mallock (3 vessels): Indiana,  
Alert, Edna Wallace Hopper.
- Thomas M. Nickolson (13 vessels):  
Ada S. Babson, Elizabeth N., Hiram  
Lowell, M. B. Stetson, A. V. S.  
Woodruff, T. M. Nickolson, Land-  
seer, Edgar S. Foster, A. M. Nickol-  
son, Wm. Matheson, Robin Hood,  
Annie G. Quinner, N. E. Symonds.
- M. J. Palson (3 vessels): Barge Til-  
lid, Schooner J. K. Manning, Tug  
Clarita.
- M. J. Dillon (1 vessel): Edith Emery.
- Russell D. Terry (1 vessel): Centen-  
nial.
- Lemuel E. Spinney (3 vessels): Amer-  
ican, Arbitrator, Dictator.
- Wm. H. Thomas (2 vessels): Elmer  
E. Gray, Thos. L. Gorton.
- Frank H. Hall (3 vessels): Ralph H.  
Hall, Sarah E. Lee, Faustina.
- M. Walen & Son (7 vessels): Kentucky,  
Effie W. Prior, Orpheus, Hattie A.  
Heckman, Ella M. Goodsin, Bessie N.  
Devine, Arthur James.
- Atlantic Maritime Co. (7 vessels):  
James W. Parker, Raynah, Susan &  
Mary, Elsie, Fannie E. Prescott, E.  
E. Gray, Mildred Robinson.
- Waldo I. Wonson (5 vessels): Ameri-  
can, Mystery, Procyon, Effie M. Mor-  
rissey, Marguerite.
- Edward Trevo (1 vessel): Edward  
Trevo.
- Henry Atwood (1 vessel): Fannie B.  
Atwood.
- Fred Thompson (1 vessel): Elsie M.  
Smith.

## Group 2

*Against Newfoundland:*

- Bessie M. Wells, Elector, Sarah B.  
Putnam, A. E. Whyland, N. B. Parker,  
Thomas F. Bayard, Arethusa, Harry  
A. Nickerson, Arkona, Edna Wallace  
Hopper, Athlete.

AMERICAN (*continued*)*Fishing Claims**Against Canada:*

Frederick Gerring, North, D. J. Adams,  
R. T. Roy, Tattler, Hurricane, Ar-  
gonaut, Jonas H. French.

CLASS III. Claims based on damages to the property of either Government or its nationals, or on personal wrongs of such nationals, alleged to be due to the operations of the military or naval forces of the other Government or to the acts or negligence of the civil authorities of the other Government.

## AMERICAN

Home Missionary Society, Daniel  
Johnson, Union Bridge Company,  
Madeiros.

## BRITISH

*Four Cable Companies Claims*

Cuban Submarine Telegraph Co., East-  
ern Extension Cable Co., Canadian  
Electric Light Co., Great North-  
western Telegraph Co.

*"Philippine War" Claims*

Ackart, Balfour, Broxup, Cundal, Dod-  
son, Fleming, Forbes, Fox, Fyfe,  
Grace, Grindrod, Hawkins, F., Haw-  
kins, J., Hendry, Hill, Hogg, Holi-  
day, Hong Kong Bank, Iloilo Club,  
Eastern Extension Telegraph Co.,  
Higgins, W., Higgins, N. L., Hoskin  
& Co., Kaufman, Ker Bolton & Co.,  
Lauders, McLeod, McMeeking,  
Moore, Philippine Mineral Syndi-  
cate, Pohang, Pohoomul, Smith,  
Stevenson, Strachan, Thomson, Un-  
derwood, Warner, Zafiro, C. B. Chie-  
ne, N. L. Chiene, Parsons & Walker.

*"Hawaiian" Claims*

Ashford, Bailey, Harrison, Kenyon,  
Levy, McDowall, Rawlins, Redward,  
Reynolds, Thomas.  
Hardman, Wrathall, Cadenhead.

CLASS IV. Claims based on contracts between the authorities of either Govern-  
ment and the nationals of the other Government.

## BRITISH

King Robert, Yukon Lumber, Hemming

## TERMS OF SUBMISSION

I. In case of any claim being put forward by one party which is alleged by the other party to be barred by treaty, the Arbitral Tribunal shall first deal with and decide the question whether the claim is so barred, and in the event of a decision that the claim is so barred, the claim shall be disallowed.

II. The Arbitral Tribunal shall take into account as one of the equities of a claim to such extent as it shall consider just in allowing or disallowing a claim any admission of liability by the Government against whom a claim is put forward.

III. The Arbitral Tribunal shall take into account as one of the equities of a claim to such extent as it shall consider just in allowing or disallowing a claim, in whole or in part, any failure on the part of the claimants to obtain satisfaction through legal remedies which are open to him or placed at his disposal, but no claim shall be disallowed or rejected by application of the general principle of international law that the legal remedies must be exhausted as a condition precedent to the validity of the claim.

IV. The Arbitral Tribunal, if it considers equitable, may include in its award in respect of any claim interest at a rate not exceeding 4 per cent per annum for the whole or any part of the period between the date when the claim was first brought to the notice of the other party and that of the confirmation of the schedule in which it is included.

The foregoing Schedule and Terms of Submission are agreed upon in pursuance of and subject to the provisions of the Special Agreement for the submission to arbitration of pecuniary claims outstanding between the United States and Great Britain, signed on the 18th day of August, 1910, and require confirmation by the two Governments in accordance with the provisions of that Agreement.

Signed in duplicate at the City of Washington, this sixth day of July, one thousand nine hundred and eleven, by the Secretary of State of the United States, Philander C. Knox, on behalf of the United States, and by His Britannic Majesty's Ambassador at Washington, the Right Honorable James Bryce, O.M., on behalf of Great Britain.

Philander C. KNOX  
James BRYCE



## Decisions

### GREAT BRITAIN *v.* UNITED STATES

(*Yukon Lumber case*<sup>1</sup>. June 18, 1913. Pages 438-444.<sup>2</sup>)

---

**ALTERNATIVE CLAIM.—IMPLIED WAIVER OF CLAIM.—CONTRADICTION BETWEEN PRIMARY AND ALTERNATIVE CLAIM.** Claim for payment of timber dues or, alternatively, of value of timber. Timber, illegally cut in Canada by Mr. Mountain, was sold by the latter to Mr. Ramsay, and in September 1900 by Mr. Ramsay to United States military authorities in Alaska. Since Canadian authorities never claimed ownership of timber, and for 13 years requested only payment of dues, *held* that alternative claim can no longer be presented. Alternative claim moreover somewhat contradictory, as claim for dues is exclusive of claim for recovery.

**PERSONAL OBLIGATION.—CONTRACT.—NEGLIGENCE.—GOOD FAITH.** No personal obligation of United States military authorities towards Canadian Government *held* to exist: no contract between them made, nor any negligence committed; United States military authorities dealt with Mr. Ramsay in perfect good faith without assuming debts and engagements of Mr. Mountain.

**OBLIGATION *IN REM*.—ENFORCEMENT OF MUNICIPAL LAW ABROAD.—SEIZURE OF STATE PROPERTY.** No obligation *in rem*: even if lien on timber had been reserved, lien would be inoperative as (1) its enforcement in United States impossible, and (2) timber State property and, therefore, not subject to seizure.

**POSSIBILITY TO AVOID GRIEVANCE.** Canadian Government cannot complain now of grievance which was easy to avoid.

*Cross-references:* Am. J. Int. Law, vol. 7 (1913), pp. 885-890; Jahrb. des V., vol. 2 (1914), pp. 458-462.

At the end of September, 1900, the Dominion Crown Timber and Land Agent at Dawson, Yukon Territory (Canada), Mr. F. X. Gosselin, was aware that a certain quantity of timber, viz., 68,500 feet, had just been cut without permit or authority on the vacant Dominion lands by a certain Howard Mountain, and that the said Mountain had sold the same timber to a certain O. N. Ramsay, who at that time was a contractor for the United States military authorities in Alaska, that the said Ramsay, under a contract of sale for delivery, had delivered the same with other large quantities of timber to the said United States military authorities, and also that the said Ramsay, who had obtained, at the request of the United States military authorities,

<sup>1</sup> In the report of Fred. K. Nielsen referred to on page 3 *supra* this case has been called the *Yukon Lumber Company* case. No such company has, however, been mentioned either in the decision or in the Schedule of Claims reprinted on p. 11 *supra*.

<sup>2</sup> References to page numbers following the date of each decision are to the report of Fred. K. Nielsen referred to in footnote 1.

a permit for 50,000 feet. had cut in trespass 24,570 feet more, and delivered the same to the said authorities.

It appears from a letter from the said Crown Agent, Gosselin, that he met Ramsay and Mountain at that time, but did not claim for recovery of the timber illegally cut and claimed only for payment of the Crown dues at \$4 per M. on the said timber as if it had been legally cut.

It is shown (Gosselin's letters December 4, 1900, and July 20, 1901) that, on September 29, 1900, Ramsay paid the Crown dues for the 24,570 feet of timber cut by him in excess of his permit, i.e., in trespass, and that Gosselin then took Mountain's promise that he would pay the same Crown dues for the 68,500 feet also cut in trespass *when he would come to Dawson some time during the winter* (Gosselin's letter December 4, 1900) or *as soon as he had cashed the order from Mr. Ramsay* which he had received for logs (Gosselin's letter July 20, 1901); and that delay was agreed to.

On December 4, 1900, Gosselin informed the Department of the Interior of the above-mentioned facts and on January 17, 1901, the Secretary of that Department, without objecting to anything Gosselin had done, gave an instruction that *if the dues were not paid within a reasonable time*, the matter was to be reported to the officer commanding the Department of North Alaska for advice as to what steps should be taken to recover the amount of dues and expenses, but no reference was made to any claim to the timber or its value.

In the meantime, that is to say on November 15, 1900, January 4. 10. 12, and March 2, 1901, the United States military authorities paid Ramsay for all the timber (300,000 feet) he had sold and delivered under contract.

In May or June, 1901, Gosselin was informed that Mountain had gone away to San Francisco, leaving no property behind him, and that he departed under an assumed name owing several people in the country.

On July 20, 1901, the said Crown Agent Gosselin applied to the United States military authorities for payment of the Crown dues left unpaid by Mountain for the timber sold by him to Ramsay and by Ramsay to the said authorities. The Crown Agent observed that Ramsay had a permit granted to him as a consideration to the United States Government, and that he should have ascertained whether or not Mountain, his vendor, had paid the Crown dues.

The views officially expressed by the Government Legal Adviser in Alaska (British memorial, annex 16) were that it would be the duty of the United States Government to either pay the dues on the 68,500 feet cut by Mountain or to see that Ramsay did.

Thereafter a correspondence was exchanged during the year 1902 between the Canadian Government and the United States military authorities in Alaska and Washington, wherein on one side the views of the Canadian Legal Adviser were communicated and applications were made to obtain from the military authorities the payment of the dues which Mountain failed to pay, and on the other side, the United States military authorities replied that they were not to be held responsible for the dues which Mountain had not paid.

Since 1902 no documents appear in the memorial except two affidavits given apparently for the present case, one of them dated in 1912 and the other without any year mentioned.

The British Government claim at the present time before this Tribunal that the United States Government should either pay the timber dues in question or the value of the timber converted by the Government of the United States to their own use.

The United States Government, on the other hand, contends that the claim is not well founded in fact or in law and asks that it be dismissed and finally barred.

It is clear at the outset that a double trespass was committed in September, 1900, one by Ramsay, who cut 24,570 feet without permit, and the other by Mountain, who cut 68,500 feet without permit.

In such matters the Canadian Government is represented by the Crown Agent, whose duties and powers are defined in an Order in Council of July 7, 1898, article 6 (British memorial, annex 27), in the following terms:

"It shall be the duty of the Crown Timber and Land Agent, subject to the authority of the Commissioner, *to receive and regulate all applications for licenses and permits to cut timber for lumbering purposes* and for fuel, for the purchase of coal lands, for the lease of lands for grazing purposes, and for hay permits; also, subject to regulations to be provided in that behalf, to receive and deal with applications for the purchase of land, but no lease or sale of land shall take place except in accordance with the regulations furnished from the Department."

The Crown Agent dealt with Ramsay and Mountain in the same manner, when he was informed of the trespass; he neither reproached the trespassers for their offense, nor did he claim the timber or its value, about \$34.40 per M. (United States answer, exhibit 5), but he claimed only the Crown dues of \$4 per M.

The Crown Agent did not, and since that time the Canadian Government did not, claim that the ownership of the timber rested in the Crown; the Canadian Government has considered itself not as the owner of the timber, nor even as the creditor of its value, but only as the creditor of certain dues, called Crown or stumpage dues, of \$4 per M., and it is shown that the Crown Agent, after having been paid by the first offender, Ramsay, granted Mountain delay until some time during the winter of 1901. Such a concession of delay implies, in this Tribunal's opinion, the existence of a debt, and not of a claim for repossession.

Not only has this been the attitude of the Crown Agent and the Canadian Government with both Ramsay and Mountain, but also with the United States military authorities.

From the very beginning, that is to say, from September and December, 1900, the Canadian Government and its Agents were perfectly aware that the timber was in the possession of the United States military authorities, but they never claimed for it or for its value. According to the express statement of the Secretary of the Interior (letter, December 9, 1901), it was only when the *Agent* of that Department at Dawson did not succeed in collecting the dues from Mountain and Ramsay, that application was made to the United States authorities to pay the said dues.

Under these circumstances, Mountain sold to Ramsay, and Ramsay sold to the United States military authorities, not a thing belonging to a third person but a thing liable for certain dues remaining unpaid; that is to say, the United States military authorities, whose perfect good faith has never been questioned, did not receive from Ramsay some timber the title to which was still vested in the Canadian Government, but some timber for which Mountain, the original vendor, had not paid the dues.

So the question which arose between the two parties has never been whether or not the ownership in the timber rested in the United States military authorities, but whether those authorities had or had not to pay the dues instead of the vendor of their vendor.

Even now, before this Tribunal, the British Government claim for payment of dues, and they have added only as an alternative a claim for the value of the timber. The opinion of this Tribunal is that it is impossible to admit that after having at the beginning ratified the trespass and claimed during 13 years

for only the payment of dues, and still now claiming for that payment, the British Government is entitled to contend that they retained the ownership of the said timber and claim for its value as representing the thing itself which has been consumed. Moreover, the British Government does not claim first for the value and secondly for the dues, but first for the dues and in the alternative for the value. It seems that this alternative is somewhat contradictory, as it is clear that the claim for the dues is exclusive of a claim for recovery.

Consequently, the question to be decided is not whether or not the United States military authorities are the legal owners of the timber, but whether or not the debt of the Crown dues can be claimed against them, which is quite a different question and the only one to be considered.

In the first place, it is difficult to find any personal obligation of the United States military authorities towards the Canadian Government. The said authorities have made no contract, and have committed no negligence, out of which could arise an obligation. Even supposing that Ramsay's permit had been granted at their request, and that they had some liability as to Ramsay's trespass, they had absolutely nothing to do with Mountain. It is impossible to find in the promise that Ramsay would not in any way abuse the permission given him to cut logs, a caution or a guarantee or some other obligation personally assumed as to the payment of Crown dues by a third person from whom Ramsay may have purchased some timber which was sold *afterwards* to the said military authorities.

The United States military authorities have purchased from Ramsay, and paid him for, the timber in perfect good faith; they had no notice of its origin; they did not assume in any way the debts and engagements which the original provider of their vendor may have assumed towards the Canadian Government in respect of the cutting of the timber; they cannot be held bound and obliged by Mountain's promise made to and agreed to by the Crown Agent to pay the dues at such or such a time, i.e., some time during the winter of 1901.

In the second place the United States military authorities are not bound *in rem*.

It is not contested that the cutting of timber in the Yukon Territory is subject to the Canadian regulations which have full power to provide the Canadian Government with such lien or other securities for guaranteeing the payment of their dues, as well as with the right of legal prosecution against any offender. The right of legal prosecution has not been exercised, and the Canadian Government has never claimed except for the dues.

Even supposing that Canadian legislation reserved a lien on the timber, giving the Crown a title to seize the timber in order to be paid the dues, this lien is inoperative in the present case.

First, because the timber is outside the Canadian Territory, and the lien, if any, enacted by the municipal law can not be enforced in a foreign country against a foreigner unless such a lien is provided for by the law of that country, and can be enforced under that law.

Second, because the timber having become State property is not subject to any seizure.

Finally, the Canadian Government does not seem justified in complaining now of a grievance which easily could have been avoided.

The still wild condition of the country may explain the absence of any efficient control over timber cutting, taking out, and passing the boundary; but the Canadian Government had every opportunity and facility in September, 1900, and at least from November, 1900, to March, 1901, until the final payment for the timber, to claim for the recovery of the timber, or of

its value, to stop the payment of the sums representing that value, when they were in the hands of the United States military authorities.

Under these conditions, the cutting of timber as well by Mountain as by Ramsay having been ratified by the Canadian Government, it remained only a debt of Crown dues. Ramsay's debt was paid by Ramsay himself, and Mountain's debt can not be considered as constituting for the United States military authorities either a personal obligation or an obligation *in rem*. Furthermore the Canadian Government, having been able to avoid the grievance arising from Mountain's acts, does not seem to be entitled now to hold the United States military authorities in any way responsible for it.

*On these motives*

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

---

OWNERS OF THE *LINDISFARNE* (GREAT BRITAIN) *v.*  
UNITED STATES

(June 18, 1913. Pages 483-488.)

---

**COLLISION OF VESSELS IN NEW YORK HARBOUR.—EVIDENCE: PROOF OF FAULT, BURDEN OF PROOF, UNIVERSALLY ADMITTED RULE OF MARITIME LAW.—INEVITABILITY OF COLLISION, NECESSARY CARE AND MARITIME SKILL, CIRCUMSTANCES, HARBOUR REGULATIONS, BREACH OF DUTY OR LIABILITY OF VESSEL.** Universally admitted rule of maritime law that ship under way colliding with ship at anchor has to prove that it was itself not at fault, or that the other ship was at fault. In the present case (*Crook*, under way, on May 23, 1900, collides with *Lindisfarne*, in dock in New York harbour), neither sufficient evidence of inevitability of collision, nor of *Crook's* necessary care and maritime skill. No evidence presented concerning either circumstances of collision, or harbour regulations and their observance, or breach of duty or liability on part of *Lindisfarne*.

**ADMISSION OF LIABILITY.** By Act of April 7, 1906, United States Congress provided for payment of costs of repairs on assumption of obligation to pay, arising out of liability.

**DEMURRAGE.** No sufficient evidence that repairs delayed or interrupted commercial operations of *Lindisfarne*. Claim for one day's demurrage yet to be allowed under Terms of Submission.

**INTEREST.** *Held* equitable to allow interest at 4 % per annum for over ten years.

*Cross-references:* Am. J. Int. Law, vol. 7 (1913), pp. 875-879; Jahrb. des V., vol. 2 (1914), pp. 450-453.

On the 23rd of May, 1900, the United States Army Transport *Crook*, damaged by collision the British steamship *Lindisfarne*, net tonnage 1944 t. in the harbour of New York. The *Lindisfarne* had to be repaired and the time while the repairs were being carried out was one day. The cost of these repairs was defrayed by the United States Government, and His Britannic Majesty's Government, on behalf of the owners of the said ship, claim a sum of £ 32. 8s. for the one day's demurrage, with interest at 4 % for 11 years, i.e., from the 25th of May, 1901, the date on which His Britannic Majesty's Government first

brought the claim to the notice of the officials of the United States Government, to the 26th of April, 1912, the date of the confirmation of the First Schedule to the Pecuniary Claims Convention, viz., £ 14. 5s. 1d., making a total of £ 46. 13s. 1d.

The Government of the United States denies that it is liable for demurrage on account of the injury sustained by the *Lindisfarne* through such collision, and asks that this claim be dismissed and finally barred.

The facts as to the collision are set forth in a communication of the Secretary of State for the United States, dated January 2, 1902, the text of which is quoted in the British memorial. These facts are admitted by the United States Government in their answer and are as follows:

"The *Crook* was being backed out of Pier No. 22 and was under charge of the Cahill Towing Company, contractors for handling the army transports in New York harbour; that while being backed, another vessel crossed her stern, and Assistant Marine Superintendent Lothrop, who was on the *Crook*, seeing danger of colliding with it, gave orders to stop the *Crook* which caused her bow to swing against the *Lindisfarne* lying alongside, with such force as to damage her."

Further it appears from the documents of the case (letter of the Secretary of State, January 8, 1902), that on the day after the collision, i.e., on May 24th noon to noon May 25, 1900, the necessary repairs to the *Lindisfarne* were made by order of the army transport officials, and after having been made the cost of these repairs was defrayed by an appropriation for that purpose by an Act of Congress approved April 7, 1906.

On May 26, 1901, the shipowners, acting through their agents in New York, Messrs. J. H. Winchester and Company, wrote to the General Superintendent, Army Transport Service, claiming for the one day's demurrage of the ship while undergoing repairs.

On September 3, 1901, the United States military authorities in New York answered that the claim could not legally be paid in the absence of a specific appropriation therefor. It was added that the claimant should apply to Congress wherein appropriations were made for like purposes.

On November 4, 1901, December 10, 1904, and February 27, 1906, the British Government, through their Ambassador at Washington, presented to the Department of State of the United States notes relative to the claim, requesting that the said claim be submitted to Congress.

On January 13, 1902, December 14, 1904, March 14, 1906, and January 6, 1909, the claim was presented to Congress, either with the expression of opinion of the War Department that "*the claim for demurrage is warranted*" or with the statement of the Department of State "*that in view of the recognition given*" this claim "*by one or another of the Departments it is not easy for this Department to give satisfactory reasons why provisions for the payment is not made.*" Favourable reports on this claim were made by the Senate Committee on Foreign Relations, and by the House of Representatives' Committee on Claims. Notwithstanding the pressing notes of the British Embassy at Washington and notwithstanding all these favourable reports, expressions of opinion and recommendations, no conclusive action was taken by Congress.

Under these circumstances the British Government contend that the liability of the United States Government has never been contested, and the failure by Congress to make an appropriation to pay is the only cause of non-payment.

On the other hand, before this Tribunal, the United States Government raises various reasons tending to reject any liability: first, that the collision was caused through the efforts of the *Crook* to avoid running down a third

vessel, and these efforts were conducted with ordinary care and maritime skill; secondly, that the collision was not the result of any negligence on the part of the officer in command of the *Crook*, either in the determination of a course of action or in the handling of the transport, and no negligence on his part can be presumed in view of his manifest duty to avoid colliding with a vessel in motion; thirdly, that the collision was in fact and in law an inevitable accident; and fourthly, that no evidence is presented on behalf of His Britannic Majesty's Government upon which a claim for demurrage can be predicated or the amount of demurrage computed; and fifthly, that the Government of the United States has never admitted any liability for the collision.

Such are the facts of the case and the contentions of the two parties.

I. *As to the liability:*

The United States Government does not deny that it must assume the liability, if any, incurred by the *Crook*.

It is not contested that the collision took place between the *Crook*, which was under way, and the *Lindisfarne* which was lying in dock.

It is a universally admitted rule of maritime law, as well in the United States as elsewhere, that in case of collision between a ship under way and a ship at anchor, it rests with the ship under way to prove that she was not at fault, or that the other ship is at fault.

In the present case no sufficient evidence is afforded in that respect by the United States Government. The mere fact that a third vessel crossed the *Crook's* stern, while she was being backed, and that there was danger of colliding with a third vessel is not sufficient evidence that the collision with the *Lindisfarne* was an inevitable accident. The mere fact that the *Crook* stopped to avoid collision with a third vessel is not sufficient evidence that the *Crook* did use the necessary care and maritime skill. No evidence is presented either as to the speed, handling, and way of the third vessel, or as to the speed of the *Crook*, the lookout on board that ship, the time when the order to stop was given, or as to the hour of the collision, the weather at that time, the tide, currents, and general condition of the waters in the harbour of New York at that time, or as to the harbour's regulations and the due observance of those regulations. No evidence and no contention is presented involving any breach of duty, or any liability on the part of the *Lindisfarne*.

The United States Government contends that some of the State or Congressional papers refer to certain reports (with the text of which the parties have been unable to provide the Tribunal), expressing the opinion that the collision was an accident which could not be foreseen. But it is stated in certain other reports, which have not been furnished to the Tribunal but which are quoted in other State or Congressional papers printed in the memorial, that the fault was entirely that of the *Crook*.

The United States Government contends that it did not admit liability for the collision by the Act of Congress approved April 7, 1906, and entitled "*An Act providing for the payment to the New York Marine Repair Company of Brooklyn, New York, of the cost of the repairs to the steamship Lindisfarne necessitated by injuries received from being fouled by the United States Army Transport Crook, in May, 1900.*" They maintain that the defraying of these repairs was simply a matter of grace and an unusual liberality. But no evidence is presented showing an intention to do an unusual liberality. Nothing appears in that respect in any of the Congressional papers and documents. On the contrary, the same papers show clearly that the said payment was provided for by Congress on an assumption of an obligation to pay, arising out of a liability.

Under these circumstances the Tribunal is of the opinion that there is no good reason to reject the liability of the United States Government.

II. *As to the nature and amount of the claim:*

The British Government claim for the one day's demurrage while the *Lindisfarne* was repaired.

It is clear that demurrage means some detention or delaying of the ship during a certain time.

In that respect no sufficient evidence is afforded by the British Government that the repairs have delayed or interrupted in any way the commercial operations of the *Lindisfarne*.

But according to clause No. 2 of *Terms of Submission* annexed to the compromise, it has been specially agreed by the two Governments:

"The Arbitral Tribunal shall take into account as one of the equities of a claim to such extent as it shall consider just in allowing or disallowing a claim any admission of liability by the Government against whom a claim is put forward."

It has already been shown that on the many occasions when this claim was under consideration neither the United States authorities nor Government objected to the claim for demurrage.

Under these circumstances the Tribunal, acting under the said specially stipulated terms of submission, consider it just not to disallow this claim.

III. *As to interest:*

The claim was presented first on May 25, 1901, to the Army authorities of the United States, and they then explained that it should not be addressed to them but to the United States Congress. It was then presented to Congress through the Department of State, acting at the request of the British Ambassador on January 8, 1902. Since that time there is no evidence to justify why during more than ten years the bills, however favourably presented, reported and recommended, never passed. As the Secretary of State said himself in his letter of March 23, 1906, in view of the recognition given these claims by one or another of the Departments *it is not easy to give satisfactory reasons why provision for the payment has not been made.*

Without referring to other grounds and discussing the United States contention that according to their public law no interest is due on State debts, the Tribunal is authorized by clause No. 4 of the Terms of Submission, annexed to Schedule I of the Compromise, to allow interest at 4 % per annum for the whole or any part of the period between the date when the claim was first brought to the notice of the other party. Taking into consideration the circumstances above mentioned, the Tribunal thinks it is equitable to do so in the present case.

*On these motives*

The Tribunal decides that the United States Government shall have to pay the British Government the sum of £ 32. 8s. with interest at 4 % since the 8th day of January, 1902, to the 26th day of April, 1912.

---

WILLIAM HARDMAN (GREAT BRITAIN) *v.* UNITED STATES*(June 18, 1913. Pages 495-498.)*

DESTRUCTION OF PRIVATE PROPERTY IN TIME OF WAR.—NECESSITY OF WAR, *VIS MAJOR*.—SANITARY MEASURE. Destruction of private property by United States military authorities on or about July 12, 1898, in Cuba, during Spanish-American War and in the interest of preservation of health of military forces *held* to be necessity of war, i.e. an act which is made necessary by the defence or attack and assumes the character of *vis major*.

NECESSARY WAR LOSSES. Necessary war losses *held* not to give rise to legal right of compensation.

EXTRAJUDICIAL ACTION. Tribunal suggests that United States consider possibility of compensation as matter of grace and favor.

*Cross-references:* Am. J. Int. Law, vol. 7 (1913), pp. 879-882; British Yearbook, vol. 2 (1921-1922), pp. 198-200; Jahrb. des V., vol. 2 (1914), pp. 454-455.

*Bibliography:* <sup>1</sup> Sir Cecil Hurst, K.C.B., K.C., "British American Pecuniary Claims Commission", British Yearbook, vol. 2 (1921-1922), pp. 198-200.

On or about July 12, 1898, during the war between the United States and Spain, while the town of Siboney, in Cuba, was occupied by the United States armed forces, certain houses were set on fire and destroyed by the military authorities in consequence of sickness among the troops and from fear of an outbreak of yellow fever. In one of these houses was some furniture and personal property belonging to a certain William Hardman, a British subject, which was entirely destroyed with the house itself.

The British Government claim, on behalf of the said William Hardman, the sum of £ 93, as the value of the said personal property and furniture, together with interest at 4 %, for 13 years from March, 1899, when the claim was brought to the notice of the United States military authorities in Cuba, to the 26th of April, 1912, when the schedule to Pecuniary Claims Agreement, in which the claim was included, was confirmed, i.e. £ 49, the full claim being, therefore, for the total sum of £ 142.

The United States denies that it is liable in damages for the destruction of the personal property of William Hardman, and contends that the United States military authorities who were conducting an active campaign in Cuba had a right in time of war to destroy private property for the preservation of the health of the army of invasion and that such authorized destruction constituted an act of military necessity or an act of war, and did not give rise to any legal obligation to make compensation.

The two parties admit the facts as above related and agree as to those facts. The British Government do not contend that Hardman's nationality entitled him to any special consideration. At the hearing of the case they did not maintain their former contention that there is no sufficient evidence of the same interest to destroy the furniture as the house. They admit that necessary war losses do not give rise to a legal right of compensation. But they contend that the destruction of Hardman's property was not a war loss in that it did not constitute a necessity of war, but a measure for better securing the comfort and health of the United States troops, and that in that respect no private property can be destroyed without compensation.

<sup>1</sup> References in this section are to publications referred to on p. 7 *supra* and to the Annual Digest.

The question to be decided, therefore, is not whether, generally speaking, the United States military authorities had a right in time of war to destroy private property for the preservation of the health of the army, but specially whether, under the circumstances above related, the destruction of the said personal property was or was not a necessity of war, and an act of war.

It is shown by an affidavit of Brigadier-General George H. Torney, Surgeon General, United States Army (United States answer, exhibit 3), who personally was present at that time at Siboney and familiar with the sanitary conditions then existing in that place, that the sanitary conditions at Siboney were such as made it advisable and necessary to destroy by fire all buildings and their contents which might contain the germs of yellow fever. No contrary evidence is presented against this statement, the truth of which is not questioned.

In law, an act of war is an act of defense or attack against the enemy and a necessity of war is an act which is made necessary by the defense or attack and assumes the character of *vis major*.

In the present case, the necessity of war was the occupation of Siboney, and that occupation, which is not criticized in any way by the British Government, involved the necessity, according to the medical authorities above referred to, of taking the said sanitary measures, i.e., the destruction of the houses and their contents.

In other words, the presence of the United States troops at Siboney was a necessity of war and the destruction required for their safety was consequently a necessity of war.

In the opinion of this Tribunal, therefore, the destruction of Hardman's personal property was a necessity of war and, according to the principle accepted by the two Governments, it does not give rise to a legal right of compensation.

On the other hand, notwithstanding the principle generally recognized in international law that necessary acts of war do not imply the belligerent's legal obligation to compensate, there is, nevertheless, a certain humanitarian conduct generally followed by nations to compensate the private war losses as a matter purely of grace and favor, when in their own judgment they feel able to do so, and when the sufferer appears to be specially worthy of interest. Although there is no legal obligation to act in that way, there may be a moral duty which can not be covered by law, because it is grounded only on an inmost sense of human assistance, and because its fulfilment depends on the economical and political condition of the nation, each nation being its own judge in that respect. In this connection the Tribunal can not refrain from pointing out the various benevolent appreciations given by the Department of State in this particular case, and commends them to the favourable consideration of the Government of the United States as a basis for any friendly measure which the special condition of the sufferer may justify.

*Upon these motives*

The decision of the Tribunal in this case is that the claim of the British Government be disallowed.

---

THE GLASGOW KING SHIPPING COMPANY (LIMITED) (GREAT BRITAIN) *v.* UNITED STATES

(King Robert case. June 18, 1913. Pages 520-523)

CONTRACT.—DEFENDANT NOT REAL PARTY IN INTEREST. Messrs. R. Chapman & Son, of Newcastle-on-Tyne, under a contract of February 11, 1905, with Messrs. McCall & Co., contractors to the U.S. Bureau of Equipment, Navy Department, Washington, D.C., accepted to transport coal by the *King Robert*, a freighter chartered by Chapman & Son from the owners, the Glasgow King Shipping Company (Limited). By agreement of June 8, 1905, the latter company relieved Chapman & Son from all responsibility for and in relation to the transportation. In view of the fact that McCall & Co. were contractors to and not agents for the U.S. Bureau of Equipment, no claim out of the contract with McCall & Co. can be brought by the company against the United States.

EVIDENCE.—UNSIGNED DOCUMENT. So-called copy of contract of February 11, 1905, attached to agreement of June 8, 1905. This so-called copy, possibly a preliminary memorandum, calling McCall & Co. "agents", but not signed by McCall, therefore constitutes no evidence of this quality.

*Cross-references*: Am. J. Int. Law, vol. 7 (1913), pp. 882-885; Jahrb. des V., vol. 2 (1914), pp. 456-458.

*Bibliography*: Nielsen, p. 520.

This is a claim on behalf of the Glasgow King Shipping Company (Limited) for the sum of £ 111. 3s. 8d. with interest at 4 % per annum from the 10th of April, 1906, to the 26th of April, 1912, amounting to £ 26. 13s. 8d., making a total of £ 137. 17s. 4d. Of this amount £ 100. 13s. 8d. represents interest at the rate of 6 % per annum from the 17th of November, 1905, to the 7th of March, 1906, on the sum of \$26,486.40 freight earned by the *King Robert* while chartered as below set forth, and £ 10. 10s. represents the expenses of cables, telegrams, postage, etc., in relation to this claim for interest.

The *King Robert* was employed under an agreement dated June 8, 1905, which is set forth in annex 7 of the British memorial, by which the Glasgow King Shipping Company, owners of the *King Robert*, and Messrs. R. Chapman & Son, of Newcastle-on-Tyne, agreed that in consideration of the said steamer "being nominated by R. Chapman & Son under their contract with the U.S. Bureau of Equipment, Navy Department, Washington, D.C., dated the 11th February, 1905, for the transportation of coal from Norfolk, Newport News, Philadelphia, or Baltimore to Manila, the owners agree to relieve R. Chapman & Son from all responsibility for and in relation to the transportation of a cargo of not less than 5,400 tons, or more than 5,700 tons, from Norfolk, Newport News, Philadelphia, or Baltimore, as ordered, to U.S. Naval Coal Depot, Sangley Point, Manila Bay, under the terms of said contract, copy of which is attached". It was further specified that freight at \$4.80 per ton was to be collected.

The document described in this agreement as R. Chapman & Son's "Contract with the U.S. Bureau of Equipment, Navy Department, Washington, D.C., dated the 11th February, 1905", a copy of which is referred to as attached to that agreement, is set forth in annex 7 of the British memorial. The copy of this document which was annexed to the agreement has also been produced for the inspection of this Tribunal.

This document shows on its face that it is not a contract between R. Chapman & Son with the U.S. Bureau of Equipment, Navy Department, as described in R. Chapman & Son's agreement of June 8th with The Glasgow King Shipping Company. The opening paragraph shows conclusively that the U.S. Bureau of Equipment is not a party to it, the parties being described as Messrs. McCall & Co., by cable authority of Messrs. Wrenn & Co., London agents for Messrs. R. Chapman & Son, steamship owners of Newcastle-on-Tyne; and Messrs. McCall & Co., contractors to the U.S. Bureau of Equipment, Navy Department, Washington, D.C. It is true that at the close of this document the following paragraph appears:

"As agents, by authority of Messrs. Wrenn and Co., London, dated February 9th, 10th, and 11th, agents for Messrs. R. Chapman and Son, Newcastle, and H. N. Manney, Chief Bureau of Equipment, Navy Department, Washington, D.C."

So far, however, as this purports to be a representation that McCall & Co. are agents for H. N. Manney, Chief Bureau of Equipment, Navy Department, it is valueless because McCall & Co.'s signature is not affixed to the document. Moreover, no authority has been shown, and so far as appears there is no justification for any such representation of agency on the part of McCall & Co.

This so-called contract may have been a preliminary memorandum, but at any rate it fails utterly to imply any contracted relation between Messrs. Chapman & Son and the United States Bureau of Equipment of the Navy Department.

In the answer of the United States a signed contract is set forth (exhibit 2), dated the 8th of March, 1905, between "Messrs. McCall & Co., of Baltimore, in the State of Maryland, Md., party of the first part, and the United States, by the Purchasing Pay Officer, United States Navy Pay Office, Baltimore, Md., acting under the direction of the Secretary of the Navy, party of the second part". By this contract McCall & Co. agreed to furnish "transportation of 30,000 tons (10 % more or less) best quality bituminous coal from Baltimore, Md., Philadelphia, Pa., Lambert's Point, Va., or Newport News, Va. (loading port for each cargo at the option of the Bureau of Equipment) to the U.S. Naval Coal Depot, Sangley Point, Manila Bay, Philippine Islands. Rate of freight four dollars eighty-seven and one-half cents (\$4.87 1/2) per ton 2,240 lbs".

There is no sufficient evidence of any other contract with the Government of the United States, and it appears on the contrary that it is under this contract that the United States Government paid to the McCall & Co.) \$26,811.75 on the 6th of March, 1906, freight for 5,506 tons delivered on the 17th of November, 1905 (United States answer, exhibit 1). It will be observed that this payment was for freight at the rate of \$4.87 1/2 per ton as provided in this contract, and not at the rate of \$4.80 per ton as provided in the so-called contract above mentioned of February 11, 1905, a copy of which was annexed to and formed part of the charter party of June 8, 1906, between the owners of the *King Robert* and Chapman & Co., at which lower rate the freight would have amounted to only \$26,428.80, being \$382.55 less than the amount which the McCall-Dinning Company have accounted for to the owners of the *King Robert* for this service.

It is unquestioned that the transportation by the *King Robert* of the cargo delivered in November, 1905, and paid for by the United States Government as above set forth is the same transportation as that upon which this claim is founded (Walker & Co.'s bill of March 30, 1906, British memorial, annex 1).

The Tribunal, therefore, must rely only on this contract of March 8, 1905, between McCall & Co. and the United States in determining the liability of

the United States in this case, and consequently the Tribunal finds that there was no privity of contract between the United States Government and the owners of the *King Robert*, who were merely contractors with a subcontractor of McCall & Co., who in turn were merely contractors with the United States Government, and not agents for that Government.

The contract of March 8, 1905, between McCall & Co. and the United States Government expressly provides:

“That upon the presentation of the customary bills and the proper evidence of the delivery, inspection, and acceptance of the said article, articles, or services, and within ten days after the warrant shall have been passed by the Secretary of the Treasury, there shall be paid to the said McCall & Co., or to their order, by the Navy paymaster for the port of Philadelphia, Pa., the sum of one hundred and forty-six thousand two hundred and fifty dollars, for all the articles delivered or services performed under this contract: *Provided, however*, that no payments shall be made until all the articles or services shall have been delivered or performed and accepted, except at the option of the Bureau of Supplies and Accounts.

“It is mutually understood and agreed, as aforesaid, that no payment or allowance to said party of the first part will or shall be made by the United States for or on account of this contract except as herein specified.”

There is nothing in this case to show that the payments thus provided for have not been made by the United States in exact accordance with these requirements of that contract.

The Tribunal is therefore of the opinion that the owners of the *King Robert* are not entitled to recover interest against the United States Government for delaying until March 6, 1906, before paying to Messrs. McCall & Co. the freight earned by the *King Robert*, and as the other items of the claim are dependent upon this item, they fall with it.

*Upon these motives*

The decision of the Tribunal in this case is that the claim of the British Government be disallowed.

GREAT BRITAIN AND OTHERS (GREAT BRITAIN)  
v. UNITED STATES

(Canadienne case. May 1, 1914. Pages 427-431.)

COLLISION OF VESSELS ON ST. LAWRENCE RIVER.—APPLICABLE LAW: *LEX LOCI DELICTI COMMISSI*.—FAULT AND LIABILITY: INTERNATIONAL RULES OF THE ROAD. Collision on October 29, 1897, on St. Lawrence River between Canadian Government steamship *Canadienne*, chartered by Mr. Lindsay, and United States Government steamship *Yantic*. According to generally recognized rule of international law in United States and in Great Britain the *lex loci delicti commissi* must apply. Fault and liability of ships involved determined under the International Rules of the Road obtaining at time of collision on St. Lawrence River between Montreal and Quebec, and under English law, respectively.

EVIDENCE: PROOF OF FAULT, REPORTS OF INVESTIGATIONS BY PARTIES. Concerning the facts of the collision no other evidence available to Tribunal than reports of two investigations made by Canadian Marine Authorities

at Montreal on November 3 and 8, 1897, and by United States Naval Authorities on November 22, 1897, at Quebec. Tribunal without opportunity to see the witnesses, the ship's papers, or the engineer's log. For some of the items of the charterer's estimate of damages no sufficient proof is given.

**EXTENT OF LIABILITY: BOTH SHIPS AT FAULT.**—In the opinion of Tribunal both ships are at fault, but in a different proportion. Under applicable English law each ship obliged to pay half the loss of the other. *Held* that, although no claim for damages suffered by the *Yantic* has been presented by United States, the *Yantic's* damage has to be taken into consideration in assessing the amount to which Great Britain is entitled.

**INTEREST.** *Held* that no allowance of interest justified.

*Cross-reference:* Am. J. Int. Law, vol. 8 (1914), pp. 655-659.

This is a claim presented by His Britannic Majesty's Government for seven thousand eight hundred sixty-five 59/100 dollars (\$7,865.59), for damage to the Canadian Government's steamship *Canadienne* and loss to her charterer, the late Robert Lindsay and his representatives, all of them British subjects, resulting from a collision which occurred in the River St. Lawrence between the steamship *Canadienne* and the United States Government's steamship *Yantic*, on October 29, 1897.

The collision was the subject of two investigations, one made by the Canadian Marine Authorities at Montreal on November 3 and 8, 1897, the other by the United States Naval Authorities on November 22, 1897, at Quebec.

I. *As to the facts:*

The *Canadienne* left Montreal on October 27, 1897, bound for Quebec, Gaspé, and other ports on the lower St. Lawrence. She was fully manned and had an apprentice pilot on board. In the early morning of October 29th she was on her way down nearing Pointe-à-Pizeau or Sillery Point, on the north bank of the river, about three miles above Quebec.

On the same morning the United States steamship *Yantic* left her Quebec anchorage at 4.15 a.m., bound for Montreal, and at 4.30 she stood up the river with a duly licensed Canadian pilot on board.

It appears from the evidence taken at the investigation held by the Canadian Authorities that the *Canadienne*, when approaching Sillery Point, first saw both side lights of another steamer, which subsequently proved to be the *Yantic*, and shortly thereafter, only her green light; afterwards both side lights appeared again, and then the green light disappeared, leaving only the red light visible.

It appears from the inquiry held by the United States Authorities that the *Yantic* came up to and passed Sillery Point without reporting any light ahead; then she changed her course slightly to starboard, and after the ship was steadied on that new course, she reported the masthead and the green light of an approaching steamer, which was the *Canadienne*.

It was found in the United States inquiry that "when the *Canadienne* saw both the *Yantic's* side lights and afterwards the green only, the latter must have been east of Pizeau Point" (United States answer, p. 29).

It is further stated in the report of the same inquiry that it is probable that the change of course made by the *Yantic* in rounding Sillery Point opened again her two lights and let the green disappear, leaving only the red visible.

After the green light of the *Canadienne* was reported, the *Yantic* finding herself red to green came one-half point to starboard and gave one blast of the whistle to indicate that she was directing her course to starboard.

To this signal the *Canadienne* gave no answer, but kept steadily on her course. Then the *Yantic* put her helm hard-a-port, reduced her speed, stopped and reversed the engines.

The *Canadienne* continued on her way, full speed ahead. Almost immediately the collision occurred.

## II. *As to the liability:*

At the outset it must be observed that the *International Rules of the Road* applied in 1897 on the St. Lawrence River between Montreal and Quebec.

When the *Canadienne* saw both side lights of the *Yantic*, and particularly when almost immediately afterwards the *Yantic* showed her red light—a clear indication that she was coming to starboard—the *Canadienne* was at fault in taking or keeping her way to cross the *Yantic's* bow so as to pass starboard to starboard, instead of giving way so as to pass port to port according to the Rules of the Road (articles 25, and 18, paras. 1 and 3). There is no evidence in this record showing the existence of any necessity, local conditions, or special rule which would authorize the *Canadienne* to keep the north side of the river (Rules of the Road, article 30). Furthermore the *Canadienne* was about to round a point in the river, and when she saw another steamer rounding the same point in the opposite direction, she was at fault in not indicating her course by sounding her whistle (Rules of the Road, article 28, para. 2).

On the other hand, it is stated in the United States inquiry that the *Yantic*, before reporting the masthead and green light of the *Canadienne*, that is to say, before or when she was rounding Sillery Point, was within sight of and should have reported the lights of the *Canadienne*. The United States officer appointed to make the inquiry said: "As the lights were plainly visible, they should have been seen before" (United States answer, p. 28), and, in fact, at that time the *Yantic* had already been sighted by the *Canadienne*. Nevertheless, those on board the *Yantic* failed to report the *Canadienne's* lights until after their ship had taken her course to starboard, and it necessarily follows that the *Yantic* did not keep a proper lookout (Rules of the Road, article 29). The same officer also stated that as he had been unable to examine the lookout he could not give any explanation as to why the lights of the *Canadienne* had not been reported.

Whatever may be the reason, right or wrong, why the *Canadienne* took or kept her way toward the north side of the river and was still showing her green light, the failure of the *Yantic* to keep a proper lookout prevented her from seeing the *Canadienne* until they were so close that it was dangerous to try to cross her bow and the *Yantic* should have kept clear of a way in which she was able to see the other steamer was already engaged (Rules of the Road, articles 27 and 29).

The *Canadienne* acted most negligently, after taking or keeping her port way as aforesaid, (a) in giving no blast signal and no answer to the starboard blast of the *Yantic*; (b) in not reducing her speed; (c) in not stopping and reversing as she was approaching nearer and nearer the *Yantic*. And when the collision appeared to be inevitable, she did not take any of the measures prescribed by the Rules of the Road as well as by the most elementary prudence to avert the accident.

Consequently, so far as it is possible to ascertain the facts of a collision after 15 years have elapsed, and without an opportunity to see the witnesses, the ship's papers, or the engineer's log, the Tribunal is of opinion that the *Canadienne* was at fault, but that the *Yantic* was not without reproach, and consequently that both ships are to blame, but in a different proportion.

III. *As to the law and the consequences of the liability:*

According to the generally recognized rule of international law in the United States (Story, *Conflict of Laws*, ch. 14, sec. 558) and in Great Britain (Marsden, *Collisions at Sea*, 6th ed., p. 198), in such a case as this the *lex loci delicti commissi* must apply.

The law in force in that respect in Canada in 1897 was the law in force in England (Canada Shipping Act, Rev. St. 1906, ch. 113, sec. 918), and at that time the English rule as reported in Marsden, *Collisions at Sea*, 6th ed., p. 123, was as follows:

"The law apportions the loss where both ships are in fault by obliging each wrongdoer to pay half the loss of the other. Thus, if the loss on ship A is £ 1,000 and that on B is £ 2,000 A can recover £ 500 against B, and B can recover £ 1,000 against A."

IV. *As to the amount of the claim:*

His Britannic Majesty's Government give an estimate of four thousand three hundred eight 77/100 dollars (\$4,308.77) net for the disbursements of the Dominion of Canada for repairs to the *Canadienne*, dock dues and incidental expenses, and the charterer an estimate of three thousand five hundred fifty-six 82/100 dollars (\$3,556.82) net, making the total of seven thousand eight hundred sixty-five 59/100 dollars (\$7,865.59) as claimed.

But some of the items in the charterer's estimate represent damages, of which no sufficient proof is given, viz., loss of traffic, two thousand two hundred fifty dollars (\$2,250); witnesses and fees of counsel, five hundred dollars (\$500); and traveling expenses, two hundred forty-eight dollars (\$248), amounting to two thousand nine hundred ninety-eight dollars (\$2,998), reducing the total amount to four thousand eight hundred sixty-seven 59/100 dollars (\$4,867.59), one-half of which is two thousand four hundred thirty-three 79/100 dollars (\$2,433.79).

Although the United States did not claim for damages suffered by the *Yantic*, inasmuch as, according to the law applicable to this case, each vessel is entitled to recover one-half of her own damage, the *Yantic's* damage, which has been estimated by the United States Naval Commissioner at one thousand dollars (\$1,000) (United States answer, p. 33). must be taken into consideration.

V. *As to the interest:*

The Tribunal, being entitled under the Terms of Submission to allow or disallow interest as it thinks equitable, is of the opinion that in this case no allowance of interest is justified.

*On these motives*

The Tribunal decides that in this case the Government of the United States shall pay the Government of His Britannic Majesty the sum of one thousand nine hundred thirty-three 79/100 dollars (\$1,933.79) without interest.

---

HENRY JAMES BETHUNE (GREAT BRITAIN) *v.* UNITED STATES

(Lord Nelson case. May 1, 1914. Pages 432-435.)

---

CAPTURE OF VESSEL PRONOUNCED ILLEGAL AND VOID BY MUNICIPAL COURT.—  
ADMISSION OF LIABILITY. Capture on June 5, 1812, nearly two weeks before  
declaration of war between Great Britain and United States, of British

schooner *Lord Nelson* by United States Naval Authorities. Vessel sold to United States Navy for \$2,999.25. On July 11, 1817, capture pronounced to be illegal and void by Court of Northern District of New York and proceeds of sale directed to be paid to owners, but direction never complied with. Before Tribunal the United States, acting on report on real value of vessel at time of capture, made on February 11, 1837, by the United States Secretary of the Navy, admitted liability to the extent of principal sum, viz: \$5,000.

DAMAGES: WRONGFUL POSSESSION AND USE, GENERALLY RECOGNIZED PRINCIPLE, VALUE OF PROPERTY, VALUE OF USE.—INTEREST: *DIES A QUO*. RATE. This claim is not for payment of liquidated and ascertained sum of money, but for indemnity and redress on the ground of wrongful possession and use. Therefore, the amount of indemnity, according to international law and generally recognized principle, must represent both value of property taken and value of use, and especially when Terms of Submission, as in this case, provide for interest and specify *dies a quo* and *dies ad quem*. *Dies a quo* not date of capture but, according to Terms of Submission, date when claim was first brought to notice of United States. Generally recognized rule of international law that interest to be paid at rate current in place and at time the principal was due. According to Terms of Submission, however, interest may not exceed 4% per annum, which rate held equitable in this case. Interest allowed from February 3, 1819, to April 26, 1912.

*Cross-reference*: Am. J. Int. Law, vol. 8 (1914), pp. 659-662.

This is a claim for five thousand dollars (\$5,000) and interest from June 5, 1812, presented by His Britannic Majesty's Government on behalf of Henry James Bethune, legal personal representative of James and William Crooks, deceased, the owners of the *Lord Nelson*, a British schooner, on account of the capture of the said schooner by the United States Naval Authorities on June 5, 1812, nearly two weeks before the declaration of war between Great Britain and the United States of America.

The capture of this schooner at the date and under the circumstances above mentioned is not disputed.

Further, it appears that the vessel, after her capture, was acquired by the United States Navy at a valuation of two thousand nine hundred ninety-nine 25/100 dollars (\$2,999.25). She was converted into a war vessel by the United States and used against Great Britain in the War of 1812, and was never returned to her former owners.

It is said that in 1815 the owners applied to the United States Government for redress, but no evidence is offered to show either the date of that application or whether it constituted a claim regularly presented.

On July 11, 1817, by decree of the Court of the Northern District of New York, the capture of the *Lord Nelson* was pronounced to be illegal and void and the proceeds of the sale, i.e., two thousand nine hundred and ninety-nine 25/100 dollars (\$2,999.25), were directed to be paid to the owners; but that direction was not complied with because the funds had meanwhile been embezzled by the clerk of the court.

On February 3, 1819, a regular claim for indemnity was received by the United States Government from the British Government, and subsequently numerous claims, petitions, and applications were presented either by the claimants or by His Britannic Majesty's Government, but no action was taken notwithstanding favorable reports and recommendations on bills introduced in Congress providing for payment of the claim.

On June 24, 1836, on a new petition presented by the claimants, the Committee on Claims of the House of Representatives, considering that the illegality of the capture was established by the said decree of 1817, resolved that an investigation should be made by the Secretary of the Navy as to the real value of the ship at the time of the capture. And on February 11, 1837, the Secretary of the Navy, after an investigation by a special committee, reported that this value should be fixed at five thousand dollars (\$5,000).

This estimate has never been questioned on any of the many occasions when this claim has been under consideration by executive or congressional committees, and the United States Government has admitted before this Tribunal its liability on this claim to the extent of the principal, to wit: five thousand dollars (\$5,000) (United States answer, p. 1).

The only question remaining for decision by this Tribunal is whether or not interest upon the principal should be awarded, and, if so, for what period and at what rate.

On this point it should be observed that from the beginning this claim has never been presented to nor considered by the United States Government as a claim for the payment of a liquidated and ascertained sum of money, but as a claim for indemnity and redress, because the United States Government wrongfully took possession of and used the vessel belonging to the claimant. That plainly appears as well from the application made as aforesaid in 1819 by His Britannic Majesty's Government, as from the valuation made by the United States Government in 1837, and from the admission that the valuation of five thousand dollars (\$5,000) was the real value of the vessel at the time of the capture.

In international law, and according to a generally recognized principle, in case of wrongful possession and use, the amount of indemnity awarded must represent both the value of the property taken and the value of its use (Rutherford's Institutes, bk. 1, ch. XVII, sec. V; VI Moore's International Law Digest, p. 1029; Indian Choctaw's case, Law of Claims against Governments, report 134, 43 Cong., 2nd sess. House of Representatives, Washington, 1875, p. 220, *et seq.*).

This principle applies especially when the Terms of Submission, as in this case, provide for interest and specify the *dies a quo* and the *dies ad quem*, for the allowance of interest, as the Tribunal thinks equitable.

It is admitted in this case that the sum of five thousand dollars (\$5,000) represents only the value of the vessel, and does not cover the use by the United States Government of the vessel or the money equivalent to its value.

Under these considerations it would have been justifiable to allow interest from the time of the capture, i.e., from June 12, 1812 except that according to section IV of the Terms of Submission annexed to the Pecuniary Claims Convention, interest is not to be allowed by this Tribunal previous to the date when the claim was first brought to the notice of the other party, and as above stated that date must be fixed as February 3, 1819.

As to the rate, it is a generally recognized rule of international law that interest is to be paid at the rate current in the place and at the time the principal was due. But in this case, by the Terms of Submission above mentioned, the two parties have agreed that in respect of any claim interest is not to exceed four per cent (4%) per annum, and, in view of all the circumstances, the Tribunal considers that the allowance of interest at this rate is equitable.

#### *On these motives*

The Tribunal decides that the agreement given by the Government of the United States to pay to His Britannic Majesty's Government the sum of five

thousand dollars (\$5,000) claimed by the legal representatives of the owners of the *Lord Nelson*, shall be put on record; and further awards that the said sum shall be paid accordingly with interest at four per cent (4%) from February 3, 1819 to April 26, 1912.

---

GREAT NORTHWESTERN TELEGRAPH COMPANY OF CANADA  
(GREAT BRITAIN) *v.* UNITED STATES

(May 1, 1914. Pages 436-437.)

---

DAMAGE TO TELEGRAPH CABLE IN QUEBEC HARBOUR.—AMENDMENT OF PLEADINGS. Damage caused on July 17, 1904, by United States gunboat *Essex*, in dropping anchor in reserved space. Principal amount and claimed counsel fees reduced during proceedings.

PARTIAL ADMISSION OF LIABILITY.—COUNSEL FEES.—INTEREST.—EVIDENCE. United States admitted liability as to principal amount, denied liability as to counsel fees and interest. On account of insufficient evidence for principal amount which United States accepted to pay, this amount held sufficient compensation for any loss incurred. *Held* not equitable to allow interest. *Cross-references*: Am. J. Int. Law, vol. 8 (1914), pp. 662-663.

This is a claim presented by His Britannic Majesty's Government on behalf of the Great Northwestern Telegraph Company of Canada, a British corporation, for one thousand thirty-nine 58/100 dollars (\$1,039.58) as stated in their memorial, which amount was reduced on the oral argument to nine hundred thirty-nine 58/100 dollars (\$939.58), together with interest from July 17, 1904, for damage caused to the telegraph cable of the said company in Quebec Harbour on July 17, 1904, by the United States gunboat *Essex*, in dropping her anchor in a reserved space and fouling that cable.

Both parties agree as to the facts.

It appears from an affidavit of the Superintendent of the company (British memorial, pp. 28-29) that within eight days after the cable was damaged, the damage was examined and estimated to be equal to at least one-third of the original cost of the cable, viz., six hundred seventy-nine 48/100 dollars (\$679.48). It appears further that the actual cost of repairs was one hundred forty-eight 10/100 dollars (\$148.10).

The claim is presented for both those items, being altogether eight hundred twenty-seven 58/100 dollars (\$827.58), to which is added, as a third item, counsel fee for two hundred twelve dollars (\$212)—afterwards reduced to one hundred twelve dollars (\$112)—a total of nine hundred thirty-nine 58/100 dollars (\$939.58).

The United States Government admits its liability for eight hundred twenty-seven 58/100 dollars (\$827.58), but denies any liability as to counsel fees and interest.

The Tribunal cannot but remark that the estimated damage of six hundred seventy-nine 48/100 dollars (\$679.48) is simply the contention of the injured party without being supported by any other evidence than its own statement and that the actual expenses for repairs, being one hundred forty-eight 10/100 dollars (\$148.10) is accounted for separately.

Under these circumstances, and considering section 4 of the Terms of Submission, the Tribunal is of opinion that the sum of eight hundred twenty-seven 58/100 dollars (\$827.58) as accepted by the United States Government

is sufficient compensation for any loss incurred by said damage, and in view of all the circumstances it does not consider it equitable to allow interest.

*On these motives*

The Tribunal decides that the agreement given by the Government of the United States to pay His Britannic Majesty's Government the sum of eight hundred twenty-seven 58/100 dollars (\$827.58) claimed by the Great North-western Telegraph Company of Canada shall be put on record, and further awards that the said sum shall be paid accordingly without interest.

---

SIVEWRIGHT, BACON AND CO. (GREAT BRITAIN)  
v. UNITED STATES

(Eastry case. May 1, 1914. Pages 499-504.)

---

DAMAGE TO VESSEL AT MANILA BAY.—NATIONALITY OF VESSEL: EVIDENCE, CERTIFICATE OF REGISTRY, TRIBUNAL ACTING *PROPRIO MOTU*. The *Eastry*, belonging to Messrs. Sivewright, Bacon and Co., of Manchester, England, chartered by Mr. Simmons and sublet by him to a company under contract with United States, damaged in June, 1901, at Manila Bay by coal hulks taking off her cargo and belonging to the United States. British nationality of ship shown by certificate of registry, produced at request of Tribunal.

DENIAL OF LIABILITY.—EVIDENCE: COURSE ADOPTED BY LOCAL UNITED STATES MILITARY AUTHORITIES, FAILURE TO DENY LIABILITY PREVIOUSLY. Quartermaster, Chief Quartermaster and Assistant Adjutant General, United States Army Transport Service, Manila, recommended payment of \$6,500, the amount the owners agreed to take in final settlement of their claims for cost of repairs and demurrage. Army Transport Service decided to make only temporary repairs in view of possible additional damages if final repairs were made, and to leave owners to file claim for such damages as had not been repaired. When temporary repairs completed, claim forwarded to War Department, Washington, by Army Transport Service with recommendation for early adjustment. Notification of United States by owners of survey of ship in Liverpool, England, on July 14, 1902, before final repairs took place. The United States never contested its obligation to pay for repairs, either at Manila, or when notified of survey at Liverpool, or later in the course of diplomatic correspondence. Denial of liability before tribunal *held* inconsistent with evidence.

AMOUNT OF CLAIM.—EVIDENCE: BURDEN OF PROOF.—DEMURRAGE. The United States never objected to amount of claim. Therefore, no burden upon Great Britain to prove that dry docking for more than a year after injuries were suffered was necessitated solely for purpose of repairing such injuries. Computation of demurrage according to rate at place of detention.

INTEREST. *Held* equitable to allow interest: no explanation can be given why this claim so frequently recommended and so favorably reported on by United States authorities was not paid.

*Cross-reference*: Am. J. Int. Law, vol. 8 (1914), pp. 650-655.

This is a claim presented by His Britannic Majesty's Government on behalf of Messrs. Sivewright, Bacon and Co., of Manchester, England, against the Government of the United States for the sum of eight hundred forty-nine

pounds eight shillings nine pence (£ 849. 8s. 9d.) with interest at four per cent (4%) for nine and a half years, i.e., from December 9, 1902, the date on which His Majesty's Government first brought the claim to the notice of the United States Government, to April 26, 1912, the date of the confirmation of the first schedule of the Pecuniary Claims Convention, viz., three hundred twenty-three pounds (£ 323), making a total of one thousand one hundred seventy-two pounds, eight shillings, nine pence (£ 1,172. 8s. 9d.).

By the certificate of registry, produced at the request of this Tribunal, it appears that the steamship *Eastry*, belonging to Messrs. Sivewright, Bacon and Co., was in June, 1901, a British ship.

It is admitted by both parties that, at that date, the *Eastry* was under time charter to one Simmons by whom she had been sublet to the *Companía Marítima*, a company then under contract with the United States Government to carry a cargo of coal to be delivered at Manila Bay.

It appears by the logbook of the *Eastry*, and it is not contested, that she arrived and anchored at Cavite, Manila Bay, on June 7, 1901, and that, on the same and following days, i.e., on June 7, 8, 13 and 15, she was damaged by certain coal hulks that come alongside to take off her cargo. It is admitted that the hulks belonged to the United States Government (British memorial, annex 8).

By a letter dated June 17, 1901 (British memorial, annex 8), a Major and Quartermaster, United States Army, in charge of the Army Transport Service, Manila, reported to the Chief Quartermaster, Division of Manila, that after inspecting the damage done the *Eastry* by the coal hulks, the superintending engineer of his office estimated the cost of necessary repairs at four thousand five hundred dollars (\$4,500) and the time required to complete these repairs at 20 working days, which at two hundred twenty-five dollars (\$225) per day demurrage would make the total cost nine thousand dollars (\$9,000).

He stated further that the ship's master had informed the superintending engineer that he, the master, estimated the cost of repairs, including demurrage, at one thousand three hundred pounds (£ 1,300), i.e., six thousand five hundred dollars (\$6,500).

In his request for instructions, the Quartermaster said:

"It would therefore appear that it will be to the advantage of the United States Government if the amount of damages as fixed by Captain Carr (the ship's master) could be paid."

The Chief Quartermaster forwarded this letter to the Adjutant General of the Division on June 18, 1901, with an endorsement recommending approval of the expenditure of six thousand five hundred dollars (\$6,500), considering that to make the repairs and pay the demurrage "will cost considerably more than \$6,500, the amount the owners are willing to take in final settlement."

By another endorsement dated June 19, 1901, *ibid.*, the Assistant Adjutant General expressly approved the recommendation of the Chief Quartermaster.

On June 24, 1901, the ship's master wrote to the Superintendent of the United States Army Transport Service submitting a claim for damages sustained by the *Eastry*, which he estimated at one thousand three hundred pounds (£ 1,300), and he requested payment of this amount. This request was made in consequence of the decision reached by the officers of the Army Transport Service as appears from the endorsements of July 17th and July 24th on that letter, that it would be advisable not to make the final repairs then, but to place the ship, by way of temporary repairs, in such a condition that she could be given a certificate of seaworthiness, leaving the owners to file a claim for such damages as had not been repaired. The reason given in these endorsements for adopting this course was that additional damages would be claimed because

of the delay involved in making all the repairs, and also because of the consequent loss of another charter party which the ship then had.

It is shown by the said endorsement of July 17, 1901, that after a new survey and estimate at the request of the United States authorities, temporary repairs were made at the expense of the United States Government, which repairs were finished on June 24, 1901, and that the United States authorities then informed the master of the *Eastry* that his ship was seaworthy, and a certificate to this effect was furnished him. He was further informed in reply to his letter of June 24th that all claims against the United States Government are adjusted by the War Department in Washington, and that his letter with all papers pertaining to the case would be forwarded with a statement of the matter, recommending that the claim be adjusted as early as practicable (British memorial, annex 9).

In August, September, October, 1901, and May 1902 (British memorial, annexes 11, 12, 13, 14, and 15), some correspondence took place between the owners of the *Eastry* and the United States authorities with reference to the offer made by the owners to accept the payment of one thousand three hundred pounds (£ 1,300) in settlement, in reply to which offer the owners were informed that "there were no funds under the control of the War Department from which claims for damages can be paid, and that Congress alone can grant relief in such cases" (British memorial, annex 15).

On July 11, 1902 (British memorial, annexes 16, 17, 18, and 20), the *Eastry* being in Liverpool, England, the representatives of the owners notified by telegrams and letters both the United States authorities in Washington and the American Embassy in London, that a survey of the ship was to be made and they advertised the fact in the newspapers, so that the United States Government might have full opportunity to be represented.

By a telegram dated at Washington, July 11, 1902 (British memorial, annex 19), the United States authorities notified the owners that the ship having been surveyed in Manila, it was not practicable for their Government to be represented by surveyors at Liverpool.

On July 14, 1902, the survey was made in the absence of any representatives of the United States Government and immediately thereafter the repairs were proceeded with.

The United States Government contends before this Tribunal that it is not liable in damages for the injuries and losses suffered by the *Eastry* because they were due to rough seas, and because the captain alone had authority to determine the time and manner of discharging the cargo. It is further alleged that the captain of the steamer was negligent in that he allowed the work of discharging the cargo to be proceeded with under the circumstances.

This was not the view taken by the United States Military authorities who had control of this case at the time the damages occurred, and who were familiar with all the circumstances. In an endorsement on the records of the case made by the Chief Quartermaster at Manila dated June 18, 1901, within a week after the injuries occurred, he stated "the damages were clearly the fault of the Government and that there is no question as to the Government's responsibility", etc. (British memorial, annex 8). So also the Major and Quartermaster in charge of the Army Transport Service at Manila, stated in a further endorsement, dated July 17, 1901, that "it is thought that the repairs should be made at the expense of the United States Government".

It does not appear from the documents, and there is no evidence, that the captain was ever consulted or asked to agree to the method adopted by the United States authorities in making the temporary repairs. He was merely informed of what had been done.

The United States Government contends before this Tribunal that the temporary repairs at Manila were made as an act of grace. But this contention finds no support either in the documentary or other evidence. All the evidence goes to show that the United States authorities throughout sought to make the most advantageous arrangement for their Government, and the course adopted by the United States authorities, both at the time the injuries occurred, and in making the preliminary repairs, is wholly inconsistent with the contention now made that the United States was not liable for the damages inflicted.

It must be especially noted that, before this claim was submitted to this Tribunal, the United States Government never, either at Manila or afterwards when it was notified of the survey and repairs at Liverpool, or later in the course of the diplomatic correspondence relating to the presentation of the claim, contested its obligation to pay for the repairs.

In view of all the evidence presented in the record and for the reasons above stated, the Tribunal is of the opinion that the United States Government is liable to pay for the damages, which form the basis of this claim.

*As to the amount of the claim:*

The United States Government contends that the fact that the *Eastry* was not dry-docked at Liverpool for more than a year after the injuries were suffered by the vessel at Manila, imposed a burden upon His Majesty's Government to prove that the dry-docking was necessitated solely for the purpose of repairing such injuries. It is not disputed that to make the repairs required as the result of the occurrences at Manila, nine days were taken in the dry dock. For that period of time the owners of the vessel were deprived of her use by reason of the said occurrences and they are entitled to compensation therefor, and four pence (4d) per gross registered ton per day is the amount claimed for demurrage for the loss of the owners on that account, which is the rate at which demurrage is computed at the place where the detention occurred.

It has been shown that the United States had full opportunity to discuss the nature and amount of the repairs and all matters connected therewith when notified of the survey at Liverpool.

Here, again, it is to be noted that from the time the claim was first transmitted to the United States Government, no objection whatever has been made either to the amount of the claim or to the obligation to pay it. On the contrary, it appears from the congressional public documents that the claim has always been recommended for payment either by the United States War Department, the Secretary of State, or the President, and favorably reported to Congress.

*As to interest:*

This claim was presented to the United States Government by the British Ambassador at Washington on December 9, 1902. There is no evidence to explain why a claim so frequently recommended and so favorably reported on by the United States authorities was not paid.

By clause No. 4 of the Terms of Submission, annexed to Schedule I of the Special Agreement, this Tribunal is authorized to allow interest at four per cent (4%) per annum for the whole or any part of the period between the date when the claim was first brought to the notice of the other party and the date of the confirmation of the first schedule. Taking into consideration the circumstances above mentioned, the Tribunal thinks it is equitable to allow interest in the present case.

*On these motives*

The Tribunal decides that in this case the United States Government shall pay to His Britannic Majesty's Government the sum of eight hundred forty-

nine pounds eight shillings nine pence (£ 849. 8s. 9d.) with interest at four per cent (4%) from December 9, 1902, to April 26, 1912.

REPRESENTATIVES OF ELIZABETH CADENHEAD  
(GREAT BRITAIN) *v.* UNITED STATES

(*May 1, 1914. Pages 506-508.*)

RESPONSIBILITY FOR ACTS OF MILITARY FORCES.—MILITARY DUTY: MUNICIPAL LAW, RULING OF MILITARY COURT. On July 22, 1907, Miss Cadenhead killed by rifle shot fired by United States private soldier at escaping military prisoner on public highway. Whether or not soldier acted in conformity with military duty is question of municipal law of United States. Such conformity established by United States military court.

DENIAL OF JUSTICE.—SPECIAL CIRCUMSTANCES.—RIGHTS OF ALIENS: GENERALLY RECOGNIZED RULE OF INTERNATIONAL LAW.—PERSONAL PECUNIARY LOSS OR DAMAGE. No denial of justice shown, nor special circumstances, nor grounds of exception to generally recognized rule of international law that foreigner within United States is subject to its public law and has no greater rights than nationals of that country. No personal pecuniary loss or damage to relatives or legal representatives of victim (reference to Schedule of Claims, clause III).

EXTRAJUDICIAL ACTION. Tribunal suggests that United States consider possibility of compensation as act of grace.

*Cross-reference*: Am. J. Int. Law, vol. 8 (1914), pp. 663-665.

*Bibliography*: Nielsen, p. 505.

His Britannic Majesty's Government present a memorial in this case "in support of the claim respecting the killing of Elizabeth Cadenhead", a British subject, who left next of kin her surviving as stated in annex 1 of the memorial, all of whom are British subjects. The amount claimed as compensation for the death of Miss Cadenhead is twenty-five thousand dollars (\$25,000).

The death of Miss Cadenhead occurred under the following circumstances: July 22, 1907, Miss Cadenhead with her brother, George M. Cadenhead, and Katharine Fordyce Cadenhead were at Sault Ste. Marie, a city in the State of Michigan, United States of America; it was about 3.30 p.m. and they were returning to the city from a visit to a military post named Fort Brady, the entrance of which is situated on a public highway called South Street. They were proceeding along the sidewalk of South Street, and when at about two hundred yards from the entrance of the Fort, Miss Cadenhead was hit by a rifle shot and instantly killed.

The shot was fired by a private soldier belonging to Company M of the Seventh Infantry, garrisoned at Fort Brady, and was aimed at a military prisoner who was escaping from his custody when at work just at the entrance of the Fort on South Street, by running easterly along the sidewalk on that street in the rear of the Cadenhead party.

His Britannic Majesty's Government contend that this soldier was not justified in firing upon an unarmed man on a public highway, that he acted unnecessarily recklessly, and with gross negligence, and that compensation should be paid by the Government of the United States on the ground that under the circumstances it was responsible for the act of this soldier.

The question whether or not a private soldier belonging to the United States Army and being on duty acted in violation of or in conformity with his military duty is a question of municipal law of the United States, and it has been established by the competent military court of the United States that he acted in entire conformity with the military orders and regulations, namely, section 365 of the Manual of Guard Duty, United States Army, approved June 14, 1902.

The only question for this Tribunal to decide is whether or not, under these circumstances, the United States Government should be held liable to pay compensation for this act of its agent.

It is established by the evidence that the aforesaid orders under which this soldier, who fired at the escaping prisoner, acted, were issued pursuant to the national law of the United States for the enforcement of military discipline, and were within the competency and jurisdiction of that Government.

It has not been shown that there was a denial of justice, or that there were any special circumstances or grounds of exception to the generally recognized rule of international law that a foreigner within the United States is subject to its public law, and has no greater rights than nationals of that country.

Furthermore, no evidence is offered and no contention is made as to any personal pecuniary loss or damage resulting to the relatives or legal representatives of the unfortunate victim of the accident, and it is to be noted that this is a pecuniary claim based on alleged personal wrongs of nationals of Great Britain, as appears from its inclusion in clause III of the Schedule of Claims in the Pecuniary Claims Convention, under which it is presented.

Under those conditions the Tribunal is of the opinion that in the circumstances of this case no pecuniary liability attaches to the Government of the United States.

It should be said, however, that it may not have been altogether prudent for the United States authorities to permit prisoners under the charge of a single guard to be put at work just at the entrance of a fort on a public highway in a city, and order or authorize that guard, after allowing one of these prisoners to escape under these circumstances, to fire at him, while running along that highway.

This Tribunal, therefore, ventures to express the desire that the United States Government will consider favorably the payment of some compensation as an act of grace to the representatives of Miss Cadenhead, on account of the unfortunate loss of their relative, under such distressing circumstances.

*On these motives*

The Tribunal decides that with the above recommendation, the claim presented by His Britannic Majesty's Government in this case be disallowed.

---

OWNER OF THE *FREDERICK GERRING, Jr.* (UNITED STATES)  
v. GREAT BRITAIN

(*May 1, 1914. Page 577.*)

---

SEIZURE OF FISHING VESSEL OFF NOVA SCOTIA.—SETTLEMENT OF CLAIM. Claim made by the United States on account of seizure on May 25, 1896, and subsequent condemnation and confiscation of American fishing vessel *Frede-*

*rick Gerring, Jr.*, together with fishing equipment. Amicable settlement between Governments.

*Cross-Reference*: Am. J. Int. Law, vol. 8 (1914), p. 655.

*Bibliography*: Nielsen, pp. 575-576.

The Tribunal considering that an amicable settlement of this case has been arrived at by the Governments concerned, according to which the Canadian Government is disposed to place at the disposal of the United States Government a sum of nine thousand dollars (\$9,000), to be employed in blotting out the recollection by the American citizen affected of an incident which, on its side, the Government of the United States will regard henceforth as finally and from every point of view closed and settled,

Decides that the said settlement shall be put on the record of this Tribunal, and shall be complied with by the Governments in conformity therewith.

---

## HOME FRONTIER AND FOREIGN MISSIONARY SOCIETY OF THE UNITED BRETHERN IN CHRIST (UNITED STATES)

v. GREAT BRITAIN

(December 18, 1920. Pages 423-426.)

---

COLONIAL TAX POLICY.—EXERCISE OF SOVEREIGNTY. Imposition of hut tax a fiscal measure in accordance with general usage in colonial administration and usual practice in African countries, to which British Government perfectly entitled in legitimate exercise of sovereignty.

MOB VIOLENCE.—GOOD FAITH, NEGLIGENCE, STANDARDS OF PROTECTION OF ALIENS.—AWARENESS OF RISK. Claim in respect of losses and damages during native rebellion in 1898 in British Protectorate of Sierra Leone. No Government responsible for act of rebellious bodies of men committed in violation of its authority, where it is itself guilty of no breach of good faith, or of no negligence in suppressing insurrection. Good faith of British Government cannot be questioned, and from outbreak of insurrection British authorities took every measure available for repression. Impossible to judge system of police and protection of life and property in savage regions of Africa by standard of highly civilized countries or cities. Missionary Society must have been aware of perils to which it exposed itself. Great Britain held not responsible.

EXTRAJUDICIAL ACTION. Tribunal recommends that Great Britain repair losses as far as possible as an act of grace.

*Cross-references*: Am. J. Int. Law, vol. 15 (1921), pp. 294-297; Annual Digest, 1919-1922, pp. 173-174.

*Bibliography*: Nielsen, pp. 421-422; Annual Digest, 1919-1922, pp. 376-377.

This is a claim for \$78,068.15 together with interest thereon from May 30, 1898, presented by the United States Government on behalf of an American religious body known as the "Home Frontier and Foreign Missionary Society of the United Brethren in Christ". The claim is in respect of losses and damages sustained by that body and some of its members during a native rebellion in 1898 in the British Protectorate of Sierra Leone.

The facts are few and simple.

In 1898 the collection of a tax newly imposed on the natives of the Protectorate and known as the "hut tax" was the signal for a serious and widespread revolt in the Ronietta district. The revolt broke out on April 27 and lasted for several days. As is common in the more uncivilized parts of Africa, it was marked by every circumstance of cruelty and by indiscriminating attacks on the persons and properties of all Europeans.

In the Ronietta district, which was the centre of the rebellion, the Home Missionary Society had several establishments: the Bompeh Mission at Rotofunk and Tiama, the Sherbro-Mendi Mission at Shengeh, the Avery Mission at Avery, and the Imperreh Mission at Danville and Momaligi.

In the course of the rebellion all these missions were attacked, and either destroyed or damaged, and some of the missionaries were murdered.

The rising was quickly suppressed, and law and order enforced with firmness and promptitude. In September, October, and November such of the guilty natives as could be caught were prosecuted and punished. (British answer, annexes 15, 16, and 17.)

A Royal Commissioner was appointed by the British Government to inquire into the circumstances of the insurrection and into the general position of affairs in the Colony and Protectorate.

On the receipt of his report, as well as of one from the Colonial Governor, the Secretary of State for the Colonies came to the conclusion that though some mistakes might have been made in its execution, the line of policy pursued was right in its main outlines and that the scheme of administration, as revised in the light of experience, would prove a valuable instrument for the peaceful development of the Protectorate and the civilization and well-being of its inhabitants (British Blue Book, Sierra Leone, C. 9388 and 1899, part 1, p. 175).

On February 21, 1899, the United States Government (British answer, annex 39,) through its Embassy in London, brought the fact of the losses sustained by the Home Missionary Society to the attention of the British Government. In his reply on October 14, 1899, Lord Salisbury repudiated liability on behalf of the British Government with an expression of regret that sensible as it was of the worth of the services of the American missionaries, there was no fund from which, as an act of grace, compensation could be awarded.

The contention of the United States Government before this Tribunal is that the revolt was the result of the imposition and attempted collection of the "hut tax"; that it was within the knowledge of the British Government that this tax was the object of deep native resentment; that in the face of the native danger the British Government wholly failed to take proper steps for the maintenance of order and the protection of life and property; that the loss of life and damage to property was the result of this neglect and failure of duty, and therefore that it is liable to pay compensation.

Now, even assuming that the "hut tax" was the effective cause of the native rebellion, it was in itself a fiscal measure in accordance not only with general usage in colonial administration, but also with the usual practice in African countries (Wallis, *Advance of our West African Empire*, p. 40).

It was a measure to which the British Government was perfectly entitled to resort in the legitimate exercise of its sovereignty, if it was required. Its adoption was determined by the course of its policy and system of administration. Of these requirements it alone could judge.

Further, though it may be true that some difficulty might have been foreseen, there was nothing to suggest that it would be more serious than is usual and inevitable in a semi-barbarous and only partially colonized protectorate, and certainly nothing to lead to any apprehension of widespread revolt.

It is a well-established principle of international law that no government can be held responsible for the act of rebellious bodies of men committed in violation of its authority, where it is itself guilty of no breach of good faith, or of no negligence in suppressing insurrection. (Moore's International Law Digest, vol. VI, p. 956; VII, p. 957; Moore's Arbitrations, pp. 2991-92; British answer, p. 1.)

The good faith of the British Government can not be questioned, and as to the conditions prevailing in the Protectorate there is no evidence to support the contention that it failed in its duty to afford adequate protection for life and property. As has been said with reference to circumstances very similar, "it would be almost impossible for any government to prevent such acts by omnipresence of its forces" (Sir Edward Thornton-Moore's Arbitrations, pp. 3-38).

It is true that the Royal Commissioner criticized in his report the mode of application of certain measures. But there is no evidence of any criticisms directed at the police organization, or the measures taken for the protection of Europeans. On the contrary, it is clear that from the outbreak of the insurrection the British authorities took every measure available for its repression. Despite heavy losses, the troops in the area of revolt were continually increased. But communication was difficult; the risings occurred simultaneously in many districts remote from one another and from any common centre; and it was impossible at a few days' or a few hours' notice to afford full protection to the buildings and properties in every isolated and distant village. It is impossible to judge the system of police and protection of life and property in force in the savage regions of Africa by the standard of countries or cities which enjoy the social order, the respect for authority, and the settled administration of a high civilization. A Government can not be held liable as the insurer of lives and property under the circumstances presented in this case (see *Wipperman case*, Ralston's International Law and Procedure, No. 491, p. 231).

No lack of promptitude or courage is alleged against the British troops. On the contrary the evidence of eye-witnesses proves that under peculiarly difficult and trying conditions they did their duty with loyalty and daring, and upheld the highest traditions of the British army.

Finally it is obvious that the Missionary Society must have been aware of the difficulties and perils to which it exposes itself in its task of carrying Christianity to so remote and barbarous a people. The contempt for difficulty and peril is one of the noblest sides of their missionary zeal. Indeed, it explains why they are able to succeed in fields which mere commercial enterprise can not be expected to enter.

For these reasons, the Tribunal is of opinion that the claim presented by the United States Government on behalf of the Home Missionary Society has no foundation in law and must be dismissed.

But if His Britannic Majesty's Government in consideration of the service which the Home Missionary Society has rendered and is still rendering in the peaceful development of the Protectorate and the civilization of its inhabitants, and of the support its activities deserve, can avail itself of any fund from which to repair as far as possible the losses sustained in the native revolt, it would be an act of grace which this Tribunal can not refrain from recommending warmly to the generosity of that Government.

*For these reasons and subject to this recommendation*

The Tribunal decides that this claim must be dismissed.

---

OWNERS OF THE CARGO OF THE *COQUITLAM* (GREAT BRITAIN)  
v. UNITED STATES

(December 18, 1920. Pages 447-451.)

SEIZURE OF VESSEL IN PORT ETCHES, HINCHINBROOK ISLAND (ALASKA); MUNICIPAL COURT PROCEEDINGS, RELEASE ON BOND. Seizure of British vessel *Coquitlam* on June 22, 1892, by United States revenue cutter at Port Etches, Hinchinbrook Island (Alaska). On July 5, 1892, libel of information filed by United States District Attorney; on September 17, 1892, release of vessel, cargo, and appurtenances on bond; on September 18, 1893, condemnation by District Court, whose decree on November 16, 1896, reversed by United States Circuit Court of Appeals with dismissal of libel.

GOOD FAITH AND FAIR CONDUCT OF SEIZING OFFICERS, BUT ERROR IN JUDGMENT;—PROBABLE CAUSE OF SEIZURE: SUSPICION OF UNDOUBTEDLY WRONGFUL FACT.—WRONGFUL APPLICATION OF MUNICIPAL LAW BY CUSTOMS AUTHORITIES. Before Tribunal, United States denies all liability on the ground that seizing officer acted in bona fide belief that revenue laws of United States had been infringed, and that for this belief there was probable cause. Good faith and fair conduct of seizing officers unquestionable, yet error in judgment for which United States liable: probable cause of seizure implies the existence of certain facts which, if proved, are undoubtedly wrongful. At time of seizure, however, wrongful character of fact not beyond doubt. Since United States judicial authorities decided that application of Customs Statutes wrong, *held* that liability clearly arises.

DAMAGES: INQUIRY OF AGENTS BY TRIBUNAL. Tribunal made inquiry of agents to determine proper amount to be paid as compensation.

INTEREST.—FAILURE TO REACT ON UNITED STATES DECLARATION. *Held* not equitable to allow interest for periods prior to six months after decision of Court of Appeals, and beyond December 21, 1904, date of declaration that United States was disposed to recommend payment subject to certain conditions and to which Great Britain never reacted.

*Cross-references*: Am. J. Int. Law, vol. 15 (1921), pp. 301-304; Annual Digest, 1919-1922, pp. 171-172, 192-193.

*Bibliography*: Nielsen, pp. 445-446; Annual Digest, 1919-1922, p. 193.

This is a claim for \$104,709.03 and interest presented by the Government of His Britannic Majesty on behalf of the owners of the cargo of the steamer *Coquitlam*. It arises out of the seizure of that steamer on the 22nd of June, 1892, by the United States cutter *Corwin* in the Behring Sea.

The following facts are admitted: the *Coquitlam* was a British ship owned by the Union Steamship Company, of British Columbia, and registered at the Port of Vancouver, B.C.; her gross registered tonnage was 256.33, her net tonnage 165.67.

In the spring of 1892 a number of British schooners left Victoria, B.C., for the purpose of hunting seals in the North Pacific Ocean. The owners of these vessels belonged to an association known as the Pacific Sealers Association, and at the time they sailed from Victoria it was understood that a ship would be sent out in the following June to convey supplies to the schooners and receive in return their catch of seal skins.

In pursuance of this understanding the *Coquitlam* was chartered on June 4, 1892, for a period of 30 days and fitted out at the Port of Victoria by the Pacific

Sealers Association. She sailed from that port for the North Pacific Ocean on June 8.

It had been arranged that the schooners should rendezvous at Marmot Island, or Tonki Bay, in Afognak Island, or at Port Etches, in Hinchinbrook Island.

The *Coquiltam* arrived at Tonki Bay on June 18, 1892, and next day at the mouth of the bay received from eight sealing schooners 5,835 seal skins and transferred to the other vessels the supplies provided. She left Tonki Bay for the second rendezvous at Port Etches and arrived there on June 22. The same day, before any transfer had been made to or from the schooners, she was seized in the harbour by the United States revenue cutter *Corwin* and taken to Sitka, where she was handed over to the Collector of Customs.

No document or entry in the ship's log has been produced purporting to have been made at the time and stating the circumstances of and reasons for the seizure.

On July 5 the United States District Attorney filed in the District Court of Alaska a libel of information against the *Coquiltam*, its appurtenances and cargo, alleging that she had committed three separate offenses: the first, under sections 2867 and 2868 of the Revised Statutes of the United States, by receiving or unloading merchandise and cargo in the waters and within four leagues of the coast of the United States; the second, under section 3109 of the same Revised Statutes, by transferring merchandise within the said limits without having previously reported and received a permit; the third, under sections 2807, 2808, and 2809, by having no manifest in writing of the cargo brought into an United States harbour.

By order of the District Court of the 17th of September, 1892, the vessel, cargo, and appurtenances were released upon giving bonds for \$87,660.95.

Upon the trial of the libel the *Coquiltam*, her cargo and appurtenances were condemned by a decree of the District Court, dated September 18, 1893. But on appeal the United States Circuit Court of Appeals for the Ninth Circuit on the 16th day of November, 1896, reversed the decree of forfeiture made by the District Court and dismissed the libel.

This decision of the judicial authorities of the United States is binding upon the Government. It decides that what sections 2867, 2868 of the Revised Statutes had in view was vessels bound to the United States and that there was no evidence that the *Coquiltam* was so bound—that section 3109 contemplated vessels not merely arriving in the United States waters but intending to proceed further inland, either to unload or take on cargo, and that there was on the record no proof of any such intention—that sections 2807, 2808 and 2809 made liable to forfeiture only such merchandise as is consigned to the master, mate, officers, or crew, and that it was not alleged in this case that any merchandise was so consigned.

The same decision goes on to say that there was no contention “that any injury has been done to the United States by the acts which are complained of in the libel, or that the United States has in any way been defrauded of revenue, or that there was any intention upon the part of the masters or owners of the vessels to evade the provisions of the revenue laws. The merchandise was not bound to the United States, nor was it consigned to any person, nor destined to be delivered at any place in the United States.”

#### I. *As to the liability:*

It appears that shortly after the seizure of the vessel the British Government brought the matter to the attention of the United States Government, but no action was taken during the pendency of the judicial proceedings, the

*Coquitlam* in the meantime having been released on bond. Subsequently, in a letter of the Secretary of State to the British Ambassador, dated December 21, 1904, the United States Government stated that the Department of State "is disposed to recognize liability and to recommend payment of a reasonable indemnity; but it will be necessary to have submitted to it the proofs showing the nature and extent of the damages suffered by the seizure, in order that the Department may consider the amount of the liability to make a definite recommendation". There is no evidence that the British Government ever complied with the request.

Before this Tribunal the United States Government denies all liability in this case.

It contends that the construction put upon the language of the Statutes by the Circuit Court of Appeals is a very technical construction, while the construction upon which the officer acted in making the seizure had abundant support in decisions of the United States Courts prior to this case, that it is clear when this circumstance is taken in conjunction with the facts as disclosed that the officer acted in the bona fide belief that the revenue laws of the United States had been infringed, and that for this belief there was probable cause.

The good faith and fair conduct of the officers of the *Corwin* are unquestionable, but though this may be taken into account as an explanation given by the same officers to their Government, it can not operate to prevent their action being an error in judgment for which the Government of the United States is liable to a foreign Government.

Further, even supposing that the interpretation of the United States Customs Statutes may have given rise to some doubt, such a doubt can not constitute a probable cause of seizure. Probable cause of seizure, as defined by Chief Justice Marshall, "imports a seizure made under circumstances which warrant suspicion" (*Locke v. United States*, 1813, vii Cranch. 339, at p. 348). It implies the existence of certain facts which *prima facie* create a liability to seizure, facts which there is good reason to believe will be established though they are not yet actually proved. The doubt must be as to the existence of the fact, not as to its wrongful character.

Since in this case there was no doubt as to the circumstances of fact under which the seizure took place, but, according to the United States contention, some possible doubt as to the application of the Statutes, their application was made by the United States naval authorities at the risk of their Government, and since it has been decided by the United States judicial authorities that this application was wrong, liability clearly arises.

## II. *As to the consequences of the liability and amount of damages :*

The result of inquiry made by the Tribunal of the agents of both Governments has been to show that a sum of \$48,000 represents a proper amount to be paid by the Government of the United States as compensation for the seizure and its consequences.

## III. *As to interest :*

It would not be equitable that interest should be allowed for the period prior to six months after the decision of the Circuit Court of Appeals on November 16, 1896, i.e., prior to May 16, 1897. On the other hand, it has been shown that, on December 21, 1904, the United States Government declared that it was disposed to recommend payment on condition that the British Government should submit proof of the nature and extent of the damages. As has been said, there is no evidence that the British Government ever complied with that request.

Taking these circumstances into consideration, this Tribunal is of opinion that interest at 4 % should be allowed from May 16, 1897, to December 21, 1904.

*For these reasons*

This Tribunal decides that the Government of the United States must pay to the Government of His Britannic Majesty the sum of \$48,000 on behalf of the British subjects injured by the seizure of the S.S. *Coquiltam* in June 1892, with interest at 4% from May 16, 1897, to December 21, 1904.

---

OWNERS OF THE *TATTLE* (UNITED STATES) v. GREAT BRITAIN

(December 18, 1920. Pages 490-494.)

---

SEIZURE OF FISHING VESSEL IN LIVERPOOL (NOVA SCOTIA) AND NORTH SYDNEY (CAPE BRETON).—SEPARATION OF CLAIMS. Seizure of United States vessel *Tattler* on April 10, 1905, by Canadian authorities in Liverpool (Nova Scotia), and on December 15, 1905, by the same authorities in North Sydney (Cape Breton). Claims presented on account of each seizure argued and decided separately.

RELEASE OF VESSEL.—WAIVER OF CLAIMS BY INTERESTED PARTIES BINDING UPON STATE. Release of vessel on April 16, 1905, subsequent to agreement whereby owners of vessel unconditionally waived all claims on account of its seizure. Owners' waiver *held* binding upon United States as the only right it is supporting is that of the owners.

WRONGFUL APPLICATION OF MUNICIPAL LAW BY CUSTOMS AUTHORITIES.—Refusal in October, 1905, by Canadian authorities in North Sydney, Cape Breton, of licence enabling the *Tattler* to ship additional members of the crew. When the *Tattler*, nevertheless, shipped men and on December 15, 1905, again entered North Sydney, she was seized for violation of the relative Canadian Statute, though in the meantime the Canadian authorities in North Sydney had discovered that their refusal had been based on an error and had issued a licence to the *Tattler*. Vessel not released until December 18, 1905. Great Britain *held* responsible.

AMOUNT OF CLAIM.—LOST PROFITS. Claim for value of herring not caught because of detention. Uncertainty of prospective catch. Indemnity fixed on the basis of trouble undergone by owners, period of detention, and tonnage, equipment and manning of vessel.

INTEREST: POSTPONEMENT OF DECISION.

*Cross-references* : Am. J. Int. Law, vol. 15 (1921); pp. 297-301; Annual Digest, 1919-1922, pp. 235-236, 172-173.

*Bibliography* : Annual Digest, 1919-1922, p. 236.

*First claim*

This is a claim for \$2,028.88 with interest, on account of a seizure of the said schooner *Tattler* on April 10, 1905, and its detention for six days, i.e., from April 10 to April 16, 1905, by the Canadian Authorities in Liverpool, Nova Scotia, on a charge of an alleged contravention of the first article of the treaty concluded at London on October 10, 1818, between Great Britain and the United States, and of section 3, paragraph 3, of chapter 94 of the

Revised Statutes of Canada, 1886, entitled: "An Act respecting fishing by foreign vessels."

The record shows that by an agreement made at Liverpool, Nova Scotia, April 15, 1905 (United States memorial, exhibit 19, enclosure 1), the owners entered into the following undertaking:

"In consideration of the release of the American schooner *Tattler* of Gloucester, Mass., now under detention at the port of Liverpool, Nova Scotia (on payment of the fine of five hundred dollars, demanded by the Honourable Minister of Marine and Fisheries of Canada, or by the Collector of Customs at said port), we hereby guarantee His Majesty King Edward the Seventh, his successors and assigns, represented in this behalf by the said Minister, and all whom it doth or may concern, against any and all claims made or to be made on account of or in respect to such detention or for deterioration or otherwise in respect to said vessel or her tackle or apparel, outfits, supplies or voyage, hereby waiving all such claims and right of libel or otherwise before any courts or Tribunal in respect to said detention or to such or any of such claims or for loss or damage in the premises."

It has been observed by the United States Government that on the same day the owners notified the Canadian authorities that the payment of the said sum of \$500 was made under protest.

But neither this protest nor the receipt given by the Canadian authorities for the \$500 contains any reservation to, or protest against, the guarantee given against "any and all claims made or to be made on account of or in respect to such detention". It does not appear, therefore, that the waiver in the undertaking of any claim or right "before any court or tribunal" was subject to any condition available before this tribunal.

It is proved by the documents that the consent of the British Government to the release of the vessel was given on two conditions, first, on payment of \$500, and, second, on the owners undertaking to waive any right or claim before any court, and the protest against the payment does not extend and can not in any way be held by implication to extend to this waiver.

This protest appears to have been a precautionary measure in case the Canadian authorities should have been disposed to reduce the sum. Any protest or reserve as to the waiver of the right to damages would have been plainly inconsistent with the undertaking itself and would have rendered it nugatory if it had been accepted by the other party.

On the other hand, it has been objected that the renunciation of and guarantee against any claims are not binding upon the Government of the United States, which presents the claim.

But in this case the only right the United States Government is supporting is that of its national, and consequently in presenting this claim before this Tribunal, it can rely on no legal ground other than those which would have been open to its national.

*For these reasons*

This Tribunal decides that the claim relating to the seizure and detention of the American schooner *Tattler* on and between April 10 and April 16, 1905, must be dismissed.

*Second claim*

This is a claim for \$2,100 with interest for the seizure of the same American schooner *Tattler* by the Canadian authorities on December 15, 1905, in the port of North Sydney, Cape Breton, for an alleged violation of the Canadian

Statute 55 and 56 Vict. (1892) chapter 3, entitled: "An Act respecting fishing vessels of the United States."

In October, 1905, the *Tattler* registered at and sailed from Gloucester, Massachusetts, to Newfoundland on a salt herring voyage, proceeding to North Sydney, Cape Breton, and entered that port to obtain a licence from the Canadian authorities under the above-mentioned Canadian Act enabling it to ship additional men as members of the crew.

It is shown by the documents and it is not denied that the Master of the *Tattler* after entering that port went on shore and applied to the Canadian authorities for the said licence; that notwithstanding three separate requests the licence was refused him on the ground that the schooner was on the American register and did not hold an American fishing licence; and that on this refusal the men were shipped without a licence.

It is established by a report of the Canadian authorities to the Minister of Marine and Fisheries of Canada dated at Ottawa, December 15, 1905 (British answer, annex 51), that up to that season United States vessels registered as trading vessels visited Newfoundland for the purpose of obtaining cargoes of frozen herring, and were afforded all the ordinary port privileges extended to trading vessels. Newfoundland, however, in that year, i.e., 1905, passed an Act preventing such vessels from procuring bait fishes and herring within the territorial jurisdiction of Newfoundland, and they were forced to catch their cargoes of fish for themselves, and so became fishing vessels. As they had not the necessary crews and could not under the Newfoundland regulations ship them in Newfoundland waters, it became necessary for them either to return home or procure the necessary crews in Canadian ports. In the early part of the season the Canadian local custom officials were not very clear as to the status of these vessels under the changed conditions. The Canadian Government, however, decided that the moment they shipped crews to catch fish they changed their character and became fishing vessels, and as such must procure a Canadian licence, under the Canadian Act. When the Government's decision was made known to the officials, this course was followed.

In the following month, i.e., November, 1905, information was received by the owners of the *Tattler* that the Canadian authorities at North Sydney had discovered their error in regard to the licence requested by and refused to the schooner, and that they were ready to issue the licence on receipt of the proper fee. The owners mailed the amount without delay to the Canadian authorities at North Sydney.

By that time the *Tattler* had returned to Gloucester and sailed again for Newfoundland, and on December 15th owing to bad weather she entered North Sydney for shelter. She was immediately seized on the charge of having, on her previous trip, shipped men without a licence. Telegraphic correspondence took place between the owners and the Canadian authorities to ascertain the facts. But it was not until three days later, i.e., on December 18, 1905 (British answer, annex 53), that her release was obtained.

This Tribunal is of opinion that the British Government is responsible for that detention.

It is difficult to admit that a foreign ship may be seized for not having a certain document when the document has been refused to it by the very authorities who required that it should be obtained.

The British Government in their answer and argument contend that the captain of the schooner had never expressly informed the Canadian Collector of Customs that his vessel was a fishing vessel. But it is to be observed that this same ship, a few months before, sailing under exactly the same conditions

and entering Canadian ports, had been treated as a fishing vessel, blacklisted and seized as one by the Canadian authorities.

That this fact could not have been and was not forgotten is shown by the aforesaid Canadian report of December 16, 1905 (British answer, annex 51).

In any case, it was admitted by the Canadian authorities (*ibid.*) that the officials were at that time insufficiently informed and uncertain as to the exact status of such vessels.

Such an error of judgment by the Canadian officials shall not result in prejudice to the foreign ship in question.

Under these circumstances the *Tattler* is entitled to an indemnity.

*As to the quantum :*

The claim is for the alleged loss of 665 barrels of herring valued at \$2,100, which it is contended the vessel did not catch because of the three days detention.

But no evidence is produced as to the certainty of this prospective catch. Nobody can say whether the vessel would have made such a catch, or whether it would have encountered some mishap of the sea.

Taking into consideration the trouble undergone by the owners, the period of the detention, and the tonnage, equipment and manning of the vessel, this Tribunal thinks that the sum of six hundred and thirty dollars (\$630) is a just indemnity.

*For these reasons*

This Tribunal decides that the Government of His Britannic Majesty must pay to the Government of the United States the sum of six hundred and thirty dollars (\$630) for the seizure and detention of the American schooner *Tattler* on and between December 15 and 18, 1905.

As to the interest, further decision will be given.

---

#### H. J. RANDOLPH HEMMING (GREAT BRITAIN) *v.* UNITED STATES

(December 18, 1920. Pages 620-623.)

---

**IMPLICIT APPROVAL OF, LIABILITY FOR ACTION TAKEN BY CONSUL.**—Employment of attorney by United States Consul at Bombay in December, 1894, January and February, 1895, for the sole benefit of United States. Whatever the Consul's authority to employ attorney, United States by its implicit approval of employment liable for costs of services rendered.

**AMOUNT OF CLAIM.—INTEREST.** Claim for \$2,000 and interest at 4% per annum for 16 years. No specific fee ever agreed upon. House of Representatives Committee of Claims suggested payment of \$2,000 in full settlement. In consideration of services rendered, expense and trouble undergone by Hemming, and of delay in payment, award made of \$2,500 without interest.

*Cross-references :* Am. J. Int. Law, vol. 15 (1921), pp. 292-294; Annual Digest, 1919-1922, p. 170.

*Bibliography :* Nielsen, pp. 617-619.

This is a claim presented by His Britannic Majesty's Government on behalf of Henry Joseph Randolph Hemming for \$2,000 and \$1,280 for 16 years' interest at 4%, and also for such further compensation as this Tribunal may think right.

This claim is on account of professional services rendered as a lawyer by H. J. Randolph Hemming at the request of the United States Consul at Bombay in December, 1894, January and February, 1895, in the prosecution of certain persons accused of counterfeiting United States gold coin in India.

The Government of the United States admits the employment of Hemming by its Consul and the rendering by him of some legal services. It does not deny the American Consul's clear right to prevent, if possible, the counterfeiting of American coin in India by setting in motion the machinery of police and prosecution, but it contends that the Consul had no legal authority to employ private counsel on behalf of his Government, for the performance of duties which might well have been carried out by the public officials of the Crown.

*As to the facts :*

It appears from the documents in the case, that on December 13 and 15, 1894, the United States Consul at Bombay informed the Secretary of State of the counterfeiting of American gold dollars in India and asked for instructions, and that in the absence of any reply he further informed him on December 22, 1894, and January 5 and 26, 1895, of the steps which he was taking to put an end to the counterfeiting and for the prosecuting of the offenders, of the employment of a lawyer, and also of the various legal services and assistance rendered in the matter by the said Hemming.

On January 30, 1895, the Secretary of State in reply forwarded some technical remarks of the Treasury Department as to the counterfeiting and made no objection to or criticism of the steps which had been taken.

On February 2 and May 11, 1895, the Consul forwarded to the Secretary of State further information as to the progress of the prosecution he had initiated and the employment of the attorney and finally communicated to his Government the decision of the Indian Court, and asked for instructions as to an appeal.

By a letter dated July 2, 1895, the Secretary of State, still acting in conjunction with the Secretary of the Treasury, negatived the suggestion of an appeal. As before he made no criticism of, nor did he refer in any way to, the employment of Hemming.

The legal proceedings thus came to an end, and the Consul by a letter dated August 2, 1895, reported to the Secretary of State the request of Hemming for a fee of \$2,000, but recommended a fee of \$500.

It is shown by the documents that the United States Government decided not to pay Hemming the fee recommended by the Consul on the ground that his employment was unauthorized, and would not have been sanctioned. There is no evidence that this decision was communicated to Hemming either by the United States Government, or by its Consul.

In 1904, Hemming, who had in the meantime given up practice in India and returned to England, addressed the American Embassy in London through Merton and Steele, solicitors in London. But it appears from the documents that the United States Government on the receipt through the Embassy of this new request adhered to its decision that as the records did not show any authorization for the employment of counsel, or for the incurring of expense in connection with the case, the claim could not be paid. There is no evidence that this decision was communicated by the United States Government or by its Embassy, either to Hemming or to his solicitors.

In 1908 Hemming went to Washington to endeavour to secure payment. There he obtained the presentation before Congress of some bills which were favorably reported upon, at first for \$500, finally, after hearing Hemming's

explanation, for \$2,000. But they had not passed when the claim was brought before this Tribunal.

It was only in April, 1910, that Hemming appealed to His Britannic Majesty's Government for assistance in procuring redress, and it is said that the claim was accordingly recommended informally to the State Department by the British Ambassador at Washington.

*As to the law :*

Whatever at the outset was the authority of the United States Consul to employ an attorney at the expense of the United States Government, it is plain from the correspondence referred to above that that Government was perfectly well aware, after its Consul's letter of December 22, 1894, received January 14, 1895, of Hemming's employment in a prosecution initiated solely for its benefit, that it did not object in any way whatever during the progress of the case to the steps taken by its Consul but appeared implicitly at all events to approve of those steps and of Hemming's employment.

This Tribunal is, therefore, of opinion that the United States is bound by the contract entered into, rightly or wrongly, by its Consul for its benefit and ratified by itself.

*As to the amount of the claim :*

There is no evidence that any specific sum was ever agreed upon as a fee to be paid to Hemming.

As has been shown, the American Consul first recommended a sum of \$500. The same sum was accordingly recommended in 1910 as equitable to the Committee of Claims of the House of Representatives by the Secretary of State and favorably reported upon in 1910 by that committee. Subsequently, in 1912, after a close investigation into Hemming's claim, the same committee suggested a sum of \$2,000 in full settlement.

This Tribunal taking into consideration the services rendered, and the expense and trouble undergone by Hemming as well as the delay in payment, thinks that the sum of two thousand five hundred dollars (\$2,500) is sufficient in full settlement of the claim, without interest.

*For these reasons*

This Tribunal decides that the Government of the United States must pay to the Government of His Britannic Majesty for the benefit of Henry Joseph Randolph Hemming, the sum of two thousand five hundred dollars (\$2,500) without interest.

---

OWNERS OF THE *SIDRA* (GREAT BRITAIN) *v.* UNITED STATES

(November 29, 1921. Pages 453-458.)

---

COLLISION OF VESSELS ON PATAPSCO RIVER.—NATIONALITY OF VESSEL, EVIDENCE, CERTIFICATE OF REGISTRY. Collision on October 31, 1905, on Patapsco River between British merchant ship *Sidra* and United States Government tug boat *Potomac*. British nationality of *Sidra* shown by certificate of registry.

APPLICABLE LAW: *LEX LOCI DELICTI COMMISSI*.—EVIDENCE: PROOF OF FAULT, BURDEN OF PROOF, RULE OF MARITIME LAW RECOGNIZED IN UNITED STATES AND

GREAT BRITAIN. According to well settled rule of international law the *lex loci delicti commissi* must apply. Well settled rule of maritime law recognized both in United States and Great Britain that ship under way colliding with ship at anchor is liable unless it proves that collision is due to fault of the other vessel.

DENSE FOG. ANCHORING AND NAVIGATION, INLAND RULES OF UNITED STATES.

In a dense fog, the *Sidra* anchored across the path of navigation, while she could well have anchored clear of the channel. The *Potomac*, upon hearing the bell of the anchored *Sidra*, stopped and instead of keeping stopped and ascertaining the location of the *Sidra* according to the common rule of prudent navigation confirmed by the Inland Rules of the United States, she then altered her course and continued ahead in the narrow channel frequented by numerous ships, without a lookout on the fore-castle, at a speed as to make it unable to avoid collision. The *Potomac* held responsible for collision and the *Sidra* as having contributed to it.

EXTENT OF LIABILITY: BOTH SHIPS AT FAULT. According to applicable United States law, when both ships are to blame the damage suffered by each of them must be supported by moiety by the other.

INTEREST: PRESENTATION OF CLAIM. No proper presentation of claim made to United States Government.

*Cross-references* : Am. J. Int. Law, vol. 16 (1922), pp. 110-114; Annual Digest, 1919-1922, p. 100.

*Bibliography* : Nielsen, p. 452.

This is a claim presented by His Britannic Majesty's Government for £ 4,336. 7s. 4d. and £ 1,127 interest for damages on account of a collision which occurred during a dense fog in the Patapsco River in the approaches of Baltimore Harbor, Maryland, in the territorial waters of the United States on the 31st of October, 1905, between the United States Government tug boat *Potomac* and the British merchant ship *Sidra*.

It appears from her certificate of registry that the *Sidra*, a steam-screw vessel, was in 1905 a British ship of 5,400 tons of displacement, 322 feet long, and drawing 10 to 12 feet.

The *Potomac* was a steam-screw tug boat owned by the United States Government; she was 135 feet in length with a draft of about 15 feet; her displacement was 650 tons.

On October 31, 1905, at 6 o'clock in the morning, the *Sidra*, bound from New York to Baltimore, was proceeding up the channel to Baltimore harbor; the pilot and the captain were on the bridge, a seaman was at the wheel, the chief officer and carpenter were stationed on the forward deck by the anchor, which was ready to let go.

At about 7.30 a.m., soon after passing Fort Carroll, the weather became foggy and the fog became so thick that at 7.45, in the judgment of pilot, it was prudent to anchor. The exact position of the vessel, when anchored, is contested.

Immediately upon anchoring, the *Sidra* rang her bell in conformity with the Inland Rules of the United States, article 15, and, thereafter, hearing the fog-blasts of an approaching steamer, which proved to be the *Potomac*, she continued to ring her bell.

On the same day, October 31, 1905, at about 6 a.m., the United States tug boat *Potomac* had left Annapolis, under orders to proceed to Baltimore to obtain provisions for the North Atlantic Fleet and to return to Annapolis on the afternoon of that same day (United States answer, exhibit 6). The com-

manding officer was on the bridge and with him a government-licensed pilot and the boatswain as lookout. She had no lookout on the forecastle.

At about 8 o'clock in the morning the *Potomac* passed Fort Carroll and proceeded up the river on the starboard side of the channel heading up; at that time the weather was still clear (United States answer, p. 44), but about ten minutes later it suddenly changed and a dense fog shut in upon the water.

Before the fog shut down, the *Potomac* sighted a steamer under way about two miles ahead in the channel and, according to the commanding officer, she was the *Sidra* (United States answer, p. 18).

As soon as the fog shut in, the *Potomac* slowed gradually until going 4 knots (United States answer, p. 44), and blew her whistle in conformity with the regulations. She passed on starboard hand close aboard of one of the buoys marking the starboard side of the channel, then she passed a second one which she ran over, then having altered her course, so as to keep more in the channel, she heard the bell of a ship, which proved to be the *Sidra*. The sound seemed to her to come from dead ahead; her course was altered so as to bring it on the starboard bow. But suddenly the shape of the steamer loomed up dead ahead at about 100 or 150 feet. The *Potomac* immediately reversed the engines full speed astern, but she was unable to check her headway in sufficient time to avoid collision. The *Potomac* collided with the *Sidra* at about right angles, causing her a large amount of damage without damaging herself. At the moment of the collision it was 8.15 a.m.

A few days after the collision occurred, i.e., on November 3, 4, 6, and 9, 1905, a United States Naval Board of Investigation was convened by the Commander in Chief of the North Atlantic Fleet, to inquire into the circumstances of the collision, and to express an opinion as to which one of the two vessels was responsible for the collision. The conclusion reached by that Board was that the *Sidra* was responsible, as she might have anchored well clear of the channel and she did not.

Before this Tribunal the British Government contend that the collision occurred by the fault of the *Potomac* in that she was proceeding at an excessive rate of speed in fog and did not stop her engines and navigate with caution on hearing forward of her beam the fog signal of a vessel anchored, whose position was not ascertained, and further in that the *Potomac* did not keep within the channel but ran outside thereof, and in that she did not maintain a proper or sufficient lookout.

The United States Government contends that the collision was due to the fault of the *Sidra* in anchoring in the channel and obstructing the path of navigation, while she might, without difficulty and with perfect safety, have been anchored outside and out of the path of other vessels.

According to the well settled Admiralty rule, recognized both in the United States and Great Britain, in case of a collision between two ships, one of them being moving and the other at anchor, the liability is for the vessel under way, unless she proves that the collision is due to the fault of the other vessel.

Consequently, in this case the responsibility lies upon the *Potomac* and the Government of the United States, unless and so far as it is established that the *Sidra* was in fault.

In that respect there is not sufficient evidence to show the exact location of the place where the *Sidra* anchored and the collision took place. It has been stated by the commanding officer of the *Potomac* (United States answer, p. 17) that the *Sidra's* anchor was a little outside the line of buoys on the easterly or starboard side of the channel, the ship herself lying across the channel. Also there is the concurring statement of those on board two other vessels, the *Chicago* and the *Sparrow*. The *Sparrow* said that she saw the *Sidra* lying her portside

parallel with the line of the channel about 50 yards from it, i.e., 160 feet. And the *Chicago* said that she saw the *Sidra* lying from 150 to 200 feet from the channel and at the time the vessel did not project into the channel.

On the other hand, the testimony of the captain of the *Sidra* shows that he took no soundings before or when anchoring (British memorial, p. 41): that he did not know where he anchored from bearings, buoys, etc. (*ibid.*), and that he anchored when he thought he was clear of the channel, but he did not know (*ibid.*, question 31, p. 41; question 79, p. 70; see also p. 76), and that after the collision at 8.20, the tide beginning to change, he used the engines to bring the vessel around quicker, in order not to be laying across the channel, and afterwards changed her anchorage in order not to be "worrying about" vessels passing up and down; furthermore, he admitted that he could have gone at least half a mile further to the northeast with entire safety and that there is three-fourths of a mile between the line of the channel and the shoal water (see British memorial, pp. 64, 65, 70).

No sufficient evidence is afforded by the British Government to contradict the above elements of proof, from which it results that the *Sidra* anchored outside the channel, but being given her 322 feet length, not far enough to prevent her from rounding across the eastern side of the path of navigation. As noted by the United States Board of Inquiry, "prudence would dictate to any vessel finding herself under the necessity of anchoring to choose a position well clear of the channel". This the *Sidra* did not do, and no reason is given why it could not have been done. As it has been shown there was about one-half-mile room farther outside the channel; the *Sidra* said that she rounded one of the buoys marking the channel before anchoring; then she had the possibility of calculating how far she had to go to be certain she was entirely clear of the line. It was so much more her duty to do it, since she heard the whistle of other vessels in the neighborhood (British memorial, p. 66, question 50).

By that lack of prudence, the *Sidra* had, in this Tribunal's opinion, contributed to the collision.

As regards the *Potomac*, this Tribunal regrets not to have before it such important testimonies and documents as the testimony of the chief engineer and the log book of that vessel. But it results from the testimony of the commanding officer that when the vessel heard the bell of the *Sidra* she was going at 4 knots an hour, and that after she had stopped her engines and altered her course to port, again she continued her course ahead under the same speed (United States answer, pp. 16, 32, 46, and 62) without ascertaining the location of that bell.

In dense fog, it is the common rule of prudent navigation not only to stop as soon as a bell is heard, but also to keep stopped until the location of the other vessel ringing the bell and being an obstruction be ascertained, and everybody knows that it is impossible in fog to rely upon the apparent direction of the sound for ascertaining that location (see Marsden, *Collisions at Sea*, pp. 378, 379).

That rule is confirmed by articles 16 and 23 of the Inland Rules of the United States as they have been construed by various Federal decisions (*The Grenadier v. the August Korff*, 74 Fed. Rep., 974, 975).

Furthermore, it must be observed that whatever be her naval orders, the *Potomac* was proceeding in a narrow channel of 600 feet wide, frequented by numerous ships going up and down, and that she knew another steamer was ahead on her way, and she had to be especially cautious as to her speed, and the strict observance of the most prudent navigation. The *Potomac*, as has been shown, had no lookout on the forecastle and she was proceeding in a fog so dense that she was unable to sight the *Sidra* until about 50 feet before colliding

and she was proceeding at such a speed as to make her unable to avoid collision.

For these reasons, the *Polomac* is to be held responsible for the collision, for not navigating with sufficient prudence, and on the other hand, the *Sidra* is to be held as having contributed to the collision by having imprudently anchored too close to the channel.

According to the well settled rule of international law, the collision having occurred in the territorial waters of the United States, the law applicable to the liability is the law of the United States, according to which when both ships are to blame the damage suffered by each of them must be supported by moiety by the other.

It results from the United States inquiry that the *Polomac* suffered no damage, and it is shown by the documents that the damage suffered by the *Sidra* amounted to £ 4,336. 7s. 4d., including £ 750 for demurrage. Consequently, the United States Government, as the owner of the *Polomac*, is liable for £ 2,168. 3s. 8d.

As for the interest, it seems difficult to consider the letter of November 10, 1905, by which the representatives of the *Sidra* asked for the result of the United States naval investigation, as having brought the present claim to the notice of the United States Government.

*For these reasons*

This Tribunal decides that the United States Government shall pay to His Britannic Majesty's Government for the benefit of the owners of the *Sidra*, the sum of two thousand one hundred and sixty-eight pounds, three shillings and eight pence (£ 2,168. 3s. 8d).

---

OWNERS OF THE *JESSIE*, THE *THOMAS F. BAYARD* AND  
THE *PESCAWHA* (GREAT BRITAIN) *v.* UNITED STATES

(*December 2, 1921, Pages 479-482.*)

---

SEARCH OF VESSELS ON THE HIGH SEAS; SEALING OF FIREARMS, AMMUNITION.—CONVENTIONAL PROTECTED ZONE OF FUR-SEALING. Seizure of British vessels *Jessie*, *Thomas F. Bayard* and *Pescawha* on June 23, 1909, by United States revenue cutter on high seas near Chirikof Island, North-East Pacific Ocean, while hunting sea otters in conventional protected zone of fur-sealing. Firearms and ammunition found on board placed under seal. Order not to break seals before leaving zone.

FUNDAMENTAL PRINCIPLE OF INTERNATIONAL MARITIME LAW.—DENIAL OF LIABILITY.—GOOD FAITH OF SEARCHING OFFICER, BUT ERROR IN JUDGMENT. Fundamental principle of international maritime law concerning interference with foreign vessels on the high seas. The United States, though admitting illegal and unauthorized character of search, denies liability because of good faith of searching officer, because of insufficient evidence, and because of exaggeration and fraudulent character of claims. United States held liable, notwithstanding good faith of naval authorities: responsibility for errors in judgment of officials purporting to act within the scope of their duties and vested with power to enforce their demands. Liability not affected by alleged exaggeration and fraudulent character.

AMOUNT OF CLAIM.—EVIDENCE.—EXAGGERATION, FRAUDULENT CHARACTER, GOOD FAITH OF CLAIMS.—LOST PROFITS.—TROUBLE. Insufficiency of evidence

as to damages and alleged exaggeration of claims do not justify charge that claims are fraudulent: bona fides of claims held proven by the mere fact of their presentation by Great Britain. Vessels, caused to leave conventional protected zone of fur-sealing, went fur-sealing in North-West Pacific Ocean. Possibility of such voyage contemplated by owners and captains before departure. No damage suffered on voyage. Profitable catch of fur-seals by vessels. No evidence of profits from sea otter hunting lost by interference by United States naval authorities. Expenses in engaging crews specially trained in sea otter hunting wasted. Allowances made for such expenses and for trouble.

INTEREST: PRESENTATION OF CLAIM. No presentation of claim made to United States Government.

*Cross-references:* Am. J. Int. Law, vol. 16 (1922), pp. 114-116; Annual Digest, 1919-1922, pp. 175, 187.

*Bibliography:* Annual Digest, 1919-1922, pp. 187-188.

These are three claims presented by His Britannic Majesty's Government:

1. For \$38,700 on behalf of the British schooner *Jessie*;
2. For \$51,628.39 on behalf of the British schooner *Thomas F. Bayard*;
3. For \$52,661.60 on behalf of the British schooner *Pescawha*, together with interest from June 23, 1909.

It is admitted that the *Jessie*, the *Thomas F. Bayard*, and the *Pescawha*, all of them British schooners, cleared at Port Victoria, B.C., for sealing and sea otter hunting and were in June, 1909, actually engaged in hunting sea otters in the North Pacific Ocean; that on June 23, 1909, while on the high seas near the north end of Chirikof Islands<sup>1</sup> they were boarded by an officer from the United States revenue cutter *Bear* who, having searched them for sealskins and found none, had the firearms found on board placed under seal, entered his search in the ship's log, and ordered that the seals should not be broken while the vessels remained north of 35° north latitude, and east of 180° west longitude.

The United States Government admits in its answer to the British memorial that there was no agreement in force during the year 1909 specifically authorizing American officers to seal up the arms and ammunition found on board British sealing vessels, and that the action of the commander of the *Bear* in causing the arms of the *Jessie*, the *Thomas F. Bayard*, and the *Pescawha* to be sealed was unauthorized by the Government of the United States.

The United States Government, however, denies any liability in these cases, first, because the boarding officer acted in the bona fide belief that he had authority so to act, and secondly, because there is no evidence on the claims except the declaration of the interested parties, and because these claims are patently of an exaggerated and fraudulent nature.

#### I. *As to the liability:*

It is a fundamental principle of international maritime law that, except by special convention or in time of war, interference by a cruiser with a foreign vessel pursuing a lawful avocation on the high seas is unwarranted and illegal, and constitutes a violation of the sovereignty of the country whose flag the vessel flies.

It is not contested that at the date and place of interference by the United States naval authorities there was no agreement authorizing those authorities to interfere as they did with the British schooners, and, therefore, a legal

<sup>1</sup> Misprint for Chirikof Island [Note by the Secretariat of the United Nations, Legal Department].

liability on the United States Government was created by the acts of its officers now complained of.

It is unquestionable that the United States naval authorities acted bona fide, but though their bona fides might be invoked by the officers in explanation of their conduct to their own Government, its effect is merely to show that their conduct constituted an error in judgment, and any Government is responsible to other Governments for errors in judgment of its officials purporting to act within the scope of their duties and vested with power to enforce their demands.

The alleged insufficiency of proof as to the damage and the alleged exaggeration and fraudulent character of the claims, do not affect the question of the liability itself. They refer only to its consequences, that is to say, the determination of damages and indemnity.

*II. As to the consequences of the liability:*

It must first be observed that the insufficiency of proof as to damages, and the alleged exaggeration of the claims formulated by the British memorial, are not enough in themselves to justify the charge that they are fraudulent in character. For this Tribunal, the mere fact that the claims are presented by the Government of His Britannic Majesty is sufficient evidence of their complete bona fides.

The three schooners, after their arms and ammunition had been sealed with an order that the seals must not be broken until they were outside the conventional protected zone of fur-sealing, went across the North Pacific Ocean to catch fur-seals alongside the Russian Islands in the western part of that ocean.

It has been submitted by the United States Government that in any event the vessels would have made the same voyage; but of that contention no sufficient evidence has been given.

On the other hand it is shown by the agreements with the crews that the possibility of such a voyage was contemplated by the owners and the captains. It is admitted by counsel for Great Britain that no damage was actually suffered on the voyage by any of the three vessels. Further it is admitted that the catching of fur-seals on the coast of the Russian Islands was profitable, though a request by this Tribunal for some detailed information as to these profits has not been satisfied.

There has been adduced no evidence sufficient to establish that had there been no interference by the United States naval authorities the vessels would have made more or any profit from sea otter hunting in the Bering Sea. It is admitted by the counsel for Great Britain that nothing is so uncertain as the profits of such a venture.

The amount of the demands is based merely on statements made by the interested parties themselves or on statistics and data which afford no sufficient evidence as to the sea otters caught by other British schooners, similarly equipped and manned, hunting during the same period and in the same localities as the three schooners in question intended to hunt.

In these circumstances, this Tribunal is only able to take into consideration the fact of the prohibition itself, by which in violation of the liberty of the high seas the vessels were interfered with in pursuing a lawful, and, it may be, profitable enterprise; but nobody can say whether that enterprise would have been more or less profitable than the one in which they actually engaged on the Russian coast or whether they would have encountered some mishap of the sea. In any case, the result was that the expenses incurred in engaging crews specially trained for this enterprise was unprofitable and wasted.

This Tribunal is of opinion that the following sums will be just and sufficient indemnities for each of the three vessels, viz., for the *Jessie*, \$544 for her special expenses and \$1,000 for the trouble occasioned by the illegal interference; for the *Thomas F. Bayard*, \$750 for her special expenses and \$1,000 for the trouble occasioned by the illegal interference; and for the *Pescawha*, \$500 for her special expenses and \$1,000 for the trouble occasioned by the illegal interference.

As to interest, there is no evidence that any claim was ever presented to the Government of the United States before being entered on the Schedule annexed to the Special Agreement, and according to the Terms of Submission, section four, interest may only be allowed from the date on which any claim has been brought to the notice of the defendant party.

*For these reasons*

This Tribunal decides that the Government of the United States shall pay to the Government of His Britannic Majesty, the sum of one thousand five hundred and forty-four dollars (\$1,544) on behalf of the schooner *Jessie*, the sum of one thousand seven hundred and fifty dollars (\$1,750) on behalf of the schooner *Thomas F. Bayard*, and the sum of one thousand five hundred dollars (\$1,500) on behalf of the schooner *Pescawha*, in each case without interest.

---

OWNERS OF THE *ARGONAUT* AND THE *COLONEL JONAS H. FRENCH*  
(UNITED STATES) *v.* GREAT BRITAIN

(December 2, 1921. Pages 509-514.)

---

SEIZURE AND CONFISCATION OF BOATS AND SEINES, ARREST OF CREWS IN TERRITORIAL WATERS (THREE-MILE LIMIT).—TIDE. Seizure of boats and seines belonging to United States fishing vessels *Argonaut* and *Colonel Jonas H. French*, and arrest of crews of boats, on July 24, 1887, by Canadian Government cutter in territorial waters surrounding Prince Edward Island (Canada). Boats and seines swept by tide inside three-mile limit while fishing outside.

TERRITORIAL WATERS, FISHING, JURISDICTION.—UNIVERSALLY RECOGNIZED PRINCIPLE OF INTERNATIONAL LAW.—GOOD FAITH, PROPER INTERPRETATION AND APPLICATION OF MUNICIPAL LAW, FORFEITURE.—DECISIONS *EX PARTE* OF MUNICIPAL COURT. By treaty, United States renounced fishing rights in Canadian territorial waters (art. 1, Treaty of London, concluded with Great Britain on October 20, 1818). Universally recognized principle of international law that State has jurisdiction over fishing within its territorial waters, and may apply thereto its municipal law and impose such prohibitions as it thinks fit. Canadian municipal law prohibiting foreigners in foreign vessels from fishing within three-mile limit, and providing for sanctions. So far as these cases stand, the proper interpretation and application of Canadian municipal law by Canadian municipal courts (good faith of fishermen, exact character of their acts) is not a question of international law. On March 6, 1888, two decisions *ex parte* rendered by Vice-Admiralty Court of Prince Edward Island condemning boats and seines to be forfeited. No reopening of cases applied for by owners.

EVIDENCE FURNISHED BY EITHER SIDE.—DOCUMENTS, AFFIDAVITS. According to art. 5, para. 4. of Special Agreement. Tribunal is to decide all claims upon

such evidence or information as may be furnished by either Government. Two brief reports of seizures addressed by captain of Canadian Government cutter to United States Consul General at Halifax, Nova Scotia, insufficient proof of legality of seizures. Additional evidence from affidavits sworn by owners, masters and men of *Argonaut* and *French*.

**LACK OF PRUDENCE.—THREAT TO SEIZE FISHING VESSELS.** No anchor on board, though intention was to fish near three-mile limit and strong tides shorewards could have been foreseen. Mere threat to seize *Argonaut* and *French* themselves no basis for indemnity unless manifested by wrongful act.

*Cross-references:* Am. J. Int. Law, vol. 16 (1922), pp. 106-110; Annual Digest, 1919-1922, pp. 176-177.

The Government of the United States claims from the Government of His Britannic Majesty, on account of the wrongful seizure and confiscation of some boats and seines of the American vessels *Argonaut* and *Colonel Jonas H. French* and the consequent loss to the owners of such vessels by reason of such seizures and threatened seizure of the vessels, the sum of \$46,655.75 with interest, being \$24,600 on account of the *Argonaut*, and \$22,055.75 on account of the *Colonel Jonas H. French*.

On the 24th of July, 1887, the *Argonaut* and the *Colonel Jonas H. French*, two American schooners, duly registered and licensed at Gloucester, Massachusetts, United States, were fishing for mackerel southward of East Point, Prince Edward Island, Dominion of Canada, in the vicinity of the Canadian Government cutter *Critic* and some other American fishing vessels.

In the afternoon of that day, the *Argonaut* being off the West River, discovered a school of mackerel and sent one of her boats with a seine to catch them.

It is shown by the affidavits sworn on August 5 and 12, 1887, by the owner, the master, and men of the *Argonaut* (United States memorial, exhibits 7, 8, 9), that the seine was set and enclosed the mackerel at a distance of about four miles from shore (United States memorial, exhibit 7), and also that there was at that time an ebb tide running eastward at the rate of about three miles an hour (*ibid.*).

It appears that the seine being fouled, about one hour elapsed before it was pursed up and the fish secured (United States memorial, exhibit 8), and during that time the aforesaid ebb tide set the boat and seine towards the shore quite rapidly (United States memorial, exhibit 7). In order to avoid difficulties with the Canadian cutter, the seine was taken up into the boat and the fish turned out alive.

At that time the Canadian cutter was about a mile away from the boat. The master of the *Argonaut* went to the *Critic* and asked if they considered the seine and boat within three miles of the shore, informing the captain that the tide had swept them from a position fully a mile outside. The captain of the *Critic* replied that the boat and seine were only two miles off shore. Notwithstanding the explanation of the master of the *Argonaut* that if the seine was inside the limit it was entirely without design on his part but the result of the tide taking it in, the seine and boat were seized and twelve men arrested.

About the same time and place, the schooner *Colonel Jonas H. French* was lying about three and a half miles off shore when she saw mackerel outside of her about a mile (United States memorial, exhibit 14). Two boats went with their seines, which were set around the fish, and one of the boats with two men in it was left in charge of the seine with the mackerel enclosed. These men soon found that they were drifting rapidly with the tide along the shore and also toward the shore, and they had no anchor or other means of preventing the

boat and seine from going with the tide (United States memorial, exhibit 15). Finding that they must inevitably drift inside the three-mile limit, they endeavored to take in the seine. and, while doing so, were arrested by the cutter *Critic*. About three-quarters of an hour had elapsed from the time the boat was left as aforesaid until the seizure (United States memorial, exhibit 15).

On July 29, 1887, two brief printed circulars were addressed by the captain of the *Critic* to the United States Consul General at Halifax, Nova Scotia, stating the fact of the seizures "for violation of the statutes in force in Canada, relating to foreign fishing vessels" (United States memorial, exhibit 2).

Immediately after the seizure of their boats and seines and the arrest of their men, the masters of the *Argonaut* and the *Colonel Jonas H. French* abandoned their fishing trip and returned to their home port in the United States. While returning they heard that it was the intention of the Canadian authorities to seize the schooners themselves wherever they could be found outside the territorial waters of the United States (United States memorial, exhibits 3, 4, 10).

On September 19, 1887, proceedings were begun in the Vice-Admiralty Court of Prince Edward Island for the forfeiture of the boats and seines, and on March 6, 1888, two decisions *ex parte* were rendered condemning the same to be forfeited for having been found to be fishing and to have been fishing and preparing to fish in the Canadian waters within three miles of the shore (British answer, annexes 57, 58).

It is shown by the documents that the owners, although opportunity was given to them to make the necessary application to the Vice-Admiralty Court, did not exercise their right to have the cases reopened and to put in their defence before the court (United States memorial, exhibits 25, 26).

It does not appear that there was any diplomatic correspondence relating to these cases before they were submitted to this arbitration.

*In law :*

By article I of the Treaty concluded at London, October 20, 1818, between the United States and Great Britain, it was stipulated that, except in certain localities, without interest in this case, the United States renounced:

"... forever, any liberty heretofore enjoyed or claimed by the inhabitants thereof, to take, dry, or cure fish on or within three marine miles of any of the coasts, bays, creeks, or harbours of His Britannic Majesty's dominions in America not included within the above-mentioned limits; Provided, however, that the American fishermen shall be admitted to enter such bays or harbours for the purpose of shelter and of repairing damages therein, of purchasing wood, and of obtaining water, and for no other purpose whatever".

By the Imperial Statute 59 George III, chapter 38 (1819), article II, it is prohibited to any foreigner in a foreign vessel to fish for or to take any fish within the three-mile limit of the Canadian coast, and by the Revised Statutes of Canada, 1856, chapter 94, sections 1, 2, 3, and 7, certain penalties and the forfeiture of the vessel and the legal prosecutions are provided for in case contravention.

It is a universally recognized principle of international law that a State has jurisdiction over sea-fishing within its territorial waters, and to apply thereto its municipal law, and to impose in respect thereof such prohibitions as it may think fit. The Treaty of 1818 did not make any exception in regard to the inhabitants of the United States in these waters.

The only question then to be decided in this case is whether or not the boats and seines of the *Argonaut* and the *French* were within the three-mile limit.

It is to be noted that, though the Canadian regulations required them to be made (see *David J. Adams* case, United States memorial, p. 358), no official

statement of the circumstances of the alleged offences or of the legal provisions alleged to be contravened, no document drawn up by the officers who carried out the seizures proving the alleged illegal position of the boats and seines, or reporting any bearings or soundings taken at the time are presented by the British Government in justification of the action of their naval authorities. The log book of the cutter *Critic* is not even produced. The only documents presented are the two brief reports, above referred to, stating the fact of the seizures for violation of the statutes in force in Canada, relating to foreign fishing vessels. This is insufficient proof of the legality of the seizures.

However, according to article 5, paragraph 4, of the Special Agreement, this Tribunal is to decide all claims submitted upon such evidence or information as may be furnished by either Government.

In regard to the *Argonaut*, it results from the affidavits of the owner, master and men, produced by the United States (United States memorial, exhibits 7, 8) and above referred to, that, first, the boat and seine were set at four miles off shore; second, that they remained out for about one hour and were drifting shoreward with the tide, and third, that the tide was running to the eastward at from two and a half to three miles an hour.

In his protest, the owner does not contest so much the position of the boat and seine within the three-mile limit as the alleged act of fishing to which the Canadian law was applied; nor does the United States Consul General, when reporting to the Assistant Secretary of State on August 7, 1887, the statements of the men, deny that the boats were seized within the three-mile limit (United States memorial, exhibit 2).

In regard to the boat and seine of the *Colonel Jonas H. French*, the sworn affidavits of the owner, master and men, produced by the United States (United States memorial, exhibits 14 and 15) show, first, that the vessel was three and a half miles from the shore; second, that the mackerel were one mile outside the vessel, so that the boat and seine were four and a half miles from the shore when the seine was set out, and third, that they delayed about three-quarters of an hour, being swept shoreward by the ebb tide, when they were seized.

It must be observed that though the intention was to fish quite near the three-mile limit and though with the exercise of a very small amount of prudence it could have been foreseen that there would be a strong tide setting shorewards, there was on board the boat no anchor or any other means of preventing its drifting within the prohibited zone.

On all the facts presented in these cases, this Tribunal finds that the boats and seines of both vessels were less than three miles from the shore when seized.

The boats and seines of the two vessels being inside the territorial waters, were, from the international law point of view, undoubtedly subject to the municipal law and the jurisdiction of Canada, and the question whether or not, under the circumstances of these cases, taking into consideration the good faith of the fishermen and the exact character of their acts, a proper interpretation and application of the Canadian law was made by the Canadian court is a question of municipal law and not a question of international law to be decided by this Tribunal, so far as these cases stand.

In regard to the contended intention of the Canadian authorities, to seize the two schooners themselves, that mere intention, even if any such existed, cannot by itself be the basis for indemnity unless it was actually manifested by some wrongful act, and, in that respect, no sufficient evidence is offered to establish any order of seizure given, or any other measure of execution taken against the two vessels.

*For these reasons*

This Tribunal decides that the claims be dismissed.

CHINA NAVIGATION CO., LTD. (GREAT BRITAIN)  
v. UNITED STATES

(*Newchwang case. December 9, 1921. Pages 414-420.*)

**COLLISION OF VESSELS ON YANGTSE RIVER.—DECISION OF MUNICIPAL COURT: RES JUDICATA.** Collision on May 11, 1902, on Yangtse River between steamship *Newchwang*, owned by China Navigation Co., Ltd., a British corporation, and United States Government collier *Saturn*. Dismissal on January 16, 1903, of action for damages brought by United States against company in British Supreme Court of China and Corea in Admiralty at Shanghai. British plea that dismissal settled United States' liability. Whatever be the value of plea of *res judicata* before international tribunal of arbitration, doctrine does not apply since no identity of questions at issue. Shanghai Court, moreover, refused company's application for leave to enter counter-claim.

**EVIDENCE: EVIDENTIAL VALUE OF MUNICIPAL COURT DECISION, BURDEN OF PROOF.—ADMISSION OF LIABILITY.** Findings of Shanghai Court as to facts are evidence of conclusions reached by competent municipal tribunal. It must be remembered, however, that before Court burden of proof on *Saturn*, while before this tribunal on *Newchwang*, and also that fresh evidence has been put before tribunal. Letter carrying private recommendation by Secretary of the Navy to Chairman of Committee on Claims of House of Representatives, never officially published, cannot be regarded as admission of liability, nor can bills introduced into United States Senate and providing for reference of claim to Court of Claims, but never voted upon in the Senate or favorably reported upon by Committee on Claims.

**NEGLIGENCE. FAULT, NAVIGATION.—INTERNATIONAL AND AMERICAN RULES OF THE ROAD: APPLICABILITY ON HIGH SEAS.** Held that *Saturn* was negligent in not keeping a good lookout and in manœuvring wrongly. On the high seas American Rules do not, but International Rules of the Road do, apply to foreign vessels. *Newchwang's* manœuvring when collision inevitable merely a desperate attempt to minimize its effect and not a fault.

**DAMAGES: INDIRECT DAMAGES, WELL-KNOWN PRINCIPLE OF THE LAW OF DAMAGES, LOST PROFITS, LOSS OF USE, DEMURRAGE.** Claim for legal expenses entailed by action brought by United States before Shanghai Court disallowed: such expenses are indirect damages, and according to well-known principle of the law of damages *causa proxima non remota inspicitur*. No sufficient evidence of alleged loss of profits. Compensation for deprivation of use to be computed according to ordinary rule of demurrage at 4d per ton gross tonnage.

**INTEREST: PRESENTATION OF CLAIM.** Tribunal unable to decide on interest, since not clear whether claim officially presented.

*Cross-references:* Am. J. Int. Law, vol. 16 (1922), pp. 323-328; Annual Digest, 1919-1922, pp. 188, 373-374.

*Bibliography:* Nielsen, pp. 411-413; Annual Digest, 1919-1922, p. 374.

This is a claim presented by His Majesty's Government for the sum of £ 4,271. 4s. 8d. with interest from August 27, 1902 (the date on which the claim was first brought to the notice of the United States Government) for damage sustained by the China Navigation Co., Ltd., a British corporation, as the result of a collision which occurred on May 11, 1902, off the southern mouth of the Yangtse River between the British steamship *Newchwang*, owned by the said company, and the *Saturn*, a naval collier, owned and operated by the United States Government.

There is no contest about the ownership of either the *Newchwang* or the *Saturn*, the British nationality of the claimant, or the fact of the collision.

On July 11, 1902, an action for damages was brought by the United States Government against the China Navigation Co., Ltd., in His Britannic Majesty's Supreme Court of China and Corea in Admiralty. On August 16, 1902, an application for leave to enter a counter-claim was filed by the China Navigation Co., Ltd., but on August 20, 1902, an order was made refusing this application for lack of jurisdiction. On January 16, 1903, both parties being represented, the Court decided the case upon its merits, and delivered a judgment as follows:

"This Court doth decree and order that the S. S. *Newchwang* being in no way to blame for the collision referred to in the Plaintiff's petition this suit be dismissed with costs to be taxed" (British memorial, p. 51).

The British Government contend that by reason of this judgment the liability of the United States for the damage and loss suffered by the China Navigation Co., in consequence of the collision is covered by the principle of *res judicata* and, therefore, not open to dispute.

It is unnecessary here to discuss the value of a plea of *res judicata* before an international tribunal of arbitration. It is a well-established rule of law that the doctrine of *res judicata* applies only where there is identity of the parties and of the question at issue. The only matter before His Britannic Majesty's Supreme Court was the liability of the China Navigation Co., Ltd., as owners of the *Newchwang*, whereas the question submitted to this Tribunal is the liability of the United States Government as owners of the *Saturn*. Whatever, therefore, be the connection in fact between the two questions, they are not identical. Further, it is impossible to say that the question of the liability of the United States is concluded by the decision of His Britannic Majesty's Court, when that Court, on the contrary, held that it had no jurisdiction to deal with that question.

In these circumstances it is for this Tribunal to decide whether the United States Government is liable to pay compensation for the said collision. For this purpose it is authorized by article 5 of the Pecuniary Claims Convention to consider such evidence and information as may be furnished by either Government.

Although the decision of His Majesty's Supreme Court is not in any sense *res judicata* in this case, and although the findings of the Court as to the facts upon which liability depends are not binding upon this Tribunal, yet they are evidence of the conclusions reached by a competent municipal tribunal. But, in considering these conclusions, and the evidence upon which they were based, it must be remembered, first, that there the burden of proof was on the *Saturn*, while before this Tribunal it is on the *Newchwang*; and secondly, that evidence has been put before this Tribunal which was not before that Court. In behalf of the United States, the most important fresh evidence is the report of the proceedings of the United States Naval Board of Investigation, dated May 23, 1902, within two weeks after the collision, which laid the blame for the collision on the *Newchwang*. The only evidence presented on the part of Great Britain which was not before the trial court, consists: (a) of certain bills introduced into the

United States Senate providing for the reference of this claim to the Court of Claims, to determine, subject to certain conditions, whether any damages should be paid, and (b) a copy of a letter dated January 30, 1907, addressed by the Secretary of the Navy to the Chairman of the Committee on Claims of the House of Representatives. His Majesty's Government contend that this letter contains an admission of liability which estops the United States from denying responsibility. It appears, however, from a statement made by the Counsel for Great Britain on the oral argument, that this letter was merely a personal or private recommendation to the Chairman of the Committee on Claims, and has never been officially published, and for this reason in the opinion of the Tribunal it can not be regarded as an admission of liability on the part of the United States. As to the bills, it was also stated in the oral argument that none of them were voted upon in the Senate, nor were they even favorably reported upon by the Committee on Claims, to which they were referred.

Dealing now with the merits:

I. *As to the facts:*

It is admitted on both sides that the night was clear and the water smooth and that there was plenty of sea room; it is shown that the regulation lights were burning brightly and the regular watches kept; the force of the tide is not in dispute, and under all these circumstances it is difficult to understand how, with the exercise of ordinary care and skill, the collision occurred.

Notwithstanding a considerable conflict of evidence, and a wide variance between the Preliminary Acts of the two ships and the oral evidence of those on board them, the following facts are clearly established.

On May 11, 1902, at about 11 p.m., the British S. S. *Newchwang*, 894 tons gross tonnage, was proceeding up the Chinese coast from Amoy to Shanghai and had passed through Steep Island Pass, steering north 2° west magnetic. Her speed was 10-12 knots. She sighted at a distance of six miles and about two points on her *port* bow the masthead light of another steamer, which afterwards proved to be the *Saturn*. She held on her course.

At the same time, the United States collier *Saturn*, bound from Shanghai to Cavite, Philippine Islands, had passed Bonham Straits and Elgar Island; her speed was 10-12 knots and she was steering south 3/4 east. She reported no light at all at the time when she herself was sighted by the *Newchwang*.

However, about 20 minutes later the *Saturn* passed another steamer, the *Hoihow*, which was going north in front of and in the same course as the *Newchwang*. The *Saturn* ported her helm and came to starboard in accordance with the Rules of the Road, but so tardily that the captain of the *Hoihow* testified that the two vessels passed at two ships' length apart.

After so passing the *Hoihow*, the *Saturn* resumed her course and it was only then that she sighted the masthead light of the *Newchwang*. At that time the two vessels were less than one and a half miles apart. In the oral argument, not only was it admitted but stress was laid upon the fact that from the time the *Saturn* passed the *Hoihow* at 11.14 p.m., only six minutes elapsed before the collision; that the *Saturn* saw the masthead light of the *Newchwang* at 11.16 p.m., and her red light at 11.17.43 p.m., and that the collision occurred at 11.20 p.m., so that the *Saturn* saw the masthead light of the *Newchwang* only four minutes and her sidelight only two minutes before the collision. The combined speed of the vessels at the time was about 22 knots.

At that moment as soon as she saw the side light on the *Newchang* the *Saturn* ported her helm, as she had done a few minutes before, when she met the *Hoihow*.

The fact that the *Saturn* crossed the *Newchwang* in this way has been contested.

But it seems to the correct inference from the statement in the Preliminary Act of the *Saturn* that when first seen, two minutes, that is, after passing the *Hoihow*, the *Newchwang* bore  $3/4$  of a point off the *Saturn*'s starboard bow—from the admission by Counsel for the United States in the course of the oral argument that it was the duty of the *Saturn* to keep out of the way of the *Newchwang*, from the evidence of her captain ("I sighted light on starboard bow  $1/2$  to  $3/4$  of a point"), and also from the captain's admission that after passing the *Hoihow*, he resumed his course, which was south by  $3/4$  east and then saw the *Newchwang*'s red light. This would have been impossible unless he had crossed her bow from starboard to port. On the other hand the consistent evidence of those on the *Newchwang* is to the effect that they first saw the green light of the *Saturn* on their starboard bow, the *Newchwang*'s course then being north  $2^{\circ}$  west magnetic, and that subsequent to that the *Newchwang* starboarded to clear a junk and did not go back on her course, so that she was getting further away from the *Saturn*.

As soon as the *Saturn* sighted the side lights of the *Newchwang*, i.e., two minutes before the collision, and came to starboard she blew her whistle and reversed her engines. But the collision was already inevitable.

On her side the *Newchwang* tried to minimize the collision by coming to port, but that proved to be useless, and the two ships struck at about right angles.

## II. As to the liability:

It is clear that a good lookout was not kept on board the *Saturn*, from the fact that though more than 20 minutes before the collision she was sighted by the *Newchwang*, at about six miles distance, she herself did not report the *Newchwang* until four minutes before the collision, when the two ships were only one and a half miles apart—and from the fact that she did not report any light of the other steamer, the *Hoihow*, which was passed a few minutes before the collision.

If a good lookout had been kept, the *Saturn* would have sighted the *Hoihow* and, behind her, the *Newchwang*, and after passing the *Hoihow* she would have kept clear of the second steamer. Instead of that, the *Saturn*, not having reported the *Hoihow*, passed her under circumstances of some peril and, having passed her, resumed her course, so that she came upon the *Newchwang* under similar but more dangerous conditions, too late for either ship to avoid an accident.

Accordingly the *Saturn* must be held to be to blame: first, for having neglected to keep a good lookout; secondly, for having resumed her course after passing the *Hoihow*, when she ought to have known that another steamer was following; and thirdly, for having manœuvred too late and render the collision unavoidable.

As to the *Newchwang*, the United States Naval Inquiry blamed that ship, first, for not having answered the *Saturn*'s starboarding whistle. But according to the Rules of the Road no answering whistle ought to have been given by the *Newchwang* unless she was going to alter her course. It is true that this is not the American rule, but on the high seas the American rule does not apply to a foreign vessel; secondly, for not having stopped and reversed her engines; but evidence has shown that she did; thirdly, for having her red light burning dimly; but the evidence has shown that it was burning brightly; fourthly, at all events for not entering into conversation before the collision, and for striking at nearly right angles; but the *Newchwang*'s manœuvre at that moment was a desperate endeavor to minimize, if possible, the effect of a collision which had been rendered unavoidably by the inexplicable action of the *Saturn*.

The *Newchwang* appears to have kept a proper lookout. When she sighted the *Saturn* on her port bow, she had only to keep her course in order to pass

port to port according to the Rules; and her manceuvring when the collision was inevitable was merely as has been said a desparate attempt to minimize its effect and can not be imputed to her as a fault.

III. *As to the amount of liability:*

The British Government claims not only the amount of the damage suffered by the *Newchwang* and the cost of her repair, but also the various expenses entailed by the action brought by the United States before the Shanghai Court.

It may be that the item for legal expenses might have been claimed in an appeal from the Shanghai decision. But this Tribunal has not to deal with such appeal, and has no authority either to reverse or affirm that decision or to deal with damages arising out of the action brought by the United States. It is true that such expenses are damages indirectly consequent to the collision; but it is a well known principle of the law of damages that *causa proxima non remota inspicitur*.

As to the amount directly arising from the collision, the British Government claim for £ 1,612 as loss of profit and expenses during the time of repair. But no sufficient evidence is adduced to prove the loss alleged and the compensation for the deprivation of use must be computed according to the ordinary rule of demurrage at 4d per ton gross tonnage, that will be for 894 tons, the *Newchwang's* gross tonnage, a sum of £ 774. 16s. for 52 days. According to the account of Farnham, Boyd & Co., Ltd., for executing repairs, the amount of those repairs was Taels 19,251.10, i.e., £ 2,401. 7s. 6d.

As to the interest, it appears in the evidence that a communication was made to the Department of State by the British Embassy at Washington in relation to this matter (British memorial, p. 61), but as a copy of that communication has not been produced the Tribunal is not in a position to say whether or not it was an official presentation of this claim, or to ascertain the date of the communication, and consequently the Tribunal is unable to decide on the question of interest.

*For these reasons*

The Tribunal decides that the United States Government shall pay to the British Government the sum of three thousand one hundred and seventy-six pounds, three shillings and six pence, (£ 3,176. 3s. 6d.) on behalf of the China Navigation Company, Limited, owner of the S. S. *Newchwang*.

---

OWNERS, OFFICERS AND MEN OF THE *WANDERER*  
(GREAT BRITAIN) *v.* UNITED STATES

(December 9, 1921. Pages 459-471.)

---

SEIZURE OF VESSEL IN ST. PAUL (KODIAK <sup>1</sup> ISLAND).—CONVENTIONAL PROTECTED ZONE OF FUR-SEALING.—DELIVERY OF BRITISH VESSEL TO BRITISH AUTHORITIES.—RELEASE BY BRITISH ADMINISTRATIVE DECISION. British vessel *Wanderer*, taken by United States revenue cutter *Concord* on high seas, towed to St. Paul (Kodiak Island), where on June 10, 1894, declared seized by United States naval authorities for possession of unsealed arms and ammuni-

---

<sup>1</sup> The spelling Kodiak used in the decision has become obsolete [Note by the Secretariat].

tion in conventional protected zone of fur-sealing; vessel sent to Dutch Harbor (Unalaska) where, on August 2, 1894, delivered to H.M.S. *Pheasant* who ordered *Wanderer* on August 16, 1894, to report at Victoria, B.C., where vessel without Court proceedings released by British administrative decision.

THE FUNDAMENTAL PRINCIPLE OF INTERNATIONAL MARITIME LAW: VISITATION, SEARCH.—EXCEPTIONS: BURDEN OF PROOF, INTERPRETATION.—DELEGATION OF AUTHORITY BY ONE STATE TO ANOTHER.—BERING SEA AWARD AND REGULATIONS. No nation can exercise right of visitation and search over foreign vessels pursuing lawful vocation on high seas, except in time of war or by special agreement. Agreement must be shown by claimant and be construed *stricto jure*. British Order in Council of April 30, 1894, authorized United States cruisers to seize British vessels for contravention of provisions of British Act of April 23, 1894, and thereby of Bering Sea Award and Regulations of August 15, 1893.

GOOD FAITH OF SEIZING OFFICERS, BUT ERROR IN JUDGMENT.—PROBABLE CAUSE OF SEIZURE.—IMPROPER EXERCISE BY UNITED STATES OFFICERS OF AUTHORITY UNDER BRITISH LAW.—ILLEGALITY OF SEIZURE; DETERMINATION. United States held liable for error in judgment of officers who, though bona fide, seized for act—mere possession, not use, of arms and ammunition—which under British law did not justify seizure, and who thus did not exercise delegated authority. Illegality of seizure and, therefore, United States liability, not conditional upon British Court decision; British naval authorities may release illegally seized vessel by merely administrative decision.

EXTENT OF LIABILITY. Liability of United States for detention extends to August 2, 1894, date of delivery of *Wanderer* to *Pheasant*, since United States naval authorities under British Act and Order in Council had either to bring *Wanderer* before British Court or to deliver her to British naval authorities and nothing shows that on June 10, 1894, when *Wanderer* sent to Unalaska, the United States naval authorities believed that *Pheasant* would be there at *Wanderer's* arrival. Great Britain liable for detention from August 2, 1894.

DAMAGES: LOST PROFITS, TROUBLE, DEDUCTION FROM DAMAGES OF SUM DUE TO DEFENDANT.—EVIDENCE. Since open season began on August 1, United States unlawfully prevented *Wanderer* from sealing only on August 1 and 2, 1894, plus three additional days to reach sealing grounds. Lost profits: average catch of other schooners; average value per skin, no deduction for wages as Great Britain also sues for officers and men; average value of catch per day during season. Liberal estimate of lost profits though evidence indefinite and inconclusive. Allowance made for trouble. Deduction from damages of sum due to United States for unpaid provisions supplied by *Concord* to *Wanderer*.

INTEREST. Interest allowed at 4 % from September 6, 1895, date of first presentation of claim, to April 26, 1912, on sum for lost profits less sum due for provisions.

*Cross-references*: Am. J. Int. Law, vol. 16 (1922), pp. 305-314; Annual Digest, 1919-1922, pp. 177-179.

*Bibliography*: Annual Digest, 1919-1922, p. 179.

This is a claim presented by His Britannic Majesty's Government for \$17,507.36 and interest from November, 1894, for damages arising out of the

seizure and detention of the British sealing schooner *Wanderer*, and her officers, men, and cargo, by the United States revenue cutter *Concord* on June 10, 1894.

The *Wanderer*, a schooner of 25 tons burden, was a British ship registered at the Port of Victoria, B.C.; her owner was Henry Paxton, a British subject and a master mariner. On the 5th of January, 1894, she was chartered for the sealing season of 1894 by the said Paxton to Simon Leiser, a naturalized British subject. Under the terms of the agreement, Leiser had to provision and equip the vessel, and Paxton was appointed as master and to be paid as such; the net profits of the venture were to be divided between them in a fixed proportion.

On January 13, 1894, the *Wanderer* left the Port of Victoria, B.C., and sailed on her sealing voyage in the North Pacific Ocean. She was manned by Paxton as master, one mate, and 14 hunters, including 12 Indians (all of them British subjects), and two Japanese, and appears to have been equipped, at the time of her seizure, with five canoes and one boat for sealing.

On June 9, 1894, at 8.30 a.m., when the vessel was in latitude 58° north and longitude 150° west, and heading west-southwest, en route for Sand Point, she was hailed by the United States revenue cutter *Yorktown*, and boarded by an officer who, acting under instructions hereinafter referred to, searched the schooner, placed her sealing implements under seal, and made an entry in the ship's log stating the number of sealskins found on board to be 400.

On the same day, about seven hours later, i.e., at about 4 p.m., the vessel being in latitude 58° 21' north and longitude 150° 22' west, heading north, wind astern, she was hailed by another United States revenue cutter, the *Concord*, and boarded and searched. During his search the officer discovered hidden on board and unsealed one 12-bore shotgun, 39 loaded shells, and 3 boxes of primers, one of which was already opened. The United States naval officer took possession of the gun and shells and made the following entry in the ship's log:

“Lat. 58.21 N., Long. 150.22 W. June 9th, 1894.

“I hereby certify that I have examined the packages of ammunition, spears, and guns referred to in the preceding page, and found all skins intact, counted the seals, and found the number to be 400.

“E. F. LEIPER

“Lieut., U.S.N., U.S.S. *Concord*.”

“Lat. 58.21 N., Long. 150.22 W., June 9th, 1894.

“On further search of the vessel I found concealed on board 12-bore shotgun, 39 loaded shells, and three boxes primers, one of which was opened already.

“E. F. LEIPER

“Lieut., U.S.N., U.S.S. *Concord*”

As the sea was rough, the commanding officer of the *Concord*, at the request of the master of the *Wanderer*, took her in tow to St. Paul, Kadiak Island. She arrived there towed by the *Concord* on June 10th at 10 a.m., and the towline being cast adrift, was about to make sail for a safe anchorage when the *Concord* without any warning ordered her to stand-by and to anchor near by. It appears also from the *Concord*'s log that in the afternoon a committee of inspection went on board the *Wanderer* to ascertain whether she was seaworthy, and that at the same time the master was informed that he was to be seized. At 4 p.m. the commanding officer of the *Concord*, Commander Goodrich, advised the master that his ship and the ship's papers had actually been seized.

The ordinary declaration of seizure was made and notice given that the seizure had been made for the following reasons:

“. . . subsequent to the warning and certificate aforesaid arms and ammunition suitable to the killing of fur seals were discovered concealed on board . . . and whereas the possession of such unsealed arms and ammunition was in contravention of the Bering Sea Award Act, 1894, clause I, para. 2, and clause III, para. 2, as well as of section 10 in the President's Proclamation . . . (United States answer, exhibit 5).

The master of the *Wanderer* protested against this declaration.

On June 16 Commander Goodrich sent a report to the Commander of the United States Naval Force in the Bering Sea (United States answer, exhibit 4) in which he stated:

“My action is based on the last half of sec. 10 of the Act of Congress April 6; the Bering Sea Award Act, and paras. 1 and 3 of your confidential instructions of May 13th.”

To this report were annexed the statements of the officers and men of the *Concord*, who took part in the search, all of which referred merely to the discovery on board of a gun and ammunition hidden and unsealed. On July 1st, the *Wanderer* arrived at Dutch Harbor, Unalaska, where she remained under seizure until August 2nd, when she was handed over to Her Britannic Majesty's ship *Pheasant* (United States answer, exhibits 12, 13).

On August 6th the schooner was sent to Victoria, B.C., and after her arrival there, she was released by order of the British Naval Commander in Chief on the Pacific Station (British memorial, p. 10). The evidence does not disclose how long the *Wanderer* was detained at Victoria by the British authorities before her release was ordered.

The Government of His Britannic Majesty contend that the seizure of the *Wanderer* was illegal; that the alleged reason for it was wholly insufficient, and that the Government of the United States is responsible for the act of its naval officers.

The United States Government, on the other hand, denies all liability; first, because its officers were acting on behalf of the British Government and not of the United States Government; secondly, because there was a bona fide belief that an infraction of the Bering Sea Award Act, 1894, had been committed; thirdly, because the release of the *Wanderer* by the British naval authorities without a regular prosecution before a court rendered it impossible to determine in the only competent way whether the seizure was illegal; fourthly, because even supposing the seizure was made without probable cause, the liability to pay damages would rest upon His Britannic Majesty's Government; fifthly, because the detention of the vessel after July 1, 1894, the date when she arrived at Dutch Harbor, Unalaska, was due to the failure of the British naval authorities to send a vessel there to take charge of the schooner; and sixthly, because there is no basis in law or in fact for the measure of damages.

#### I. *As to the legality of the seizure and liability of the United States:*

The fundamental principle of the international maritime law is that no nation can exercise a right of visitation and search over foreign vessels pursuing a lawful vocation on the high seas, except in time of war or by special agreement.

The *Wanderer* was on the high seas. There is no question here of war. It lies, therefore, on the United States to show that its naval authorities acted under special agreement. Any such agreement being an exception to the general principle, must be construed *stricto jure*.

At the time of the seizure, as the result of the Arbitral Award of Paris, August 15, 1893, and the Regulations annexed thereto, there was in operation between the United States and Great Britain a conventional régime the object of which was the protection of the fur seals in the North Pacific Ocean.

By the Award it was decided, *inter alia*: "that concurrent regulations outside the jurisdictional limits of the respective governments are necessary and that they should extend over the water hereinafter mentioned."

By the Regulations above referred to, it was provided that the two Governments should forbid their citizens and subjects, first, to kill, capture, or pursue at any time and in any manner whatever, the fur seals within a zone of sixty miles around the Pribilof Islands; and secondly, to kill, capture and pursue fur seals in any manner whatever from the first of May to the 31st of July within the zone included between latitude 35° north and the Bering Straits, and eastward of longitude 180°.

Furthermore the same Regulations provide:

"*Article 6.* The use of nets, firearms and explosives shall be forbidden in the fur-seal fishing. This restriction shall not apply to shotguns when such fishing takes place outside of Bering's Sea during the season when it may be lawfully carried on."

To comply with the Award and Regulations, an Act of Congress was passed in the United States on April 6, 1894. This Act provided:

"*Sec. 10.* . . . if any licensed vessel shall be found in the waters to which this Act applies, having on board apparatus or implements suitable for taking seals, but forbidden then and there to be used, it shall be presumed that the vessel in the one case and the apparatus or implements in the other was or were used in violation of this Act until it is otherwise sufficiently proved".

On April 18, 1894, instructions were given to the United States naval authorities, according to which:

"*Para. 6.* Any vessel or person . . . having on board or in their possession apparatus or implements suitable for taking seal . . . you will order seized" (United States answer, exhibit 20).

On their side the British Government passed an Act dated April 23, 1894, providing:

"*Sec. 1.* The provisions of the Bering Sea Arbitration Award . . . shall have effect as if those provisions . . . were enacted by this Act." (United States answer, exhibit 17).

The British Act further provides:

"*Sec. 3, para. 3.* An order in council under this Act may provide that such officers of the United States of America as are specified in the order may, in respect of offenses under this act, exercise the like powers under this act as may be exercised by a commissioned officer of Her Majesty in relation to a British ship . . ." (United States answer, exhibit 17).

As may be observed, the United States Act and the instructions to its naval authorities did not follow the wording of the Award Regulations exactly, and Her Majesty's Government drew attention to the variance, in a letter addressed by their Ambassador in Washington to the Secretary of State on April 30, 1894:

" . . . I am directed to draw your attention to paragraph 6 of the draft instructions, so far as it relates to British vessels. The paragraph requires modification in order to bring it, as regards the powers to be exercised by United States cruisers over British vessels, within the limits prescribed by the British Order in Council conferring such powers.

"The Earl of Kimberly desires me to state to you that the Order in Council which is about to be issued to empower United States cruisers to seize British vessels will only authorize them to make seizures of vessels contravening the provisions of the British Act of Parliament, or, in other words, the provisions of the award.

“There is no clause in the British Act corresponding with section 10 of the United States Act of Congress. United States cruisers can not therefore seize British vessels merely for having on board, while within the area of the award and during the close season, implements suitable for taking seal” (United States answer, exhibit 21).

Meanwhile and on April 30, 1894, a British Order in Council was issued providing:

“*Para. 1.* The commanding officer of any vessel belonging to the naval or revenue service of the United States of America, and appointed for the time being by the President of the United States for the purpose of carrying into effect the powers conferred by this article, the name of which vessel shall have been communicated by the President of the United States to Her Majesty as being a vessel so appointed as aforesaid, may . . . seize and detain any British vessel which has become liable to be forfeited to Her Majesty under the provisions of the recited act, and may bring her for adjudication before any such British court of admiralty as is referred to in section 103 of ‘The Merchant Shipping Act, 1854’ . . . or may deliver her to any such British officer as is mentioned in the said section for the purpose of being dealt with pursuant to the recited Act” (United States answer, exhibit 18).

It appears from the documents that an exchange of views took place between the two Governments in order to arrive at some agreement as to the regulations. On May 4, 1894, an agreement was reached. The previous United States instructions, dated April 18, 1894, were revoked (53 Cong. 2d Sess. Senate Ex. Doc. No. 67, p. 228); a memorandum of the agreement regulations was exchanged (*ibid.*, p. 120; United States answer, exhibit 23) and those regulations were sent by the United States Government to their naval officers (*ibid.*, pp. 126, 226, 228). From these new regulations of May 4, 1894, the provision concerning the possession of arms was omitted.

In these circumstances, the legal position in the sealing zone at the time of the seizure of the *Wanderer* may be summarized as follows: the provisions of the Award in their strict meaning, and those provisions only, had been agreed upon as binding upon the vessels, citizens, and subjects of the two countries, and it was only for contravention of those provisions that the United States cruisers were authorized to seize British vessels.

Such being the state of the law, the question to be determined here is whether or not the *Wanderer* was contravening the aforesaid provisions so as to justify her seizure.

The declaration of seizure does not allege that the *Wanderer* was killing or pursuing or had killed or pursued fur seals within the prohibited time or zone, but that she was discovered to have certain arms and ammunition unsealed and hidden on board. The offense alleged was the possession of such arms and ammunition (United States answer, exhibit 5). The same charge is brought by the notice of the declaration of seizure “. . . whereas in thus having concealed arms and ammunition on board, you were acting in contravention . . .” (United States answer, exhibit 6). In the report of the United States authorities, a report of a merely domestic character, the same view is taken. It is explained by the repeated references to the above quoted section 10 of the United States Act of April 6, 1894.

Inasmuch as it was only *use* and not the mere *possession* of arms and ammunition which was prohibited by the Paris Award and Regulations, it is impossible to say that the *Wanderer* was acting in contravention of them.

Even if it be admitted that in case of contravention the United States officers were empowered to seize on behalf of Her Majesty’s Government under the British Act, it is clear that such a delegation of power only gave them authority

to act within the limits of that Act, and as the seizure was made for a reason not provided for by that Act, it is impossible to say that in this case they were exercising that delegated authority.

The bona fides of the United States naval officers is not questioned. It is evident that the provisions of section 10 of the Act of Congress constituted a likely cause of error. But the United States Government is responsible for that section, and liable for the errors of judgment committed by its agents.

Further, contrary to the contention of the United States answer, it must be observed that Her Majesty's Government were under no international or legal duty to proceed against the ship through their Admiralty courts, and not to release her by a merely administrative decision. Under section 103 of the British Merchant Shipping Act, 1854 (United States answer, p. 65), it is only when a ship has become subject to forfeiture that she may be seized and brought for adjudication before the Court, and as the ship in this case was not considered subject to forfeiture, the aforesaid provision had no application.

The United States Government points out that the Government of Her Britannic Majesty were held responsible by Her Majesty's Courts in certain cases of seizures made by the United States authorities under the Paris Award Act, even when those seizures were held to be unjustified in the circumstances. But it must be observed that in those cases the seizure was for acts which, if they had been proved, would have constituted a contravention justifying the seizure; in this case, on the contrary, the seizure was made for an act, namely, the possession of arms, which did not constitute any contravention justifying the seizure. In other words, in the aforesaid cases, it was not contested that the United States authorities acted within the limits of the powers entrusted to them, but it was decided that their action was not justified by the facts.

The contention that the British Government is liable for the detention of the *Wanderer* from and after July 1, 1894, the date when she arrived at Unalaska, until she was delivered to the *Pheasant*, because of the delay of that vessel in reaching that port, is not well founded. According to the power delegated to them under the British Act and Order in Council, the United States naval authorities in case of seizure had either to bring the vessel before a British court or to deliver her to the British naval authorities. Here the United States officers neither brought the *Wanderer* before a British court nor delivered her to a British naval authority before the 2nd of August.

It has been contended by the United States that although the *Wanderer* was sent to Dutch Harbor, Unalaska, about 500 miles to the west of St. Paul, that is to say exactly the opposite direction from where a British court be found, nevertheless, it is shown by a letter of the commanding officer of the American fleet, dated June 13, 1894, that he had been informed that a British man-of-war would be sent to Unalaska about the time the *Wanderer* arrived there. As to this contention, it must be observed that the said letter is dated three days after the *Wanderer* was sent to Unalaska, which was on June 10th. Furthermore, it appears from a letter of the commanding officer of the United States fleet addressed to the secretary of State on May 28, 1894, i.e., 12 days before the seizure, that that officer having been informed by H.M.S. *Pheasant* that she was the British vessel ordered to co-operate in carrying out the concurrent regulations, had himself suggested to the commanding officer of the *Pheasant* that he should make his headquarters at Sitka until June 12th, at St. Paul, Kadiak Island, until June 30th, and after that at Unalaska "as this seems to be the best arrangement that could be made for turning over British sealers that may be seized". This arrangement was communicated to the American fleet on the same day by a circular dated May 28, 1894 (Ex. Doc., 264).

Consequently there is nothing to show that on June 10th, the date when

the *Wanderer* was sent to Unalaska, the United States naval authorities believed the British man-of-war would be at Unalaska at the date of the schooner's arrival.

There still remains to be considered the question of the liability of the United States for damages arising after the *Wanderer* was delivered on August 2nd (United States answer, exhibit 13) to Her Britannic Majesty's ship *Pheasant* at Dutch Harbor, Unalaska.

The above-mentioned Order-in-Council of April 30, 1894, which authorized American officers to seize British sealers for contravention of the Bering Sea Award Act of 1894, provides that vessels seized by such officers either may be brought for adjudication before a British Court of Admiralty, as specified in section 103 of the Merchant Shipping Act of 1854, or may be delivered "to any such British officer as is mentioned in the said section for the purpose of being dealt with pursuant to the recited Act". In this case the latter course was followed, and the *Wanderer* was delivered to the commander of the *Pheasant* on August 2nd, and was ordered by him to proceed forthwith to Victoria, B.C., where there was a British Court having authority to adjudicate in the matter. Upon the arrival of the *Wanderer* there, the customs officers declined to take proceedings against her, and the Admiral in charge of Her Britannic Majesty's ships ordered that she be released from custody.

This Tribunal having held that Her Britannic Majesty's Government were under no international or legal duty to proceed against this ship, and that the release of the ship by administrative action was justified under section 103 of the Merchant Shipping Act of 1854 it follows that the British authorities, rather than the United States authorities, were responsible for the detention of the vessel after she was delivered to their charge on August 2nd. The authority conferred by the above-mentioned Order in Council upon the American officer who seized this vessel was to exercise "the like powers under the Bering Sea Award Act of 1894 as may be exercised by a commissioned officer of Her Majesty in relation to a British ship". In other words, the powers of the British officer and the American officer in relation to the detention of this ship were identical, and consequently the Tribunal having held that the detention of the vessel by the American officer was not justified, must likewise hold that her detention by the British officer was equally unjustified. Inasmuch as the British officer was at liberty to release the vessel, and as the United States is not responsible for her unjustifiable detention by a British officer, the United States is responsible only for damages for detaining the vessel until the 2nd of August.

## II. *As to the consequences of liability and the amount of damages:*

The provisions of article 2 of the Award of the Fur Seal Arbitration Tribunal of 1893, which was adopted by the legislative enactment by the Government of Great Britain and of the United States in 1894, are as follows:

"The two Governments shall forbid their citizens and subjects, respectively, to kill, capture, or pursue in any manner whatever, during the season extending, each year, from the 1st of May to the 31st of July, both inclusive, the fur seals on the high sea, in the part of the Pacific Ocean, inclusive of the Bering Sea, which is situated to the north of the 35th degree of north latitude, and eastward of the 180th degree of longitude from Greenwich . . ." (United States answer, exhibit 16).

It appears, therefore, that from the 10th of June, when this vessel was seized, until the 31st of July, she was prohibited by these provisions from sealing operations in the North Pacific within the limits described, which were fixed by the Award of the Arbitration Tribunal as the limits which included the entire area within which fur sealing might profitably be engaged in during that

period, and she was within those limits when seized. It follows that during the part of her detention for which the United States is responsible, the only period during which she was unlawfully prevented from sealing by the United States authorities, was the period covered by the first two days in August, which followed the termination of the close season on the 31st of July, as fixed by the Award, and the three additional days which should be allowed for the vessel to reach the sealing grounds, if she had been released at Dutch Harbor on August 2nd.

The damages claimed by the claimants as set forth in the British memorial are based upon "a reasonable estimate of the sums which the owners would have received as the proceeds of the voyage if it had been completed, together with interest thereon", and these sums include only the value of the estimated catch for the season if the schooner had not been seized, damages for detention of master and crew, the value of provisions and alleged injuries to guns. It does not appear that any damages were claimed for the detention of the ship during the period prior to the 1st of August, and it is clear that no pecuniary loss on account of any of the items mentioned was suffered by the detention of the ship, or the master and crew during that period, because it is evident from the surrounding circumstances that it was her purpose to occupy that period in proceeding to Bering Sea, and remaining in that vicinity until the open season began on the 1st of August. The value of the prospective catch for the whole season is estimated by the claimants at \$9,080.86 on the basis of 950 skins at 39s. 3d. per skin.

It is shown by the documents that the average catch during the same season of other schooners similarly equipped was about 96 skins per boat or canoe, or 43 skins per man. The *Wanderer* had one boat and five canoes and 14 men, which would make 576 skins, reckoning by boats and canoes, or 602 skins reckoning by men, or striking a mean, 589 skins.

It has been shown that the average value of skins was about \$8.60 per skin in 1894. Consequently on these figures the loss for the season may be estimated at about \$5,000.

As damages are claimed in this case by the British Government not only for the owners but also for the officers and men who by the seizure were deprived of their earnings per skin, no deduction for wages should be made from the aforesaid value per skin.

The exact duration of the season is not stated, but it appears from the evidence that it extended through the month of August and the greater part of September, covering about 40 days, so that the average value of the catch per day can be estimated at about \$125. The evidence offered as a basis for this estimate is indefinite and inconclusive, but the Tribunal is of the opinion that, taking into consideration the illegal detention of this vessel by the United States authorities for a period of nearly two months, it is justified in adopting a liberal estimate of the profits which she would have made on the five sealing days during which she might have hunted, if she had not been unlawfully detained by the United States until August 2nd. This Tribunal, therefore, considers that the damages for this detention should be fixed at \$625 for her loss of profits and \$1,000 for the trouble occasioned by her illegal detention.

As to damages for the detention of the master, mate and men, there is no evidence sufficient to support these claims.

A sum of \$120 is also claimed for injury to guns; but to evidence is afforded sufficient to support this item and it must be disallowed.

As to the sum of \$126.50, the amount of certain provisions, which are said to have been supplied and purchased from H.M.S. *Pheasant*, there is no evidence sufficient to support it.

On the other hand, it appears from a letter dated August 5, 1894, addressed by the commanding officer of the American fleet to the Secretary of the Navy that some provisions valued at \$21.95 supplied by the U.S.S. *Concord* to the *Wanderei* were not paid for (United States answer, exhibit 13). This sum then must be deducted from the total amount of damages to be paid by the United States Government.

*As to interest :*

The British Government in their oral argument admit that the 7 % interest claimed in their memorial must be reduced to 4 % in conformity with the provisions of the Terms of Submission.

It appears from a letter addressed by the Marquis of Salisbury to the British Ambassador in Washington on August 16, 1895, and handed by him to the Secretary of State on September 6, 1895, that this was the first presentation of a claim for compensation in this case. Therefore, in accordance with the Terms of Submission, section IV, the Tribunal is of the opinion that interest should be allowed at 4 % from September 6, 1895, to April 26, 1912, on the \$625 damages allowed for loss of profits, less \$21.95 for the provisions supplied by the U.S.S. *Concord*, namely, on \$603.05.

*For these reasons*

The Tribunal decides that the Government of the United States shall pay to the Government of His Britannic Majesty for the claimants the sum of one thousand six hundred and three dollars and five cents (\$1,603.05), with interest at four per cent (4 %) on six hundred and three dollars and five cents (\$603.05) thereof, from September 6, 1895 to April 26, 1912.

CHARTERERS AND CREW OF THE *KATE* (GREAT BRITAIN)  
v. UNITED STATES

(December 9, 1921. Pages 472-478.)

SEIZURE OF VESSEL ON THE HIGH SEAS.—CONVENTIONAL PROTECTED ZONE OF FUR-SEALING. British vessel *Kate* seized by United States revenue cutter *Perry* on high seas on August 26, 1896, for having seal skins on board that appeared to have been shot in conventional protected zone of fur-sealing; vessel towed to Dutch Harbor (Unalaska), where on August 29, 1896, date of arrival, released by United States commanding officer of Bering Sea Patrol, she not having any guns on board; on September 8, 1896, back in locality where seized.

DELEGATION OF AUTHORITY BY ONE STATE TO ANOTHER.—BERING SEA AWARD AND REGULATIONS. British Order in Council of April 30, 1894, authorized United States cruisers to seize British vessels for contravention of provisions of British Act of April 23, 1894, and thereby of Bering Sea Award and Regulations of August 15, 1893.

GOOD FAITH OF SEIZING OFFICER.—REASONABLE GROUND FOR SEIZURE. United States *held* liable for any damages resulting from seizure: while no question of bona fide of seizing officer, his superior officer found no reasonable ground for seizure.

**DAMAGES: LOST PROFITS, TROUBLE, DETENTION OF OFFICERS AND CREW.**  
 Lost profits: comparison of catch of *Kate* before seizure and after return to locality where seized with catch of schooner *Sieward* in same periods shows *Kate's* efficiency to be less than one-half that of *Sieward*. Fifty per cent of *Sieward's* catch from *Kate's* seizure until her return, less seals taken by *Kate* on way back, taken as probable catch lost by *Kate*. Allowance made for trouble. No pecuniary damages suffered on account of detention of officers and men since lost profits allowed over period of detention.

**INTEREST.** Interest allowed at 4 % from February 15, 1897, date of first presentation of claim, to April 26, 1912, on sum for lost profits.

*Cross-references:* Am. J. Int. Law, vol. 16 (1922), pp. 328-333; Annual Digest, 1919-1922, pp. 188-189.

*Bibliography:* Annual Digest, 1919-1922, p. 189.

This is a claim presented by His Britannic Majesty's Government for \$4,044.75 and interest for damages for the seizure and detention of the ship, cargo, officers, and men of the British schooner *Kate* by the United States steamer *Perry* on August 26, 1896.

The *Kate*, a schooner of 58.11 tons gross, was a British ship registered at the Port of Victoria, B.C.; her owners were Henry F. Bishop and Samuel Williams, native British subjects, and Otto F. Buckholz, a naturalized Canadian having been born in Germany. By charter party dated December 20, 1895, the *Kate* was chartered for the full season of 1896 for a sealing voyage in the waters of the North Pacific Ocean and Bering Sea by Carl G. Stromgren, a naturalized Canadian having been born in Sweden; Emil Ramlose, also a naturalized Canadian having been born in Denmark, and James Cessford, a native Canadian. Under the terms of the charter party, the charterers had to provision and equip the vessel, and one-fifth of the entire catch of skins for the season was to be paid to the owners (British memorial, pp. 4, 21, 22).

On January 15, 1896, the *Kate* left the Port of Victoria, B.C., and sailed on her sealing voyage in the North Pacific Ocean. She was manned by Stromgren as master, Ramlose as mate, and Cessford as second mate, and four seamen and 25 Indians (British memorial, pp. 23, 24), and had 12 canoes (British memorial, p. 9).

On August 23rd, an officer from the United States cutter *Rush* boarded the *Kate* and overhauled the skins (British memorial, pp. 3, 24).

On August 26th, 1896, the *Kate*, while in latitude 57° 33' N., longitude 172° 53' W., was boarded by an officer from the United States revenue cutter *Perry* and seized, and the following entry was made in her log book:

"Seized this day the British schr. *Kate* for having on board two (2) fur sealskins bearing evidence of having been shot in Bering Sea" (British memorial, p. 25).

At the same time the Captain of the *Perry* gave the master of the *Kate* a document (British memorial, p. 6) reading as follows:

"U.S. REVENUE CUTTER SERVICE, STEAMER 'PERRY'.

"Port, at sea, lat. 57.33 N., long. 172.53 W.

"August 26, 1896.

"I, H. D. Smith, a captain of the Revenue Cutter Service of the United States, commanding the United States steamer *Perry*, declare that the British schooner *Kate* of Victoria, whereof Stromgren is master, was this 26th day of August, 1896, boarded by Lieutenant F. J. Haake, R.S.C., who reported to me that said vessel had contravened the provisions of the Bering Sea Award Act,

1894. The following evidence, found upon search, is relied upon to prove such violation of law:

"The aforesaid British schooner *Kate* was found cruising within the area of the Award on the date given, namely, August 26, 1896, in latitude 57.33 N., longitude 172.53 W., from Greenwich, having on board two (2) fur sealskins bearing evidence of having been shot in the Bering Sea.

"Having reason to believe, from the evidence cited, that the aforesaid British schooner *Kate* had contravened the Bering Sea Award Act, 1894, in the following particulars, to wit: in having on board two (2) fur sealskins bearing evidence of having been shot in Bering sea in violation of said Act and article 6 of the Regulations of the Paris Award, incorporated in said Bering Sea Award Act, 1894, I have this day seized the aforesaid British schooner *Kate*, her tackle and cargo, by authority of said Act and Orders in Council issued thereunder.

"H. D. SMITH,

"Captain, R.S.C., Commanding"

The *Perry* took the *Kate* in tow and on August 29, 1896, arrived in Dutch Harbor at Unalaska, and a few hours later the master of the *Kate* was informed that she was released by order of the United States commanding officer of the Bering Sea Patrol, and the following entry was made in her log:

"Released this day the Br. sch. *Kate* by order of Capt. C. L. Hooper, Commanding Bering Sea Patrol; she not having any guns on board."

The *Kate* remained at Unalaska August 30th, and while there the master of the *Kate* prepared and sent through the commander of H.M.S. *Satellite* to Captain Hooper a protest in writing claiming compensation for all loss from the time the *Kate* was absent from the sealing grounds, until she arrived back again (British memorial, p. 26).

On the following day, August 31, the weather being calm, the *Kate* was towed out from Unalaska by H.M.S. *Pheasant*. "On 3rd September, 1896, the sealing grounds having been reached" (British memorial, p. 8, sec. 27), the *Kate* took 21 seals; on September 5th, 7 seals; on September 6th, 9 seals; on September 7th, 20 seals; on September 8th, in approximately the locality where she was seized by the *Perry* on August 26th, she took no seals, and on September 9th, she took 41 seals.

The Government of His Britannic Majesty, on behalf of the charterers and the crew of the schooner *Kate*, claim damages on account of the seizure of the said schooner, contending that it was illegal and without reasonable cause, or any justification whatsoever, and that even had the detention of the vessel been justified owing to circumstances showing guilt, she should have been delivered to the British naval officer at Unalaska, or in his absence taken to Victoria (British memorial, pp. 11, 12).

The United States Government, on the other hand, denies all liability; first, because its officers were acting on behalf of the British Government and not of the United States Government; secondly, because there was a bona fide belief that an infraction of the Bering Sea Award Act, 1894, had been committed; thirdly, because the senior naval officer in command of the American fleet in ordering the release of the *Kate* did so as a matter of grace and favor, and the release of the vessel is no proof that the seizure was unjustifiable; and fourthly, because there is no basis in law or in fact for the measure of damages (United States answer, p. 2).

I. *As to the legality of the seizure and liability of the United States:*

The authorities cited in the declaration of the captain of the *Perry* in making the seizure of the *Kate* were article 6 of the Regulation of the Paris Award, and Bering Sea Award Act of 1894, and the Orders in Council issued thereunder.

Article 6 of the Regulations provides:

"The use of nets, firearms, and explosives shall be forbidden in the fur seal fishing. This restriction shall not apply to shotguns when such fishing takes place outside of Bering's Sea during the season when it may be lawfully carried on" (United States answer, p. 22).

The Bering Sea Award Act of 1894 put into operation the Regulations of the Paris Award, and also provided in section 3, paragraph 3 thereof, that:

"An Order in Council under this Act may provide that such officers of the United States of America as are specified in the order may, in respect of offences under this Act, exercise the like powers under this Act as may be exercised by a commissioned officer of Her Majesty in relation to a British ship" (United States answer, p. 28).

The Order in Council of April 30, 1894, provided in section 1 thereof that:

"The commanding officer of any vessel belonging to the naval or revenue service of the United States of America and appointed for the time being by the President of the United States for the purpose of carrying into effect the powers conferred by this article, the name of which vessel shall have been communicated by the President of the United States to Her Majesty as being a vessel so appointed as aforesaid, may, if duly commissioned and instructed by the President in that behalf, seize and detain any British vessel which has become liable to be forfeited to Her Majesty under the provisions of the recited act, and may bring her for adjudication before any such British court of admiralty as is referred to in section 103 of the 'Merchant Shipping Act, 1854' . . . or may deliver her to any such British officer as is mentioned in the said section for the purpose of being dealt with pursuant to the recited act" (United States answer, pp. 45, 46).

The commanding officers of the United States naval forces in Bering Sea received confidential instructions in a circular to commanding officers, No. 22, dated July 24, 1894, in part as follows:

"Sealing vessels fallen in with after the 31st of July, in the Bering Sea, are to be carefully searched to see if there are any implements on board, not under seal, except spears, that could be used in fur-seal fishing.

"A number of skins are to be taken indiscriminately and examined to see if there are any marks of shot, as cheap firearms, to be thrown overboard with ammunition when escape is found to be impossible, may be carried" (United States answer, exhibit 7).

By instructions from the United States Treasury Department, dated April 11, 1895, the commander of the Bering Sea Fleet was directed:

"It has been charged heretofore, that vessels of the patrol fleet, have not properly performed their duty in the matter of making search of sealing vessels fallen in with. . . . Should you find a skin on board a vessel that bears satisfactory evidence of having been shot within the Bering Sea, you will seize the vessel. . . . The search for skins, and the determination as to whether the animals were killed by spear or shot, is of equal importance with the discovery of firearms and the unlawful use of the same in Bering Sea, under the 'Regulations governing vessels employed in fur-seal fishing during the season of 1895' " (United States answer, exhibit 8).

Any special instructions for the sealing season 1896 are not included in the evidence furnished in this case. The only evidence produced of the instruc-

tions for the season 1896 is a letter from the Secretary of State to the British Ambassador in Washington, dated April 14, 1896, in which, calling attention to the provision of the Order in Council of April 30, 1894, above quoted, it is stated:

"The President has designated the revenue steamers *Bear*, *Rush*, *Perry*, *Corwin*, *Grant*, and *Wolcott* to cruise in the North Pacific Ocean and Bering Sea, including the waters of Alaska within the Dominion of the United States, for the enforcement of the Acts of Congress approved April 6 and 24 and June 5, 1894, . . . during the season of 1896" (United States answer, exhibit 9).

The fact that the *Kate* had among her catch two seal skins that presented the appearance of being shot, when neither guns nor ammunition, except powder for the signal gun, were found on board, did not seem to the commander of the United States Bering Sea Fleet, when the *Kate* was brought to him at Unalaska, "proof of guilt sufficiently strong to justify sending the vessel to court", and he ordered her immediate release; but at the same time he commended the captain of the *Perry* for his strict "obedience to orders to 'seize any vessel having seal skins on board that appear to have been shot'" (United States answer, exhibit 11).

In the circumstances, while there is no question of the bona fides of the officer making the seizure, it is evident that his superior officer did not consider that there was reasonable ground for the seizure. It follows, therefore, that on the evidence presented here it must be held that the seizure of the *Kate* was unjustifiable, and the United States Government is responsible for any damages resulting from this seizure as the case stands.

## II. *As to the measure of damages:*

The estimated probable catch of the *Kate* during the period from August 26 to September 7th, inclusive, is fixed by the claimants as 145 seal skins at a value of \$7.55 each, amounting to \$1,094.75. This estimate is based on the catch of the schooner *Dora Seward*, which had 16 canoes, while the *Kate* had 12, being twelve-sixteenths of the 329 seal skins taken by the *Dora Seward* during that period, less the 102 seal skins taken during the same period by the *Kate*.

A comparison of the catch of the *Kate* with the catch of the *Dora Seward* shows that during the period between August 23rd and 26th, inclusive, the *Kate* took 76 seals and the *Seward* 166; and after the return of the *Kate* to the locality where she was seized, she took during the period between September 8th to 15th, inclusive, 49 seals and the *Seward* 102. As measured by the *Seward*, the efficiency of the *Kate* was somewhat higher after her return, following her seizure, than prior thereto, but the efficiency of the *Kate* was always less than one-half the efficiency of the *Seward*, as shown by a comparison of their catches day by day. Therefore, as the claimants have asked that compensation for loss of catch for the period during which she was illegally prevented from sealing should be based on a comparison with the actual catch of the *Dora Seward* during the same period, the claimants can not complain if fifty per cent (50%) of the catch of the *Dora Seward* is taken as the probable catch lost by the *Kate*.

Inasmuch as the sealing operations of the *Kate* on August 26th were not disturbed, the last canoe not having come on board until 7 p.m. of that day, the total catch being 45 seals, compensation should be allowed for the period of August 27th to September 7th, inclusive, based on one-half of the *Seward's* catch of 247 seals during that period, less the 57 seals taken by the *Kate* during that period, showing a loss of 67 seal skins, which, at the price of \$7.55, represents a loss of \$508.05.

The Tribunal, therefore, considers that the damages for this detention should be fixed at \$508.05 for her loss of profits, and \$500 for the trouble occasioned by her illegal detention.

Inasmuch as the profits for the estimated catch of the *Kate* during the period of detention have been allowed, there was no pecuniary damages suffered on account of the detention of the officers and the crew.

*As to interest :*

The British Government in their oral argument admit that the 7 % interest claimed in their memorial must be reduced to 4 % in conformity with the provisions of the Terms of Submission.

It appears from a note addressed by the British Ambassador at Washington to the Secretary of State, dated February 15, 1897, that this was the first presentation to the Government of the United States of a claim for compensation in this case (United States answer, exhibit 16). Therefore, in accordance with the Terms of Submission, section IV, the Tribunal is of the opinion that interest should be allowed at 4 % on the \$508.05 damages for loss of profits, from February 15, 1897, to April 26, 1912, the date of the confirmation of the schedule.

*For these reasons*

The Tribunal decides that the United States Government shall pay to the Government of His Britannic Majesty, on behalf of the claimants, the sum of one thousand and eight dollars and five cents (\$1,008.05), with interest at four per cent (4 %) on five hundred and eight dollars and five cents (\$508.05) thereof, from February 15, 1897, to April 26, 1912.

---

LAUGHLIN McLEAN (GREAT BRITAIN) *v.* UNITED STATES

(*Favourite case. December 9, 1921. Pages 515-519.*)

---

SEIZURE OF VESSEL ON THE HIGH SEAS.—CONVENTIONAL PROTECTED ZONE OF FUR-SEALING.—DELIVERY OF BRITISH VESSEL TO BRITISH AUTHORITIES, RELEASE BY BRITISH ADMINISTRATIVE DECISION. British vessel *Favourite* seized by United States revenue cutter *Mohican* on high seas on August 24, 1894, for having unsealed shotgun on board in conventional protected zone of fur-sealing; vessel sent to Unalaska where, on August 27, 1894, delivered to H.M.S. *Pheasant*, who ordered *Favourite* to report at Victoria, B.C., where vessel without Court proceedings released by British administrative decision.

IMPROPER EXERCISE BY UNITED STATES OFFICERS OF AUTHORITY UNDER BRITISH LAW.—GOOD FAITH OF SEIZING OFFICERS, BUT ERROR IN JUDGMENT.—ILLEGALITY OF SEIZURE: DETERMINATION. Reference made by Tribunal to reasons stated in award in *Wanderer* case <sup>1</sup>.

EXTENT OF LIABILITY. Liability of United States for detention extends to August 27, 1894, date of delivery of *Favourite* to *Pheasant*. Great Britain held liable for detention from that date.

DAMAGES: LOST PROFITS, TROUBLE. United States unlawfully prevented *Favourite* from sealing from August 24 to August 27, 1894, plus three additional days to reach sealing grounds. Lost profits: average daily catch of *Favourite* between August 1 and 24, 1894. Allowance made for trouble.

---

<sup>1</sup> See p. 68 *supra*.

INTEREST. Interest allowed at 4 % from September 6, 1895, date of first presentation of claim, to April 26, 1912, on sum for lost profits.

*Cross-reference:* Am. J. Int. Law, vol. 16 (1922), pp. 301-304.

This is a claim for \$19,443.28 together with interest from November 30, 1894, presented by His Britannic Majesty's Government on behalf of Laughlin McLean, for damages arising out of the seizure of the British sealing schooner *Favourite* by the United States revenue cutter *Mohican* on August 24, 1894, and her subsequent detention.

The *Favourite* was a British schooner registered at the Port of Victoria, and her owner was Laughlin McLean, a British subject and master mariner. In 1894, R. P. Rithets and Company, Limited Liability, a body incorporated under the laws of British Columbia, and managers of the said schooner, fitted the vessel out for a sealing voyage.

After procuring a special sealing licence, the vessel manned by Laughlin McLean as master, and a crew of eight men, sailed from Victoria on June 18, 1894. When the vessel sailed from Victoria, she had on board no firearms except one double-barrel shotgun, the barrels of which had been cut off to about 11 inches. The presence of this gun was noted on the ship's manifest. The vessel proceeded to Kyuquot on Vancouver Island, where a crew of 45 Indian hunters was procured.

After the sealing implements on board had been sealed by Her Majesty's Customs Officers and entry made in her log book, the vessel set sail for Bering Sea on July 4, 1894; entered that sea on August 1st; and after breaking the seals on the implements commenced sealing and continued sealing until August 24, 1894. On that date when in longitude 168.30, latitude 54.27, the vessel was boarded and searched by an officer of the United States revenue cutter *Mohican*, who made the following entry in the ship's log:

"Boarded the *Favourite*. Found log correctly kept. No violations of regulations, as per log; one shotgun unsealed."

The officer then left the *Favourite*, but returned shortly thereafter and directed the master to go on board the *Mohican*, bringing with him all his papers and the gun, with which direction the master complied. The gun was fired and found to shoot very accurately for a distance of 50 yards. Whereupon the master was informed that the vessel was under seizure, for the following reasons, which are stated in the declaration of seizure:

"... for violation of article six (6) of the Award of the Tribunal of Arbitration and of that part of section ten (10) of the Act of Congress approved April 6, 1894, which reads:

"... or if any licensed vessel shall be found in the waters to which this act applies, having on board apparatus or implements for taking seals, but forbidden then and there to be used, it shall be presumed that the vessel in the one case and the apparatus or implements in other was or were used in violation of this Act until it is otherwise sufficiently proved'" (United States answer, exhibit 4).

On August 30, 1894, the commander of the United States naval forces in Bering Sea sent a report to the Secretary of the Navy, in which he stated:

"It is more than likely that the shotgun for which the vessel was seized was intended to be used in projecting signal stars, as the barrels were cut off, reducing them to a length of about 12 inches, but it was found after trial, that it could be used to kill seals much beyond the ordinary range of spear throwing.

"But whether this was the only intention, or whether there was another to use it for killing seals in case it was allowed for signal purposes, I am not prepared to say; but its possession is clearly in violation of the provisions con-

tained in sec. 10 of the Act of Congress approved April 6, 1894" (United States answer, exhibit 7).

To this report were annexed the reports of the officers of the *Mohican* with reference to the seizure of this vessel.

The *Favourite* was immediately sent in the custody of a prize crew from the *Mohican* to Unalaska, and on August 27th was delivered to the commanding officer of the British cruiser *Pheasant* at Unalaska, who ordered the *Favourite* to report to the Collector of Customs at Victoria, B.C.

Upon her arrival at Victoria, the *Favourite* was released by order of Rear Admiral Stevenson, the British Naval Commander-in-Chief on the Pacific Station.

The Government of His Britannic Majesty contend that the seizure of the *Favourite* was illegal and unjustifiable, as neither the Bering Sea Award, nor the regulation made therein or thereunder, nor any legislation or other legal or competent authority, justified or authorized the seizure of the vessel in the circumstances.

The United States Government, on the other hand, denies all liability; first, because its officers were acting on behalf of the British Government and not of the United States Government; secondly, because there was the bona fide belief that an infraction of the Bering Sea Award Act, 1894, had been committed; thirdly, because the release of the *Favourite* by the British naval authorities without a regular prosecution before a court rendered it impossible to determine in the only competent way whether the seizure was illegal; fourthly, because, even supposing the seizure was made without probable cause, the liability to pay damages would rest upon His Britannic Majesty's Government; fifthly, because the detention of the vessel from and after August 27, 1894, the date of its delivery to the commanding officer of the British cruiser *Pheasant* at Unalaska, was due to the action of the British authorities; and sixthly, because there is no basis in law or in fact for the measure of damages claimed.

I. *As to the legality of the seizure and liability of the United States:*

On the facts in this case, and for the reasons stated in the award of this Tribunal in the case of the *Wanderer*, claim No. 13, delivered December 9, 1921, this Tribunal holds:

(1) That the seizure of the British ship *Favourite* by United States officers, under section 10 of the Act of Congress approved April 6, 1894, was an improper exercise of the authority conferred upon them by the British Government under the Bering Sea Award Act of 1894, and the Order in Council of April 30, 1894;

(2) That the good faith of the United States naval officers is not questioned, their error in judgment being caused by the provisions of the aforesaid section 10, for which section and the error of judgment committed by its agents thereunder, the United States Government is liable;

(3) That inasmuch as the offence of the *Favourite* did not make her liable to forfeiture, the British Government were under no international or legal duty to proceed against the ship through their admiralty courts, and not to release her by a merely administrative decision; and

(4) That the British authorities, rather than the United States authorities were responsible for the detention of the ship after she was delivered to them on August 27th.

The United States Government, therefore, is liable only for the three days of her detention, namely, from August 24th to August 27th, during which she was under the control of officers of the United States, and the three addi-

tional days which should be allowed for the vessel to return to the sealing grounds if she had been released at Unalaska on August 27th.

II. *As to the amount of damages:*

The damages claimed on behalf of the claimant, amounting to \$19,443.28, as set forth in the British memorial, are based upon "a reasonable estimate of the sums which the owners would have received as the proceeds of the voyage, if it had been completed, together with interest thereon", or, in the alternative, the said amount is claimed "by reason of the loss of time, wages, provisions and outfit for the remainder of the season after the 24th of August, 1894".

It is shown in the British memorial that during the period between August 1st and August 24th, the *Favourite* had taken 1,247 seal skins, the net value of which, as shown by their sale in London was at the rate of \$8.62 per skin. This would make the average daily catch, 52 skins, equivalent to \$448.24 in value. It does not necessarily follow that the *Favourite* would have continued to take seal skins at this daily average during the remainder of her voyage, but the Tribunal is of the opinion that in view of her hunting equipment consisting of 19 canoes and 45 Indian hunters and a crew of eight white men, an estimated allowance of 52 skins per day as an average is not excessive. The Tribunal, therefore, considers that the prospective profits for these six days should be estimated at \$448 per day, making \$2,688 in all, and fixes this amount as damages for her loss of profits with \$500 additional for the trouble occasioned by her illegal detention.

*As to interest:*

The British Government in their oral argument admit that the 7 % interest claimed in their memorial must be reduced to 4 % in conformity with the provisions of the Terms of Submission.

It appears from a letter addressed by the Marquis of Salisbury to the British Ambassador in Washington on August 16, 1895, and handed by him to the Secretary of State of the United States on September 6, 1895, that this was the first presentation of a claim for compensation in this case. Therefore, in accordance with the Terms of Submission, section IV, the Tribunal is of the opinion that interest should be allowed at 4 % from September 6, 1895, to April 26, 1912, on \$2,688 damages allowed for loss of profits.

*For these reasons*

This Tribunal decides that the Government of the United States shall pay to the Government of His Britannic Majesty, on behalf of the claimants, the sum of three thousand one hundred and eighty-eight dollars (\$3,188) with interest on two thousand six hundred and eighty-eight dollars (\$2,688) thereof at four per cent (4 %) from September 6, 1895, to April 26, 1912.

---

JESSE LEWIS (UNITED STATES) *v.* GREAT BRITAIN

(David J. Adams case. December 9, 1921. Pages 526-536.)

---

SEIZURE OF FISHING VESSEL IN DIGBY BASIN (NOVA SCOTIA).—CONDEMNATION OF VESSEL AND CARGO BY MUNICIPAL COURT, FORFEITURE. Seizure of United States vessel *David J. Adams* on May 7, 1886, by Canadian authorities in

Digby Basin, Nova Scotia. Vessel and cargo condemned as forfeited by Vice-Admiralty Court at Halifax on October 28, 1889, for having entered Digby port for the purpose of procuring bait. No appeal against decision.

TERRITORIAL WATERS, FISHING, JURISDICTION.—BINDING FORCE OF: 1. MUNICIPAL LAW DESIGNED TO IMPLEMENT TREATY; 2. INTERPRETATION OF LAW AND TREATY BY MUNICIPAL COURTS.—IMMUNITY OF JURISDICTION: FUNDAMENTAL PRINCIPLE OF JURIDICAL EQUALITY OF STATES.—DENIAL OF JUSTICE.—EXHAUSTION OF LOCAL REMEDIES. By treaty United States, renouncing fishing rights in Canadian territorial waters, secured access of American fishermen to Canadian bays and harbours for several purposes but not for procuring bait (art. 1, Treaty of London, concluded with Great Britain on October 20, 1818). British law designed to implement treaty is binding on any person within British jurisdiction so far as consistent with treaty. The same applies to interpretation and application of the said law by municipal Courts. On the ground of juridical equality of States, however, such interpretation, so far as it implies interpretation of treaty, does not bind United States. This Tribunal, moreover, has not to deal with the way in which municipal law has been applied by municipal Courts, except in case of denial of justice, which may not be invoked unless local remedies exhausted. In this case, owner of vessel renounced right to appeal. Duty of this Tribunal is to interpret treaty from international point of view.

INTERPRETATION OF TREATY: TERMS, INTENTION, NEGOTIATIONS.—FAILURE TO ENFORCE MUNICIPAL LAW. ACKNOWLEDGMENT OF RIGHT, *MODUS VIVENDI*. PUBLIC WARNING OF FORTHCOMING ENFORCEMENT, GOOD FAITH. Meaning of treaty, determined according to clear wording; no sufficient evidence of contrary intention of High Contracting Parties; report of American Plenipotentiaries cited. British Act of 1819, implementing treaty, rarely enforced. Acknowledgment by United States in 1877 that American fishermen enjoyed access to Canadian ports for purchasing bait only by sufferance. Tolerance continued under Treaty of Washington (1877-1885) and *modus vivendi* (ending January 1, 1886). On March 5, 1886, before beginning of fishing campaign 1886, public warning of forthcoming enforcement by Canadian Government, reproducing text of 1818 Treaty. Master of *David J. Adams* not bona fide.

EXTRAJUDICIAL ACTION.—*ACTIO IN REM* Tribunal suggests that Great Britain consider allowance, as an act of grace, of adequate compensation, though proceedings which resulted in confiscation of *David J. Adams* constituted *actio in rem* against vessel and not against owner.

*Cross-references*: Am. J. Int. Law, vol. 16 (1922), pp. 315-323; Annual Digest, 1919-1922, pp. 237-238, 331-332, 335-336.

*Bibliography*: Nielsen, pp. 524-525; Annual Digest, 1919-1922, p. 238.

The United States Government claims from His Britannic Majesty's Government the sum of \$8,037.96 with interest thereon from May 7, 1886, for loss resulting from the seizure of the schooner *David J. Adams* by the Canadian authorities in Digby Basin, Nova Scotia, on May 7, 1886, and the subsequent condemnation of the vessel by the Vice-Admiralty Court at Halifax on October 20, 1889.

#### I. *As to the facts*:

The *David J. Adams*, a fishing schooner (United States memorial, p. 316), of 66 register tonnage, owned by Jesse Lewis, an American citizen of Gloucester, Massachusetts, United States of America; Alden Kinney, likewise an American

citizen, being the master, sailed from Gloucester on or about April 10, 1886, for cod and halibut fishing on the Western Banks, lying to the south-east of Nova Scotia, in the North Atlantic Ocean, with special instructions to the master not to enter into Canadian ports (United States memorial, pp. 182, 185, 248). After remaining on the Banks for about 12 days, the vessel proceeded to Eastport, Maine, United States of America, to obtain bait and other supplies, but being unable to procure at Eastport her needed supply of bait, she proceeded to Nova Scotia's shore, namely, to Annapolis Basin (United States memorial, pp. 249, 309). On the morning of May 6, 1886, contrary to the owner's instructions, she entered Annapolis Basin, and when entering the Gut, she heard from another boat that there was bait at Bear River (United States memorial, p. 309). Then she anchored above the mouth of Bear River (United States memorial, pp. 269, 273, 288, 309). While the schooner was lying at anchor, the master with some men of the crew went on shore, and addressing a Canadian fisherman, Samuel D. Ellis, he said that he wanted to know whether he had any bait, and on the affirmative answer of Ellis, he asked him whether he would sell it to him.

On the refusal of Ellis, because it was against the law and he could not sell to Americans, Kinney replied "that the schooner had been an American, but the English had bought her". Having been told by Ellis that the price was \$1.00 a barrel, he offered \$1.25, and so he bought four barrels of herring which had been caught the same morning (United States memorial, p. 275). The same Kinney addressed, likewise, a certain Robert Spurr: he asked him who owned the bait, and the said Robert Spurr, showing about four and a half barrels of bait in a boat anchored in a weir, said it belonged to his father, William Spurr, and to his partner, George Vroom. The master of the *David J. Adams* bought those four and a half barrels and engaged the next morning's catch at the rate of \$1.00 per barrel. On May 7th, as she was preparing to leave Digby Basin, the schooner was boarded by the chief officer of the Canadian cruiser *Lansdowne*, who asked the master what he was in for and if he had any bait on board; the master answered that he was in to see his people (United States memorial, pp. 253, 289), and that he had no bait on board; then the said officer told Kinney that he had no business to be there; he asked him if he knew the law, and being answered affirmatively (United States memorial, pp. 254, 258), he ordered the said master to proceed beyond the limits and returned to his cruiser. Being ordered by the commander of the cruiser to board the schooner again and to examine her thoroughly, the same officer went alongside the schooner and told the master it was reported that he had bought bait. On the formal denial of Kinney the officer proceeded to make a search, and having found bait, apparently perfectly fresh, was told by the master it was ten days old. Leaving the schooner again, the officer went to report to his commanding officer, and, having so reported, was ordered to return to the schooner with Captain Charles T. Dakin, of the *Lansdowne*, who after putting the same questions and having received the same denials from the captain, returned to the *Lansdowne*, once more leaving the schooner free. But on their report the commanding officer of the Canadian Cruiser ordered the schooner to anchor close to the *Lansdowne*. The following day, i.e. on May 8th, the schooner was declared to be seized (United States memorial, pp. 253, 254, 259).

On the same day the vessel was removed to St. Johns, New Brunswick, and three days later she was taken back again to Digby.

On May 7th a process in an Admiralty suit against the schooner was served on the vessel for: (1) violation of the convention between Great Britain and the United States signed at London on October 20th, 1818; (2) for violation of the Act of the British Parliament, being chapter 38 of the Acts passed in

the 59th year of the reign of his late Majesty, George III. and being entitled "An Act to enable His Majesty to make regulations with respect to the taking and curing of fish in certain parts of the coasts of Newfoundland and Labrador, and in his said Majesty's other possessions in North America, according to a convention made between His Majesty and the United States of America;" and (3) for violation of chapter 72 of the Acts of the Parliament of the Dominion of Canada made and passed in the year 1883, and entitled "The Customs Act, 1883", and the Acts of the said Parliament of the Dominion of Canada in amendment thereof (United States memorial, p. 202).

In the meantime, the Secretary of State of the United States having been informed by the shipowner of these occurrences, the American Consul General at Halifax, acting on the instructions of the Secretary of State, proceeded to Digby to inquire into the facts. He seems to have encountered some difficulties in ascertaining what were the grounds on which the Canadian authorities were basing the seizure (United States memorial, pp. 39, 42, 43, 47) and it appears from the documents (United States memorial, pp. 78, 79, 89) that the charges against the schooner were alternatively said by the Canadian authorities to be a violation of the Fisheries Stipulations in force between the British Government and the United States Government, and of the Canadian Fisheries Acts, and a violation of the Canadian Customs Acts. On the other hand, the Consul General must have had some difficulty in ascertaining the true facts, since in the master's affidavit of May 13th, is the solemn and misleading declaration that he did not buy bait when anchored above Bear River (United States memorial, p. 44).

A diplomatic correspondence ensued with the United States Government protesting against what it contended to be a misinterpretation of the Treaty of 1818 by the Canadian Government and His Britannic Majesty's Government contending that, as the case of the *David J. Adams* was still *sub judice*, diplomatic action was to be suspended for the time being. After having been somewhat delayed, by reason of certain negotiations which took place in 1886-1888 between the two Governments concerning fisheries, the action for forfeiture of the *David J. Adams* and her cargo was decided on October 28, 1889, by the Vice-Admiralty Court at Halifax. The ship and her cargo were condemned as forfeited to Her Britannic Majesty for breach and violation of the convention and the various Acts relating thereto, and ordered to be sold at public auction, and expressly on the following motives (United States memorial, p. 326):

"That the said vessel [*David J. Adams*] . . . did on or about the 6th day of May, A. D. 1886, enter into Annapolis Basin, . . . and that the said vessel *David J. Adams* and those on board the said vessel did so enter for purposes other than the purpose of shelter or of repairing damages, of purchasing wood or of obtaining water, and that the said vessel *David J. Adams* and those on board of the said vessel did within three marine miles of the shores of the said Annapolis Basin on the said 6th day of May A.D. 1886, prepare to fish within the meaning of the convention between His late Majesty, George III, King of the United Kingdom . . . and the United States of America, made and signed at London on the 20th day of October, A.D. 1818, and within the meaning of . . . [British Act 59, George III, c. 38, and Canadian Acts, 31 Vict., chap. 61 (1868), 33 Vict., chap. 15 (1870), 34 Vict., chap. 23 (1871)], . . . and contrary to the provisions of the said convention and of the said several Acts, and that the said vessel *David J. Adams* and her cargo were thereupon seized within three marine miles of the shores of the Annapolis Basin . . .".

It is not contested that no appeal was taken against that decision.

Now this case is presented before this Tribunal under the following conditions:

By reason of certain conditions of fact and for various other considerations, while by the Treaty of London of October 20th, 1818, the United States renounced the liberty of fishing in Canadian waters, except on certain specified coasts, the access of American fishermen to the British territorial waters of Canada was conventionally regulated between the American and British Governments as follows:

“The United States hereby renounce forever, any liberty, heretofore enjoyed or claimed by the inhabitants thereof, to take, dry or cure fish on, or within three marine miles of any of the coasts, bays, creeks, or harbours of His Britannic Majesty’s Dominions in America not included within the above-mentioned limits: Provided, however, that the American fishermen shall be admitted to enter such bays or harbours for the purpose of shelter and of repairing damages therein, of purchasing wood, and of obtaining water, and for no other purpose whatever” (United States memorial, p. 375).

Great Britain and Canada, acting in the full exercise of their sovereignty and by such proper legislative authority as was established by their municipal public law, had enacted and were entitled to enact such legislative provisions as they considered necessary or expedient to secure observance of the said Treaty; and, so far as they are not inconsistent with the said Treaty, those provisions are binding as municipal public law of the country on any person within the limits of British jurisdiction. At the time of the seizure of the *David J. Adams* such legislation was embodied in the British Act of 1819 (59 George III, c. 38), and the Canadian Acts of 1868 (31 Vict. 61), 1871 (34 Vict., c. 23).

Great Britain and Canada, acting by such proper judicial authority as was established by their municipal law, were fully entitled to interpret and apply such legislation and to pronounce and impose such penalty as was provided by the same, but such judicial action had the same limits as the aforesaid legislative action, that is to say so far as it was not inconsistent with the said Treaty.

In this case the question is not and cannot be to ascertain whether or not British law has been justly applied by said judicial authorities, nor to consider, revise, reverse, or affirm a decision given in that respect by British courts. On the contrary, any such decision must be taken as the authorized expression of the position assumed by Great Britain in the subject matter, and, so far as such decision implies an interpretation of said treaty, it must be taken as the authorized expression of the British interpretation.

The fundamental principle of the juridical equality of States is opposed to placing one State under the jurisdiction of another State. It is opposed to the subjection of one State to an interpretation of a Treaty asserted by another State. There is no reason why one more than the other should impose such an unilateral interpretation of a contract which is essentially bilateral. The fact that this interpretation is given by the legislative or judicial or any other authority of one of the parties does not make that interpretation binding upon the other party. Far from contesting that principle, the British Government did not fail to recognize it (United States memorial, p. 119).

For that reason the mere fact that a British court, whatever be the respect and high authority it carries, interpreted the treaty in such a way as to declare the *David J. Adams* had contravened it, cannot be accepted by this Tribunal as a conclusive interpretation binding upon the United States Government. Such a decision is conclusive from the national British point of view; it is not from the national United States point of view. On the other hand, the way in which the Canadian Acts, enacted to enforce the Treaty, had been applied by the Canadian courts, and penalties have been imposed, is a municipal question, and this Tribunal has no jurisdiction to deal with them. The only exception would be the case of a denial of justice. But a denial of justice may

not be invoked, unless the claimant has exhausted the legal remedies to obtain justice. As has been shown, the claimant in this case renounced his right to appeal against the decision concerning his vessel. Then the duty of this international Tribunal is to determine, from the international point of view, how the provisions of the treaty are to be interpreted and applied to the facts, and consequently whether the loss resulting from the forfeiture of the vessel gives rise to an indemnity (oral argument, p. 157).

According to the British view, the stipulation of the Treaty of 1818 according to which the American fishermen shall be admitted to enter the Canadian bays and harbors for shelter, repairing damages, purchasing wood, obtaining water, "and for no other purpose whatever", means that the American fishermen have no access to the said bays and harbors for purchasing bait.

On the other hand, the United States Government contends that the right of access as such is not prohibited to the American fishermen by the Treaty, except so far as it is inconsistent with the prohibition of taking, drying or curing fish within the three-mile limit, accepted by the United States in that Treaty. The four cases (shelter, repairs, wood and water) of admittance, are cases where admittance is secured by the Treaty and cannot be refused or prohibited by local legislation.

In other words, according to the American view the United States Government had renounced by the Treaty their former liberty to fish in Canadian territorial waters. That renunciation has a counterpart the obligation of the Canadian Government to admit American fishermen for shelter, repairs, wood, and water and for no other purpose. That is to say, that Canada has no obligation to admit the said fishermen for any other purpose than these four—that Canada may very well prohibit the entrance for any other purposes; but, so long as entrance for the purpose of purchasing bait is not prohibited by Canadian legislation, it must be considered as the legal exercise of the right of access belonging to any American ship.

In this Tribunal's opinion, a stipulation which says that fisherman "shall be admitted" for certain enumerated purposes and "for no other purpose whatever" seems to be perfectly clear and to mean that for the specified purposes the fishermen shall be admitted and for any other purposes they had no right to be admitted, and it is difficult to contend that by such plain words the right to entrance for purchasing bait is not denied.

No sufficient evidence of contrary intention of the High Contracting Parties is produced to contradict such a clear wording.

It has been said in support of the United States contention that "if the language of the Treaty of 1818 is to be interpreted literally, rather than according to its spirit and plain intent, a vessel engaged in fishing would be prohibited from entering a Canadian port 'for any purpose whatever, except to obtain wood or water, to repair damages, or to seek shelter'". And also that "the literal meaning of an isolated clause is often shown not to be the meaning really understood or intended" (United States memorial, pp. 56, 57).

Such an intention of the negotiators to contradict the literal meaning of the Treaty does not appear in the evidence presented in this case. It appears from the report dated October 20, 1818, from Gallatin and Rush, the two American Plenipotentiaries (British answer, pp. 27, 28), that they had in view to procure for the American fishermen fishing on the fishing grounds outside the three-mile limit off Nova Scotia coasts, the privilege (that is to say, the exceptional right) of entering the ports for shelter.

But, assuming the construction contended for by the United States Government, it must be considered that as early as 1819, that is to say, immediately after the Treaty, the British Act of 1819 (59 Geo. III, c. 36, section III) expressly

enacted that the entrance into the Canadian bays and harbors should not be lawful. This act says:

“Be it enacted that it shall be lawful for any fishermen of the said United States to enter into such bays or harbours of His Britannic Majesty’s Dominions in America as are last mentioned for the purpose of shelter, and repairing damages therein, and of purchasing wood, and of obtaining water, and for no other purposes whatever.”

If the entrance for the other purposes is not lawful, it is difficult to say that such entrance is not prohibited.

It is true that, according to the various documents produced, either by reason of arrangements between the American and British Governments or for political or economic reasons the enforcement of the prohibition resulting from that statute was practically rare, and it results from the documents that the entering of American fishermen into the Canadian ports for the purpose of purchasing bait was at certain periods of time commonly practiced.

But it has been shown that, at least in 1877, before the Halifax Commission, it was admitted by the United States that the American fishermen were enjoying access to the Canadian ports for purchasing bait “only by sufferance”, and could at any time be deprived of it “by the enforcement of existing laws or the re-enactment of former oppressive statutes”. And the United States Government stated at that time that it was not aware “that the former inhospitable statutes have ever been repealed. Their enforcement may be renewed at any moment” (British answer, p. 11).

During the period extending from 1877 to 1886, the fisheries articles of the Treaty of Washington (May 6, 1871; United States memorial, p. 392), superseded the Treaty of 1818 as regards the prohibition of fishing and the tolerance for purchasing bait was continued.

On January 31st, 1885, the United States Government denounced the Washington convention, which was declared to be terminated on July 1st, 1885 (British answer, p. 60), but in order not to disturb the fishing campaign of 1885 a *modus vivendi* was agreed upon by the two Governments to end on January 1, 1886, and the notes exchanged on that occasion show that the purchasing of bait was to continue during that time and that the Canadian authorities should abstain from impeding the local traffic incidental to fishing during the remainder of the season of 1885 (United States memorial, pp. 397, 400). At the same time the Canadian Government proposed to the United States Government that a mixed commission should settle by agreement the various fishing difficulties existing between the two countries and the *modus vivendi* was proposed from the Canadian side, based on a favorable Presidential recommendation for that proposal (United States memorial, p. 401; British answer, p. 62).

The Senate of the United States did not agree to that proposition.

At the termination of the transitory régime which purported to avoid an “abrupt transition” in the existing state of things (United States memorial, p. 399), in the early days of March, 1886, and before the beginning of the fishing campaign of 1886, the Canadian Government gave a public warning, dated March 5th, 1886 (United States memorial, p. 367), reproducing the text of the 1818 Treaty. The same warning also called attention to the provisions of the Canadian Act, 1868, respecting fishing by foreign vessels, but not to the special provisions of the Act of 1819 concerning the entrance by the fishermen into the Canadian harbors. The British Government requested the United States Government to give also a public warning; but it answered that the proclamation of the President already given on January 31st, 1885, constituted a “full and formal public notification”, and it was not necessary to repeat it (British answer, pp. 62, 63).

Such was the state of things when the owner of the *David J. Adams* was deprived of his vessel.

The United States Government contends that even assuming the existence of the prohibition of entering into Canadian harbors for purchasing bait, the seizure was, on the facts in this case, a violation of international law, because "as a matter of international law, where for a long continued period a Government has, either contrary to its laws or without having any laws in force covering the case, permitted to aliens a certain course of action, it cannot, under the principles of international law, suddenly change that course and make it affect those aliens already engaged in forbidden transactions as the result of that course and deprive aliens of their property so acquired, without rendering themselves liable to an international reclamation" (oral argument, p. 751; see also p. 47).

But it seems difficult to apply such a principle based upon the bona fides of foreigners to this case where (a) the master of the schooner was not an alien already engaged in the country in a transaction suddenly forbidden; (b) the said master entered the Canadian harbor in violation of his own shipowner's instructions (United States memorial, pp. 182, 185, 248); (c) the said master admitted that he knew the Canadian law (United States memorial, pp. 254, 258); (d) the said master, in order to induce his vendor to sell him the bait, falsely declared that his vessel had been bought by Englishmen and was no more an American one; (e) the said master falsely declared that he entered the harbor to see his relatives (United States memorial, pp. 253, 289); that he had no bait on board (United States memorial, pp. 254, 263); that he strongly denied that he had bought bait (United States memorial, pp. 254, 259); that the bait, which was afterwards revealed by the search, was ten days old (United States memorial, pp. 254, 263, 289, 290, 302), and even after the seizure, he tried to deceive the United States Consul General by asserting under oath that he did not purchase or attempt to purchase bait while at anchor above Bear River (United States memorial, pp. 46, 269, 273, 288, 309); (f) the said master took away the ship's papers (United States memorial, p. 45), which afterwards he refused to give to the Canadian authorities (United States memorial, p. 316); and where, as it is clearly shown, this master made desperate efforts to avoid the consequences of an act which he knew was illegal.

If, on the other hand, such an attitude of the master of the *David J. Adams* is compared with the public proclamations by the Canadian Government as well as by the United States Government (United States memorial, p. 367; British answer, pp. 62, 63), it does not appear that this was a case of a sudden and unexpected change of a Government's conduct towards a foreigner suddenly surprised by that change.

Furthermore, and without interfering with what the Canadian authorities, acting under their municipal rights of jurisdiction, held to be the proper application of their legislation and the penalties thereunder, and without admitting any foundation in this case for a contended denial of justice, for the reasons above stated, this Tribunal cannot refrain from observing that if the unlawfulness of the entrance in the Canadian ports was effectively provided for in the Act of 1819, in accordance with the Treaty of 1818, on the other hand the penalty of forfeiture for buying bait was enacted for the first time by the Act of 1886 (49 Vict., c. 114; United States memorial, p. 386), posterior to the seizure of the *David J. Adams*.

Further, if the consequences resulting to the owner of the *David J. Adams* from the confiscation so pronounced are considered, they appear as being particularly unfortunate and unmerited.

It results from the documents (United States memorial, p. 181) that Jesse Lewis was a poor, aged man, who was possessed of no means of any moment or value other than the said schooner, that his wife was an invalid, and that after his vessel was seized he was compelled to go to sea to earn a living for himself and his wife (United States memorial, p. 183). And, further, he appears as having been perfectly innocent of his master's conduct, whom he had expressly prohibited from entering Canadian ports, as it has been shown.

It is true, the proceedings which resulted in the confiscation of the *David J. Adams* constituted an *actio in rem* against the vessel and not against the owner; but finally all the consequences of the affair were inflicted on the owner and his abandonment of his right of appeal which might have succeeded as to the penalty, seems to have been partly due to his absence of pecuniary means.

Under these circumstances, this Tribunal thinks it is its duty to draw the special attention of His Britannic Majesty's Government to the loss so incurred by Jesse Lewis and it ventures to express the desire that that Government will consider favorably the allowance as an act of grace to the said Jesse Lewis or to his representatives, on account of his unfortunate misfortune, of adequate compensation for the loss of his vessel and the damages resulting therefrom. That compensation, this Tribunal earnestly urges upon the attention of the British and Canadian Government.

*For these reasons*

The tribunal decides that, with the above recommendation, the claim presented by the United States Government in this case be disallowed.

---

GEORGE RODNEY BURT (UNITED STATES) *v.* GREAT BRITAIN

*(Fijian Land Claims. October 26, 1923. Pages 588-598.)*

---

CESSION OF SOVEREIGNTY, ANNEXATION, SUCCESSION OF STATES: PRIVATE PROPERTY RIGHTS ACQUIRED PREVIOUS TO.—INTERPRETATION OF (PRIMITIVE) MUNICIPAL LAW.—EVIDENCE.—DENIAL OF JUSTICE: GOOD FAITH, PROCEDURE, VIOLATION OF LAW. Purchase in 1868 by Burt, United States citizen, of 3,750 acres in Fiji Islands from native chiefs. Evidence: three deeds and certificate. Cession of sovereignty in 1874 by native chiefs to Great Britain. Burt's claim for recognition and respect of property rights in 1884 disallowed by British Governor in Council on the ground that native chiefs had no power to grant private title to lands. *Held* by Tribunal that chiefs had such power and that title, originally valid, had subsisted, since evidence shows no abandonment of claim by Burt. *Held* also that Great Britain, though its authorities were bona fide and procedure employed in dealing with land titles was the customary and appropriate one, by refusing to recognize title failed to carry out obligation which, under international law, it assumed as succeeding Power in the islands: Tribunal looks only to general result which was reached.

DAMAGES: ACCURATE DETERMINATION. LOST PROFITS, LUMP SUM. The amount of damages necessarily unsusceptible of accurate determination (speculative valuation, prospective profits). lump award made.

*Cross-references:* Am. J. Int. Law, vol. 18 (1924), pp. 814-821; Annual Digest, 1923-1924, pp. 78-79.

*Bibliography:* Annual Digest, 1923-1924, p. 79.

I. On the tenth day of October, 1874, Great Britain acquired by peaceful cession "the possession of and full sovereignty and dominion over" the Fiji Islands. The deed of cession executed by Thakombau (or Cakobau), the then reputed overlord Chief or King in Fiji, and by twelve other natives styled the "high chiefs" of the islands reads as follows:

Whereas, divers subjects of Her Majesty the Queen of Great Britain and Ireland have from time to time settled in the Fijian group of islands, and have acquired property or certain pecuniary interests therein; and whereas the Fijian Chief Thakombau, styled Tui Viti and Vunivalu, and other high chiefs of the said islands, are desirous of securing the promotion of civilization and Christianity, and of increasing trade and industry within the said islands; and whereas it is obviously desirable in the interests as well of the natives as of the white population that order and good government should be established therein; and whereas the said Tui Viti and other high chiefs have conjointly and severally requested Her Majesty the Queen of Great Britain and Ireland aforesaid to undertake the government of the said islands henceforth; and whereas, in order to the establishment of British government within the said islands, the said Tui Viti and other the several high chiefs thereof, for themselves and their respective tribes, have agreed to cede the possession of and the dominion and sovereignty over the whole of the said islands, and over the inhabitants thereof, and have requested Her said Majesty to accept such cession; which cession the said Tui Viti and other high chiefs, relying upon the justice and generosity of Her said Majesty, have determined to tender unconditionally, and which cession, on the part of the said Tui Viti and other high chiefs is witnessed by the execution of these presents, and by the formal surrender of the said territory to Her said Majesty; and whereas His Excellency Sir Hercules George Robert Robinson, Knight Commander of the Most Distinguished Order of Saint Michael and Saint George, Governor, Commander in Chief, and Vice Admiral of the British Colony of New South Wales and its dependencies, and Governor of Norfolk Island, hath been authorized and deputed by Her said Majesty to accept on her behalf the said cession:

Now these presents witness.

1. That the possession of and full sovereignty and dominion over the whole of the group of islands in the South Pacific Ocean known as the Fijis (and lying between the parallels of latitude of fifteen degrees south, and twenty-two degrees south of the Equator, and between the meridian of longitude of one hundred and seventy-seven degrees west, and one hundred and seventy-five degrees east of the meridian of Greenwich), and over the inhabitants thereof, and of and over all ports, harbours, havens, roadsteads, rivers, estuaries, and other waters, and all reefs and foreshores within or adjacent thereto, are hereby ceded to and accepted on behalf of Her said Majesty the Queen of Great Britain and Ireland, her heirs and successors, to the intent that from this time forth the said islands and the waters, reefs, and other places as aforesaid, lying within or adjacent thereto, may be annexed to and be a possession and dependency of the British Crown.

2. That the form or constitution of government, the means of the maintenance thereof, and the laws and regulations to be administered within the said islands, shall be such as Her Majesty shall prescribe and determine.

3. That, pending the making by Her Majesty, as aforesaid, of some more permanent provision for the government of the said islands, His Excellency Sir Hercules George Robert Robinson, in pursuance of the powers in him vested, and with the consent and at the request of the said Tui Viti and other high chiefs, the ceding parties hereto, shall establish such temporary or provisional Government as to him shall seem meet.

4. That the absolute proprietorship of all lands, not shown to be now alienated, so as to have become bona fide the property of Europeans or other foreigners, or not now in the actual use or occupation of some chief or tribe, or not actually required for the probable future support and maintenance of some chief or tribe, shall be and is hereby declared to be vested in Her said Majesty, her heirs and successors.

5. That Her Majesty shall have power, whenever it shall be deemed necessary for public purposes, to take any lands upon payment to the proprietor of a reasonable sum by way of compensation for the deprivation thereof.

6. That all the existing public buildings, houses, and offices, all enclosures and other pieces or parcels of land now set apart or being used for public purposes, and all stores, fittings, and other articles now being used in connexion with such purposes, are hereby assigned, transferred, and made over to Her said Majesty.

7. That, on behalf of Her Majesty, His Excellency Sir Hercules George Robert Robinson promises: (1) that the rights and interests of the said Tui Viti and other high chiefs, the ceding parties hereto, shall be recognized, so far as is consistent with British sovereignty and colonial form of government; (2) that all questions of financial liabilities and engagements shall be scrutinized, and dealt with upon principles of justice and sound public policy; (3) that all claims to titles of land, by whomsoever preferred, and all claims to pensions or allowances, whether on the part of the said Tui Viti and other high chiefs, or of persons now holding office under them or any of them, shall in due course be fully investigated and equitably adjusted.

In witness whereof, the whole of the contents of this instrument of cession having been, previously to the execution of the same, interpreted and explained to the ceding parties hereto, by David Wilkinson, Esq., the interpreter nominated by the said Tui Viti and the other high chiefs, and accepted as such interpreter by the said Sir Hercules George Robert Robinson, the respective parties hereto have hereunto set their hands and seals.

Done at Levuka, this 10th day of October, in the year of our Lord 1874.

(Signed) (L.S.) CAKOBAU, R.

*Tui Viti and Vunivalu*

(L.S.) MAAFU

(L.S.) TUI CAKAU

(L.S.) RATU EPELI

(L.S.) VAKAWALETABUA, TUI BUA

(L.S.) SAVENAKA

(L.S.) ISIKELI

(L.S.) ROKO TUI DREKETI

(L.S.) NACAGILEVU

(L.S.) RATU KINI

(L.S.) RITOVA

(L.S.) KATUNIVERE

(L.S.) MATANITOBUA

(Signed) (L.S.) HERCULES ROBINSON

I hereby certify that, prior to the execution of the above instrument of cession, which execution I do hereby attest, I fully and faithfully interpreted and explained to the ceding parties hereto, the whole of the contents of the said document (the several interlineations on p. , line , and on p. , line of the manuscript having first been made), and that such contents were fully understood and assented to by the said ceding parties. Prior to the execution of the said instrument of cession, I wrote out an interpretation of the same in the Fijian language, which interpretation I read to the several chiefs, who

one and all approved thereof. A copy of such interpretation is hereto annexed marked (A).

Dated this 10th day of October, A.D. 1874.

(Signed) D. WILKINSON  
Chief Interpreter

II. Immediately after the cession, Great Britain established the appropriate machinery to investigate and pass upon the validity of titles to land. This machinery consisted of a board of land commissioners whose findings and conclusions were subject to review by the Governor in Council. Somewhat later provision was made for rehearing on a proper petition before a final Tribunal made up of the Governor and the members of his Council, with the Chief Justice of the Colony and the Native Commissioner sitting with them. It appears that between 1874 and 1882 more than 1,300 claims were thus considered and passed upon. Under the normal procedure where a claim was allowed a Crown grant covering the land involved was issued; where a claim was disallowed a Crown grant *ex gratia*, covering a portion of the land claimed, was sometimes made.

III. George Rodney Burt, a native citizen of the United States, came to the Fiji Islands in 1856 and, excepting the period from 1871 to 1874, hereinafter more particularly referred to, resided in the islands continuously until 1894. He at first carried on a general trading business and later engaged in farming on a comparatively large scale for this region. In 1862 he took up land on the upper Rewa River and is said there to have established the first real plantation in the islands. In 1866 he went to the Sigatoka River district and purchased a tract of land called Kavokai Nagasau, afterwards sold by him to a German subject who eventually obtained a Crown grant for it. In 1868 Burt purchased another tract known as Emuri and situated on the opposite side of the Sigatoka River from Kavokai Nagasau. It is the title to the Emuri tract, consisting of 3,750 acres, which is involved in this controversy.

IV. The purchase of Emuri is evidenced by three deeds and a certificate, running to Burt and his partner Underwood who was subsequently bought out by Burt. These papers are set forth in the appendix to the United States memorial at pp. 187-195. The first deed was executed on February 27, 1868, for a consideration of \$200 in merchandise. The description of boundaries being found unintelligible, a second deed, dated June 2, 1868, was executed, ostensibly to remedy this defect. The consideration in this latter instrument is given as \$220 in trade, apparently including the \$200 previously paid. Still later a third deed, dated October 28, 1868, was obtained by Burt in order to extend the boundaries of the tract. The consideration named in this final transfer is \$320 which included the \$220 already paid, and \$100 in gold paid down on the execution of the deed. The certificate referred to deals with a complication arising from a conveyance by other parties to some part of the land in question, and is a declaration by the principal chief signing the deeds to the effect that such conveyance was null and void.

The grantors in these deeds were Ratu Kini, who seems to have been at the time the undisputed paramount and ruling chief of the territory in which Emuri lies, and certain other subordinate chiefs or heads of tribes supposed to have an interest in the land. While the evidence is to some extent conflicting on the question of the voluntary execution of the deeds by some of the grantors other than Ratu Kini, and as to the receipt of any part of the consideration by such other grantors, we are satisfied that Burt and Underwood secured from the ruling chiefs such title to Emuri as they had power and right to give.

V. Burt and his partner entered into possession of the land in February, 1868, and proceeded to make substantial improvements. Buildings were erected, planting was done, and about 200 head of livestock were put on the property, approximately 500 acres being thus actually occupied during 1868 (memorial, p. 201). This occupation which the land commissioners specifically found to be "substantial" (memorial, p. 201) subsisted for some ten months when it was interrupted in January, 1869, by an incursion by a savage mountain tribe, described as the most unruly element in the islands. The buildings were burned, the land was devastated, and Burt barely escaped with his life. He went back six months later, but was not permitted by the members of this mountaineer tribe to resume operations or gather his crop of cotton; and he was, therefore, obliged to go away from the plantation and seek other remedies. Evidence produced at the hearing shows that early in 1869 Burt appealed to the United States authorities and presented a bill for damages in the sum of \$69,000 for raids and depredations of the natives, and that an investigation of the matter was conducted by Commander Truxton of the U.S. warship *Jamestown*. Commander Truxton found that Burt had been damaged to the extent of \$50,000, and referred the claim to Washington for such action as the United States Government might see fit to take. It also appears from the same evidence that at the beginning of April, 1869, Burt was in Sydney, New South Wales, attempting to raise money to resume operations in Fiji. He then went to the United States and during 1871 pressed his claim before the State Department in Washington. The proceedings before the Department were evidently protracted and it was not until June, 1873, that the final answer of the State Department was given. In substance the United States Government declined to incur the expense or risk of collecting Burt's claim, but it acceded to his request that the American Consular Agent in Fiji be directed to place no obstacle in his way.

In 1874 Burt was back in Fiji. Conditions meanwhile in the islands had manifestly remained more or less chaotic. An attempt had been made to set up an effective government through the creation of a native confederacy, but it can hardly be said that public order and a settled government, satisfactory either to the natives or to the white population, had been established. Perhaps the best evidence of this is to be found in the deed of cession of October 10, 1874, which recites the obvious desirability "in the interests as well of the native as of the white population that order and good Government should be established".

The record contains a deed dated in July, 1874, from Burt to one Ives of Coldwater, Michigan, purporting to sell Emuri for a consideration of \$10,200. It seems to be a reasonable inference that this transaction was in effect a transfer of the property as security for a loan. Evidently Ives was a personal friend; Burt left him a small sum of money in his will. Ives is not shown ever to have been in Fiji or to have had any other interest in the islands; and in 1879 he executed a deed, releasing the property to Burt for the same consideration, to wit, \$10,200. Whether this is the proper construction of the transaction or not, we are of the opinion that for the purposes of this case the situation was not essentially affected by it.

In 1875, when the title stood in Ives, Burt filed with the Board of Land Commissioners a claim for a Crown grant in Ives' name but over Burt's own signature. This claim was not pressed and was never brought on for hearing. From 1875 on for a number of years the whole subject of land titles was in the hands of the local British authorities, and claims were being considered in the order in which they were filed. The process was clearly a lengthy and somewhat complicated one. In 1879 a time limit was fixed for the filing of claims, and Burt, in that year and after the release to him from Ives, filed his claim to

Emuri in his own right. In May, 1880, the Board of Land Commissioners disallowed the Burt claim but recommended that he be given an *ex gratia* grant for 160 acres. In July of that year the Governor in Council, in a decision which was not published at the time, approved the finding of the Land Commissioners but cut the *ex gratia* grant down to 100 acres, whereupon Burt went into possession of the 100 acres and made substantial improvements. In November, 1882, a petition for a rehearing was presented by the Native Commissioner on behalf of two natives claiming an interest in the land. This rehearing was not gazetted until March, 1883, and a decision was not given until April, 1884, when the claim was disallowed in its entirety, and Burt was excluded from the 100 acres which he had occupied a year and a half earlier.

VI. On these facts the precise question before this Tribunal is whether Great Britain, as the succeeding Power in the islands under the deed of cession of 1874, failed in any respect to observe and carry out any obligation toward Burt which it may be properly said, from the point of view of international law, to have assumed. If Burt had at the time a valid title to the lands, it is plain that under all the circumstances the Government was bound to recognize and respect it. In this connexion we do not concern ourselves with the methods and the procedure adopted and employed in dealing with land titles. We have no criticism to make in this regard; on the contrary we feel that good faith is rightly attributable to the authorities at every stage and that the procedure was the customary and appropriate one for handling a situation of this nature. We look only to the general result which was reached and note that this result was the ultimate denial of Burt's right.

VII. We therefore come to the particular question involved: whether Burt had at the time of the cession such an interest as to entitle him to invoke the obligation of the succeeding Power. His title to Emuri, resting as it did upon a conveyance from the ruling chiefs of the territory in which the land was situated, naturally depended upon the power of such chiefs to convey. It has been strenuously contended by counsel for Great Britain that, in the then existing state of land tenures in Fiji, the chiefs acting alone could not convey the equivalent of a fee-simple title to land. It is asserted that under the native custom a certain class, known as "taukeis" and defined as occupiers of the soil, had specific rights which could not be alienated without their express consent. It was, therefore, urged that inasmuch as the taukeis were not parties to the deeds, no valid title could have been conveyed. The record contains much in the way of opinion and argument upon this question. Various theories were advanced both at the time of the cession to Great Britain and afterwards. As time passed, the taukei view commanded more and more attention, and some years after the cession seems to have been rather definitely taken by the local authorities. We think it must be recognized that in this period of transition from primitive native custom to the white man's law it would be difficult, if not quite impossible, to lay down at any particular moment of time an exact definition of land polity in the Fiji Islands. We entertain grave doubts about the existence at any time of an intelligible system of feudal tenures or a consistent law of real property, as we understand it, among the natives. If there is any one fact which stands out with striking prominence during the entire period anterior to the cession it is that the law of the club pretty effectually dominated the situation. On the other hand there are well authenticated instances in which the chiefs themselves took fairly high ground in this matter and regarded themselves virtually as trustees for their people. They certainly assumed the right to dispose of land as they chose, but sometimes they did so with a commendable caution and in a spirit of great fairness to their subjects. We find Thakombau

stating frankly that all that was needed in such a case was his own word and that whether he ought to give his word and would do so was the real question. In discussing the question of the cession to Great Britain with his own chiefs, he declared that they must consider it with the utmost care because, as he said, "what we do today can not be undone tomorrow". It stands without dispute that the most solemn and consequential act affecting land and sovereignty in the islands was performed on the theory that the chiefs had the power to act. The British authorities of the day did not proceed hastily in this momentous transaction; they took advice on the point. They had before them the conflicting theories and deliberately adopted the view that the chiefs were competent to convey. Sir Hercules Robinson, Sir John Thurston and Sir Arthur Gordon may be considered on this record to have committed themselves clearly in this respect at the critical moment of the cession. We can not help feeling that, on the whole case, the chiefs had the power, and that the distinction between want of power and possible abuse of power goes far towards reconciling the conflicting views. One hesitates to believe that the people on the ground, either whites or natives, in their practical dealings were or could under the circumstances be profoundly influenced by ideal considerations on the subject of land tenures. They were confronted not by a theory, but by an actual condition, and we do not feel called upon at this distance of time to take up the academic task of laying down and applying principles which would evidently run so decidedly against the current of actual dealings on the spot.

At this point it is proper to note that the Land Commissioners in 1880 solemnly held that if the signatures of the three chiefs attached to the deed of June 2, 1868, were "genuine and were obtained bona fide, they were undoubtedly the proper persons to have executed the grant".

VIII. Passing now to the question of the subsistence of Burt's right up to the date of the cession to Great Britain, we have only to enquire whether a reasonable construction of the evidence shows any abandonment by him of his claim. The inference to our minds is irresistible that if he had not been dispossessed of Emuri by the wrongful, violent act of an uncontrollable mountain tribe—an event which the Land Commissioners found to have no bearing upon his title—he would have continued in occupation, and it is not an unwarranted assumption to say that if the cession to Great Britain had taken place in 1869, Burt would have almost automatically received a Crown grant. We fail to find anything in the subsequent events which indicates any intention on his part to abandon; on the contrary he diligently prosecuted his claim so far as the circumstances and his limited resources permitted, and was at no stage of the proceedings in default. He stood upon his rights under the conveyances from the chiefs, and, on the view which we take, the Crown authorities by refusing to recognize his title, failed to carry out the obligation which Great Britain, as the succeeding Power in the islands, must be held to have assumed.

IX. The damages are necessarily unsusceptible of accurate determination. The memorial of the United States presents the maximum possible claim. The demand is for \$232,929.50 with interest from April 25, 1884. We can not avoid the impression that the bill as presented comprises a large element of speculative valuation and prospective profits, and we have reached the conclusion that upon the whole case full justice would be done by a lump award of £ 10,000 or its equivalent in dollars as of the date of the award.

*Now, therefore:*

The Tribunal decides that the British Government shall pay to the United States the sum of £ 10,000.

BENSON ROBERT HENRY (UNITED STATES) *v.* GREAT BRITAIN

(*Fijian Land Claims. November 2, 1923. Pages 599-605.*)

CESSION OF SOVEREIGNTY, ANNEXATION: PRIVATE PROPERTY RIGHTS ACQUIRED PREVIOUS TO.—EVIDENCE: BURDEN OF PROOF. Cession of sovereignty over Fiji Islands by native chiefs in 1874. Petition presented by Henry, United States citizen, for Crown grant to 480 acres in island of Fiji. Petition disallowed by Governor in Council in 1887. Claim for compensation made before Tribunal. Burden of proof: claimant must prove that on date of cession of sovereignty he was proprietor in his own right of 480 acres in question. *Held* that no evidence brought to that effect.

*Cross-reference:* Am. J. Int. Law, vol. 18 (1924), pp. 821-827.

This is a claim for compensation, preferred by the Government of the United States of America on behalf of one, Benson Robert Henry, an American citizen, arising out of the disallowance of his title to 480 acres of land in the island of Fiji. We propose to state the facts of this case only in detail sufficient to explain the character of the claim and to elucidate our decision which turns, as will presently appear, on one single question, namely, whether on October 10, 1874, the date of the cession of Fiji to Great Britain, the claimant was, in his own right, proprietor of the lands in question or any part of them.

In September, 1855, Commander Boutwell, of the United States Navy, whose ship was then visiting Levuka, imposed upon the chief Cakobau the payment of about £ 9,000 as compensation for destruction and theft by Fijian natives of property belonging to American citizens. This sum was to be paid in 12 months. In 1867 only a small portion of it had been paid; and on July 12 of that year Cakobau signed a document hypothecating certain lands as security for payment of the balance.

In 1868 two gentlemen, by name Brewer and Evans, arrived in Fiji from Melbourne as agents for the Polynesia Company, Limited, of Melbourne, then about to be formed; and on July 23, 1868 a charter was granted them, as such agents, by Cakobau, who is chief signatory, with the ratification and confirmation of six principal chiefs under Cakobau.

By the material portion of that charter, Brewer and Evans undertook on behalf of the said company to provide for the payment of the compensation, already referred to, to the United States of America; and, in consideration thereof, Cakobau ceded, granted, and transferred to Brewer and Evans as trustees for the said proposed company about 200,000 acres of land as specified in the schedule. Paragraph 4 of the schedule is as follows:

"4. Also Suva, its harbour, territories, and district, commencing from Lami, running along the coast towards Rewa, to the township of Kalabo, and running inland to the Waimanu" (memorial, p. 259).

The lands so described include those in respect of which Henry's claim arises.

This charter was accompanied by the following agreement:

"The Company agree not to alienate any of the land until the whole of the American debt is paid. Should the amount not be paid within the time specified in the agreement of the Company with Dr. Brewer, the land reverts to King Thakombau" (memorial, p. 259).

On the following day, July 24, Evans and Brewer executed an agreement under seal, by which they undertook to pay the balance of the compensation due from Cakobau to the United States of America, the first instalment on their return to Melbourne, the second and final instalment on or before July 24,

1869. These instalments were, in fact, paid by the Polynesia Company, Limited, on July 13, 1869, and on November 19, 1870, respectively.

By a deed dated July 13, 1869, Cakobau and one Natika, with the ratification and confirmation of nine other chiefs and landowners, who also signed, conveyed to the Polynesia Company, Limited, certain lands at Suva to the extent of about 27,000 acres, wherein were included the 480 acres in respect of which this claim for compensation is made.

The Polynesia Company, Limited, having been formed, issued its regulations in November, 1869, under which land warrants were to be issued to shareholders entitling them to "select" lands in districts declared by the Company "open for settlement". The Suva lands were declared open for settlement. No shareholder might make more than one frontage selection in the Suva district; and any selection with a sea frontage was limited to 160 acres.

On August 12, 1870, Jacob Brache, a director of the Polynesia Company, Limited, T. Copeland and the claimant Henry entered into the following agreement at Melbourne:

*"Articles of Agreement*

"Melbourne, Australia

"August 12, 1870

"We, the undersigned Jac. Brache and T. Copeland and B. R. Henry, do agree to associate ourselves together for the purpose of selecting land in Fiji from shares and land warrants of the Polynesian Company Limited now held by the said Jac. Brache and for said purposes do hereby agree to send B. R. Henry to Fiji to select and locate upon such lands as he may deem best for agricultural purposes and we further agree to give to B. R. Henry in consideration of his services when the association is entered in and agreed to, one-third of one hundred and sixty of the above-named shares, and Thos. Copeland agrees to pay J. Brache one hundred and forty pounds sterling for eighty of the above shares if the said B. R. Henry reports that land can be cultivated in Fiji profitably and to the mutual advantage of each of the undersigned.

"J. Brache (in trust)

"T. Copeland

"B. R. Henry"

(memorial, p. 264).

On the same day, in pursuance of this agreement. Henry signed a receipt in these terms:

"Melbourne, August 12, 1870.

"Received from Mr. Jacob Brache one hundred and sixty shares in Polynesia Company Limited with land warrants for six hundred and forty acres and also, warrants for six town lots, such shares and warrants to be held in trust by the undersigned in accordance with the Articles of Agreement between Jacob Brache, Thomas Copeland, and Benson Robert Henry, dated August 12, 1870; also another warrant for six town lots by the Polynesia Company Limited in the name of Franz Bleaker and are in the name of Charles Brache all the above mentioned shares and land warrants to be held in trust by the undersigned.

"B. R. Henry

"Numbers of issue of shares, viz.: 504, 505, 507, 508, 509, 510, 511; 17 land warrants, viz.: 382, 129A, 190A, 466, 468, 469, 470, 471, 472, 473, 214A, 189A" (memorial, p. 268).

This document is ungrammatical and confused; and the number of warrants specified in the footnote is irreconcilable with the receipt itself. In our opinion, the first sentence of the receipt refers to the four land warrants Nos. 586, 587, 588 and 589 hereinafter mentioned.

In December, 1870, the claimant Henry and Copeland arrived in Suva and selected four lots of 160 acres each, represented by warrants numbered 586 to 589 inclusive. Two contiguous lots, the warrants for which were numbered 586 and 588 fronted on the Tamavua River, and are hereinafter referred to as the Tamavua Block; two other contiguous lots, further south, fronting on Sauva Harbour, are hereinafter referred to as the Harbour Block, and were covered by warrants 587 and 589.

Warrant No. 586 passed into the possession of Jacob Brache and was lost. The land held thereunder formed the subject matter of a conveyance from the Polynesia Company, Limited, to the claimant Henry date April 12, 1875. Warrant No. 588 is made out to Charles Brache and his assigns, and is endorsed under date of December 23, 1870, by Henry, as attorney for Charles Brache, to Copeland. Warrant No. 587 is made out to Henry and his assigns and is endorsed with an assignment in blank by Henry, also under date of December 23, 1870, thus becoming negotiable. Warrant No. 589 is made out to T. Copeland and his assigns and is not endorsed. It is with the 480 acres under warrants 586, 587 and 588 that this claim is concerned.

On July 29, 1873, Henry and Copeland executed a power of attorney to Jacob Brache, authorizing him, *inter alia*:

"... for us and in our names and as our names and as our acts and deeds to sign, seal and deliver all deeds and documents, receipts &c. and receive all moneys, lands, warrants, and conveyances of land to which we may become entitled in virtue of our shares in the Polynesia Company Limited and selections made by us in Suva, Fiji, under the regulations of the aforesaid company, also to vote and act for us at all meetings of the Polynesia Company Limited and to sue and be sued in our behalf (in all matters relative to the aforesaid company) . . ." (memorial, p. 279).

On August 12, 1873, Jacob Brache, acting under this power, assigned all right, title, and interest of Copeland and Henry in both the Harbour and Tamavua Blocks to Charles Brache, to be held in trust for a certain proposed company until certain payments were made to Jacob Brache by Henry and Copeland. There is no evidence that these payments were ever made.

In April, 1874, Henry pledged the Harbour Block warrants, Nos. 587 and 589, to one Simmonds for £ 45, and shortly afterwards in that year left Fiji; nor, except that he is alleged to have been subsequently in communication with his attorney in Fiji, Mr. Scott, is he heard of again till 1898, when, in connexion with proposed action by the United States State Department on his behalf in the matter of his Fiji land claims, he swears in Oregon an affidavit containing statements of doubtful accuracy.

In October, 1874, Fiji was ceded to Great Britain and the Lands Commission was instituted by Great Britain to inquire into existing land titles in Fiji in accordance with the undertaking contained in the deed of cession.

In December, 1874, Jacob Brache redeemed the pledged Harbour land warrants from Simmonds, who enclosed a receipt to Brache in the following letter:

*Receipt for £ 43. 17s. 5d.*

“Mr. Jacob Brache  
“Dear Sir,

December 7, 1874

“I hereby acknowledge to have received from you (and for which you have a separate receipt) the sum of £ 43. 17s. 5d. for money advanced by Mr. W. Simmonds, of Suva, to Mr. B. R. Henry, of Suva, on certain warrants of land selected by him for you, and which said warrants I have handed to you.

“Yours truly,  
“C. SIMMONDS”  
(British answer p. 9).

The suggestion underlying this letter, that the original selection of Suva lands by Copeland and Henry was made on behalf of Jacob Brache, is repeated in another letter written to Jacob Brache by Copeland, which is in these terms:

“My dear Mr. Brache,

Levuka, June 21, 1875.

“Yours of the 31st ultimo to hand. I enclose you the power of attorney, signed as requested, and sincerely trust you will come out of the Polynesia ‘spec’ all right.

“T. A. COPELAND

“P.S. The Governor and Land Commissioner have arrived. I shall put in my application for the Suva Block, and send you full power of attorney. It is the only way left to secure you the block” (answer, p. 10).

And again, in a letter to the Commissioner of Lands, Fiji, dated Melbourne, September 28, 1875, Jacob Brache, referring to Copeland’s 160 acres of the Harbour Block, writes:

“... As I am the holder of the said warrant under assignment, the title for such land must naturally pass in my hands” (answer, p. 12).

Some correspondence between Jacob Brache and the Lands Commission ensued; and on January 13, 1876, Jacob Brache, as attorney for one Alfred Asbeck, presented a petition for a Crown grant in respect of the Harbour Block alleging therein that Asbeck on September 1, 1873, had purchased these lands from Copeland and Henry and had paid £ 160 for them. This petition was heard in March, 1878, and, no evidence being offered, was disallowed.

On January 28, 1880, Jacob Brache preferred two more petitions to the Lands Commission, one, as attorney on behalf of Henry and Copeland, in respect of the Harbour Block of 320 acres; another, on behalf of Henry, in respect of the Tamavua Block of 320 acres. The two petitions were heard and were disallowed by the Governor in Council on January 31, 1882. The Tamavua Block petition was reheard and dismissed on August 21, 1883. In connexion with the rehearing of the Harbour Block petition, a question was raised as to the authority of Mr. Jacob Brache to represent Henry and Copeland. The point was argued before the Council on November 23, 1886, when Mr. Scott, as counsel for the petitioners, states that he appeared in a twofold position, representing Brache: (1) as attorney for Henry and Copeland; (2) as being pecuniarily interested in the claim (answer pp. 194, 195). This petition, as being one in which the Crown had an interest, was referred, under ordinance XXV, of 1879, to the Acting Chief Justice, who delivered an opinion to the effect that the claim be disallowed. This opinion was confirmed and the petition

disallowed by the Governor in Council on September 12, 1887. These appear to us to be all the facts necessary for the decision of this claim.

For the purpose of our decision we make the following assumptions:

1. That Cakobau and his co-signatories gave a valid title in the Suva lands to the Polynesia Land Company Limited.
2. That the Polynesia Land Company Limited gave to their transferees valid titles in the Suva lands.
3. That a land warrant was a good muniment of title, whether perfected by a conveyance or not.
4. That no breach of the regulations of the Polynesia Land Company Limited had been committed.
5. That the title of the transferees of the Polynesia Land Company Limited was not affected by the fact that the payment of the second instalment of the indemnity by the Polynesia Land Company to the United States of America was made 16 months after the appointed date.

We now address ourselves to the decisive question:

Was the claimant Henry on October 10, 1874, the date of the cession of Fiji to Great Britain, proprietor, in his own right, of the 480 acres of land in question or of any part of them?

The onus of satisfying the Tribunal on this point lies on the claimant.

Our answer to that question is in the negative.

The reasonable inference in our opinion to be drawn from Henry's operations and conduct, viewed in the light of the documents, and, in particular, of:

- (1) The land warrants themselves;
- (2) The agreement between Jacob Brache, Copeland and Henry dated August 12, 1870 (memorial, p. 264);
- (3) The receipt signed by Henry dated August 12, 1870;
- (4) The assignment by Jacob Brache to Charles Brache dated August 12, 1873 (memorial, p. 316);

is that Henry was acting from the beginning, whether he be correctly described as trustee or as agent, not on his own behalf. In any case, the evidence falls far short of discharging the onus of proof which is imposed upon the claimant.

But, further, even if it be assumed that, in the first instance, Henry acquired these 480 acres of land for himself, having regard to the facts and documents already referred to and to the sale on September 1, 1873, for valuable consideration of Henry's 160 acres of the Harbour Block to Alfred Asbeck (answer, p. 14), we can not, in the absence of any explanation of these transactions by Jacob Brache, find ground to warrant us in making any award in favour of the claimant.

*Now therefore:*

The decision of the Tribunal in this case is that the claim of the Government of the United States of America be disallowed.

HEIRS OF JOHN B. WILLIAMS (UNITED STATES)  
v. GREAT BRITAIN

(*Fijian Land Claims. November 8, 1923, Pages 606-611.*)

CESSION OF SOVEREIGNTY, ANNEXATION: PRIVATE PROPERTY RIGHTS ACQUIRED  
PREVIOUS TO.—INTERPRETATION OF (PRIMITIVE) MUNICIPAL LAW.—

EVIDENCE: DOCUMENTS. VALIDATION, DELETIONS.—CONTRACT: INTERPRETATION. FACTS, FAIRNESS. INTENTION OF PARTIES.—DAMAGES: LUMP SUM. Conveyance in 1846 to Williams, United States Commercial Agent in Fiji, of three lands of 100, 20 and 1,000 acres in Fiji Islands by native chiefs. Cession of sovereignty in 1874 by native chiefs to Great Britain. Subsequent claims for Crown grants concerning three lands disallowed.

Since conveying chiefs were rebels and fugitives and therefore unable to give good titles, deeds for first two lands signed by them not valid. Endorsement by two native landholders adds nothing to their legal effect. Property, moreover, in dispute: Williams occupied two lands not before intervention in 1855 by United States naval commander, who also obtained endorsements on two deeds from chiefs of Vutia. Circumstances, however, largely rob endorsements of value as evidence of free consent to conveyance. Two further documents signed in 1856 by two Vutia chiefs merely acknowledge conveyances executed in 1846 and do not affect Williams' title. *Held* that no title proved sufficient to justify favourable award.

Grantors of third land were in position to give good title. Property not in dispute. Land conveyed to Williams and two others whose names deleted, while no evidence that Williams, who died in 1860, survived two others. *Held* that deed created tenancy in common, not joint tenancy: fairness, facts, intention of parties. Award made for one third of compensation due in respect to whole property. Lump sum allowed.

*Cross-reference:* Am. J. Int. Law, vol. 18 (1924), pp. 827-831.

This claim is preferred by the Government of the United States of America on behalf of the heirs of J. B. Williams, asking for compensation arising out of the disallowance of that gentleman's title to certain lands in Fiji.

The lands in question are: (1) 100 acres in the island of Laucala; (2) the island of Nukulau, 20 acres; (3) 1,000 acres at Nukubalavu in the island of Viti Levu.

Mr. J. B. Williams appears to have gone to Fiji about the year 1840; he became United States Commercial Agent there, and died there in 1860.

1. As to the *Laucala* land, the claimants produce four documents as the foundation of Williams' title.

The first is a conveyance, dated June 1, 1846, from the chief Cokana Uto or Phillips to Williams and Ichabod Handy, for a consideration of \$50.20 in trade (memorial, p. 329). This deed is endorsed by mark, by two natives, Koromoves and Korotabaleo, who, as "landholders, acknowledged and consented to the sale". These two persons similarly endorsed the Nukulau conveyance and are referred to by Mr. Carew, the Land Commissioner, in his report on that petition, in the following terms:

"They appeared to have followed Cokana Uto about for the purpose of confirming sales of land made by him whether his own property or that of others and it appears from evidence in other claims to have been a matter of indifference to them" (memorial, p. 393).

The second Laucala deed is a conveyance, in consideration of some articles in trade, from Koquaraniqio to Williams and Handy, dated September 25, 1846.

Both Cokana Uto and Koquaraniqio at the respective dates of their conveyances were rebels against and fugitives from the paramount chief of Rewa.

There is no evidence of occupation of Laucala by Williams or anyone else in right of Williams till in the year 1855 or 1856. That occupation took place under the following circumstances.

In September, 1855, the United States ship *John Adams*—Commander Boutwell—visited Fiji in order to take punitive measures against the natives for the destruction and theft of American citizens' property, amongst such property being Mr. Williams' house on Nukulau. Commander Boutwell seized the occasion to investigate Williams' title to Laucala which was in dispute. In his report to the Secretary of the Navy (memorial, p. 362), after referring to the recent disturbances, he says:

"On learning these facts I determined to make the natives build our consul another house; pay the value of \$1,200 in pigs, gum, and fish, for the loss of his property; and reinstate Mr. Williams in possession of his land, the two small islands of Nukulau and Lauthala, which he had purchased and had deeds for. I examined the interpreter who had made the purchase for the consul and his deeds (and) decided that the land belonged to our consul but was informed by Mr. Moore that the chiefs of Rewa and Vutia disputed the claim of Mr. Williams and Mr. Handy (an American) to this land. On September 18 I had an interview with the chiefs of Rewa on board, who acknowledged that the land had been sold to Mr. Williams, and on the 19th I had an interview with the chiefs of Vutia, who not only consented to Mr. Williams' claim, but countersigned the deeds."

These countersignatures, by mark, appear under an endorsement on the two deeds referred to testifying that:

"This matter of the land has been settled to our satisfaction".

Commander Boutwell also endorsed and signed statements to the effect that the title of Williams and Handy was, in his opinion, good.

Without enquiring in detail into the actions of Commander Boutwell, and quite apart from native evidence, the circumstances in which these endorsements were made appear to us largely to rob them of value as evidence of free assent to the conveyances in question. Nor is Commander Boutwell's opinion of Williams' and Handy's title fortified by the fact that, according to his own report, he interviewed the chiefs after having determined to reinstate Mr. Williams in his disputed property.

But Williams was not yet satisfied as to his title, and two more documents were drawn up in identical terms and signed on the same day, the first by a Vutia chief, by name Ko Ra Daka Waqa, dated September 2, 1856, the other, by another Vutia chief, by name Tuni, dated October 2, 1856, and witnessed by one Charles Rounds. The following is the text of the earlier document:

"Lauthala Rewa, September 2, 1856.

"I, Ko Ra Daka Waqa, one of the chiefs of Vutia do hereby acknowledge the purchase and payment by John B. Williams and Ichabod Handy of all that tract and parcel of land called Lauthala Point, or Island, all that part lying south of the creek called Vunia Vaudra which communicates with Rewa River and the bay on the west side of Lauthala, the said creek being navigable for boats at high water, and being the first approach from the anchorage in the roads; the receipt for the goods in payment whereof was previously acknowledged as per deed granted the first day of June and twenty-fifth day of September in the year 1856. To have and to hold the above-released premises to the said John B. Williams and Ichabod Handy their heirs and assigns to them and their use and behoof for ever.

"Witness to signature:  
CHARLES ROUNDS

his  
KO RA DAKA WAQA ×  
mark."

There is no evidence of either of these documents having been explained to the signatory, or of any consideration having passed. But, apart from their value as evidence, it is somewhat difficult to appreciate their effect as muniments of title. They do not purport to be conveyances, or anything more than acknowledgments of the conveyances executed and the consideration paid in 1846. If the deeds of 1846 are valid and *bona fide* conveyances, these documents are superfluous; if the former are not valid and *bona fide* conveyances, the latter do not make them so.

Williams died on June 10, 1860, and Dr. Isaac Mills Brower took charge of his estate and granted leases of the Laucala lands, as Williams had done in some instances between 1856 and 1860.

After the cession of Fiji to Britain in 1874, the Land Commission was instituted to investigate and report on the titles to land granted by natives to foreigners; and in 1875, the heirs of J. B. Williams presented a petition for a Crown grant of the Laucala lands in question. It was heard and disallowed in 1878. The petition was reheard in 1880 and the disallowance affirmed (answer, p. 100).

We find that:

1. Neither of the two grantors under the deed of 1846 was, at the respective date of those deeds either *de facto* or *de jure*, in a position to give a good title to the Laucala land;
2. The endorsements on the two deeds of 1846 add nothing to their legal effect;
3. The title to these lands was in dispute in September, 1855;
4. There was no occupation of the Laucala land by Williams or on Williams' behalf till late in 1855 or in the year 1856;
5. The two deeds of 1856 do not affect Mr. Williams' title which stands or falls by the two conveyances of 1846.

It is pointed out in the memorial (p. 58), that: "four subclaims to land on Laucala, obtained by purchase from Williams and presented by Messrs. Burt, Hennings, and Ryder, were allowed". the suggestion being that there is some *inconsistency between disallowing the title of Williams and allowing titles of purchasers from him*. There is no such inconsistency. These three purchasers proved substantial occupation and, thereupon, they were entitled under the principles followed in Fiji land cases even in the absence of strict title, to a Crown grant *ex gratia*.

With regard to occupation of Laucala by Williams or in his right, no Crown grant *ex gratia* was made; and the refusal of such a grant is not a matter for the consideration of this Tribunal. It may be said that the fluctuating fortunes of native chiefs in civil war afford but slender foundation for any conclusion in one direction or the other as to their right to convey lands, but, apart from that feature of this claim, we think that no title is proved sufficient to justify an award in favour of the claimants. The claim in the Laucala case is, therefore, dismissed.

2. With regard to the *Nukulau* claim, it is to be noted that the Land Commissioner reported favourably upon it, though it was disallowed by the Governor in Council both on the report and after rehearing. With this exception, the facts are substantially the same as in the Laucala claim.

The deed alleged to found Williams' title is a grant of the island of Nukulau by Cokana Uto or Phillips to Williams and Andrew Breed and Samuel T. House, for a consideration of £ 30 in trade, and dated June 8, 1846 (answer, p. 101). Qaraniqo endorsed the deed on September 11, 1848:

“Nukulau, September 11, 1848.

“I acknowledge and consent to the sale of the within-named land, Nukulau, payment having been made to Cokana Uto, myself one piece blue and orange print, twelve dollars.

“Witnesses:

“JOHN H. DANFORD  
“DAVID WALKER”

“QARAINQIO,  
“his X mark

(Answer, p. 102)

At these respective dates Cokana Uto and Qarainqio were rebels against and fugitives before the paramount chief of Rewa and, therefore, unable to give good title to Nukulau.

Koromovei and Korotabalea endorsed on this conveyance an acknowledgment and consent similar to that on the Laucala deeds.

Commander Boutwell endorses this deed as follows:

“Having examined this deed I consider John B. Williams’ title to the land good.

“E. B. BOUTWELL

“Commanding U.S.S. *John Adam*.”

“Lauthala Roads

“September 17, 1855”

Our observations therefore on the Laucala deeds of 1846 and our first three findings in that case apply to this claim also.

The claim therefore in this case is dismissed.

3. *Nukubalavu*. This claim is different.

Kaibau and Koroiduadua, the grantors of this land under a conveyance of October 12, 1846, for a consideration of \$46 in trade, were in a position to give a good title.

There is title or no evidence of dispute about the property, and, probably in consequence of that very fact, Commander Boutwell plays no part in this claim. As in the Nukulau case, the conveyance was to Williams, Breed and House, the two latter names having been erased wherever they occur throughout the deed, presumably by Williams who profited thereby. Having regard to the fact that these same erasures occur both in the Nukulau and the Nukubalavu deeds at an interval of four months, they must have been made after the execution of the latter deed. There is no evidence that Williams survived Breed and House. If, therefore, this deed were taken as creating a joint tenancy in the strict sense, this would be sufficient to defeat this claim. But in our opinion, it would be fairer and more in consonance with the real facts of the case and the intentions of the parties to treat the deed as creating a tenancy in common, with the result that the heirs of J. B. Williams are entitled only to one third of the compensation which we find to be due in respect of the whole property. The range of value is very wide. The claim is for \$10,000; the valuation of Messrs. Page, Scott, and Joske in 1882 (memorial, p. 390) is £ 2,000; that of Mr. Allardyce in 1893 (answer, p. 26) is as follows:

“*Nukubalavu*. This block is situated on the south coast of Vanualevu and is of no particular value. If put up to auction it would not fetch above a few pounds.”

We think that the justice of the case would be met by an award of a lump sum of £ 150.

*Now, therefore:*

The decision of the Tribunal in these cases is:

(1) *Laucala*. That the claim of the Government of the United States of America be disallowed.

(2) *Nukulau*. That the claim of the Government of the United States of America be disallowed.

(3) *Nukubalavu*. That the British Government shall pay to the Government of the United States of America the sum of £ 150.

ISAAC M. BROWER (UNITED STATES) *v.* GREAT BRITAIN

(*Fijian Land Claims. November 14, 1923. Pages 612-616.*)

CESSION OF SOVEREIGNTY, ANNEXATION; PRIVATE PROPERTY RIGHTS ACQUIRED PREVIOUS TO.—INTERPRETATION OF (PRIMITIVE) MUNICIPAL LAW.—EFFECTIVE OCCUPATION. Purchase in 1863 by two United States citizens of six small islands in Fiji from Fiji chieftain. Purchase in 1870 of a half interest in same islands by Brower. United States citizen. Cession of sovereignty in 1874 by native chiefs to Great Britain. Subsequent claim for Crown grant presented by Brower disallowed in 1881. *Held* that chieftain had power to give title (reference made to Burt case, see p. 93 *supra*) and that, since islands never had been inhabited, no question as to their effective occupation by Brower could arise.

CONTRACT: INTERPRETATION, MOST REASONABLE VIEW.—PRESENTATION OF CLAIM ON BEHALF OF INTERESTED PARTY. Terms of arrangement entered into by Brower with two individuals some time before disallowance of claim for Crown grant. In the absence of precise facts, the Tribunal interpreting the arrangement takes the most reasonable view. *Held* that title to a half interest was properly vested in Brower at time of cession of sovereignty and at date of filing of claim before Tribunal and that Great Britain, as succeeding Power in the islands, under the obligation assumed at time of cession should have recognized title.

DAMAGES: SPECULATIVE AND PRECARIOUS VALUE, NOMINAL DAMAGES. Since value of islands rested entirely upon rumour of buried treasure, only nominal damages awarded.

*Cross-reference:* Am. J. Int. Law, vol. 18 (1924), pp. 832-835.

This claim is presented by the United States on behalf of Isaac M. Brower for the sum of \$1,250, with interest. It arises out of the disallowance of Brower's application for a Crown grant to certain lands in Fiji. The facts are as follows:

In 1863, two American citizens, Thompson and Gillam, purchased from a Fiji chieftain known as Tui Cakau a group of small islands, six in number, forming a part of the Fijian group. The islands were designated on the charts as the Ringgold Islands, the native appellation being Yanuca-i-Lau, meaning "bad islands". They were not inhabited. Not more than three of them were of any potential value, the rest being described as "mere rocks" (memorial, p. 439) or "sand banks" (memorial, p. 424). The natives appear to have gone there intermittently to get turtles.

The circumstances surrounding the purchase were somewhat peculiar. Gillam and Thompson came to Fiji apparently with the idea that buried

treasure existed on these islands. They first consulted with Brower, United States Consul, who directed them to Tui Cakau as the owner. They then bought the islands from Tui Cakau, paying \$250, in Chilean ten-dollar gold pieces. The purchasers at once went to the islands and spent about two months digging over the ground evidently in a vain search for treasure. At the end of this period they abandoned the enterprise and went away from Fiji, leaving in Brower's hands a blank deed of sale. Brower subsequently sold under this deed to one Barber, who put an agent named Macomber in charge to maintain a sort of constructive possession with the intention of some day going there to occupy them (memorial, p. 423).

In 1870, Brower bought a half interest from Barber for the sum of £ 30, and in 1873 the remaining half interest was sold to one Halstead.

On October 23, 1875, immediately after the cession of Fiji to Great Britain, Brower and Halstead applied for a Crown grant. In November, 1880, the application was denied by the Land Commissioners on the grounds of: (1) insufficient and fictitious occupation; (2) long-continued adverse occupation (memorial, p. 421).

In 1881, at the request of Brower, there was a rehearing at which further evidence was adduced, and in October of that year a final judgment of disallowance was rendered.

Upon the final hearing in 1881, the attorney for Brower and Halstead asked leave to amend the petition and to substitute the names of two half-castes called Valentine for that of Brower, and the amendment was allowed (memorial, p. 431).

Some three years previously it seems that Brower had entered into some arrangement, the terms of which are not found in the record, for the disposal of his interest to the Valentines for the sum of £ 100. After the failure to secure a Crown grant the Valentines sued Brower in the Supreme Court of Fiji for the repayment of the £ 100, and in August, 1884, recovered judgment. This phase of the subject is dealt with as follows in the report made by George H. Scidmore, United States Special Agent:

"Previous to the hearing of this claim by the Fiji Land Commission Brower entered into a contract with William Valentine and his two brothers (half-castes by an American father and native mother) for the sale of his (Brower's) interest in the islands, and received from the Valentines £ 100. Brower prosecuted the claim before the Commission in his own name, but failed to obtain a Crown grant. He was subsequently sued in the Supreme Court of Fiji by the Valentines for the repayment of said £ 100, and, in August, 1884, they recovered judgment for that amount, with interest and costs" (memorial, p. 433).

On these facts it is contended by counsel for Great Britain: first, that good title to the islands was never secured because Tui Cakau had no power to dispose of them; and second, that in any event no recovery in Brower's favour can be had because before final judgment in the proceedings for a Crown grant he had withdrawn in favour of the Valentines.

On the question of the chief's power to give title we are of opinion that the facts bring this case within the principles laid down in the decision of the Burt case already made by this Tribunal. Tui Cakau was conceded to be the paramount chief of the district in which the Ringgold islands lay. Quoting again from the Scidmore report:

"Tui Cakau was paramount chief of Cakau-drove, and these islands were within his dominions. His capricious will was the supreme law there, and the time, labour, property, wives, children and lives of his people were at his mercy" (memorial, p. 434).

The final judgment of disallowance states:

"We do not doubt that the purchase in question was honestly made nor that any rights which attach to the possession of the deed has, after passing through several hands properly vested in the present claimants. We are however of opinion that Tui Cakau had no right to sell these lands without the consent of the taukeis . . ." (memorial, p. 431).

The right of the paramount chiefs to sell without taukei consent has been fully dealt with in the opinion in the Burt case already mentioned.

It is hardly necessary in this connexion to discuss the subject of occupation, for a careful examination of the record discloses nothing rising to the dignity of effective occupation either by natives or by the purchasers, although there is evidence indicating that the latter took steps to maintain possession by placing their agents from time to time upon the islands, and that Tui Cakau at their request on one or two occasions undertook to keep the natives off. The islands were to all intents and purposes uninhabited. We consider, therefore, that the title was vested in Brower and Halstead at the time of the cession to Great Britain.

The issue founded upon Brower's alleged withdrawal from the situation requires especial attention. Did the subsequent proceedings, particularly the Valentine transaction, operate to defeat his claim? We are somewhat in the dark as to just what took place between Brower and the Valentines. According to Scidmore, a contract for the sale of Brower's interest was entered into. Whether there was an out and out conveyance by deed is not clear. It may have been an arrangement conditioned upon the final issuance of a Crown grant. Whatever it was we may assume that the Valentines were regarded as the real parties in interest at the time of the substitution in 1881. The effect of the transaction was manifestly a matter of dispute; otherwise the subsequent litigation between Brower and the Valentines would not have taken place. It is contended that if Brower made a sale and the title failed because of the refusal to issue a Crown grant a proper pleading of this act of the State would have been a perfectly good defence to the Valentine suit for recovery of the purchase price and that therefore title can not be regarded as having properly revested in Brower. The difficulty with this contention is that facts sufficient to support it are not before us. We do not know what the precise arrangement with the Valentines was: we do not know whether they brought suit for damages for breach of contract to convey or whether they sued for recovery of the purchase money under some condition expressed in the deed. We do not know whether the plea above referred to was made and disallowed by the Court, or whether Brower neglected to take advantage of such a defence, if it existed. It seems idle to speculate on these matters in the absence of the facts. The most reasonable view is that Brower did try to dispose of his interest; that the transaction was upset by the failure to secure a Crown grant and that the final result was to place him exactly where he stood in the beginning. The effort to sell was abortive and he was obliged to pay back what he had received. We find no evidence that the title definitely passed to the Valentines and remained in them; but their complete disappearance from the situation raises an obvious presumption against the supposition that Brower's interest actually passed to them.

We hold that the title to a half interest in the Ringgold islands was properly vested in Brower at the time of the cession to Great Britain; that this title should have been recognized by Great Britain as the succeeding Power in the islands under the obligation assumed at the time of the cession; and that Brower was the holder of the title at the date of the filing of the claim against Great Britain by the United States.

Passing to the question of damages, it is plain that the islands forming the subject matter of this claim had only a speculative and precarious value. Nobody had ever taken the trouble to occupy and settle upon them. There is no evidence of any improvements. In their natural state they apparently formed only a fishing ground for turtle. The chart indicates that they were little more than reefs or points of rock. Their value apparently rested entirely upon a rumour of buried treasure. The original purchase for a fantastic consideration paid in gold pieces is explainable on no other theory. The subsequent dealings were clearly based upon the same speculative consideration. The treasure tradition evidently persisted and the same fictitious valuation is reflected in the purchase by Brower of a half interest for £ 30, and in the purported transfer of that interest to the Valentines for £ 100. With the lapse of time the islands as such did not assume any real value, for as late as 1898, Mr. Allardyce, the Colonial Secretary and Receiver-General, made the following report upon them:

"These are six small islands of the Ringgold group. They are mere islets with a few cocoanut trees on them. They are situated in a remote portion of the Colony at a distance of about 180 miles from Suva. If put up to auction, I doubt if there would be a single bid for them" (answer, p. 11).

In these circumstances, we consider that notwithstanding our conclusion on the principle of liability, the United States must be content with an award of nominal damages.

*Now, therefore:*

The Tribunal decides that the British Government shall pay to the United States the nominal sum of one shilling.

#### EASTERN EXTENSION, AUSTRALASIA AND CHINA TELEGRAPH COMPANY, LIMITED (GREAT BRITAIN) *v.* UNITED STATES

(November 9, 1923. Pages 73-81.)

SEA WARFARE.—DESTRUCTION OF PRIVATE PROPERTY IN TIME OF WAR.—SUBMARINE CABLES, INTERNATIONAL CONVENTION FOR THE PROTECTION OF—, GENERAL PRINCIPLE OF INTERNATIONAL LAW, COMMUNICATIONS OVER HIGH SEAS, NEUTRALS, CONTRABAND, BLOCKADE. Destruction by United States naval authorities on May 2, 1898, in Manila Bay, during Spanish-American War, of submarine cables owned by neutral company *held* legitimate. Unlimited right of destruction in time of war recognized by article 15 of International Convention for the Protection of Submarine Cables of 1884. Such right also based upon general principle of international law entitling belligerent to deprive enemy of communications over high seas, whether or not communications kept up by neutrals (contraband, blockade).

NECESSARY WAR LOSSES.—REQUISITION, EXPROPRIATION, ANGARY, SEIZURE OF NEUTRAL-OWNED CARGO.—NEUTRALITY AND PUBLIC SERVICE.—INTERNATIONAL CHARACTER OF SUBMARINE CABLES.—EQUITY. COMITY, AWARENESS OF RISK, DISCRIMINATION BETWEEN (1) ALIENS, (2) OWN NATIONALS AND ALIENS. Destruction in time of war of neutral-owned submarine cables *held* not to give rise to legal right of compensation. No analogy with requisition, expropriation, or exercise of right of angary. No analogy either with seizure

of neutral-owned cargo: the Company, operating as a Spanish public service under the authority of the Spanish Government, cannot be regarded as a neutral. For the same reason, the Company's cables lack international character.

No compensation due on the ground of equity, the Company having been well aware of its own risk. It is perfectly legitimate for a Government, in the absence of any special agreement to the contrary, to afford to subjects of any particular Government treatment which it refused to subjects of other Governments or to reserve to its own subjects treatment which is not afforded to foreigners.

APPLICABLE LAW, FRAMING OF NEW RULES BY TRIBUNAL. Duty of Tribunal is not to lay down new rules.

*Cross-references:* Am. J. Int. Law, vol. 18 (1924), pp. 835-842; Annual Digest, 1923-1924, pp. 415-419.

*Bibliography:* Nielsen, pp. 40-72; Annual Digest, 1923-1924, p. 419.

This is a claim presented by His Britannic Majesty's Government on behalf of the Eastern Extension, Australasia and China Telegraph Company, Limited, a British corporation, for a sum of £ 912. 5s. 6d., being the amount which this company had to expend upon the repair of the Manila-Hong Kong and the Manila-Capiz submarine telegraph cables which had been cut by the United States naval authorities during the Spanish-American War in 1898.

The facts are as follows:

Under concessions granted by the Spanish Government and dated, respectively, December 14, 1878, and April 14, 1897, the Eastern Extension Company had laid down certain submarine telegraph cables connecting Manila and Hong Kong and Manila and Capiz, which the Company was operating in 1898.

In April, 1898, war broke out between the United States and Spain, and on May 1, 1898, the United States naval forces, under the command of Commodore afterwards Admiral, Dewey, entered Manila Bay and destroyed or captured the Spanish warships lying in that harbour. On the same day (United States answer, p. 14, exhibit 5) Commodore Dewey, through the British consul at Manila, proposed to the Spanish Captain General that both the United States and the Spanish authorities should be allowed to transmit messages by cable to Hong Kong. That proposition having been refused, on the morning of the following day, viz., on May 2, 1898, the Manila-Hong Kong cable was cut by order of the American Commodore, this cutting being effected within Manila Bay and consequently within the territorial waters of the enemy.

On May 10 the Company, acting on a formal order of the Spanish Government under the provisions of the concession above referred to, sealed the end of the cable at Hong Kong, thereby preventing any use of the cable by the United States forces. Subsequently, the United States Navy Department proposed to the Company to re-establish cable communication between Manila and Hong Kong, and the Company refused, informing the American Navy Department that the Company was under the orders of the Spanish Government and that the transmission of messages from the Philippine Islands to Hong Kong had been prohibited by that Government (United States answer, p. 12, exhibit 2). Furthermore, as appears from the oral argument on behalf of His Britannic Majesty's Government (notes of the 11th sitting, p. 251), the British Government themselves, acting in the interest of shipping, subsequently asked the Madrid Government if they would consent to the reopening of the cables; but the Spanish Government refused to accede to this request except on terms which the United States could not accept.

On May 23 the Manila-Capiz cable was cut, also inside Manila Bay.

These facts are not contested; and further it is admitted on behalf of Great Britain that the severance of the cable between Manila and Hong Kong, as well as between Manila and Capiz, was a proper military measure on the part of the United States, taken with the important object of interrupting communication whether with other parts of the Spanish possessions in the Philippine Islands or with the Spanish Government and the outside world.

The question is whether or not the United States Government is bound to pay to the Company, as damages, the cost incurred by the Company in repairing the cables.

The British Government admits that there was not in existence in 1898 any treaty or any rule of international law imposing on the United States the legal obligation to pay compensation for the cutting of these cables, but they contend that, under article 7 of the Special Agreement establishing this Tribunal, such compensation may be awarded on the ground of equity, and that the United States Government, having paid compensation to some other foreign cable company for similar cuttings during the same war, is therefore legally bound to compensate the British company, and, finally, that in the absence of any rule of international law on the point, it is within the powers, if it be not the duty, of this Tribunal to lay down such a rule.

The United States Government contends that the cutting of the cables by its naval authorities was a necessity of war giving rise to no obligation to make compensation therefor; that the United States were entitled to treat the said cables as having the character of enemy property, on the ground that their terminals were within enemy territory and under the control of the enemy's military authorities, and that the sealing of the terminal at Hong Kong, on neutral territory, was a hostile act of itself impressing this cable with enemy character. Further, the United States Government contends that there is no rule of international law imposing any legal liability on the United States, but that, on the contrary, the action of the United States naval authorities and the refusal to pay compensation are justified by international law and that the United States Government is not bound to pay compensation to the British company merely because more favourable treatment was meted out to another foreign company, the facts underlying whose claim were, in any case, different. Further, the United States Government say that it is not the duty, nor within the power, of this Tribunal to lay down any new rule of international law, but only to construe and apply such rules or principles as existed at the time of the cutting of these cables.

It may be said that article 15 of the International Convention for the Protection of Submarine Cables of 1884, enunciating the principle of the freedom of Governments in time of war, had thereby recognized that there was no special limitation, by way of obligatory compensation or otherwise, to their right of dealing with submarine cables in time of war. In our opinion, however, even assuming that there was in 1898 no treaty and no specific rule of international law formulated as the expression of a universally recognized rule governing the case of the cutting of cables by belligerents, it can not be said that there is no principle of international law applicable. International law, as well as domestic law, may not contain, and generally does not contain, express rules decisive of particular cases; but the function of jurisprudence is to resolve the conflict of opposing rights and interests by applying, in default of any specific provision of law, the corollaries of general principles, and so to find—exactly as in the mathematical sciences—the solution of the problem. This is the method of jurisprudence; it is the method by which the law has been gradually evolved

in every country resulting in the definition and settlement of legal relations as well between States as between private individuals.

Now, it is almost unnecessary to recall that principle of international law which recognizes that the legitimate object of sea warfare is to deprive the enemy of those means of communication, which the high seas, in their character as *res nullius* or *res communis* afford to every nation. The user by the enemy of that communication by sea, every belligerent, if he can, is entitled to prevent, subject to a due respect for innocent neutral trade; he is even entitled to prevent its user by neutrals, who use it to afford assistance to the enemy either by carrying contraband, by communicating with blockaded coasts, or by transporting hostile despatches, troops, enemy agents, and so on. In such cases the neutrals do not, properly speaking, lose their neutral character; but their action itself loses that character, such action being, as it is said, impressed with a hostile character. Thus it may be said that a belligerent's principal object in maritime warfare is to deprive the enemy of communication over the high seas while preserving it unimpeded for himself.

It is difficult to contend in the same breath that a belligerent is justified by international law in depriving the enemy of the benefit of the freedom of the high seas, but is not justified in depriving him of the use of the seas by means of telegraphic cables.

Not only does the cutting of cables appear not to be prohibited by the rules of international law applicable to sea warfare, but such action may be said to be implicitly justified by that right of legitimate defence which forms the basis of the rights of any belligerent nation.

It is contended, however, that the cutting, however legitimate, may create an obligation to compensate the neutral owner of the cable; and various instances are, or may be, given of legitimate acts which, it is said, do create such an obligation. We do not think that the instances given furnish a just analogy. In those instances, the right is not absolute but limited, and is in reality only itself acquired in consideration of the payment of compensation, and has no existence as a right apart from the obligation to make compensation. Such is the case in respect of requisition, either for the purposes of ownership or user; of expropriations, or, to take a case from maritime law, of the exercise of the right of angary.

Reference has been made to certain opinions (Dupuis, *Revue générale du droit international public*, vol. 10, p. 546) which seem to suggest that in the case of cables which connect enemy and neutral territories and are the property of neutrals, the right of a belligerent to cut ought to be exercised subject to the obligation to pay compensation, since it is not certain that the transmission of messages by the enemy over the cable has the consent of the neutral owner, against whom the belligerent is acting, and who may in fact be innocent. In such a case, it is suggested, the neutral owner of a cable is in the same position as the neutral owner of cargo which may or may not be used for warlike purposes and against whom there is no evidence of intention to assist the enemy, and who, if such cargo be seized, must be paid for it. In the first place, it is a matter of controversy whether or not such rule as to the neutral owner of such cargo in fact exists; secondly, such a rule, if it does exist, is in practice inapplicable to submarine cables, having regard to their peculiar character; thirdly, the facts postulated for the application of the suggested rule do not exist in this case.

The cables in this case were laid and operated, not only by permission or concession granted to a neutral by the Spanish Government, but they were, under those concessions, legally to be considered from the Spanish point of view as "works of public utility" (Schedule of Conditions of March 28, 1898, article 3). The Spanish Government expressly reserved to itself "the right of

organizing over the cable service such a system of supervision as it deems best" (*ibidem*, article 4; Schedule of Conditions of December 14, 1878, article 8). The receiving and transmitting stations had to be situated in the offices of the State (Conditions of 1878, article 6). The Spanish Government had reserved the right, belonging in any case to any State over its own national telegraph lines, and recognized by international telegraph conventions, of suspending the transmission of messages dangerous to the security of the State (Conditions of 1878, article 12); and it was expressly stipulated that the operation of the cable was to be carried out at the risk of the Company, which received in exchange certain privileges, a certain monopoly, and certain exemptions from taxes and imports (Conditions of 1898, article 3). Finally, the order given to the Company to seal the terminal at Hong Kong and the mere fact that the Company considered itself legally bound to obey that order, notwithstanding the fact that this terminal was in a neutral country, the refusals of the Company and the Spanish Government, made respectively to the United States Government and to the British Government, to reopen the lines, appear to be conclusive evidence that the Company was in reality operating, not in the character of a private neutral commercial undertaking subject only to certain local regulations, but as an actual Spanish public service, as completely under the authority of the Spanish Government as would have been any State service. In such circumstances it does not seem possible to regard this Company as ignorant of, or as not having consented to, the use of the cable for military purposes by the Spanish military authorities, or as entitled to avail itself of neutral character in order to claim compensation for the cutting of its cables. The fact is that this Company could not act as a neutral, without violating its concession.

It has been said (see the opinion of Sir Robert T. Reid and Mr. Henry Sutton, British memorial, pp. 12 and 13) that if the cables had been the ordinary property of neutrals, that fact, under the ordinary rule, would have been fatal to this claim, but that the ordinary rule does not apply to such property as these cables, which are of an international character. But it seems difficult to concede such international character to these cables which were under the absolute control and authority of a particular State. If they afforded communication between different countries and nations and in that sense, were international, they were not more international than a packet boat or any other ship trading between various countries.

According to the terms of the concessions, these cables possessed the character of Spanish works of public utility, and if, as private ordinary property, they were subject to destruction without compensation in case of necessity of war, *a fortiori* they were so as an enemy public utility undertaking.

As to the contention that, having regard to the terms of article 7 of the Special Agreement providing for the settlement of these claims, this Tribunal is to decide, "in accordance with treaty rights and with the principles of international law and of equity", compensation in this case should be paid on the ground of equity, the following observations may be made:

If the strict application of a treaty or of a specific rule of international law conducts to a decision which, however justified from a strictly legal point of view, will result in hardship, unjustified having regard to the special circumstances of the case, then it is the duty of this Tribunal to do their best to avoid such a result, so far as it may be possible, by recommending for instance some course of action by way of grace on the part of the respondent Government.

In this case it is to be observed that the Eastern Extension Company was well aware of its own risk in Spanish territory. As has been shown, their concessions expressly provided for it. The various advantages, privileges, exemptions and

subsidies accorded them by the Spanish Government form the consideration in exchange for which the Company assumed the risk of being treated in time of war as a Spanish public service with all the consequences which that position implied.

In the opinion of this Tribunal there is no ground of equity upon which the United States should be adjudged to pay compensation for the materialization of this risk in the form of an act of war the legitimacy of which is admitted.

The British Government contend that, as a matter of right, the Eastern Extension Company is entitled to receive compensation because some other foreign cable company, viz., La compagnie française des câbles télégraphiques, working cables between the United States of America, Haiti, and Cuba, received from the United States Government compensation for the cutting of its cables. It is urged that, when acts of war by a belligerent have resulted in personal injury to individuals in certain territory or in damage to their property in that territory, if the Government of that territory pays the claims of the nationals of one country, it must also pay the claims of the nationals of other countries without discrimination (oral argument, pp. 261 and 262); and further, as the argument would seem to imply (oral argument, p. 264), that if it be established that a Government has paid compensation to its own citizens, then it is bound to pay compensation to foreigners whose person or property was damaged; and authority is said to be found for the last proposition in cases arising out of the Mexican insurrection.

Whether viewed as a general principle, or in its particular application to the facts of this claim, such a proposition appears to us to be impossible of acceptance. It is perfectly legitimate for a Government, in the absence of any special agreement to the contrary, to afford to subjects of any particular Government treatment which is refused to the subjects of other Governments, or to reserve to its own subjects treatment which is not afforded to foreigners. Some political motive, some service rendered, some traditional bond of friendship, some reciprocal treatment in the past or in the present, may furnish the ground for discrimination. We do not know that the provisions of the French or Belgian law, reserving to their own nationals a right to reparation for war losses, gave rise, or could give rise, to any protest by resident foreigners, any more than could the fact that, by special agreement, the Belgians in France and the French in Belgium have been reciprocally admitted to the same treatment in their respective countries. An instance of such discrimination is furnished by the proclamation of Lord Kitchener of Khartoum, dated May 31, 1902, on the final surrender of the Boer forces. In that instrument it is provided (paragraph 10) that a commission would be appointed for the purpose of assisting the restoration of the people to their homes and helping those who, owing to war losses, were unable to provide for themselves; and that for that purpose a sum of money should be placed at the disposal of the commission. The final clause of that paragraph provides as follows:

“No foreigner or rebel will be entitled to the benefits of this clause”.

It appears from the documents in this case that the repairs of the French cables in question had been effected with all expedition and at the express request of the United States authorities and for American strategic purposes (Senate document No. 16, 58th Congress, 2nd session, pp. 22 and 23); that, unlike the British cables, the French cables were used by the American naval authorities and had afforded them direct communication with President McKinley (*ibidem*); and that the French cable company had rendered the United States valuable services during the operations of 1898 (letters from the French Embassy at Washington, November 15, 1901; November 28, 1902; February 19, 1903; March 12, 1903).

There is no evidence that the Eastern Extension Company can avail itself of a similar plea. The French case is a good example of the payment of compensation, on grounds of equity and comity, which did not exist in the British case.

From these considerations it does not appear that the contention of the British Government on this point is in any way justified.

As to the contention of the British Government that, in the absence of any rule governing the matter of cable cutting, it is the duty of this Tribunal to frame a new rule, we desire to say:

First, the duty of this Tribunal, in our opinion, under article 7 of the Special Agreement, is not to lay down new rules. Such rules could not have retroactive effect, nor could they be considered as being anything more than a personal expression of opinion by members of a particular Tribunal, deriving its authority from only two Governments;

Secondly, in any case this Tribunal, as has been already stated, is of opinion that the principles of international law, applicable to maritime warfare, existing in 1898, are sufficient to enable us to decide this case.

*Now, therefore:*

The Tribunal decides that the claim of His Britannic Majesty's Government be disallowed.

CUBA SUBMARINE TELEGRAPH COMPANY, LIMITED (GREAT BRITAIN) *v.* UNITED STATES

(November 9, 1923. Pages 82-84.)

SEA WARFARE.—DESTRUCTION OF PRIVATE PROPERTY IN TIME OF WAR.—SUBMARINE CABLES, INTERNATIONAL CONVENTION FOR THE PROTECTION OF—, GENERAL PRINCIPLE OF INTERNATIONAL LAW.—NECESSARY WAR LOSSES.—DISCRIMINATION BETWEEN: (1) ALIENS, (2) OWN NATIONALS AND ALIENS.—APPLICABLE LAW, FRAMING OF NEW RULES BY TRIBUNAL. Destruction by United States naval authorities on May 11 and July 11, 1898, at the entrance of Cienfuegos Harbour and in San Juan Channel, Cuba, during Spanish-American War, of submarine cables, and of cable house on land. Reference made to decision in Eastern Extension case, see p. 112 *supra*.

NEUTRALITY AND PUBLIC SERVICE, EQUITY, AWARENESS OF RISK. Character of Company as Spanish public service more apparent than in Eastern Extension case. *Held* that destruction was fully justified and that equity was on the side of the United States in its refusal to pay damages.

*Cross-reference:* Am. J. Int. Law, vol. 18 (1924), pp. 842-844.

*Bibliography:* Nielsen, pp. 40-72.

This is a claim presented by His Britannic Majesty's Government on behalf of the Cuba Submarine Telegraph Company Limited, a British corporation, for a sum of £ 8,174. 17s. 9d., being the amount which this Company had to expend upon the restoration of the submarine cables, connecting various places on the island of Cuba, which had been cut by the United States naval authorities during the Spanish-American war of 1898.

The facts are as follows:

Under concessions granted by the Spanish Government and respectively dated December 31, 1869, and September 29/30, 1895, the Cuba Submarine

Telegraph Company was operating in 1898 certain submarine telegraph cables connecting La Habana, Santiago de Cuba, Cienfuegos, Manzanillo and various other places in the island of Cuba.

In April, 1898, war broke out between the United States and Spain. At the very beginning of the war a proclamation of the President of the United States, dated April 22, 1898, declared a blockade of the north coast of Cuba, including all ports on that coast between Cárdenas and Bahía Honda and the port of Cienfuegos on the south coast of Cuba. That blockade was maintained from that time by the United States naval forces.

On May 11, 1898, by command of the United States superior naval officer, the cables on the eastern side of Colorado Point at the entrance to Cienfuegos Harbour were cut and the cable house on land was destroyed by the American naval forces under heavy fire and in circumstances of considerable difficulty. All communication by ocean cable with Cienfuegos was thus interrupted. On July 11, 1898, the cable connecting Santa Cruz del Sur, Trinidad, Cienfuegos and La Habana with the stronghold of Manzanillo on the east of Cuba was similarly cut in the San Juan Channel; this cutting not only prevented telegraphic communication between the above-mentioned points but, according to the report addressed to the American commanding officer, was to have the great moral effect of checking the inland traffic with Manzanillo and certainly to prevent the calling of reinforcements then in the west to resist the ultimate American attack and the capture of Manzanillo. It may be observed that all these cuttings took place inside enemy territorial waters.

These facts are not contested, nor, from the point of view of the successful conduct of operations by the United States naval and military forces in Cuba, is the importance of interrupting the telegraphic communications between enemy ports denied.

As in the case of the Eastern Extension, Australasia and China Telegraph Company, the question is whether or not the United States Government is bound to pay as damages to the Cuba Company the cost of repairing the said cables and appurtenances.

The contentions of the British Government and of the United States Government are practically the same in both cases, and it would be superfluous to repeat all that has been said in this Tribunal's decision relating to the Eastern Extension Company's claim as to the application of international law, equity, the treatment afforded by the United States Government to the French cable company and the alleged duty of this Tribunal to frame some new rule of international law on this subject. It seems to be sufficient to refer to that decision.

Some particular remarks may, however, be made.

In this case the character of the Company's enterprise as a Spanish public service having a military and strategic interest is more clearly apparent. The transmission of the official correspondence of the Spanish Government was obligatory and gratuitous, the managers and directors being appointed by that Government (Schedule of 1869, articles 4 and 11); inspection of any kind of the contents of the official communications was prohibited; Spanish authorities had the right to inspect every description of correspondence and to refuse to allow the forwarding of despatches prejudicial to the security of the State; all ciphers or secret keys were excluded from all private correspondence (*ibidem* article 12), but, going further still, the service and preservation of the line within the Spanish dominions were reserved to the Spanish authorities and when, in 1895, some new cables were conceded to the Cuba Company, it was expressly explained in the report presented on September 27, 1895, to Her Majesty the Queen Regent of Spain by the Spanish Minister of Colonies, that the cables were to be laid in order to remove some military difficulties presented

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 Landsdowne 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.

As will presently appear, this opinion is not concerned with the merits of the claim itself inasmuch as, in the view of the Tribunal, the Government of the United States of America is entitled to succeed on the preliminary point, relating to the jurisdiction of the Tribunal to entertain the claim at all.

It is necessary, however, to state in some detail the facts out of which the claim arises.

In the year 1893, a corporation entitled the Rio Grande Dam and Irrigation Company (hereinafter called the "American company") was formed under the laws of the territory of New Mexico with a capital stock of \$5 million in shares of \$100 each, for the purpose, *inter alia*, of constructing a dam across the Rio Grande River and impounding its waters for irrigation purposes. The dam was to be constructed at Elephant Butte, a point in Sierra County, New Mexico, about 120 miles above the city of El Paso, and all the concessions, rights and privileges necessary to the effective equipment of the undertaking as an irrigation enterprise were legally acquired by the company aforesaid. The term of the company's existence was forty-seven years. By virtue of a Federal Act of March 3, 1891, in case of an undertaking of this character, an approval and confirmation by the Secretary of the Department of the Interior was necessary. That approval and confirmation was given on February 1, 1895 (memorial, p. 51). By section 20 of that Act it is provided as follows:

"*Provided*, that if any section of said canal, or ditch, shall not be completed within five years after the location of said section, the rights herein granted shall be forfeited as to any uncompleted section of said canal, ditch, or reservoir, to the extent that the same is not completed at the date of the forfeiture" (U.S. answer, app., p. 129).

In October, 1895, the Rio Grande Irrigation and Land Company, Limited (hereinafter called the "English company"), on whose behalf this claim is preferred, was incorporated in England, for the purpose of financing the American company in consideration of the transfer of the whole undertaking of the American company. Its capital was £ 500,000, consisting of £ 100,000 8 % cumulative preference shares of £ 1 each, and £ 400,000 ordinary shares of £ 1 each. There was also an authorized issue of 2,000 first mortgage debentures of £ 50 each bearing interest at 5 %. These debentures were secured on the undertaking and property of the company under a trust deed which was executed on August 28, 1896, and which conferred upon the National Safe Deposit Company, Limited, as trustee for the debenture-holders, a power of sale in the event, *inter alia*, of the company's going into liquidation, and empowered the trustee in such an event on request made, to appoint a receiver (section 10). Debentures were issued to the value of over £ 40,000, though the precise figure is uncertain. There was also an issue of preference shares to the value of £ 30,500.

The following were the arrangements made between the American and the English companies:

By an agreement dated March 27, 1896 (reply, p. 17), the American company agreed to lease to the English company:

"All the said concession of the American company and all the rights and privileges held or enjoyed by the American company therewith or thereunder as from the date hereof . . ." (reply, p. 17).

for the aforesaid term of 47 years, less three days. The American company covenanted to transfer to and vest in the English company: (a) "All the undertaking of the American company, now capable of being validly transferred to the English company; (b) "The benefit and obligation of certain contracts relating to the acquisition of land, water rights, water rents and water

supply which the American company had made with local landowners and municipalities.”

The price to be paid, on completion, by the English company was 300,000 fully paid ordinary shares in the English company and £ 26,500 in cash.

By an agreement dated May 30, 1896, between the two companies, Nathan E. Boyd, an American citizen and the promoter of the whole enterprise, and R. Chetham Strode were appointed the American company's nominees to receive the 300,000 ordinary shares on its behalf (reply, p. 23); while the payment of £ 25,600 in cash was subsequently altered by an agreement of May 31, 1896, between the two companies, to £ 19,450 in debentures and £ 7,050 in cash (U.S. additional evidence, p. 1).

To revert to the agreement of March 27, 1896, in execution of a power created by paragraph 7 thereof, Dr. Nathan E. Boyd was nominated by the American company a director of the English company; and by paragraph 11 it was provided:

“11. The American company shall continue its existence and shall act as the agent of the English company and shall comply with all instructions of the English company or its directors from time to time and shall if requested so to do by the English company hold all or any of the premises hereby agreed to be sold in trust for the English company or as it may from time to time direct” (reply, p. 22).

The arrangements between the companies were completed by an indenture dated May 30, 1896, which witnesses that the American company, in consideration of a yearly rent of \$1 and certain covenants to be performed by the English company, “has leased, demised, and to farm, let, and full liberty given to enjoy and exercise” (U.S. answer, app., p. 655), to the English company the whole of its irrigation undertaking, as therein particularly described:

“To have and hold . . . from the first day of June, one thousand, eight hundred and ninety-six, for and during and until the full end and term of forty-seven years thence next ensuing and fully to be completed and ended” (U.S. answer, app., p. 657).

The English company also acquired the control of the whole of the capital stock of the American company.

There is ample evidence in the minute book of the directors of the English company that, from an early moment in the existence of that company, its directors had felt anxiety as to the validity of the lease from the American company, in view of the alien laws of the United States. In January, 1896, Mr. Newton Crane, a distinguished American counsel, practising at the English bar, was consulted on the point; and expressed the opinion that the English company:

. . . “may hold canals by leasehold within the territory of New Mexico and State of Texas, and take over absolutely the franchises and powers granted by the United States and the Territory of New Mexico and the State of Texas”.

Mr. Hawkins, however, a local attorney in New Mexico, differed; and, this fact being brought to his notice Mr. Newton Crane, in an opinion dated November 18, 1896, while asserting the view that a lease was, both by American and English law, personal property and not an interest in real property, advised that it might be wise, in view of possible local hostility, to form another company in West Virginia, to which the stock of the American company should be transferred, the English company becoming the holder of all the stock in the West Virginia company; but that, in other respects, all arrangements should remain as they were. This advice was followed; and in April, 1897, a company entitled the Rio Grande Investment Company was incorporated

in West Virginia, to which the American company's stock was transferred as consideration for \$1 million worth of stock fully paid of the Rio Grande Investment Company, of which stock the English company became the holder (reply, p. 13; reply, p. 50; English company's minute book, meeting of Friday, April 30, 1897).

It has been discussed before us whether the undertaking as well as the stock of the American company was transferred to the Rio Grande Investment Company. There is evidence both ways, but in our view, the point is, for our present purpose, immaterial.

For some time, going back to a date anterior to the formation of the American company, there had been complaints made by the Mexican to the United States Government in respect of the depletion of the flow in the lower portion of the Rio Grande, owing, as it was alleged, to the interception of its waters for irrigation purposes in Colorado and New Mexico. Commissions of inquiry had been held, and as early as 1890, a suggestion was put forward by Colonel Anson Mills and other engineers that the United States should construct a dam near El Paso. The Elephant Butte enterprise brought this question to a point; it being alleged that the construction of the Elephant Butte dam would make a supply of water adequate for the needs of Mexico impossible.

The jurisdiction over navigable rivers in the United States is vested in the Secretary of War; and proceedings by the Attorney-General may be taken, if so advised, to prevent the diminution of the navigability of such rivers (see Act, September 19, 1890, c. 907; and Act, July 13, 1892, c. 158, printed at pages 125 and 129 of the U.S. answer, appendix).

The federal authorities, having satisfied themselves that the Rio Grande below El Paso was, for some considerable distance, navigable, in May, 1897, brought a suit in the District Court of New Mexico to obtain an injunction against the Rio Grande Dam and Irrigation Company with a view to preventing the construction of the dam at Elephant Butte, on the ground that it would obstruct and diminish the navigability of the Rio Grande. The record was amended by the addition of the English company as co-defendants. The suit was dismissed by the District Court; the dismissal was affirmed by the Supreme Court of New Mexico; but the Supreme Court of the United States, on appeal, reversed that judgment, and remitted the matter to the Court of New Mexico for inquiry as to whether the defendants' dam would diminish the navigability of the Rio Grande within the limits of present navigability. The inquiry was made, and the suit was again dismissed by both the courts of New Mexico; but, on appeal, was again remitted by the Supreme Court of the United States, for the purpose of the same inquiry. At this juncture, in April, 1903, leave was given by the District Court of New Mexico to the United States to file a supplemental complaint, praying that the rights of the American company relating to the Elephant Butte undertaking might be forfeited, on the ground that the work had not been completed within five years after the location of the section as required by section 20 of the Act of March 3, 1891, c. 561 (U.S. answer, app., pp. 74, 93, and 129). The supplemental complaint was served on the attorney of the American company but no appearance within the appointed time was entered thereto. A decree of forfeiture was granted by the District Court, and was affirmed both by the Supreme Court of New Mexico, and, in December, 1909, by the Supreme Court of the United States (U.S. answer, app., pp. 74-92).

The complaint of His Britannic Majesty's Government, as put forward in the reply, is that these proceedings were oppressively and indirectly launched and prosecuted with other than their avowed object; and that:

“The real purpose of the litigation appears to have been to defeat the Com-

pany's scheme and it is the initiation and relentless prosecution of the suit of which His Majesty's Government complain" (reply, p. 4).

More than nine years before the conclusion of this litigation namely, in April, 1900, the English company had gone into liquidation (reply, p. 26).

On May 3, 1900, Dr. Nathan E. Boyd was appointed receiver for the debenture holders (reply, p. 43); and on May 4, 1900, the liquidator of the company sold the equity of redemption in all the company's undertaking, assets and rights to the receiver (reply, p. 49), the debenture holders, thereupon, becoming the owners of everything belonging to the company.

The only remaining facts, relevant to the point of jurisdiction which we have now to decide are connected with the presentation of this case during this session before the Tribunal.

On Friday, November 9, 1923, the British Agent applied for leave to file a reply. This application was opposed by the United States Agent, broadly, on the ground, that, having regard to the history of the case, the rules of procedure, and the defective character of the memorial, so voluminous a document should not be admitted at so late a moment. After some discussion, having regard to the desire of both governments to have the case disposed of, it was agreed that the case should proceed, the reply being admitted, and both sides being at liberty to file additional evidence. Later, on the same day, the following conversation took place between the Tribunal and the Agents on both sides (transcript of record, 17th sitting, p. 23):

"The UMPIRE: . . . Mr. Nielsen, you want to present some observations about a preliminary motion, is not that so?"

"Mr. NIELSEN: I want to present a motion that this claim should be dismissed because of the manner in which it is presented, and because there is no showing of any British interest in it, I mentioned one individual whom we have always regarded as the real claimant.

"The UMPIRE: In the circumstances Mr. Nielsen will explain or deliver up that motion, and then Sir Cecil Hurst will answer.

"Mr. NIELSEN: I shall ask Mr. Dennis to argue that motion, if it pleases.

"The UMPIRE: Mr. Dennis will deliver that motion and then you will give your answer on the motion, Sir Cecil Hurst.

"Sir Cecil HURST: A reply will certainly be made on behalf of His Britannic Majesty's Government."

The motion to dismiss the claim was filed on that day by the United States Agent. Broadly, it raised two points: (1) the absence of British interest in the claim; (2) the breach of the Rules of Procedure in the presentation of the case.

On Monday, November 12, 1923, the British Agent wrote a letter to the United States Agent giving notice that he intended to argue that a preliminary motion of this character was not contemplated or provided by the rules or any of the instruments controlling the Tribunal. This point was in fact taken by the British Agent at the end of his argument made in reply to the motion, when, he further argued that, if such a motion was provided for anywhere, on the proper construction of rules 31, 37, and 38, application for leave to make it must be in writing, and that there had been no such application in writing; and further, that, while under the rules and the exchange of notes read together, an agreement in writing between the Agents, in such case, was necessary, here there was no such agreement, nor, indeed, any agreement at all.

To these arguments there is, in the opinion of the Tribunal, one conclusive answer. Whatever be the proper construction of the instruments controlling the Tribunal or of the rules of procedure, there is inherent in this and every legal

Tribunal a power, and indeed a duty, to entertain, and, in proper cases, to raise for themselves, preliminary points going to their jurisdiction to entertain the claim. Such a power is inseparable from and indispensable to the proper conduct of business. This principle has been laid down and approved as applicable to international arbitral tribunals (see Ralston's International Arbitral Law and Procedure, pp. 21 *et seq*). In our opinion, this power can only be taken away by a provision framed for that express purpose. There is no such provision here. On the contrary, by article 73 of chapter III of The Hague Convention, 1907, which, by virtue of article 4 of the treaty creating this commission, is applicable to the proceedings of this commission, it is declared:

"The tribunal is authorized to declare its competence in interpreting the *compromis* as well as the other acts and documents which may be invoked, and in applying the principles of law."

The question, therefore, which we have to decide is this: whatever our opinion may be as to the forfeiture of the American company's rights by the courts of the United States, does the English company possess the interest necessary to support this claim?

Clearly, the debenture holders, in this respect, are in no better position than their debtors, the English company, through whom they claim.

To answer this question, it is necessary to consider carefully the provisions of the United States Alien Law, Act of March 3, 1887, c. 340 (U.S. answer, app., p. 122); it being United States law which is decisive of the validity of this leave. This point, it may be observed, is raised on the face of the record.

The following are the material sections of the Act aforesaid:

"1. That it shall be unlawful for any person or persons not citizens of the United States, or who have not lawfully declared their intention to become such citizens, or for any corporation not created by or under the laws of the United States, or of some State or Territory of the United States, to hereafter acquire, hold, or own real estate so hereafter acquired, or any interest therein, in any of the territories of the United States or in the District of Columbia, except such as may be acquired by inheritance or in good faith in the ordinary course of justice in the collection of debts heretofore created:

" . . . . .

"4. That all property acquired, held, or owned in violation of the provisions of this Act shall be forfeited to the United States, and it shall be the duty of the Attorney-General to enforce every such forfeiture by bill in equity or other proper process" (U.S. answer, app. pp. 122-123).

Two questions arise on these sections. The first is this: were the American company's rights, concessions, and privileges, real estate rights? This question is best answered by the description of them contained in: (1) The Agreement of March 27, 1896 (reply, p. 17); (2) The Indenture of May 30, 1896 (U.S. answer, app. p. 655); (3) The Trust Deed of August 28, 1896 (British additional evidence).

In our opinion, the answer to this question is in the affirmative. The description of these rights given in the documents referred to leaves no room for doubt on this point.

The second question is this: did the lease of these rights, concessions, and privileges, granting as it did to the English company, the entire undertaking for the whole life of the American company, constitute "an interest in real estate"? In the opinion of the Tribunal, the answer to this question also is in the affirmative. No decision to the contrary has been brought to our notice. Looking at the wording of the Act itself, the term "interest" is very wide, certainly wide enough to include a lease. It is no doubt true that a lease is personal

estate and goes to the executor; but that fact does not, in our opinion, prevent its being an interest in real estate—a view which seems to be supported by the description of a lease as a “chattel *real*”. Further, the words in section I, “hold or own”, appear to point in the same direction; as, had freeholds only been contemplated, the word “own” would have been sufficient; while the word “hold” is aptly referable to a lease. It should also be remembered that this claim is expressly put forward as “based on an alleged denial in whole or in part of real property rights” (reply, p. 3).

In an opinion, dated May 20, 1887, immediately after the passage of the Act under consideration, the Attorney-General of the United States expressed the view that “bona fide leases are not intended to come within the inhibition of the Act”, but the recent decision on November 19, 1923, of the Supreme Court of the United States in *Frick v. Webb* (281 Federal Reporter 407), seems to support a contrary view. This was a suit brought in the United States District Court by one Frick, who wished to sell some stock in a California land corporation to his co-plaintiff, Satow, a Japanese subject, to prohibit the Attorney-General of California from taking steps to prevent the sale being carried out, as being in contravention of section 2 of the Californian Alien Land Law of 1920 (Statutes of California, 1921, p. lxxxiii).

The material sections of that law are:

“*Section 1.* All aliens eligible to citizenship under the laws of the United States may acquire, possess, enjoy, transmit, and inherit, real property, or any interest therein, in this State, in the same manner and to the same extent as citizens of the United States except as otherwise provided by the laws of this State.

“*Section 2.* All aliens other than those mentioned in section one of this act may acquire, possess, enjoy, and transfer real property, or any interest therein, in this State, in the manner and to the extent and for the purpose prescribed by any treaty now existing between the Government of the United States and the nation or country of which such alien is a citizen or subject, and not otherwise” (279 Federal Reporter, p. 115).

The material portion of the headnote is as follows:

“Ownership by a Japanese subject, who is ineligible to citizenship, of stock in a farm corporation, which owned agricultural land, held ‘ownership of an interest in the land,’ within Alien Land Law, Cal. 1920, Sec. 2”.

In the course of the judgment these words occur:

“We think the ownership of stock in such a corporation would be an interest in real property”.

The plaintiff appealed to the Supreme Court of the United States which upheld the decision.

Without pushing this decision too far, it would seem, at least, to indicate that the Supreme Court of the United States is inclined to give a broad interpretation to the words “interest in real property” or “interest in real estate” where they occur in alien laws.

It was urged by the British Agent that, as the Alien Law of 1887 had never been invoked by the United States in the long litigation against the American and English companies, this point should not be taken by the Tribunal now. This, as has been said, is not the view we take of our power or duty in relation to a clear point of jurisdiction raised, as this is, on the face of the record. Further, the course followed in this respect by the United States may well be explained by the fact that the main object of that litigation was not to crush the English company, but to get rid of the Elephant Butte concession which had been granted to the American company.

It is possible, perhaps, to argue that the meaning of section 4 of the Alien Law of 1887 is that the title to such property is good until forfeited by proper process. It appears to the Tribunal that, if that meaning was intended, the words would have been "shall be subject to forfeiture", and not "shall be forfeited". However that may be, by section 1 the acquisition of real estate or any interest therein by the persons mentioned is made "unlawful". Such acquisition, therefore, cannot found any claim for compensation.

The result, therefore, is that the English company took no valid rights whatever under the lease from the American company, and possesses no interest on which a claim such as this can be founded.

A very large part of the arguments addressed to the Tribunal on both sides was directed to the transactions relating to the debentures issued by the English company and the nationality of the debenture holders. Having regard to the view which the Tribunal takes of the position of the English company under the alien law, discussion of these points is unnecessary.

Another ground urged before us by the Government of the United States was the breach of the rules of procedure which, it was alleged, His Britannic Majesty's Government had committed in the presentation of the claim. On this point, it is sufficient to say that, while recognizing that there were defects in the memorial in this case, the Tribunal does not think, in all the circumstances, that those defects were such as to furnish, in themselves, adequate ground for allowing a preliminary motion of this character.

In conclusion, we desire to say that, in our opinion, even had the lease from the American company been valid, a formidable point, arising out of the English company's relations with the Rio Grande Investment Company, might still have lain in the way of His Britannic Majesty's Government.

*Now, therefore:*

The award of the Tribunal is that the claim of His Britannic Majesty's Government be disallowed.

## UNION BRIDGE COMPANY (UNITED STATES) *v.* GREAT BRITAIN

*(January 8, 1924. Pages 376-381.)*

AMENDMENT OF PLEADINGS.—INTERNATIONAL TORT.—NEUTRAL PROPERTY.—  
LIABILITY FOR ACTS OF OFFICIALS, WAR CIRCUMSTANCES, INTENTION. Purchase in January-March, 1899, by Orange Free State from American company of materials for steel road bridge f.o.b. New York. Outbreak of war between Great Britain and Orange Free State on October 12, 1899. Arrival of materials in Port Elizabeth on October 25 and November 12, 1899. Refusal by agents of Orange Free State to pay. Annexation of Orange Free State by Great Britain on May 24, 1900. Transport of materials in August, 1901, from Port Elizabeth to Bloemfontein by order of Storekeeper of Cape Government Railways at Port Elizabeth and without notice to agents of company. Storage at Bloemfontein by Imperial Railway authorities. No request for return made by agents of company who since October, 1901, were aware of transport to Bloemfontein. No answer to letters written in 1907 by Central South African Railways to company concerning return of materials. Materials put up to auction and bought by Central South African Railways on July 22, 1908.

United States claim before Tribunal originally based upon State succession, conquest, annexation, subsequently on wrongful interference by British officials.

*Held* that transport of materials, the company's title to which Great Britain does not deny, was international tort committed in respect of neutral property; that Great Britain liable since Storekeeper acted within scope of his duty; and that liability not affected either by Storekeeper's mistake as to neutral character and ownership of materials, or by pressure and confusion caused by war, or by lack of intention on the part of British Authorities to appropriate materials.

DAMAGES: PRINCIPLE OF INTERNATIONAL LAW, FAIR COMPENSATION, CONTRACT VALUE, FAILURE OF PLAINTIFF TO ACT.—INTEREST. According to principle of international law fair compensation due, not contract value of materials. Owner's failure to act to be taken into account. No interest allowed.

*Cross-references:* Am. J. Int. Law, vol. 19 (1925), pp. 215-219; Annual Digest, 1923-1924, pp. 170-171.

*Bibliography:* Nielsen, pp. 371-375.

In this case, the Government of the United States of America prefers a claim for damages, arising out of alleged wrongful interference with certain bridge material, which belonged to the Union Bridge Company, an American firm, by officials in South Africa, for whose action His Britannic Majesty's Government is said to be responsible. This is the form of the claim as now made; but, originally, as presented in the United States memorial (p. 6), it was put forward against His Britannic Majesty's Government, as successors in contractual liability, by virtue of conquest and annexation, to the Orange Free State.

Having regard to the contents of the answer, this ground was recognized by the United States to be unmaintainable, and was abandoned, on the occasion of the first argument at Washington, on June 12th and 13th 1913 (oral argument, p. 1).

The case now comes before us for further hearing under a direction given by the Tribunal on that occasion (supp. pap., p. 3), with the addition of some supplementary papers which were filed on February 17th, 1914, by His Britannic Majesty's Government, in response to a request made by the Tribunal for further documents (*ibid.*). This change of attitude, taken together with considerable *lacuna* in the correspondence and in the evidence on certain points of importance—explicable, perhaps by the outbreak of war in South Africa at a crucial date in the history of the case—has somewhat embarrassed the Tribunal. The evidence, however, has sufficed to enable us to arrive at a decision.

The material facts are these:

By a contract in writing, contained in two tenders and acceptances, dated in January, February, and March, 1899 (mem., app. exhibits 3-6), the Union Bridge Company agreed with the Orange Free State, acting through its general agents, Messrs. William Dunn & Co. of 43 Broad Street Avenue, London E.C., to supply and deliver for the sum of £ 2,200 and in accordance with a specification (mem., app., p. 10) the material for a wrought steel road bridge. The material was bought f.o.b. New York (see clause 16, "General conditions", app. mem., p. 19 and exhibit 4, p. 23, *ibid.*) and was delivered in two consignments, on board the steamers *Kurrachie* and *Clan Robertson* which sailed from New York for Algoa Bay, South Africa, on September 18th and September 27th, 1899, respectively. The consignments were addressed as follows: "In Dienst, Inspector-General of Public Works, Orange Free State Government, Bloemfontein, South Africa" (mem., app., pp. 40-43). A certificate of acceptance of the material and of the absence of unnecessary delay in the manufacture of the

finished material (ans., annex. 30) was given by Messrs. R. W. Hunt & Co. who were appointed (mem., app., exhibit 7) for that purpose under clauses 5 and 9 of the general conditions (mem., app., p. 17).

During the voyage from New York to Algoa Bay, viz., on October 12th. 1899, war broke out between Great Britain and the Orange Free State. The two steamers referred to arrived at Port Elizabeth on October 25th and November 12th. 1899 (mem., p. 33 and 38), respectively. The bridge material was unloaded at that port, and stored on depositing ground belonging to the Harbour Board. Meanwhile, in accordance with clause 22 of the general conditions of the contract (mem., app., p. 20), the bills of lading had been presented for payment in London on October 27th. 1899, to Messrs. William Dunn & Co., who refused payment (mem., p. 51).

On May 24th. 1900, the Orange Free State was, by proclamation, annexed to Great Britain (ans., p. 40, annex 31).

In June, 1900, a firm of agents, Messrs. Mackie, Dunn & Co., who described Messrs. William Dunn & Co., as "our London friends" (ans., annex 1) took steps to get into communication with the Inspector-General of Public Works at Bloemfontein, with a view to selling the bridge material to the British authorities (ans., annex 1-16). Throughout this correspondence the firm in question assert the property of the Union Bridge Co., in the bridge material, by whom they are instructed to sell and on whose behalf they hold the documents of title (ans., annex 7). On his side the Inspector of Public Works, acting on behalf of the Military Governor, accepts Messrs. Mackie, Dunn & Co's statement of the position and discusses the price to be paid for the material and the reductions to be made (ans., annex 6). Finally, on January 10th. 1901, an offer of £ 3,000 is made by the Inspector of Public Works, to remain open for acceptance till January 28th (ans., annex. 12). By a letter dated January 31st (ans., annex 14) acceptance of this offer is intimated by Messrs. Mackie, Dunn & Co., but is rejected on February 18th (ans., annex 15) by the British authorities as being out of time and because of the unsettled state of the country. To this letter Messrs. Mackie, Dunn & Co. reply on February 23rd (ans., annex 16) regretting the decision come to, and suggesting that the matter may be reopened and another offer made by the British authorities at a more opportune moment.

The question has been much discussed both at Washington (oral argument, pp. 14-16) and before us (transcript, pp. 18-23) as to how the property in this material could be in the Union Bridge Co. having regard to the fact that it was bought by the Orange Free State f.o.b. New York. We think it sufficient to say that the matter is not in issue before us. The learned agent of His Britannic Majesty's Government is not concerned to dispute the point (oral argument p. 62). His position would appear to be that the contract for purchase f.o.b. New York and the negotiations between the British authorities and Messrs. Mackie, Dunn & Co. on the footing that the title to this material was in the Union Bridge Co., are elements for the consideration of the Tribunal; but that, from the point of view of his Government, now that State Succession has been abandoned, the f.o.b. contract is *res inter alios acta*, while the negotiations for sale in South Africa make it very difficult, if not impossible, for him to deny that the title was, as at that time, in the Union Bridge company (transcript pp. 43-47). But further, it seems to us that having regard to the refusal of the Orange Free State to pay for the material, and to the subsequent disappearance of the Orange Free State in consequence of conquest and annexation, a claim in equity to the property in the material could have been maintained by the Union Bridge Company.

In our view, the real defences are that, assuming the property to be in the Union Bridge Co.:

(1) His Britannic Majesty's Government is not liable on any principle of law or equity;

(2) If there be liability, no damage has, in fact, been suffered by the Union Bridge Company.

The material continued to lie at Port Elizabeth till August 1901, when, without inspection and without notice to Messrs. Mackie, Dunn & Co (supp. pap., p. 10) it was forwarded by the order of Mr. W. H. Harrison, the Storekeeper of the Cape Government Railways at Port Elizabeth, by rail to the charge of the District Storekeeper, Bloemfontein—a distance of 400 miles (ans., annex 17). There are several contradictory accounts of this removal. In our view the result of the evidence is that Mr. Harrison purported to act upon instructions given to him, shortly after the outbreak of war, when he was storekeeper at East London, to forward all bridge material intended for the Orange Free State railways, to the Imperial Military Railways, Bloemfontein (ans., annex 17). In so forwarding this material, therefore, he made two mistakes, inasmuch as it (1) was neutral property; and (2) was intended for a road, and not a railway bridge (*ibid.*). The Cape Government Railways were distinct from and independent of the Imperial Railways (supp. pap., p. 21); but the British Agent disclaims any intention to deny responsibility for the action of the Cape Government Railways (transcript, pp. 79-80). The Imperial Railway authorities were much annoyed by the arrival of this material at Bloemfontein and refused at first to receive it (supp. pap. pp. 5-18); but it was eventually unloaded and stored at Bloemfontein by the railway authorities (ans., annex 26, p. 40) where it lay till September 1909.

Messrs. Mackie, Dunn & Co. were aware early in October, 1901, that the material had been unloaded at Bloemfontein and would remain there for the present (supp. pap. "B", p. 31); yet during the eight years that it lay there, the Imperial Railway authorities at Bloemfontein received from that firm neither protest nor demand that it should be returned to Port Elizabeth or sent to any other destination. Finally, in 1907, two letters dated, respectively, February 18th and June 24th (supp. ans., annexes 32 and 33) were written by the General Manager of the Central South African Railways to the Union Bridge Company offering to return them the material on certain terms as to payment of charges and indemnity, and intimating that, in default of instructions, the railways would sell it by public auction to defray the expenses already incurred by them in the matter. These letters were unanswered. Accordingly, the material was put up to auction, under the by-laws of the railways on July 22nd, 1908, at Bloemfontein (supp. ans., Annex 35) and bought in for £ 545 (*ibid.*, annex 37). A year later, on August 4th, 1909, the material was sold to the Crown Mines Ltd. for £ 1,500 (supp. ans., annex 40 and 41). The Union Bridge Company have received nothing by way of payment for the material.

On these facts, the question arises: is there any liability on His Britannic Majesty's Government?

In our opinion, the answer to this question is in the affirmative.

The consignment of the material to Bloemfontein was a wrongful interference with neutral property. It was certainly within the scope of Mr. Harrison's duty as Railway Storekeeper to forward material by rail, and he did so under instructions which fix liability on His Britannic Majesty's Government.

That liability is not affected either by the fact that he did so under a mistake as to the character and ownership of the material or that it was a time of pressure and confusion caused by war, or by the fact, which, on the evidence, must be admitted, that there was no intention on the part of the British authorities to appropriate the material in question. The knowledge of Messrs. Mackie, Dunn & Co., in October, 1901, that the material was at Bloemfontein, coupled with

their failure for eight years to make any protest or demand for its return is relevant, in our view, only to the question of quantum of compensation, and does not qualify the intrinsic wrongfulness of Mr. Harrison's action. In this aspect of the case, that action constitutes an international tort, committed in respect of neutral property, and falls to be decided not by reference to nice distinctions between trover, trespass and action on the case, but by reference to that broad and well-recognized principle of international law which gives what, in all the circumstances, is fair compensation for the wrong suffered by the neutral owner. This, and not the contract value of the material is, in our opinion, the true measure of damages.

There is evidence that in October, 1907, the material had deteriorated by reason of rust, corrosion, and bending (ans., annex 19); but this deterioration would have resulted, perhaps to an even greater degree, had the material lain near the sea at Port Elizabeth; and it is a reasonable inference that it was because of their inability to find a purchaser that Messrs. Mackie, Dunn & Co. let the material lie in store for so many years. In other words, in our view, the consignment to Bloemfontein did not cause the deterioration. Taking, therefore, £ 1,500 as the value of the material in 1909, and deducting therefrom the sums of £ 249 and £ 17 10s. for charges at Port Elizabeth (supp. pap., pp. 31 and 16) and £ 123 for marine freight due to the *Clan Robertson* (supp. pap., p. 33), which the Union Bridge Co. would have to pay in any case, and making some allowance for storage at Bloemfontein, we think that justice will be met by an award of £ 750 without interest.

*Now, therefore:*

The Tribunal decides that His Britannic Majesty's Government shall pay to the Government of the United States of America the sum of £ 750 sterling.

#### SEVERAL CANADIAN HAY IMPORTERS (GREAT BRITAIN) *v.* UNITED STATES

*(Canadian Claims for Refund of Duties. March 19, 1925. Pages 364-370.)*

EXHAUSTION OF LOCAL REMEDIES.—MUNICIPAL LAW: KNOWLEDGE OF ALIENS OF PRESUMPTION.—IMPLIED WAIVER OF DEFENCE. Collection between 1868 and 1882 of too high customs duties on importations of baled hay from Canada into United States. Failure of claimants to avail themselves of legal remedies secured by United States legislation. No reimbursement of claimants made. *Held* that legal remedies were adequate and that importers are presumed to know customs laws of countries with which they are dealing; plea that claimants at time of collections were unaware, until too late, that duties paid were in excess of those imposed by law therefore rejected. *Held* also that submission of claims to Tribunal by United States constituted no implied waiver of defence under municipal law. Claims disallowed.

*Cross-references:* Am. J. Int. Law, vol. 19 (1925), pp. 795-800; Annual Digest, 1925-1926, p. 230.

*Bibliography:* Nielsen, pp. 347-363.

This proceeding involves five claims which have been argued, submitted, and considered together for duties paid to the Government of the United States

on importations of baled hay from Canada. It is contended that the duties so paid were in excess of those imposed by law.

Concerning the facts there is no dispute.

Between 1868 and 1882 duties were levied, collected, and paid pursuant to the provisions of section 2516 of the Revised Statutes of the United States. The material portion of this statute reads as follows:

"There shall be levied, collected and paid on the importation of all raw or unmanufactured articles, not herein enumerated or provided for, a duty of 10 *per centum ad valorem*; and on all articles manufactured in whole or in part, not herein enumerated or provided for, a duty of 20 *per centum ad valorem*."

The duty of making classifications under the customs laws was vested in the collectors of customs, supervised by the Treasury Department. That department classified baled hay as an article manufactured in whole or in part, and, therefore, during the period mentioned, the duty of 20 *per centum ad valorem* was levied and collected upon all baled hay imported into the United States.

There were also in force at this time the following laws relating to protest, appeal, and resort to the courts by importers for the recovery of any duties alleged to be erroneously or illegally exacted.

Section 2931 of the Revised Statutes of the United States:

"On the entry of any vessel, or of any merchandise, the decision of the collector of customs at the port of importation and entry, as to the rate and amount of duties to be paid on the tonnage of such vessel or on such merchandise, and the dutiable costs and charges thereon, shall be final and conclusive against all persons interested therein, unless the owner, master, commander, or consignee of such vessel, in the case of duties levied on tonnage, or the owner, importer, consignee, or agent of the merchandise, in the case of duties levied on merchandise, or the costs and charges thereon, shall, within ten days after the ascertainment and liquidation of the duties by the proper officers of the customs, as well in cases of merchandise entered in bond as for consumption, give notice in writing to the collector on each entry, if dissatisfied with his decision, setting forth therein, distinctly and specifically, the grounds of his objection thereto, and shall within thirty days after the date of such ascertainment and liquidation, appeal therefrom to the Secretary of the Treasury. The decision of the Secretary on such appeal shall be final and conclusive; and such vessel, or merchandise, or costs and charges, shall be liable to duty accordingly, unless suit shall be brought within ninety days after the decision of the Secretary of the Treasury on such appeal for any duties which shall have been paid before the date of such decision on such vessel, or on such merchandise, or costs or charges, or within ninety days after the payment of duties paid after the decision of the Secretary. No suit shall be maintained in any court for the recovery of any duties alleged to have been erroneously or illegally exacted, until the decision of the Secretary of the Treasury shall have been first had on such appeal, unless the decision of the Secretary shall be delayed more than ninety days from the date of such appeal in case of an entry at any port east of the Rocky Mountains, or more than five months in case of an entry west of those mountains."

Section 3011 of the Revised Statutes of the United States:

"Any person who shall have made payment under protest and in order to obtain possession of merchandise imported for him, to any collector, or person acting as collector, of any money as duties, when such amount of duties was not, or was not wholly, authorized by law, may maintain an action in the nature of an action at law, which shall be triable by jury, to ascertain the validity of such demand and payment of duties, and to recover back any excess so paid. But no recovery shall be allowed in such action unless a protest and appeal

shall have been taken as prescribed in section twenty-nine hundred and thirty-one.”

These provisions are similar to those found in the customs laws of various countries, including Canada (pages 57 to 63 of the answer.)

The several claimants were Canadian shippers of baled hay consigned to agents or brokers in the United States who paid and billed back upon their respective consignors duties at the rate of 20 *per centum, ad valorem*.

In 1882 a firm of commission merchants in New York, availing itself of the provisions of sections 2931 and 3011 of the Revised Statutes above quoted, proceeded by protest, appeal and suit to recover the difference between 10 *per centum* and 20 *per centum, ad valorem*, paid on certain shipments of baled hay. This proceeding culminated in a decision of the Circuit Court of the United States for the Northern District of New York to the effect that under section 2516 of the Revised Statutes of the United States, baled hay was dutiable only at the rate of 10 *per centum ad valorem* (*Frazee, et al. vs. Moffitt, collector*; 18 Federal 584). Consequently, the plaintiff in that proceeding recovered judgment for the additional 10 *per centum* which it had paid. There was no appeal from this decision and the Treasury Department on March 23, 1882, issued to collectors of customs a circular reading in part as follows:

“The Attorney-General has advised acquiescence in such ruling (*Frazee, et al. vs. Moffitt, collector*). I yield to this opinion and officers of the customs will govern their actions accordingly.”

Thenceforth baled hay ceased to be classified as a manufactured article under section 2516 of the Revised Statutes of the United States, and duties began to be levied and collected at the rate of 10 *per centum* instead of 20 *per centum, ad valorem*.

At no time did the claimants here involved avail themselves of the right of protest to the collector, appeal to the Treasury Department and resort to the courts secured by section 2931 and 3011 of the Revised Statutes of the United States. It is asserted, however, that at the time the collections were made they had no actual knowledge of the provisions of the customs laws of the United States and were not aware, until too late for protest and appeal under the statutes, that the duties paid were in excess of those imposed by law. In 1883 the claimants presented a memorial to the Governor-General of Canada requesting that their claims be brought to the attention of the United States, and certain diplomatic correspondence ensued. The position taken by the Government of the United States was in effect that in the circumstances the claimants must have recourse to Congressional action for any refund to which they might appear to be entitled. A bill was later introduced in Congress and the matter was in due course referred to the Committee on Claims of the United States Senate, which in turn referred the bill to the Court of Claims for findings of fact under the terms of the Act of March 3, 1887. The Court of Claims in February, 1909, reported back to the Senate Committee findings of fact in the case of one claimant, Blain, evidently taken as typical.

In the course of the argument a letter from the Secretary of the Treasury dated March 20, 1906, to the Senate Committee on Claims was produced. Inasmuch as this letter does not appear in the formal record, it is here quoted:

1126-D

"TREASURY DEPARTMENT  
"OFFICE OF THE SECRETARY

"Washington, March 20, 1906

"The Chairman  
"Committee on Claims  
"United States Senate

"Sir:

"I have the honor to acknowledge the receipt of your letter of the 14th instant requesting information relative to the merits of S. 4402, granting to the Court of Claims jurisdiction to hear and determine, notwithstanding failure to file protests, etc., the claims of Hosmer, Crampton & Hammond and others for duties in excess of those imposed by law upon hay imported into the United States during the years 1866 to 1882, inclusive.

"All of the claims covered by said bill have not been identified on the records of the Department but many have been and all so far as identified are entirely similar and are covered by the following statement of facts.

"Under the tariff acts of 1861, 1862, and 1870, codified in the Revised Statutes of 1874 and 1878, hay was not specifically provided for and by a ruling of this Department dated April 8, 1868, the same was held to be dutiable at the rate of 20 % *ad valorem* as a non-enumerated manufactured article under the Act of March 2, 1861 (see section 2516, Revised Statutes).

"Duties were assessed in accordance with such ruling upon all imported hay until March 23, 1882, when the United States Circuit Court having held in the case of *Frazer v. Moffitt*, 18 Federal Reporter 584, that such hay was subject to a duty of 10 % only, as a non-enumerated unmanufactured article under section 2516 R.S., the Department acquiesced in said decision and duties at the rate of 10 % only were collected upon imported hay until the passage of the Act of 1883, by which hay was made subject to a specific duty at \$2.00 per ton.

"Under the provisions of section 14 of the Act of June 30, 1864 (sec. 2931, Revised Statutes), the decision of the Collector was made final and conclusive against all persons interested therein unless a protest was filed against such decision within ten days thereafter, and an appeal taken to the Secretary of the Treasury.

"As none of the claimants filed the protests necessary to a review of the collector's decision and a refund of the duties erroneously assessed, they did not pursue their legal remedy and must be considered as having concurred in the collector's decision and in any errors occurring therein.

"The amount of duties involved in the aggregate or in each individual case covered by the bill can not be ascertained unless the ports of entry be stated and then only at a very large expense. The aggregate of the excessive duties collected on imported hay between the dates mentioned has, however, been variously estimated at from \$250,000 to \$2,000,000.

"In my opinion, the passage of the bill referred to would establish a very bad precedent, as I know of no reason why these importers should be repaid the excessive duties collected from them that would not equally apply to all persons who have paid excessive duties and have not pursued their legal remedy, and to allow all such claims would be equivalent to a repeal of the provisions of law requiring the filing of protests by importers and would subject the Government to an avalanche of claims subsequent to every adverse decision of the courts in customs cases.

"For your further information I enclose herewith letters dated the 1st and 10th ultimo from the Department to the Chairman of the Committee on Claims of the House of Representatives relative to similar claims.

"Respectfully,

"L. M. SHAW

"Secretary.

"(2 inclosures)"

Although the subject was under consideration by Congress for several years no Congressional action was taken; and eventually the claims were included in the schedule for decision by the Tribunal.

It is clear from the foregoing statement of facts that the customs laws of the United States afforded adequate legal remedies to all importers in the situation of these claimants who might be dissatisfied with the duties exacted and contend that they were either unlawful or excessive. These remedies we find were not only reasonable and fair, but more or less common to the customs laws of all civilized countries. We do not conceive that in the orderly administration and enforcement of such laws any other course of action is open to governments as a practical matter. Some definite procedure for the control of appeals for refunds must be laid down and observed. It is of course conceivable that a statutory procedure might be so unreasonable as effectually to deny the right of protest and appeal, but we do not find any such condition here; and even if a case of unreasonable and arbitrary statutory procedure were presented, provided it applied equally to the nationals of the government concerned and to foreigners, we should entertain grave doubt as to whether it could be said to operate as a denial of justice so as to lay the foundation for an international claim.

Section 2931 of the Revised Statutes of the United States has been construed by the Supreme Court of the United States. We quote from the opinion in *Arnson* and another *v. Murphy*, collector, 115 U.S. 579, decided on December 7, 1885:

"The statute makes the decision of the collector final and conclusive as to the rate and amount of duties, unless there is a specific protest made to the collector within ten days after the liquidation, and an appeal taken to the Secretary of the Treasury within thirty days after the liquidation. The decision of the Secretary on the appeal is made final and conclusive, unless a suit is brought within ninety days after such decision, in the case of duties paid before the decision, or within ninety days after the payment of duties paid after the decision; and no suit can be brought before a decision on the appeal, unless the decision is delayed for the time specified in the statute.

"We are of opinion that it is incumbent upon the importer to show, in order to recover, that he has fully complied with the statutory conditions which attach to the statutory action provided for. He must show not only due protest and appeal, but also a decision on the appeal, and the bringing of a suit within the time limited by the statute after the decision, or else that there has been no decision, and the prescribed time after the appeal has elapsed. The decision on the appeal is, necessarily, a matter of record in the Treasury Department, and, as is shown in the present case, it is communicated to the collector by a letter to him, the letter itself being the decision. The letter is a matter of record in the custom house. Inquiry there or at the Treasury Department would always elicit information on the subject: and the importer, knowing when his appeal was taken, can always protect himself by bringing his suit after the expiration of the time named after the appeal, although he has not heard of a decision, being thus certain that he will have brought it within the time prescribed after a possible decision.

“The conditions imposed by the statute cannot, any of them, be regarded as matters a failure to comply with which must be pleaded by the defendant as a statute of limitation. The right of action does not exist independently of the statute, but is conferred by it. There is no right of action on showing merely the payment of the money as duties, and that the payment was more than the law allowed, leaving any statute of limitation to be set up in defence, as in an ordinary suit. But the statute sets out with declaring that the decision of the collector shall be final and conclusive against all persons interested, unless certain things are done. The mere exaction of the duties is, necessarily, the decision of the collector, and, on this being shown in any suit, it stands as conclusive till the plaintiff shows the proper steps to avoid it. These steps include not only protest and appeal, but the bringing of a suit within the time prescribed. They are all successively grouped together in one section, not only in section 14 of the act of 1864, but in section 2931 of the Revised Statutes; and the ‘suit’ spoken of in those sections is the ‘action’ given in Revised Statutes, section 3011.”

We adopt this reasoning as applicable to these claims.

The plea that the claimants were ignorant of their rights under the law, and consequently entitled to refunds of duties, regardless of the law, through the award of an international tribunal cannot be sustained. Importers, whatever their nationality, must be presumed to know and are bound by the customs laws of the countries with which they are dealing. These claimants in fact dealt through commission brokers and agents in the United States by whom the duties were actually paid.

The submission of the claims to this Tribunal by the Government of the United States constituted no implied waiver and did not operate to take them out from under the ordinary statutory provisions.

*Now, therefore :*

The award of the Tribunal is that the claims of His Britannic Majesty's Government be disallowed.

---

OWNER OF THE *R. T. ROY* (UNITED STATES) *v.* GREAT BRITAIN

(*March 19, 1925. Pages 408-410.*)

---

SEIZURE OF FISHING VESSEL IN LAKE HURON, ESCAPE.—EVIDENCE: PLACE OF SEIZURE. DAMAGE. FAILURE TO CO-OPERATE IN COLLECTING EVIDENCE.—EXHAUSTION OF LOCAL REMEDIES, EQUITY. Seizure of American fishing vessel *R. T. Roy* on June 25, 1908, by Canadian inspector of Fisheries in Lake Huron. Escape of vessel after preliminary examination by inspector of officers and crew at South Bay Mouth on June 27, 1908. Claim presented for damages on account of seizure, detention, loss of catch, destruction of nets. *Held* that, wherever boundary through Lake Huron was then located, evidence not sufficient to determine whether seizure effected on American or on Canadian side of it, and that evidence of damages inconclusive and unsatisfactory. Vessel's escape and its failure, therefore, to submit to orderly legal procedure emphasized. *Held* equitable to disallow claim for failure to exhaust local remedies.

*Cross-reference:* Am. J. Int. Law, vol. 19 (1925), pp. 800-803.

*Bibliography:* Nielsen, pp. 406-407.

On June 25, 1908, the *R. T. Roy*, a steam fishing vessel of American ownership and registry, was seized in Lake Huron by a Canadian inspector of Fisheries. The reason alleged for the seizure was that the vessel was at the time fishing in Canadian waters. The inspector took her forthwith, together with the officers and crew, to South Bay Mouth, a Canadian port. There, it appears, a preliminary examination of the officers and crew was conducted by the inspector, and their testimony was reduced to writing. After a lapse of two or three days the inspector set out in another vessel with the *Roy* in tow, the officers and crew still on board, for Sault Ste. Marie, another Canadian port, where the usual legal inquiry looking to the ultimate condemnation or release of the vessel was intended to take place. On the way, the *Roy* ran on a reef in Canadian waters, and, efforts to float her again proving ineffectual, the inspector went on to Sault Ste. Marie in the other boat for the purpose of securing assistance. While he was gone the captain and crew of the *Roy* succeeded in getting her off the reef, and they thereupon took her back to her home American port, Alpena, Michigan, where on the first day of July, 1908, further depositions of the officers and crew covering the circumstances of the seizure were taken before a notary public. These latter depositions are included in the record. The testimony taken at South Bay Mouth, saving that of the captain, has not been produced. The evidence indicates that the papers embodying the South Bay Mouth testimony were left on the *Roy* by the inspector when he left her to go to Sault Ste. Marie, and that they were subsequently carried to Alpena and there disappeared. Some years later, however, the testimony of the captain was produced by one of the attorneys for the claimant at Alpena, on request of the State Department.

At the moment of seizure there was a discussion between the inspector and the captain with regard to the precise location of the *Roy*. The chart carried by the *Roy* was produced, and, while the evidence is not quite clear on the point, it seems probable that the cross found on the chart was placed there by the captain in the course of this discussion, and that this cross represented both the captain's and the inspector's estimate of the place of seizure. It is contended by the Government of the United States that the seizure took place within American waters, and it is contended by His Majesty's Government that the point was in Canadian waters.

Damages are claimed for the seizure and detention of the vessel, for loss of the catch of fish, and for destruction of nets.

The sole issue—one of pure fact—which is sharply raised in the pleadings and has been exhaustively argued by distinguished counsel, is whether, having due regard for the international boundary through Lake Huron as it was then located, the seizure of the *Roy* was effected on the American or on the Canadian side of that boundary.

In the view which we take of this controversy, we do not find it necessary for us to follow the argument in its involutions with respect to the exact location of the boundary through Lake Huron as laid down by the Treaty of Ghent of 1783 and by the decision of the Special Commissioners in 1822, pursuant to the second Treaty of Ghent, executed in 1814. Nor are we inclined to engage upon any detailed analysis of the evidence beyond pointing out its vague and uncertain character. We have been forced to conclude that in the state of the record it is impossible, without indulging unwarranted conjecture, to determine the main question of fact involved. Leaving out of account the complicated problem of the boundary itself, which is of course not physically indicated through Lake Huron, we are faced by an irreconcilable conflict of untested and untestable statements. The location of the point of seizure is at best a mere guess. The captain of the *Roy* is quoted as saying that he "could only make an

estimate or guess as to her location when seized". To check the location by reference to the speed of the *Roy* on her trip to the fishing ground is impracticable because varying estimates of speed were made. The so-called "deep hole", where the nets were set, might have been ascertained with reasonable accuracy, but no evidence on this subject has been adduced. The unexplained disappearance of the best contemporary evidence, namely, the statements taken at South Bay Mouth two days after the seizure for the express purpose of ascertaining the facts, is also a disturbing factor. The evidence of damages is inconclusive and unsatisfactory.

The Tribunal is constrained to emphasize the failure of the claimant to submit to the orderly legal procedure provided for the determination of the issue at the time. The seizure here complained of was the initial step in a procedure which, if it had been permitted to pursue its normal course, would have led to a judicial inquiry in which the very issue here presented would have been considered with full opportunity to elicit all the facts by examination of records and cross-examination of material witnesses. This procedure was interrupted, and its logical completion rendered impossible, by the affirmative act of the claimant's representative in withdrawing the vessel from the only jurisdiction where the matter could be duly and promptly dealt with. The circumstances do not justify us in finding that the Canadian authorities had abandoned the seizure when such withdrawal took place.

Moreover, proceedings might have been taken in the Canadian courts at any time against the Fisheries inspector personally or against the Canadian Government by way of petition of right.

The terms of submission provide that this Tribunal "shall take into account as one of the equities of a claim to such extent as it shall consider just in allowing or disallowing a claim, in whole or in part, any failure on the part of the claimant to obtain satisfaction through legal remedies which are open to him or placed at his disposal".

In the exercise of the discretion thereby conferred, the Tribunal is of the opinion that the claim must be disallowed.

*Now, therefore :*

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

---

#### ADOLPH G. STUDER (UNITED STATES) *v.* GREAT BRITAIN

*(March 19, 1925. Pages 548-553.)*

---

ANNEXATION. SUCCESSION OF STATES: PRIVATE RIGHTS ACQUIRED PREVIOUS TO—.—INTERNATIONAL RESPONSIBILITY FOR DEPENDENT STATE.—EXHAUSTION OF LOCAL REMEDIES.—EVIDENCE: PROOF OF MUNICIPAL LAW.—EXTRAJUDICIAL ACTION. Grant of land made on February 3, 1877, by Sultan of Muar to Mr. Adolph G. Studer, United States citizen. Annexation of Muar in 1878 by Sultan of Johore who, according to Mr. Studer, deprived him of benefit of grant. Assumption by Great Britain of international responsibility for Government of Johore in 1885. Failure of Mr. Studer to submit case to local Courts as agreed to by Sultan. Lack of evidence concerning facts and municipal law obtaining in Muar at time of grant. *Held* that reason why claim not carried before Courts of Johore not sufficiently explained. Claim

disallowed with recommendation that Sultan's offer that claim be submitted to Johore Courts be renewed.

*Cross-reference:* Am. J. Int. Law, vol. 19 (1925), pp. 790-794.

*Bibliography:* Nielsen, p. 547.

This claim as put forward in the memorial is "for the repeated invasion and ultimate destruction of cessionary and property rights" in the State of Muar, in the Malay Peninsula. The particular events giving rise to it took place in the years 1875, 1876 and 1877. The original claimant, Adolph G. Studer, was at that time the Consul of the United States at Singapore. He conceived the idea of securing a cession of land somewhere in the peninsula and establishing a plantation. After a preliminary inquiry he decided that the State of Muar was a desirable location for his project and accordingly approached the ruling Sultan of that State, Ali Iskander Sah, with a view to obtaining a grant. Following certain conversations with one Keun, an employee of a bank at Singapore, who apparently represented the Sultan, Studer sent Keun to see the latter at Malacca, and the result was a so-called preliminary concession dated December 24, 1875 (appendix to the memorial, pp. 201-204). This instrument, drawn up by Studer himself in the technical language usual in conveyances made under the Anglo-Saxon system of land tenure, purported to convey to Studer under certain conditions the fee simple title to a tract of land six geographical miles square, to be selected by Studer on any portion of Muar not already disposed of by the Sultan. One of the conditions required Studer to make the selection within three years from the date of the instrument. About one year later Studer himself went to Malacca and, after an interview with the Sultan, proceeded to Muar where he undertook to make the selection. At the same time he also located grants for several other individuals who appeared to have become interested, through him or otherwise, in the possibilities for developing plantations in that territory.

On February 3, 1877, the preliminary grant was superseded by a final one which defined Studer's concession by metes and bounds (appendix to the memorial, pp. 204-206). This second instrument appreciably enlarged the area of the grant so that it included approximately 80 square miles. The final grant comprised substantially 50,000 acres.

Sultan Ali died in July, 1877.

The contention of the United States is that although Studer subsequently complied with all of the conditions of the grant, he was deprived of the benefit thereof, and his concession was effectually destroyed, through the wrongful acts and omissions of the subsequent ruler of Muar, the Sultan of Johore, to whose dominions the State of Muar was annexed in 1878.

The British Government appears in this proceeding by virtue of its assumption of responsibility internationally for the Government of Johore under the provisions of a treaty made in 1885.

In January, 1894, Studer brought his claim to the attention of the British Acting Governor of the Straits Settlement by means of a letter outlining at length the history of the concession and of his efforts to secure recognition for it and to operate under it (appendix to the memorial, p. 175). In October, 1894, Studer filed with the State Department at Washington a comprehensive statement of his claim, which occupies, together with the exhibits, nearly 200 pages of the record (appendix to the memorial, pp. 85-276 1/2). In October, 1896, the State Department took the matter up with the British Government and a long diplomatic correspondence ensued, concluding with a communication dated April 28, 1906, from Sir Edward Grey, then at the head of the Foreign Office, to the Honorable Whitelaw Reid, then American Ambassador

(appendix to the memorial, p. 582). This communication referred to a previous suggestion that the claim be submitted to the local courts in Johore for adjudication, and, after transmitting a memorandum from the Sultan of Johore and his advisory board, Sir Edward Grey said:

"It is therein again pointed out that no valid reason has yet been adduced for the claimant's refusal to submit his claim in a regular manner before the proper court in Johore; and, as was stated in the note to Mr. Choate of the 8th of November, 1903, His Majesty's Government feel that until that step has been taken the Johore Government cannot be pressed to recognize the claim in any way.

"It appears from the earlier 'statement of facts and argument for the claimant' drawn up in 1899, that some difficulty was thought to exist in adopting this course, on the ground that 'the immunity of the Sovereign Power from suits at law within its territorial limits, unless by its own consent and in the manner in which it ordains', was a familiar principle at law.

"With a view of meeting this objection His Majesty's Government have thought it desirable to obtain a distinct assurance from the Sultan of Johore on the subject; and His Highness has now formally expressed willingness to waive all technical objections, and to agree to the case being tried by the Principal Judicial Officer in Johore in the presence of a British officer. In the circumstances Your Excellency will no doubt agree that the legal remedies which are open to the claimant in the Sultan's courts must be exhausted before any question of treating the matter through the diplomatic channel or referring it to arbitration can be considered" (appendix to the memorial, pp. 582-583).

It does not appear that any advantage was taken of this offer. Counsel for the United States in the course of the oral argument stated that so far as he was advised the reason for the failure was that the existing treaty with the schedule in which this claim was ultimately included was then already under discussion between the two Governments (transcript of oral argument, p. 695), and Counsel for His Majesty's Government gave it as his understanding that the offer still stands (transcript of oral argument, pp. 447-448).

In the view which, with great reluctance, we feel obliged to take of this case, we do not consider it either necessary or proper for us to enter upon a detailed examination of the evidence presented. The Tribunal finds itself not only embarrassed by the singular lack of reliable evidence and testimony on both sides, but virtually precluded from arriving at any confident conclusion upon the merits of this most interesting and complicated controversy. There is hardly a statement of fact in this record which is not disputed; and the number of facts which may be said to be definitely ascertained or admitted is almost negligible. Every issue has been strenuously fought. It may be useful to enumerate some of these issues:

The power of Sultan Ali to make any concession is denied.

The evidence governing the status and authority of the Sultan in such matters is meagre and unsatisfactory.

Assuming that he had the power, it is contended that the Sultan did not in fact exercise it in this instance; that there is no adequate showing that the Sultan knew what he was doing when he signed the deeds or that he intended to do more than issue a mere licence or permit. In this connexion it is admitted that the record is silent upon the rather important question whether the Sultan could read or understand the English language in which the deeds were framed.

The relative positions of the Sultan and of the so-called Tumongong of Muar and the necessity for ratification by the latter are not so clearly defined as one would like to have them. In this connexion it is contended that the Tumongong did in reality ratify the concession; but the document relied

upon for this purpose is at least open to varying interpretations, and the further evidence on the point seems shadowy and imperfect.

The construction to be placed upon the grant itself has been debated at great length. On the one hand, we are asked to hold that the deed must be construed at its face value, in accordance with the principles of western systems of land tenure, as a conveyance of title in fee simple; on the other, it is argued that the instrument must be interpreted in the light of the Malay customary law, and that so construed it has the effect of a mere permit to enter and cultivate, such permit being personal to the grantor and lapsing with his death. The Tribunal has not before it any authoritative statement of the Malay customary law applicable to the State of Muar in 1876 and 1877. The situation in this respect offers serious complications. We are dealing with a transition period; and while it is plain that the native customary law, whatever it may have been, ultimately gave way to the white man's law, the point of time at which it can fairly be said that the process had advanced far enough to embrace the possibility of a grant of this form and character is, in our opinion, hardly susceptible of determination on the record before us. The evidence of actual practice at the period under consideration is fragmentary and inconclusive.

A large part of the oral argument has been devoted by both counsel to a discussion of events subsequent to the grant, bearing particularly upon Studer's efforts to comply with the conditions and to develop his project in the face of alleged interference by the local authorities. Some 12 acts of commission and omission have entered into this discussion. We apprehend that in any conscientious examination of the question whether a denial of justice within the meaning of international law took place, the conclusion would have to be based not upon the definite establishment of any one or more of these so-called "trespasses" as such, but upon the cumulative effect of these transactions viewing them as illustrative of a general prevailing condition and of the attitude maintained by the local authorities. These are all disputed questions of fact, and without taking them up *seriatim* and in detail we are constrained to hold that in the present state of the evidence we can not form a reliable conclusion as to whether there was or was not a denial of justice.

The Tribunal sees no reason to doubt Studer's absolute sincerity and perfect good faith from beginning to end; it has been deeply impressed by this circumstance, which is indeed conceded by counsel for His Majesty's Government. Nevertheless, where a case rests so largely upon *ex parte* statements prepared many years after the event by the party in interest, for the express purpose of presenting his claim in the best possible light, allowances must be made for infirmities of memory as well as for a claimant's natural sense of grievance amounting sometimes to almost an obsession. Studer's letter to the Acting Governor of the Straits Settlement and his communication to the Department of State were both written nearly 20 years after the transactions took place. Neither of these statements possesses the solemnity of a sworn declaration. They are merely the attempts of an individual who truly believed that he had been wronged, and perhaps had been unjustly treated, to recall and set down acts and circumstances of long ago. In effect, the Government of the United States asks the Tribunal to accept these statements without substantial corroboration and to found its judgment upon them. Without regarding many, if not most, of the essential facts as duly established in this way, it is difficult to see how any judgment could be rendered; and even so, much would be left to inference and conjecture.

On the whole record the Tribunal is convinced that the Government of the United States was justified in espousing this claim. It is, moreover, our unanimous feeling that the claim deserved, and still deserves, careful consider-

ation and adjudication upon the merits. The record here does not permit this, and we are definitely of the opinion that no Tribunal so far removed in time and space from the date and scene of this controversy can be expected adequately to deal with the intricate questions of fact involved. The industry and ingenuity of counsel in making the best of so difficult a situation has challenged our unreserved admiration. They have done everything that highly skilled and competent advocates could do to assist us.

The opportunity once presented to carry the claim before the courts of Johore under guaranties apparently sufficient to insure full inquiry and impartial adjudication seems to have been passed over for reasons which are not sufficiently explained. This Tribunal earnestly recommends that this offer be renewed and accepted and that the courts of Johore in that event take the matter up in a liberal spirit without regard to legal refinements and technicalities.

With this emphatic recommendation the award of the Tribunal is that the claim of the Government of the United States be disallowed.

OWNER OF THE *HORACE B. PARKER* (UNITED STATES)

*v.* GREAT BRITAIN

(November 6, 1925. Pages 570-572.)

REFUSAL OF REPAIRS OF FOREIGN FISHING VESSEL.—INTERPRETATION OF TREATY.—DAMAGES: LOSS OF USE, LOST PROFITS.—EVIDENCE, USUAL AND UNCHALLENGED. Refusal of Newfoundland authorities to allow *Horace B. Parker*, an American fishing vessel, the replacing in Bay of Bulls (Newfoundland) of riding sail blown away in boisterous weather. Vessel compelled to go to St. Pierre therefor. Time lost in getting back to fishing grounds. Decay of bait. Loss of catch. *Held* that under article 1 of Anglo-American Treaty of October 20, 1818, right of American fishermen to repair damages in Newfoundland waters not restricted to repairs essential to navigation, and that replacing sail needed for fishing purposes, where such sail has been blown away, is clearly within the phrase "repairing damages". *Held* also that measure of damages is loss of use of vessel, i.e., of probable catch, i.e. of catch of other vessels, or of average catch under conditions at hand (reference made a.o. to *Wanderer*, *Kate*, and *Favourite* awards, see pp. 68, 77, and 82 *supra*). *Held* further that unchallenged evidence of usual character provides sufficient basis upon which to make award. Amounts claimed for loss of catch and loss of bait awarded.

*Cross-reference:* Am. J. Int. Law, vol. 20 (1926), pp. 378-380.

This is a claim for damages by reason of the refusal of the Newfoundland authorities to permit exercise of the right of making repairs as secured to American fishermen by the proviso to article 1 of the Treaty of 1818. The evidence is somewhat in conflict. For the purpose of decision we accept the British version of the case as to what the claimant sought to do. The riding sail of the vessel having been blown away in boisterous weather, the master put into Bay of Bulls on the east coast of Newfoundland to obtain water and make necessary repairs. The Newfoundland authorities refused to allow the procuring of a new riding sail, asserting that "a riding sail is part of a fishery outfit and is not necessary for the sailing of a vessel". The master protested to the collector of customs and also sought to obtain a different ruling through the American consular agent, but the authorities at St. Johns sustained the

local authorities and persisted in the refusal. In consequence of inability to procure the sail at Bay of Bulls, the vessel was compelled to go to St. Pierre therefor. Five days were lost in getting to St. Pierre and further time in getting back to the fishing grounds. During that time the bait decayed. Also there was a "spurt of fish", and other vessels on the spot took large cargoes.

At the time of the occurrence it was contended by the authorities of Newfoundland that the words "repairing damages" in the treaty must be construed to limit the permissible repairs to repairs essential to navigation and could not be held to cover repairs necessary to fishing. At the hearing, a further contention was made to the effect that "repairing damages" must be limited to such repairs as the crew itself could make with the materials carried by the ship. But we observe that the treaty secures the right to "American fishermen". This indicates that it was given in order that they might fish in the waters adjacent to Newfoundland, not part of British territorial waters, where they had been accustomed to fish, and negatives an interpretation which would restrict the right to repairs essential to navigation and distinct from fishing. For the rest, it is enough to say that replacing a sail needed for fishing purposes, where such a sail has been blown away, seems to us clearly within the phrase "repairing damages"; and we so hold.

It is contended in the answer that the damages claimed are "remote, speculative, contingent, and incapable of ascertainment". As to this, it is enough to say that a long line of decisions of international tribunals has established as the measure of damages for such cases loss of use of the vessel, to be measured by the loss of probable catch. For this purpose the catch of other vessels or the average catch under the conditions at hand has often been taken as the measure. Indeed, this tribunal has so held in three prior cases. The *Wanderer*, claim No. 13. American-British claims arbitration; The *Favorite*, claim No. 13, id.; The *Kate*, claim No. 28, id. See also, the *Hope On*, Moore, international arbitrations, IV, 3261; Bering Sea damage claims, id. II. 2123, 2131; case of Costa Rica packet, id. V. 4948; foreign relations of the United States, 1902, appendix I, pp. 451, 454, 459.

Objection was made at the hearing that the affidavits in the memorial of the United States do not expressly preclude the possibility of the ship's having afterwards obtained a full cargo. But we find the evidence in this case is of the sort which has usually been presented in such cases, and, as the answer raised only the question of the legal rule as to the measure of damages, and did not challenge the evidence in the memorial as not sufficiently specific and circumstantial, we think there is a sufficient basis upon which we may make an award.

We therefore award the sum claimed by the United States, namely, \$1,500, on account of failure to obtain cargo and \$100 for loss of bait, in all \$1,600.

---

OWNER OF THE *THOMAS F. BAYARD* (UNITED STATES)

v. GREAT BRITAIN

(November 6, 1925. Pages 573-574.)

---

FISHING IN TERRITORIAL WATERS.—INTERPRETATION OF TREATY: *RES JUDICATA*. DAMAGES: LOST PROFITS.—DAMAGE, EVIDENCE: AFFIDAVITS, RECEIPTS, DOCUMENTS. Entry of *Thomas F. Bayard*, an American fishing vessel, into Bonne Bay, Newfoundland, to obtain fresh supply of bait. Notice by customs officer to master that purchase of bait or other transaction relating to fishery

operations within three miles off coast would be in violation of Anglo-American Treaty of October 20, 1818. Return of vessel to Gloucester. Loss of time before getting back to fishing grounds. Contention before Tribunal that notice did not preclude master from catching bait instead of buying it. *Held* that preclusion from catching bait apparent from Newfoundland's restricted interpretation of treaty as rejected by Permanent Court of Arbitration in North Atlantic Coast Fisheries Arbitration. *Res judicata* of Permanent Court's decision. Damages, evidence: claim substantiated by affidavits, receipts, and documents as to each item. Claimed amount awarded.

This is a claim for damages by reason of refusal of Newfoundland authorities to permit an American vessel, enrolled and licensed for the fisheries, to exercise the right of fishing in Bonne Bay on the treaty coast of Newfoundland. The American case is that while the vessel was fishing for halibut off the coast of Newfoundland bait became exhausted and it put into Bonne Bay to obtain a fresh supply. Upon arrival the customs officer gave the master a printed notice as follows:

"I am instructed to give you notice that the presence of your vessel in this port is in violation of the articles of the International Convention of 1818 between Great Britain and the United States, in relation to fishery rights on the coast of Newfoundland, and of the laws in force in this country for the enforcement of the articles of the convention, and that the purchase of bait or ice, or other transaction in connexion with fishery operations, within three miles off the coast of this colony, will be in further violation of the terms of said convention and laws."

The master testifies that he showed the collector a copy of the provision of the Treaty of 1818 and argued that he had a right to take bait under the treaty, but was told by the collector that the latter had an official duty to perform. Fearing that the vessel would be seized if he remained in the bay, and that the halibut already taken would spoil if he went elsewhere in search of bait, the master returned to Gloucester, losing 38 days of fishing before he could get back to the fishing grounds.

It is argued that the notice in question meant only that the master would not be allowed to buy bait, and that he was not precluded from catching it, as he had a right to do under the treaty. We think the answer to this contention is to be found in the attitude of Newfoundland prior to the decision of the Permanent Court of Arbitration at The Hague in the North Atlantic Coast Fisheries Arbitration. The sixth question put to that Tribunal was:

"Have the inhabitants of the United States the liberty under the said articles or otherwise to take fish in the bays, harbours, and creeks on that part of the southern coast of Newfoundland which extends from Cape Ray to Rameau Islands, or on the western and northern coasts of Newfoundland from Cape Ray to Quirpon Islands or on the Magdalen Islands?"

That question grew out of the claim of Newfoundland that the fishing privilege, conceded by the Treaty of 1818, did not include the taking of fish in bays, harbors, and creeks on the Treaty Coast. Great Britain on behalf of Newfoundland so contended before The Hague Tribunal. The notice in question was drawn up in view of this contention, and we have no doubt that any attempt of the vessel to catch bait fish in Bonne Bay would have been followed by serious consequences. The very language of the notice declaring that the mere presence of the American fishing vessel in Bonne Bay was unlawful and forbidding any "transaction in connexion with fishery operations within three miles of the coast" shows that the Newfoundland authorities were asserting and were prepared to maintain the claim as to the limits of the fishing

privilege of the United States which the Permanent Court of Arbitration at The Hague, by its answer to the sixth question in the North Atlantic Coast Fisheries Arbitration, has held to have been unwarranted.

As to the damages, the claim is set forth with unusual precision of detail and is substantiated by affidavits, receipts, and documents as to each item. We are entirely satisfied with this proof and award the sum of \$3,212.98, as claimed.

OWNER OF THE *SARAH B. PUTNAM* (UNITED STATES)  
v. GREAT BRITAIN

(November 6, 1925. Pages 568-569.)

RECOGNITION OF FOREIGN FISHING LICENCES.—THREAT TO SEIZE FISHING VESSEL.—INTERPRETATION OF AGREEMENT: MINUTES OF COUNCIL OF NEWFOUNDLAND.—OBLIGATION TO REDUCE DAMAGES.—DAMAGES: LOST PROFITS.—AMENDMENT OF PLEADINGS. *Modus vivendi* entered into between Great Britain and United States on February 15, 1888, under which Newfoundland obliged to recognize Canadian "annual" fishing licences. Difference of opinion concerning meaning of "annual". Interpretative agreement of October 15, 1888, under which Newfoundland undertook to recognize past Canadian licences issued for one year from date of issuance. Failure to instruct Newfoundland customs officials accordingly. Entry in June, 1889, of *Sarah B. Putnam*, an American fishing vessel, in port of Ferryland, Newfoundland. Refusal by local authorities to recognize her Canadian licence expiring on July 25, 1889. Same refusal in two other ports, threat to seize vessel. Return to home port with partial cargo. *Held* that master not bound to pay for Newfoundland licence under protest instead of returning to home port, and that return justified by denial of right to procure bait; that licence of *Sarah B. Putnam* valid in Newfoundland under agreement of October 15, 1888, as interpreted by Tribunal in the light of the minutes of Council of Newfoundland; and that, as to lost profits, United States properly abandoned claim originally put forward for possible second and third voyage (reference made to *Horace B. Parker* and *Thomas F. Bayard* awards, see pp. 153 and 154 *supra*). Claimed amount awarded.

*Cross-reference:* Am. J. Int. Law. vol. 20 (1926), pp. 377-378.

This is a claim for damages due to refusal of Newfoundland authorities to recognize a fishing licence issued by the Canadian authorities under the terms of a *modus vivendi* agreed to between the Governments of Great Britain and the United States. The *modus vivendi* provided for "annual licences" to be issued either by the Canadian authorities or the Newfoundland authorities, to be recognized by each when issued by either. A difference of opinion developed between the latter Governments as to whether licences should be issued to be valid for one year from their dates or should be made to expire on the 31st of December. Ultimately the Newfoundland Government, as we interpret the minutes of the Council, agreed to recognize past Canadian licences issued to be good for one year from their date, and the Canadian Government agreed for the future to issue licences expiring on December 31. It appears, however, that the Newfoundland customs officials received no orders to recognize Canadian licences, accordingly when the vessel in question, which held a regularly issued Canadian licence expiring on July 25, 1889, presented itself at

the port of Ferryland in Newfoundland in June 1889, the local customs authorities refused to recognize the licence. After trying at two other ports, at each of which the authorities refused to recognize the licence, and after information that the vessel would be seized if attempt was made to act under it, the master gave up fishing and sailed for his home port with a partial cargo.

In the answer it is set up: (*a*) that the master should have paid for a Newfoundland licence under protest and reclaimed the money; (*b*) that it is not shown that the master even if denied his right to procure bait in Newfoundland, could not have procured it elsewhere; (*c*) that the abandonment of the fishery was not a natural or probable result of the refusal of the Newfoundland authorities to recognize the licence; (*d*) that the licence was not valid in Newfoundland; and (*e*) that the damages claimed are "remote, speculative, contingent, and incapable of assessment".

As to the first contention, we find that the master communicated at once by telegraph with the State Department at Washington. Obviously that Government could not acquiesce in the proposition that the terms of the *modus vivendi* should be set aside by requiring two licences where but one annual licence was provided for. We think the master was not bound to proceed in any other way than by asserting his rights under the licence and the *modus vivendi* and referring the matter to his own Government.

Upon the second and third contentions, there seems to us sufficient evidence that denial of the right to procure bait in Newfoundland compelled abandonment of the fishing voyage.

With respect to the fourth contention, quite apart from any question of the binding force of the *modus vivendi* and its provision for "annual licences" to be recognized both in Canada and in Newfoundland, the action of the Council of Newfoundland on October 15, 1888, above referred to, seems to us to be decisive.

As to damages, the questions raised are the same as those considered in the cases of the Horace B. Parker (claim No. 76) and the Thomas F. Bayard (claim No. 77) and call for no further comment.

We award the sum of \$8,625, claimed by the United States for enforced giving up of the voyage. The claim, originally put forward for a possible second and third voyage, which were not attempted, were very properly abandoned by the United States.

F. H. REDWARD AND OTHERS (GREAT BRITAIN)  
v. UNITED STATES

(*Hawaiian Claims. November 10, 1925. Pages 160-161.*)

CONQUEST, ANNEXATION, SUCCESSION OF STATES: LIABILITY FOR DELICT. Monarchist rebellion in Hawaii on January 6, 1895. Arrest and imprisonment of British subjects under martial law proclaimed on January 7, 1895, by President of Republic. Choice offered by Government to stand trial by military commission or leave the country. Several chose to leave, others released after investigation. Rejection on December 17, 1897, of claims presented by Great Britain. Annexation of Hawaii by United States on July 7, 1898. Claims brought before Tribunal for wrongful imprisonment etc. *Held* that no general principle of succession to liability for delict exists to which succession through conquest would be exception (reference made to Robert E. Brown award, see p. 120 *supra*).

*Cross-references:* Am. J. Int. Law, vol. 20 (1926), pp. 381-382; Annual Digest, 1925-1926, p. 80.

*Bibliography:* Nielsen, pp. 85-159.

These are claims for wrongful imprisonment, detention in prison, enforced leaving of the country, and other indignities, claimed to have been inflicted upon British subjects by the authorities of the Hawaiian Republic prior to annexation by the United States.

We think the cases are governed by the decision of this tribunal in the case of Robert E. Brown, American and British claims arbitration, claim No. 30.

It is contended on behalf of Great Britain that the Brown case is to be distinguished because in that case the South African Republic had come to an end through conquest, while in these cases there was a voluntary cession by the Hawaiian Republic as shown (so it is said) by the recitals of the Joint Resolution of Annexation. We are unable to accept the distinction contended for. In the first place, it assumes a general principle of succession to liability for delict, to which the case of succession of one state to another through conquest would be an exception. We think there is no such principle. It was denied in the Brown case and has never been contended for to any such extent. The general statements of writers, with respect to succession to obligations, have reference to changes of form of government, where the identity of the legal unit remains, to liability to observe treaties of the extinct state, to contractual liabilities, or at most to quasi-contractual liabilities. Even here, there is much controversy. The analogy of universal succession in private law, which is much relied on by those who argue for a large measure of succession to liability for obligations of the extinct state, even if admitted (and the aptness of the analogy is disputed), would make against succession to liability for delicts. Nor do we see any valid reason for distinguishing termination of a legal unit of international law through conquest from termination by any other mode of merging in, or swallowing up by, some other legal unit. In either case the legal unit which did the wrong no longer exists, and legal liability for the wrong has been extinguished with it.

We decide that these claims must be rejected.

---

## SEVERAL BRITISH SUBJECTS (GREAT BRITAIN) *v.* UNITED STATES

*(Iloilo Claims. November 19, 1925. Pages 403-405.)*

---

CESSION OF SOVEREIGNTY. ANNEXATION. SUCCESSION OF STATES.—PROTECTION OF ALIENS AGAINST INSURGENTS.—NECESSARY WAR LOSSES, CONDUCT OF MILITARY OPERATIONS. Cession by Spain to United States of sovereignty over Philippines: treaty signed on December 10, 1898, exchange of ratifications on April 11, 1899. Provision that on exchange of ratifications Spain should evacuate islands. Desire of Spanish commander at Iloilo, Island of Panay, to evacuate earlier. Request on December 14, 1898, by Iloilo business men among whom six of present claimants, to United States commander at Manila to occupy place. Evacuation of Iloilo by Spanish commander on December 24, 1898, immediately followed by occupation by Filipino insurgents. Arrival of United States expeditionary force in Iloilo harbour on December 28, 1898. Declaration of war by so-called Filipino Republic against United States on February 4, 1899. Landing of United States forces

in Iloilo on February 11, 1899, occupation of town burned by insurgents. Loss of claimants' property by, or in consequence of, fire. *Held* that no culpable disregard of interests of claimants shown: (1) United States intervention was matter of discretion; (2) delay in landing forces largely due to request by businessmen themselves; and (3) no wanton or intentional destruction of property by United States vessels or troops, Tribunal not competent to criticize conduct of military operations. Claims disallowed.

*Cross-reference:* Am. J. Int. Law, vol. 20 (1926), pp. 382-384.

*Bibliography:* Nielsen, pp. 382-402.

These are claims for destruction of property of British subjects on the occasion of the occupation of Iloilo by the forces of the United States during the Philippine Insurrection.

On August 12, 1898, a "Protocol of Agreement" had been entered into between the United States and Spain whereby it was provided that the United States should "occupy and hold the city, bay, and harbour of Manila, pending the conclusion of a treaty which shall determine the control, disposition, and government of the Philippines". On December 10, 1898, a treaty was signed whereby, in article III, Spain ceded the Philippines to the United States. Article v of the treaty provided that on exchange of ratifications Spain should evacuate the islands. Exchange of ratifications did not take place until April 11 following. In the meantime, the Spanish commander at Iloilo, on the island of Panay, the second place of importance in the archipelago, being pressed by Filipino insurgents, desired to evacuate, and seems to have communicated this desire to General Otis, the American commander at Manila. The latter stated that he was without authority to act on the suggestion. On December 14, however, the businessmen of Iloilo having requested General Otis to occupy the place in order to preserve peace and property, the general cabled to Washington asking permission to do so. No answer was sent till December 21. In consequence an expeditionary force could not be dispatched until December 26 and it did not reach Iloilo until December 28. Although General Otis had endeavoured to get word of the expedition to the Spanish commander, he had not succeeded. The place had been evacuated on December 24, and was promptly occupied by a force of Filipino insurgents. General Miller, who commanded the expeditionary force, acting on a petition from the business men of Iloilo, which he communicated to General Otis, and on instructions from Manila, and ultimately from Washington, remained in the harbour without landing his force or attempting to take possession until February 11. On that date, pursuant to orders dated February 8, which reached him on February 10, he landed, drove out the insurgents, and occupied the town. From the beginning the insurgents had threatened to burn the town if forcibly driven out, and on February 11 they succeeded in carrying out this threat. The property of the claimants was destroyed by, or lost in consequence of, this fire.

It is contended by Great Britain that there was culpable neglect on the part of the authorities of the United States in three respects: (1) in the delay of a week in answering General Otis's request, so that the Spanish commander had evacuated Iloilo and the insurgents had taken control before the expedition under General Miller arrived; (2) in delaying the occupation of Iloilo after General Miller's arrival, so that the insurgents were able to make and carry out preparations for burning the town; (3) in the manner of landing and occupation when finally made.

As to the first contention, we are of opinion that there was no duty upon the United States under the terms of the Protocol, or of the then unratified

treaty, or otherwise, to assume control at Iloilo. *De jure* there was no sovereignty over the islands until the treaty was ratified. Nor was any *de facto* control over Iloilo assumed until the taking up of hostilities against the United States on the part of the so-called Filipino Republic required it on February 11, 1899. The sending of General Miller's force, at the request of the business men of the place, was an intervention to preserve peace and property. As between the United States and the claimants or their government, it was a matter of discretion whether or not to do this, and no fault can be imputed because of delay in undertaking such an intervention.

As to the second contention, it appears that the delay was, at least, largely due to request of the business men who had originally sought intervention (among them six of the present claimants) who feared the town would be burned and their property destroyed if General Miller attempted to land and to take forcible possession. Even if it is assumed that there was any duty toward the claimants to act promptly, under all the circumstances we can not say that the delay was culpable.

As to the third contention, it appears that the Filipino insurgents, who burned Iloilo, were acting under orders from and professed allegiance to the so-called Filipino Republic, which, on February 4 preceding, had declared war against the United States and had attacked the American forces at Manila, thus bringing on a conflict which lasted over three years. There was no wanton or intentional destruction of property by the vessels or troops of the United States. Indeed, there is evidence that the troops exerted themselves vigorously to put out the fires and to stop looting. The most that is claimed is that, if the operations of landing and taking the town had been carried out in a different way, the burning by the insurgents might have been prevented. But the circumstances were difficult and the general situation was trying. The operations were in charge of experienced officers and we do not feel competent to criticize their judgment as to the conduct of military operations. Considering all the circumstances, we do not think that any culpable disregard of the interests of the claimants has been shown.

We decide that these claims must be rejected.

---

#### D. EARNSHAW AND OTHERS (GREAT BRITAIN) *v.* UNITED STATES

(*Zafiro case. November 30, 1925. Pages 579-585.*)

---

LOOTING, DESTRUCTION OF PRIVATE PROPERTY IN TIME OF WAR. Looting and destruction of private property on May 4, 1898, at Cavite, Philippines, by crew of *Zafiro*, an American merchant vessel acting in Manila Bay as supply ship and part of United States naval forces.

RESPONSIBILITY FOR ACTIONS OF MERCHANT VESSEL IN NAVAL FORCES.—SEA WARFARE: CONVERTED MERCHANTMAN.—PUBLIC VESSEL.—RESPONSIBILITY FOR ACTS ASHORE OF SAILORS. *Held* that United States responsible for actions of *Zafiro* by nature of service and purpose for which employed, irrespective of her not being a "converted merchantman" under Convention VII, Hague Conference 1907. *Held* also highly culpable to let this particular crew go ashore without effective control in circumstances prevailing at the time.

EXTENT OF LIABILITY.—EVIDENCE: BURDEN OF PROOF. United States *held* liable for the whole, though not all of the damage was done by crew of

*Zafiro*: crew participated to substantial extent (no burden on Great Britain to prove exact items of damage chargeable to crew), and part chargeable to unknown wrongdoers cannot be identified.

INTEREST. In view of considerable, though unascertainable, part of damage not chargeable to crew held that no interest should be allowed.

*Cross-references*: Am. J. Int. Law, vol. 20 (1926), pp. 385-390; Annual Digest, 1925-1926, pp. 221-222.

*Bibliography*: Annual Digest, 1925-1926, p. 222.

These are claims for property looted or destroyed by the crew of the *Zafiro*, on May 4, 1898, while the ship was moored alongside the wharf of the Manila Slipway Company at Cavite, engaged in coaling. The claimants were employees of the company and lived on the premises in houses belonging to the company. During the naval battle of May 1, 1898, in Manila Bay, as the wharf and premises were in the line of fire and shells were exploding about the houses, the claimants and their families went away for safety, leaving the premises in charge of Filipino watchmen and Chinese employees of the company. On May 4 the *Zafiro* was ordered to go to the Spanish coal pile at Cavite to coal, and in order to do so moored alongside the company's wharf. The evidence as to what followed is in conflict and there is much dispute as to the facts. We do not doubt that the affidavits of the watchmen and of the Chinese employees are at least somewhat exaggerated. But it is clear enough that the Chinese crew of the *Zafiro* took a substantial part in the looting of the houses of the claimants and destruction of their property, which was undoubtedly complete and thorough. Hence it becomes necessary to consider whether and how far the United States is liable for the actions of the crew.

It appears that the *Nanshan* and *Zafiro*, two British merchant vessels, were bought by Admiral Dewey at Hong Kong, under authority of the Secretary of the Navy, in April, 1898. They were not commissioned, but were registered as American vessels, and the original crews (British officers and Chinese sailors) were shipped in the American merchant service. The reason for so doing is set forth in Admiral Dewey's autobiography as follows: "We registered them as American merchant steamers, and by clearing them for Guam, then almost a mythical country, we had a free hand in sending them to English, Japanese or Chinese ports to get any supplies we might need." In other words, it was not intended that they should trade and they did not trade. They were used as supply ships and colliers; and the purpose of registering them as merchant steamers was to enable them to resort to neutral ports to obtain supplies and coal, not for general purposes of the United States, but for the specific purposes of Admiral Dewey's naval operations. An ensign and four men were placed on each and Admiral Dewey and Admiral Crowninshield each speak of the naval officers as being "in command". Admiral Crowninshield says: "The naval officer exercised control over all the movements of the ship and gave all orders concerning her. The merchant captain was merely his executive officer, being familiar with the crew and with the ship." Ensign Pearson, now Commander Pearson, who was on the *Zafiro*, says: "My instructions were not to interfere particularly with the details of the ship's routine, but to receive the Admiral's orders for the ship and see them carried out, and to assist as much as possible and consistent with the general duty of the ship." He adds: "At the time of her purchase she was manned by British merchant officers and a crew of Chinese. With the exception of the captain and chief engineer, these officers and crew were retained on the vessel. A. M. Whitton, who had been first mate, was made captain, and W. D. Prideaux, formerly second mate, was made first mate . . . The handling and management of the Chinese crew

was left to the ship's officers, who had been with the crew in the merchant service and better understood their ways and peculiarities."

On behalf of the United States, it is contended that the *Zafiro*, registered as a merchant ship, must be so regarded and can not be held to be a public ship for whose conduct the United States may be held liable. In support of that contention reference is made to a long line of cases as to the immunities of public ships, e.g., the *Exchange*, 7 Cranch, 116; the *Charkuch*, L. R. 4 Adm. & Eccl. 59; the *Parlement Belge*, 5 P. Div. 197; the *Guj Djemal*, 264 U.S. 90; the *Pesaro*, 277 Fed. Rep. 473; the *Attualità*, 238 Fed. Rep. 909. In addition counsel for the United States rely upon the seventh convention of the Second Hague Conference of 1907, and on the decisions of the United States Court of Claims in *Stovell v. United States*, 36 Ct. Cl. 392, and the Manila prize cases, 188 U.S. 254, in which, it is argued, the status of the *Nanshan* and the *Zafiro* was established.

We have no difficulty in distinguishing those cases from the one before us. The *Exchange* case had to do with the immunity of warships in foreign ports. So also the other cases first cited have to do with claims to immunity from process while in foreign ports. That is quite a different question from the one before us, which is not one of what immunity the *Zafiro* might have claimed in Hong Kong, but of what responsibility attaches to the United States for her action, in Manila Bay, where and while she was acting as a supply ship for Admiral Dewey's squadron, in the naval operations he was then and there conducting, and was under his orders through a naval officer put on board to carry them out. No such situation is presented in the cases cited. In the *Guj Djemal*, 264 U.S. 90, and *ex parte Hussein Lufti Bey*, 256 U.S. 616, the Turkish Government owned, possessed, and operated the vessel, but it was engaged in "ordinary commerce under charter to a private trader". It was held that the vessel could be libeled for services and supplies. In the *Pesaro*, 277 Fed. Rep. 473, the ship was owned by the Kingdom of Italy, was in possession of the Italian Government and was manned by a master, officers, and crew employed by a department of the Government. But it "was engaged in commercial trade, carrying passengers and goods for hire, and in such trade was not functioning in a naval or military capacity, or under the immediate direction of the department of the Italian Government having to do with military or naval affairs" (473-4). Even if the case before us were necessarily governed by the question whether immunity could have been claimed for the *Zafiro* in a foreign port, these decisions would not be in point. Even more is this true of the *Attualità*, 238 Fed. Rep. 909, where the crucial point, as the court decided, was to be found in the circumstance that the Italian Government was not in possession of the ship which it owned.

In the admirable opinion of Judge Mack in the *Pesaro*, 277 Fed. Rep. 473, 481, it is said: "If, as I believe, sound principles of admiralty jurisprudence require that a ship be treated as an entity separate and distinct from her owner, the immunity of a public ship should depend primarily, not upon her ownership, but upon the nature of the service in which she is engaged and the purpose for which she is employed." We agree. But if we carry this out and say that the liability of the State for her actions must depend upon the nature of the service in which she is engaged and the purpose for which she is employed, it is obvious that the case before us differs radically from all those which have been cited and on which the United States relies.

It may be conceded that the *Zafiro* does not meet all the requirements of "a converted merchantman" under convention VII of the Second Hague Conference of 1907. But the purpose of that convention was to distinguish

converted merchantmen from privateers and to give them a proper status as ships of war; not to cover such a case as that presented here.

As to the Manila prize cases, 188 U.S. 254, and *Stovell v. United States*, 36 Ct. Cl. 392, we think, when looked at critically, they go to sustain liability of the United States. One of the findings of the Court of Claims, affirmed by the Supreme Court of the United States, was: "The naval officer exercised control over the vessel and gave all orders concerning her. The merchant captain was merely his executive officer, being familiar with the crew" (188 U.S. 280). Another finding was: "the duty of the naval captain on said ship was to take general charge of the vessel, execute all orders from the flagship, controlling the movements of the *Nanshan* . . . but not to interfere with the internal management and discipline of the ship and such things as loading and unloading cargo" (id. 281). The question involved in those cases was whether the merchant officers of the *Nanshan* and *Zafiro* were entitled to prize money for ships taken in the battle of Manila. The District Court held that "the *Nanshan* and the *Zafiro*, not participating in any of said captures and not being armed vessels of the United States within signal distance of the vessel or vessels making the capture, under such circumstances and in such conditions as to be able to render effective aid if required, are not entitled to share in any of the prize money". (id. 282-3). The Court of Claims "held on the facts that the *Nanshan* was not at the battle of Manila in such a condition as to enable her to render effective aid if required; that she was performing the functions of a collier, to be protected instead of to act aggressively" (id. 282). These findings were approved and adopted. They are far from showing that the *Zafiro* at the time in question was a mere merchant ship for whose actions the United States would not be responsible.

From all the evidence we are of opinion that the *Zafiro* was a supply ship, acting in Manila Bay as a part of Admiral Dewey's force, and under his command through the naval officer on board for that purpose and the merchant officers in charge of the crew.

We have next to inquire whether at the time of the looting in question the Chinese crew were under discipline and officered so as to make the United States responsible, and to consider how far the United States would be chargeable for want of supervision by those who had or should have had the crew in charge under the circumstances.

It is well settled that we must distinguish between soldiers or sailors under the command of officers, on the one hand, and, on the other hand, bodies of straggling and marauding soldiers not under the command of an officer, or marauding sailors not under command or control of officers. Hayden's case, 3 Moore, International Arbitrations, 2985; case of Terry and Angus, Id. 2993; Mexican Claims, Id. 2996-7. These cases draw a very clear line between what is done by order or in the presence of an officer and what is done without the order or presence of an officer. But it is not necessary that an officer be on the very spot. In Donougho's case, 3 Moore, International Arbitrations, 3012, a Mexican magistrate called out a posse to enforce an order; but no responsible person was put in charge and the posse became a mob so that damage to foreigners resulted. The Mexican Government was held liable. In Rosario & Carmen Mining Company's claim, id. 3015, growing out of the same occurrences, Sir Edward Thornton relied in part on the culpable want of discretion shown by the magistrate who called out the posse in not putting it in charge of a proper person or being present himself "to restrain the violence of such an excited body of men". In Jeanneaud's Case, 3 Moore, International Arbitrations, 3001, a cotton gin belonging to neutrals was burned by volunteer soldiers who were in a state of excitement after a battle. The officers did not

use the ordinary means of military discipline to prevent it, and their government was held liable. In the Mexican claims, 3 Moore, International Arbitrations, 2996-7, a government was held liable where the officers failed to restrain such actions after having had notice thereof (see also Porter's case, Id. 2998). And in the case of Dunbar & Belknap, id. 2998, there was held to be liability where officers left the property of foreigners without protection when it was in obvious danger from their soldiers.

In the case before us, we think the officers were not actually present at the houses when the looting was done. After members of the crew brought some of the property upon the vessel, and one of the officers found where it came from, he went to the houses and took away some articles in order to preserve them for the owners. This is evidently what the Chinese witnesses have in mind when they charge the officers with looting; for one of the officers tells us that when he found the Chinese so interpreted his good offices, he desisted for the sake of good order. After the matter was drawn to the attention of the naval officers, the vessel was searched and the articles found on board were returned to the claimants. But the damage had been done. Moreover, Captain Whitton's statement that he "stopped anything he saw coming on board" gives the impression that he did not stop with sufficient promptitude the taking of things on land before they could come on board, after he found that plundering was going on. Without regard to this point, however, we feel that there was no effective control of the Chinese crew at the time when the real damage took place. When the *Zafiro* was tied up alongside the company's wharf, where the houses were, the naval officer and the merchant captain went off to look at the Spanish batteries, leaving the crew in charge of the first mate. The latter gave half of the crew leave to go ashore. Captain Whitton says significantly: "You know what Chinese are, especially these times." To let this crew go ashore where these houses were, with no one in charge of them, at a time when plunder and pillage were certain—and plunder and pillage by the Filipinos had been observed by all the officers—seems to us to have been highly culpable.

It was said in argument that a government is not responsible for what its sailors do when on shore leave. But we cannot agree that letting this Chinese crew go ashore uncontrolled at the time and place in question was like allowing shore leave to sailors in a policed port where social order is maintained by the ordinary agencies of government. Here the Spaniards had evacuated Cavite, and no one was in control except as the Navy controlled its own men. The nature of the crew, the absence of a régime of civil or military control ashore, and the situation of the neutral property, were circumstances calling for diligence on the part of those in charge of the Chinese crew to see to it that they were under control when they went ashore in a body. In Jeanneaud's case, 3 Moore, International Arbitrations, 3001, the unusual circumstances were dwelt upon. Here also what might have been proper enough under other circumstances became culpable under those which actually obtained. Had the officers been ashore with the crew, liability would be clear enough. But to let the crew go ashore uncontrolled, and thus to let them get out of the control that obtained when they were on the ship, seems to us in substance the same thing.

We think it clear that not all of the damage was done by the Chinese crew of the *Zafiro*. The evidence indicates that an unascertainable part was done by Filipino insurgents, and makes it likely that some part was done by the Chinese employees of the company. But we do not consider that the burden is on Great Britain to prove exactly what items of damage are chargeable to the *Zafiro*. As the Chinese crew of the *Zafiro* are shown to have participated to a

substantial extent and the part chargeable to unknown wrongdoers can not be identified, we are constrained to hold the United States liable for the whole.

In view, however, of our finding that a considerable, though unascertainable, part of the damage is not chargeable to the Chinese crew of the *Zafiro*, we hold that interest on the claims should not be allowed.

We award as follows: to D. Earnshaw, \$4,392 (Mexican); to A. Young, \$1,306.50 (Mexican); to G. Gilchrist, \$458 (Mexican).

---

LUZON SUGAR REFINING COMPANY, LIMITED (GREAT BRITAIN)  
v. UNITED STATES

(November 30, 1925. Page 586.)

---

NECESSARY WAR LOSSES, CONDUCT OF MILITARY OPERATIONS.—EVIDENCE: REPORT OF MILITARY COMMANDER. United States *held* not responsible for damage done by United States forces to plant of claimant in 1899 during Philippine insurrection; damage incident of military operations as shown by report of commanding United States general.

*Cross-references:* Am. J. Int. Law, vol. 20 (1926), p. 391; Annual Digest, 1925-1926, pp. 225-226.

*Bibliography:* Nielsen, p. 586; Annual Digest, 1925-1926, p. 226.

This is a claim for injury to the plant of the claimant during the Philippine insurrection. It appears that the insurgents entrenched about fifty yards on each side of the pumping station of the claimant and that during the operation of driving them out the plant was damaged by shells. It is clear from the report of General Otis that the damage was an incident of the military operations whereby the insurgents were driven from their capital. The foreign residents, whose property unhappily chanced to stand in the field of those operations, have no ground of complaint against the United States which had no choice but to conduct them where the enemy was to be found. No complaint is made that the troops were out of hand or did anything beyond what the operations necessarily involved.

Hence this claim must be rejected and we so decide.

---

J. PARSONS (GREAT BRITAIN) v. UNITED STATES

(November 30, 1925. Page 587.)

---

DESTRUCTION OF PRIVATE PROPERTY IN TIME OF WAR.—POLICE MEASURE.

United States *held* not responsible for destruction of stock of (poisonous) liquors directed by United States military authorities in 1899 during Philippine insurrection: matter of police.

*Cross-reference:* Am. J. Int. Law, vol. 20 (1926), p. 385.

*Bibliography:* Nielsen, p. 587.

This is a claim for the value of a stock of liquors destroyed by order of the Provost Marshal General, under authority of the Military Governor General, at Manila, during the Philippine insurrection. We are satisfied that the destruc-

tion was a matter of police entirely within the powers of the military government and quite justified by the circumstances. Hence, we hold that this claim must be rejected, and it is so decided.

## SUCCESSORS OF WILLIAM WEBSTER (UNITED STATES)

### *v.* GREAT BRITAIN

(December 12, 1925. Pages 540-546.)

**CESSION OF SOVEREIGNTY, ANNEXATION, SUCCESSION OF STATES: PRIVATE RIGHTS ACQUIRED PREVIOUS TO—** Purchase in 1836-1839 by Webster, United States citizen, of certain lands in New Zealand from native chiefs and tribes. Proclamation by Great Britain on January 14 and 29, 1840, of non-recognition of titles to land not derived from or confirmed by Queen. Cession of sovereignty on February 6, 1840, by native chiefs and tribes to Great Britain. Act of June 9, 1841, going less far than proclamations and establishing Crown Commission to examine titles derived from aborigines and recommend Crown grants in lieu thereof to maximum of 2,560 acres per claimant, unless more authorized by Governor and Council. Submission by Webster of his claims to Commission "willing to take his chance with all others". Crown grants made for about 42,000 acres. Claim for compensation presented before Tribunal on the ground that not all native titles were given effect.

**JURISDICTION, PRELIMINARY MOTION.** Preliminary objection to jurisdiction overruled since: (1) Tribunal unable to decide upon jurisdiction before full hearing of Cayuga Indians claim (see p. 173 *infra*), and (2) since according to rules of procedure award shall be delivered as soon as possible and Tribunal satisfied that claim must be rejected on its merits.

**INTERPRETATION OF (PRIMITIVE AND DEVELOPED) MUNICIPAL LAW.—EQUITY.** *Held* that under customary native law Webster acquired no more than titles of uncertain scope and content, not extending to full property (*dominium*). Differences listed with Burt's claim (see p. 93 *supra*). *Held* also that Act of June 9, 1841, instead of destroying Webster's imperfect native titles, gave him option of claiming them and insisting they be allowed, for what they were worth, on the basis of international law, or of exchanging them for better title derived from Crown to such lands as should be awarded him, and that he agreed to the latter. *Held* further not equitable that Webster, who was awarded more than sixteen times maximum, should receive full title to whole of large claimed areas.

**AWARENESS OF RISK.** *Held* that Webster must have known that native titles not marketable unless confirmed, established, or transformed, so that losses due to delay or uncertainty in confirming, etc. (proclamations of January 14 and 29, 1840), were risk of his speculation. Claim disallowed.

*Cross-references:* Am. J. Int. Law, vol. 20 (1926), pp. 391-397; Annual Digest, 1925-1926, pp. 83-84.

*Bibliography:* Nielsen, pp. 537-539; Annual Digest, 1925-1926, p. 84.

As described in the memorial, "this claim is for damages resulting from the denial of title to and loss of possession of certain lands in . . . New Zealand" as a consequence of what are claimed to have been "unwarranted and unjustifiable acts of the British authorities after the annexation by the British Crown".

It appears that William Webster, a citizen of the United States, who was engaged in trading with the native population of New Zealand, purchased from native chiefs and native tribes, between 1836 and 1839, large tracts of land, the extent of which is not clearly established. As shown by the claims lodged before the New Zealand Commission, they amounted to some 184,000 acres. As claimed in his applications to the American Government, they amounted to about 500,000 acres, of which he asserted he had "proved title to about 240,000 acres". The purchases were paid for chiefly in goods and merchandise, and he claims to have invested in this way about \$78,000. The New Zealand Land Commission found an outlay of a little less than \$40,000.

Webster was not the only person engaged in buying land from the natives at this time. Indeed, it appears that different land speculators, other than Webster, claimed to have bought in this way some 654,000 acres more than the whole area of the two principal islands. Hence, to avoid conflict and to prevent spoliation of the natives, it became necessary for some government to step in. This was done by the British Government when, in 1839, it commissioned Captain William Hobson, R.N., as Lieutenant Governor of New Zealand, and directed him to proclaim that Great Britain would "not acknowledge as valid any title to land, which either has been or shall hereafter be acquired in that country", unless derived from and confirmed by the crown. In pursuance thereof, on January 29, 1840, Captain Hobson made a proclamation in which, reciting that it was not intended to "dispossess the owners of any lands acquired on equitable conditions, and not in extent or otherwise prejudicial to the present or prospective interests of the community", he announced that the crown did not deem it "expedient to recognize any titles to land in New Zealand which are not derived from or confirmed by Her Majesty". A like proclamation had been made on January 14, 1840, by Sir George Gipps, Governor of New South Wales, to whose jurisdiction New Zealand had been added.

On February 6, 1840, Great Britain entered into a treaty with the native chiefs and tribes of New Zealand, called the Treaty of Waitangi, whereby sovereignty was ceded to the British Crown. The land laws of New South Wales were then extended to New Zealand, by an Act of August 4, 1840, and commissioners were appointed to examine and report on claims to land titles. On June 9, 1841, this Act was repealed, and an Act was passed by the Colony of New Zealand providing for a second commission to examine the titles derived from the aborigines and recommend grants in lieu thereof. This Act established a maximum of 2,560 acres for any one claimant, unless more was authorized expressly by the Governor and Council. After some correspondence with the American Consul at Sydney, New South Wales, and with the New Zealand authorities, Webster, on October 3, 1841, wrote to the Colonial Secretary: "I wish my claims to be laid before the Commissioners and am willing to take my chance with all others." Accordingly he submitted his claims to the Land Commission and ultimately he and his assignees were allowed about 42,000 acres, the difference being due partly to surveys and definite fixing of boundaries, partly to interpretation of native grants, partly to determination of the amount of the consideration paid by Webster in different conveyances, and partly to the insistence of the Home Government that the Colonial Government should not go too far in approving and allowing grants in excess of the maximum. The contention is that the several native grants should have been given effect as conveying to Webster a full and complete title by British law to their entire extent, and that his successors are entitled to compensation for the difference between the amount of land called for in the native grants and granted to him by the Crown.

A preliminary question was raised to the effect that this claim is barred by

article V of the convention between Great Britain and the United States, executed on February 8, 1853, and ratified on July 26, 1853. This question was argued to us in connection with the argument of a like question in the Cayuga Indians claim. We found upon that argument that some of the points involved were also involved in the Cayuga Indians claim, and felt unable to pass upon them with assurance until a more complete understanding of the latter could be had from a full hearing thereon. Hence we were constrained to overrule the preliminary objection, reserving power to decide the present case upon the point involved in the objection, should it ultimately appear proper to do so. At the hearing on the merits, counsel for Great Britain has once more urged this point upon us.

Rule 39 of the rules of procedure governing our proceedings reads: "The award of the Tribunal in respect to each claim shall be delivered at a public session of the Tribunal as soon after the hearing of such claim has been concluded as may be possible." We do not feel justified in passing on the question as to the effect of article V or the Convention of 1853 until after full argument of the Cayuga Indians claim. Nor, in view of rule 39, do we feel justified in delaying a decision of the present case until after that argument is concluded, since we are satisfied that, in any event, the claim now before us must be rejected on its merits.

Native land tenure in New Zealand prior to the annexation was the subject of an elaborate report to the Colonial Government in 1843. It is a subject upon which much has been written by local historians, in public documents, and by anthropologists and ethnologists. The native law was customary and in a low stage of development. The land was possessed and occupied by the tribe and separate cultivation seems to have given no more than what might be called a usufructuary interest. Alienation, in the sense in which it was understood by the white purchasers, was something quite new to the natives. There is some evidence that many of the tribes and chiefs supposed that they were giving purchasers no more than a sort of usufruct. As the sales to speculators were made mostly within five years before annexation and the bulk of Webster's purchases were within the year before Captain Hobson's proclamation, it is obvious that no specific customary law as to the manner or effect of these wholesale alienations of communal property could have grown up. In order to purchase land so held, so as even to obtain such title as was known to native law, was far from easy. It involved the collective interests of a large group, not always easy to ascertain, and called for representation of interests by persons whose authority was not always clear. Hence, before annexation purchases of land from the natives were the chief source of quarrels and disturbances. The first care of the Government after annexation was to put an end to this cause of conflict by establishing a definite régime of private property under British law instead of the indefinite régime of customary, collective tribal rights of occupation or possession and of uncertain titles by purchase from chiefs and tribes.

Conveyances from the native chiefs could give Webster no higher or different title than that which existed by native customary law. As has been said, it is, at least, very doubtful how far the customary communal or collective title to land involved more than a claim to occupation by the tribe. Nor is it clearly shown that the natives understood any such thing as *dominium* over land, as it is understood in developed law, or understood the sort of title, with its implications, which Webster asserts was conveyed to him.

It is argued that the title of the British Crown is derived from the same source as Webster's title. We cannot agree. All those who had any claim to represent the aboriginal natives, as politically organized, entered into a treaty

ceding sovereignty to Great Britain. The treaty ceded sovereignty in article I. In article II, possession was guaranteed to the chiefs and tribes in all which they possessed individually or collectively. This is a clear declaration of the nature of native property as it existed at the time of the cession. It is far from recognizing the sort of proprietary system which Webster's claim presupposes. In addition an exclusive right of pre-emption of lands was given to the Crown. This was a matter of sovereignty. It was a legal regulation of alienation, not a conveyance of property.

It is said that in this respect the present case is governed by the decision of this Tribunal in one of the Fiji land claims, namely, the claim of Rodney Burt, American-British claims arbitration, No. 44. But we think that case differs from the present case in three important respects. In the first place, in the Burt case there was a long period of transition from native customary law to the white man's law, as a result of which conflicting theories as to power to convey and the effect of conveyance grew up. The British Government deliberately committed itself to one of these theories, and that theory was the basis of Burt's claim. Secondly, Burt, who had what, under the decision of the Land Commissioners in his case, was a full and complete native title, was deprived of all rights although he had been in actual (not constructive) possession prior to the cession. He was not allowed even what the native grant, at the very least, must have given him, nor was he allowed any equivalent therefor. Thirdly, the provisions of the cession as to titles were very different from those in the present case. In the Burt case, in addition to the cession of sovereignty, there was a declaration that "the absolute proprietorship of all lands, not shown to be now alienated, so as to have become bona fide the property of Europeans, or other foreigners", subject to certain exceptions, should be the property of the Crown. In other words, the cession assumes a pre-existing régime of "absolute proprietorship" in land and of alienations whereby European purchasers had acquired such property rights. In the present case the cession recognizes nothing more than a régime of possession by chiefs and tribes.

It is argued further that Webster's title has the same basis as the title of the British Crown because the native grants to him were taken as extinguishing the native title and the surplus over the grants made to Webster by the Colonial Government was held to revert to the Crown. But we interpret differently the proceedings by which these grants were made and cannot accept this contention.

Our conclusion is that Webster acquired no more than a native customary title, the content and scope of which was very uncertain and can not be said to have extended to a full property or *dominium* as known to matured law.

We do not think that these customary titles were "destroyed" by the local legislation, as contended by the United States. The Act of August 4, 1840, setting up the first commission, provides that native titles not "allowed" by the Crown after investigation shall be void. It then provides for grants and prescribes a maximum grant to any claimant. The Act of June 9, 1841, setting up the second commission, provides that all lands validly sold by the aboriginal natives shall be vested in the Crown. But this is evidently for the purpose of adopting the common-law view that all lands are held of the Crown, and thus laying the foundation for a modern property régime in place of the native customary tenure. For the Act then provides how any person who had acquired title prior to annexation may obtain a grant in lieu of his purchase fixing a scale for judging what he had paid and a maximum grant for any grantee. True, it was not till 1865 that an allowance of customary titles as such was provided for. But we think Webster was given an option of claiming his customary title and insisting it be allowed, for what it was worth, on the basis of international law, or of exchanging it for a Crown grant in fee simple

under the terms of the statute of 1841. Obviously there was great advantage in the latter in that the title under the latter was marketable, while, after annexation, the customary title was not. Webster agreed to submit his claims to the Land Commission and "take his chances along with the rest". We think this means that he agreed to exchange his customary title for a title derived from the Crown to such lands as should be awarded him. In fact the maximum was not applied in his case. He was awarded more than 16 times that maximum. This feature of the case distinguishes it at once from the Burt case. After this exchange and these grants, which seem to have been the result of very careful investigation and of a disposition on the part of the commissioners and of the Governor to do Webster justice and to be governed by equity rather than by the strict terms of the statute, we do not think Webster had any just claim for further grants in fee simple. He had exchanged his customary title to the surplus for a better title to what was granted him. It does not seem to us equitable that for his customary title he should receive a full title by British law to the whole of the large areas which he claims. Even less would it have been equitable to award him full title by British law to the fullest possible extent of the indefinite boundaries which his conveyances from the native chiefs called for. He could not have been in actual possession of all of these tracts, nor were the limits of such possession as he had by any means clear. In these respects also the Burt case is very different.

As to one claim which Webster submitted to the Land Commission, it appeared that all the chiefs who should have joined were not parties to his conveyance. On this ground the Commission rejected his title. It is contended that he should have been allowed an undivided interest corresponding to that of those who joined. But, as we understand it, these customary titles were collective. The chiefs were in no sense tenants in common. Such title as there was, was in the collectivity. If the collectivity, or its representatives, acted there was an alienation. If not, less than the collectivity had nothing to convey. Such seems to have been the view of the Commission, and we see no reason to think that their view of native tenures was erroneous.

It is said that the "threat" in the instructions of the British Government to Captain Hobson in 1839—and in the proclamation of Sir George Gipps, prior to annexation, that the Crown would not acknowledge as valid titles not derived from or confirmed by a grant from the Crown—destroyed the value of Webster's property. But the statutes after annexation did not go as far as these proclamations. The proclamations deprived him of nothing. If it is claimed that they injured the marketability of his property (which he had acquired as a speculation, not in order to settle thereon), the answer is that he must have known that, in order to be marketable, the title would ultimately need some kind of confirmation or establishment or some kind of transformation into the sort of title known to developed law. The titles obtained from native chiefs under customary law were not like those under consideration in *United States v. Percheman*, 7 Peters 51, 86-87. Those were titles to land in Florida under Spanish law. They were full and complete, giving a *dominium*, as well understood from Roman times in continental Europe and in lands settled therefrom. In the present case, losses due to delay or uncertainty in confirming or establishing the titles, or to deductions in exchange for a full and marketable title under British law, were a risk of Webster's speculation.

We are, therefore, of opinion that this claim should be rejected, and we so decide.

---

CUNNINGHAM AND THOMPSON COMPANY AND OTHERS (GREAT BRITAIN) *v.* UNITED STATES

(*Fishing Claims, Group I.*)

COMMERCIAL ACTIVITIES OF FOREIGN FISHING VESSELS IN TERRITORIAL WATERS. —INTERPRETATION OF TREATY; *RES JUDICATA*.—LIGHT DUES, CUSTOMS DUTIES, SHIPS' EQUIPMENT.—POSTPONEMENT OF AWARD: AGREEMENT BETWEEN AGENTS. Exaction by Newfoundland between 1897 and 1910 of light dues, customs duties, etc., from American fishing vessels engaged, according to Great Britain, in commercial activities in Newfoundland territorial waters. *Held* that purchase of herring by American fishing vessels from independent fishermen in Newfoundland territorial waters is not exercise of fishing privilege belonging to United States under Anglo-American Treaty of October 20, 1818, and that disposing of fishing outfit and gear by such vessels in said waters to Newfoundland fishermen as part of their compensation is not one of customary means and methods reasonably necessary to exercise of that privilege. *Held* also that question of hiring men by American fishing vessels in Newfoundland waters answered by Permanent Court of Arbitration in North Atlantic Coast Fisheries Arbitration and that, on the basis of this arbitration, American vessels were engaged in trading. Determination of recoverable amounts postponed in view of possible agreement between agents. Exemption of ships' equipment. Award made pursuant to agreement between agents.

*Cross-reference:* Am. J. Int. Law, vol. 20 (1926), pp. 397-399.

*Bibliography:* Nielsen, pp. 554-564.

(*Decision, November 6, 1925. Pages 565-566.*)

These are claims for refund of light dues, customs duties, and other charges levied upon vessels engaged, as claimed by the United States, in herring fishing at Bay of Islands and other places upon what, for convenience, may be called the Treaty Coast of Newfoundland. The answer of Great Britain sets up that the vessels in question were exercising commercial privileges by (*a*) purchasing herring; (*b*) hiring men in Newfoundland waters; and (*c*) "selling goods in Newfoundland to employees".

As to the first contention, there is a mass of conflicting evidence on the one hand as to the course pursued by particular American vessels which are claimants, and on the other hand as to the practice of American vessels generally in the herring fishery on the Treaty Coast. Partly the contention involves questions of fact and of the legal interpretation of the facts when found. In part it involves the questions of law raised by the second contention. There can be no doubt that purchase of herring from independent fishermen in Newfoundland waters could not be regarded as an exercise of the fishing privilege belonging to the United States, under the Treaty of 1818. But, for reasons which will appear presently, we do not deem it necessary, with respect to each vessel in question, to determine as a fact whether it was fishing or was buying herring on each occasion for which claim is made.

We think the questions raised by the second contention are disposed of in the answers to the first and second questions in the award of the Permanent Court of Arbitration at The Hague in the North Atlantic Coast Fisheries arbitration.

It remains to consider the third contention.

Under the answer of the Permanent Court of Arbitration at The Hague to the seventh question in the North Atlantic Coast Fisheries arbitration, an American vessel could not exercise fishing privileges and commercial privileges on the same voyage. As to any voyage there must be wholly and purely fishing activities or the vessel must be regarded as trading. Concession of the fishing privilege in the Treaty of 1818 carried with it tacitly (or by implication) the privilege of doing such things as are reasonably necessary to its exercise in view of the nature of the fishery to be carried on. It is contended, on behalf of the United States, that the privilege extends to all customary means and methods of carrying on the fishery. But in our opinion this is true only provided and to the extent that the customary means and methods are reasonably necessary to the exercise of the fishing privilege. We consider that the disposing of fishing outfit and gear to Newfoundland fishermen in Newfoundland waters as a part of their compensation, such outfit and gear remaining their property after use in the employment and entering into the general stock of the country, was not a reasonably necessary mode of or incident of exercising the fishing privilege and must be held to have been trading.

So far as appears, it was quite enough to have given out outfit and gear for the purpose of fishing while in the employ of the vessel, charging it might be for outfit and gear lost or destroyed. A payment or part payment in outfit and gear, so as to come into competition with the trade of Newfoundland in such articles, was not necessary nor was it reasonable. There is nothing to show that an arrangement whereby the outfit and gear, so far as unconsumed, should remain the property of the vessel, was not perfectly feasible and reasonable. There is evidence that Newfoundland fishermen, who employed servants and fished independently, provided nets in this way.

As all the American vessels pursuing the herring fishery on the Treaty Coast regularly disposed of gear and outfit to Newfoundland fisherman so as to leave such articles (if unconsumed) in Newfoundland as the property of those fishermen, we must hold that all of the claimant vessels, at all the times in question, were to that extent engaged in trading and hence were not exclusively exercising fishing privileges.

It is assumed that the agents of the respective parties will be able to agree upon the amounts recoverable in view of the foregoing findings. If not, the Tribunal will proceed to determine them.

*(Order, November 9, 1925. Page 567.)*

With respect to barrels and salt, which went back upon the ships on which they came, were not landed, and were used solely to transport the fish obtained, we are of opinion that they were part of the ships' equipment and were not subject to duty.

*(Award, December, 22 1925. Page 567.)*

The agent for the United States and the associate agent for Great Britain having reached an agreement concerning the amounts to be paid to the United States in the fishing claims in Group I, conformably to the decision of the Tribunal with respect to these claims rendered on November 6, 1925, and the order made with respect to them on November 9, 1925, the Tribunal awards the following sums in these claims pursuant to this agreement:

<i>Number of claim</i>	<i>Name of claimant</i>	<i>Amount \$</i>
45	Cunningham & Thompson Company . . . . .	1,093.70
46	Representatives of Fred L. Davis, deceased . . . . .	452.38
47	Representative of William Parsons, deceased . . . . .	390.95
48	Gorton-Pew Fisheries Company . . . . .	1,089.50
49	Representative of William H. Jordan, deceased . . . . .	37.50
50	Orlando Merchant . . . . .	831.00
51	Representative of Jerome McDonald, deceased . . . . .	304.24
52	John Pew & Son . . . . .	106.62
53	Gorton-Pew Fisheries Company, successor to D. B. Smith & Company . . . . .	882.85
54	Sylvanus Smith & Company, Inc. . . . .	228.23
55	Representative of John Chisholm, deceased . . . . .	249.08
56	Carl C. Young . . . . .	406.70
57	Hugh Parkhurst & Company . . . . .	121.41
58	Almon D. Malloch . . . . .	139.47
59	Thomas M. Nicholson . . . . .	364.44
63	Lemuel E. Spinney . . . . .	151.10
64	William H. Thomas . . . . .	130.56
65	Frank H. Hall . . . . .	56.38
66	M. Walen & Son, Inc. . . . .	313.85
67	Atlantic Maritime Co. . . . .	267.90
68	Waldo I. Wonson . . . . .	341.22
70	Henry Atwood . . . . .	21.00
71	Fred Thompson . . . . .	19.92
TOTAL		\$ 8,000.00

## CAYUGA INDIANS (GREAT BRITAIN) *v.* UNITED STATES

*(January 22, 1926. Pages 307-331.)*

TREATY (CONTRACT) WITH INDIAN TRIBE.—SUBJECTS OF INTERNATIONAL LAW.—LEGAL STATUS, PROTECTING POWER, NATIONALITY, MIGRATION OF INDIAN TRIBE.—RIGHT OF PROTECTING POWER TO SUE. Removal in 1784 of considerable portion of Cayuga Nation, a tribe of the Six Nations, from Buffalo Creek, New York, to Grand River, Canada. Conclusion in 1789, 1790, and 1795 of treaties between New York State and Cayuga Nation: cession of lands to New York State against annuity of \$1,800 forever to the Nation to be paid at Canandaigua, Ontario County, Canada. Payment of annuity to Cayugas living in Canada until 1810, and from then on to Cayugas living in United States. War of 1812 (War of Independence), in which Cayugas in United States and those in Canada took part on side of United States and of Great Britain, respectively. Conclusion in 1814 of Treaty of Ghent between United States and Great Britain obliging United States to restore to Indians with whom it had been at war "all the possessions, rights, and privileges which they may have enjoyed or been entitled to" in 1811 before war (article IX). Presentation of claim before Tribunal for: (1) whole amount of annuity from 1810 to the present; or (2), alternatively, for proportion of

annuity for past and future to be ascertained by reference to numbers of Cayugas in United States and in Canada for the time being. *Held* that Indian tribe is not a legal unit of international law and is a legal unit only in so far as law of sovereign nation within whose territory it occupies land recognizes it; that, at Revolution, New York State, not the United States, succeeded to British Crown as protecting power of Cayuga Nation; that, hence, Cayuga Nation with which New York State contracted, so far as it was a legal unit, was a legal unit of New York law and at the date at which claim arose had not British nationality; and that, therefore, Great Britain can not maintain claim for whole annuity. *Held* also that, though migration does not affect national character of Indian tribe, Canadian Cayugas are British nationals and Great Britain, therefore, is entitled to maintain claim for them.

**ABANDONMENT OF RIGHTS.** *Held* that Canadian Cayugas did not by their emigration surrender all claim or interest in annuity and property: by Treaty of 1789, after removal to Canada, the United States guaranteed their lands to Six Nations, and principal signers of Treaty of 1795 and of annuity receipts from 1795 to 1810 were Canadian Cayugas.

**INTERPRETATION OF TREATY: SUBSTANCE AND FORM, APPARENT MEANING, RULE OF EFFECTIVENESS.—GROUNDS OF DECISION: PRINCIPLES OF INTERNATIONAL LAW, EQUITY, JUSTICE, FAIR DEALING.** *Held* that claim is within purview of Treaty of Ghent: article IX of this Treaty, construed on elementary principle of justice requiring to look at substance, not form, has in view Indians who, like Canadian Cayugas, substantially participate in division of money; and that, according to general and universally recognized principles of justice and fair dealing, and especially since article 7 of Special Agreement of 18 August 1910 (see p. 10 *supra*) provides that decision shall be made "in accordance with . . . the principles of international law and of equity", anomalous and hard situation of Cayugas, to whom was a covenant with tribe and posterity what was a covenant with legal unit that might and came to be but fraction of whole, gave rise, when tribe divided, to claim of Canadian Cayugas to proportionate share of annuity, and that such share ought to have been paid to them from 1810 to present time (ample discussion of grounds of decision as stipulated in different treaties); and that the same follows from article IX, Treaty of Ghent, which is not only a "nominal" provision, not intended to have any definite application: apparent meaning, interpretation so as to give relevant clause a meaning rather than so as to deprive it of meaning.

**MOMENT AT WHICH CLAIM ARISES.—STATE CONTRACTS AND FEDERAL LIABILITY.—DENIAL OF JUSTICE.** *Held* that claim not barred by article V, Claims Convention 1853 ("every claim upon either Government arising out of any transaction of a date prior to the exchange of the ratifications of the present convention"): (1) earliest date at which claim against United States can be said to have accrued is 1860 when, New York State having definitely refused to recognize claims of Canadian Cayugas based upon Treaty of 1795 (a contract of New York State, giving no rise to Federal liability in case of non-fulfilment), the matter was brought to attention of United States authorities, and they failed to carry out article IX, Treaty of Ghent; (2) in 1853 there had not, as yet, been denial of justice by United States.

**PERSONS UNDER DISABILITY: GENERAL PRINCIPLES OF JUSTICE CONCERNING PRESCRIPTION, STATUTES OF LIMITATION, LACHES.—LACHES OF PROTECTING POWER, GOOD FAITH, EQUITY.—INTEREST.** *Held* that, on the general principles of justice concerning prescription, statutes of limitation, and laches in relation

to persons under disability, dependent Indians are not to lose just claims through laches of protecting sovereign unless there has been so complete and bona fide change of position in consequence of that laches as to require such result in equity; and that, in equity, payments made by New York State from 1811 to 1849, when claim of Canadian Cayugas presented to New York legislature, should stand as made, and interest on share of Canadian Cayugas in past installments from 1849 should be denied.

**JURISDICTION: MONEY AWARD, DECLARATORY JUDGMENT.—DAMAGES: ACCURATE DETERMINATION, MAXIM THAT EQUALITY IS EQUITY.** *Held* that 'Tribunal has jurisdiction to render money award only, no declaratory judgment concerning rights for the future; and that money award should, therefore, contain two elements: (1) share in payments from 1849; (2) capital sum yielding income equal to half of annuity for future (in the absence of accurate data concerning relative numbers of Cayugas in United States and Canada, Tribunal applies maxim that equality is equity). Award made for \$100,000.

*Cross-references:* Am. J. Int. Law, vol. 20 (1926), pp. 574-594; Annual Digest, 1925-1926, pp. 203, 206, 237-238, 246.

*Bibliography:* Nielsen, pp. 203-306, Annual Digest, 1925-1926, pp. 203-204, 206-207, 238, 246.

This is a claim of Great Britain, on behalf of the Cayuga Indians in Canada, against the United States by virtue of certain treaties between the State of New York and the Cayuga Nation in 1789, 1790, and 1795, and the Treaty of 1814 between the United States and Great Britain known as the Treaty of Ghent.

At the time of the American Revolution, the Cayugas, a tribe of the Six Nations or Iroquois, occupied that part of Central New York lying about Cayuga Lake. During the Revolution, the Cayugas took the side of Great Britain, and as a result their territory was invaded and laid waste by Continental troops. Thereupon the greater part of the tribe removed to Buffalo Creek and after 1784 a considerable portion removed thence to the Grand River in Canada. By 1790 the majority of the tribe were probably in Canada. In 1789 the State of New York entered into a treaty with the Cayugas who remained at Cayuga Lake, recognized as the Cayuga Nation, whereby the latter ceded the lands formerly occupied by the tribe to New York and the latter covenanted to pay an annuity of \$500 to the nation. In this treaty a reservation at Cayuga Lake was provided for. As there was much dissatisfaction with this treaty on the part of the Indians, who asserted that they were not properly represented, it was confirmed by a subsequent treaty in 1790 and finally by one in 1795, executed by the principal chiefs and warriors both from Buffalo Creek and from the Grand River. By the terms of the latter treaty, in which, as we hold, the covenants of the prior treaties were merged, the State covenanted, among other things, with the "Cayuga Nation" to pay to the said "Cayuga Nation" eighteen hundred dollars a year forever thereafter, at Canandaigua, in Ontario County, the money to be paid to "the Agent of Indian Affairs under the United States for the time being, residing within this State" and, if there was no such agent, then to a person to be appointed by the Governor. Such agent or person appointed by the Governor was to pay the money to the "Cayuga Nation", taking the receipt of the nation and also a receipt on the counterpart of the treaty, left in the possession of the Indians, according to a prescribed form. By this treaty the reservation provided for in the Treaty of 1789 was sold to the State.

There are receipts upon the counterpart of the Treaty of 1795 down to and including 1809, and these receipts and the receipt for 1810, retained by New

York, show that the only persons who can be identified among those to whom the money was paid, and the only persons who can be shown to have held prominent positions in the tribe, were then living in Canada. In 1811 an entire change appears. From that time a new set of names, of quite different character, appear on the receipts retained by New York. From that time there are no receipts upon the counterpart. Since that time, it is conceded, no part of the moneys paid under the treaty has come in any way to the Cayugas in Canada, but the whole has been paid to Cayugas in the United States, and since 1829 in accordance with treaties in which the Canadian Cayugas had no part or in accordance with legislation of New York. The claim is: (1) that the Cayugas in Canada, who assert that they have kept up their tribal organization and undoubtedly have included in their number the principal personages of the tribe according to its original organization, are the "Cayuga Nation", covenantees in the Treaty of 1795, and that as such they, or Great Britain on their behalf, should receive the whole amount of the annuity from 1810 to the present. In this connexion it is argued that the covenant could only be discharged by payment to those in possession of the counterpart of the treaty and indorsement of a receipt thereon, as in the treaty prescribed; (2) in the alternative, that the Canadian Cayugas, as a part of the posterity of the original nation, and numerically the greater part, have a proportion of the annuity for the future and a proportion of the payments since 1810, to be ascertained by reference to the relative numbers in the United States and in Canada for the time being.

As the occasion of the change that took place in and after 1811 was the division of the tribe at the time of the War of 1812, those in the United States and those in Canada taking the part of the United States and of Great Britain, respectively, Great Britain invokes article IX of the Treaty of Ghent, by which the United States agreed to restore to the Indians with whom that Government had been at war "all the possessions, rights, and privileges which they may have enjoyed or been entitled to" in 1811 before the war.

Great Britain can not maintain a claim as for the Cayuga Nation for the whole annuity since 1810 and for the future. In order to maintain such a claim, it would be necessary to establish the British nationality of the obligee at the date at which the claim arose. The settled doctrine on this point is well stated by Little, Commissioner, in *Abbiatti's case*, 3 Moore, *International Arbitrations*, 2347-8. See also *Mexican claims*, 2 *id.* 1353; *Dimond's case*, 3 *id.* 2386-8. The obligee was the "Cayuga Nation", an Indian tribe. Such a tribe is not a legal unit of international law. The American Indians have never been so regarded, 1 Hyde, *International Law*, para. 10. From the time of the discovery of America the Indian tribes have been treated as under the exclusive protection of the power which by discovery or conquest or cession held the land which they occupied. Wheaton, *International Law*, 838; 3 Kent, *Commentaries*, 386; *Breaux v. Jones*, 4 La. Ann. 141. They have been said to be "domestic, dependent nations" (Marshall, C. J., in *Cherokee Nation v. Georgia*, 5 Pet. 1, 17), or "States in a certain domestic sense and for certain municipal purposes" (Clifford, J., in *Holden v. Joy*, 17 Wall. 211, 142). The power which had sovereignty over the land has always been held the sole judge of its relations with the tribes within its domain. The rights in this respect acquired by discovery have been held exclusive. "No other power could interpose between them" (Marshall, C. J., in *Johnson v. McIntosh*, 8 Wheat. 543, 578). So far as an Indian tribe exists as a legal unit, it is by virtue of the domestic law of the sovereign nation within whose territory the tribe occupies the land, and so far only as that law recognizes it. Before the Revolution all the lands of the Six Nations in New York had been put under the Crown as "appendant to the

Colony of New York", and that colony had dealt with those tribes exclusively as under its protection (Baldwin, J., in *Cherokee Nation v. Georgia*, 5 Pet. 1, 34-35). New York, not the United States, succeeded to the British Crown in this respect at the Revolution. Hence the "Cayuga Nation", with which the State of New York contracted in 1789, 1790 and 1795, so far as it was a legal unit, was a legal unit of New York law.

If the matter rested here, we should have to say that the Legislature of New York was competent to decide, as it did in the treaties of 1829 and 1831, what constituted the "Nation", for the purposes of the prior treaties made by the State with an entity in a domestic sense of its own law and existing only for its own municipal purposes.

It does not follow, however, that Great Britain may not maintain a claim on behalf of the Cayuga Indians in Canada. These Indians are British Nationals. They have been settled in Canada, under the protection of Great Britain and, subsequently, of the Dominion of Canada, since the end of the eighteenth or early years of the nineteenth century. There was no definite political constitution of the Cayuga Nation, and it is impossible to say with legal precision just what would constitute a migration of the nation as a legal and political entity. But as an entity of New York law, it could not migrate. "Nationality is the status of a person in relation to the tie binding such person to a particular sovereign nation." Parker, Umpire, in Administrative Decision No. 5, Mixed Claims Commission, United States and Germany, October 31, 1924, 25 Am. Journ. Int. Law, 612, 625. The Cayuga Nation, as it existed as a legal unit by New York law, could not change its national character, without any concurrence by New York, and become, while preserving its identity as the covenantee in the treaty, a legal unit of and by British law. The legal character and status of the New York entity with which New York contracted was a matter of New York law. Moreover, the situation of the Cayuga Nation is very different from that of an ordinary corporation, which has no small margin of self-determination. Such a legal unit cannot change its national character by its own act. See North and South American Construction Company's case, 3 Moore, International Arbitrations, 2318, 2319. Even less is such a thing possible in the case of an Indian tribe, whose dependent condition is as well settled as its legal position is anomalous. Such tribes are "in a state of pupilage" (Marshall, C. J., in *Cherokee Nation v. Georgia*, 5 Pet. 1, 17). They have always been "subject to such restraints and qualified control in their national capacity as was considered by the whites to be indispensable to their own safety and requisite to the due discharge of the duty of protection" (3 Kent, Commentaries, 386). In the case of Indians on the public domain of the United States, they are "the wards of the Nation. They are communities dependent on the United States" (Miller, J., in *United States v. Kagama*, 118 U.S. 375, 383-4). With respect to Indians, the Government "is *in loco parentis*" (Nisbet, J., in *Howell v. Fountain*, 3 Ga. 176).

When the Cayugas divided, some going to Canada and some remaining in New York, and when that cleavage became permanent in consequence of the War of 1812, Great Britain might, if it seemed desirable, treat the Canadian Cayugas as a unit of British law or might deal with them individually as British nationals. Those Indians were permanently established on British soil and under British jurisdiction. They were and are dependent upon Great Britain or later upon Canada, as the New York Cayugas were dependent on and wards of New York. If, therefore, the Canadian Cayugas have a just claim, according to "the principles of international law and of equity", Great Britain is entitled to maintain it.

That, as a matter of justice the Canadian Cayugas have such a claim, has

been the opinion of every one who has carefully and impartially investigated their case. In 1849, the Commissioners of the Land Office, to whom the Legislature of New York had referred a memorial of "the chiefs and warriors of the Cayuga Indians residing in Canada West", reported in their favor and urged a "just distribution" of the annuity. This commission was composed of the then Lieutenant Governor, Secretary of State, Comptroller, Treasurer, and State Engineer and Surveyor of New York (N.Y. Assembly, Doc. 1849, vol. 3, No. 165). Afterwards the claim was considered in detail by the General Term of the Supreme Court of New York in *People v. Board of Commissioners of the Land Office*, 44 Hun. 588. That tribunal pointed out that we "ought not to permit words such as 'sovereign states', 'treaties', and the like to conceal the real facts". The substance of the matter was that New York agreed to pay the then Cayuga Indians and their posterity, and on the division of the tribe the annuity ought to have been apportioned as, indeed, was done when the New York Cayugas afterward divided. It is true the judgment in this case was reversed by the Court of Appeals. But the reversal was upon jurisdictional grounds in no way affecting the views of the Supreme Court upon the merits of the claim. Nor can we examine the evidence and come to any other conclusion than that as a matter of right and justice such an apportionment should have been and ought to be made.

In the report of the Committee of the New York Senate, in 1890, that committee was governed by two propositions of law, one that the Canadian Cayugas by their emigration "surrendered all claim or interest in the annuity funds and property of said Cayuga Nation of Indians", the other, that the claim was not within the purview of the Treaty of Ghent (N.Y. Senate Doc. No. 73, 1890). But the first cannot be maintained in view of the circumstances that the United States guaranteed their lands to the Six Nations in 1789 after the removal to the Grand River in 1784, and that the principal signers of the Treaty of 1795 and most of those who receipted for the annuities on behalf of the Nation from 1795 to 1810 were Cayugas who had so emigrated. As to the second, we do not so construe the Treaty of Ghent. The committee relies on the form of payment to the nation as an entity. The word "enjoy" in the treaty, as we think, refers to the substantial participation in the division of the money. If New York did not follow the treaty as to production of and receipt on the counterpart, the State was bound to see that those who ought to have the money were those who got it. Both in this report and in the opinion of Judge O'Brien, then Attorney-General of New York, in 1884 (memorial, vol. III, p. 777), the circumstance that the Canadian Cayugas had taken part with Great Britain in the War of 1812 is evidently regarded as a ground of excluding them from any share in the annuity. So also the letter of Commissioner Bissell (memorial, vol. III, p. 793) gives this reason. But it is obviously untenable, and it was expressly stated on behalf of the United States at the hearing that no such defense is urged. It is evident that both the committee and the Attorney-General go upon the form of the covenant and the legal authority of New York to determine what shall be recognized as the Cayuga Nation. They do not deny the merit of the claim. This is palpably true of the decision of the New York Court of Appeals in *Cayuga Nation v. State*, 99 N.Y. 235.

It cannot be doubted that until the Cayugas permanently divided, all the sachems and warriors, wherever they lived, whether at Cayuga Lake, Buffalo Creek, or the Grand River in Canada, were regarded as entitled to and did share in the money paid on the annuity. Indeed, it is reasonably certain that the larger number and the more important of those who signed the Treaty of 1795 were then, or were soon thereafter, permanently established in Canada. It is clear that the greater number and more important of those who signed the

annuity receipts from the date of the treaty until 1810 were Canadian Cayugas. We find the person through whom, by the terms of the treaty, the money was to be paid, writing to the Governor of New York in 1797 that the Canadian Cayugas had not received their fair proportion in a previous payment and proposing to make the sum up to them at the next payment. Everything indicates that down to the division the money was regarded as payable to and was paid to and divided among the Cayugas as a people. The claim of the Canadian Cayugas, who are in fact the greater part of that people, is founded in the elementary principle of justice that requires us to look at the substance and not stick in the bark of the legal form.

But there are special circumstances making the equitable claim of the Canadian Cayugas especially strong.

In the first place, the Cayuga Nation has no international status. As has been said, it existed as a legal unit only by New York law. It was a *de facto* unit, but *de jure* was only what Great Britain chose to recognize as to the Cayugas who moved to Canada and what New York recognized as to the Cayugas in New York or in their relations with New York. As to the annuities, therefore, the Cayugas were a unit of New York law, so far as New York law chose to make them one. When the tribe divided, this anomalous and hard situation gave rise to obvious claims according to universally recognized principles of justice.

In the second place, we must bear in mind the dependent legal position of the individual Cayugas. Legally, they could do nothing except under the guardianship of some sovereign. They could not determine what should be the nation, nor even whether there should be a nation legally. New York continued to deal with the New York Cayugas as a "nation". Great Britain dealt with the Canadian Cayugas as individuals. The very language of the treaty was in this sense imposed on them. What to them was a covenant with the people of the tribe and its posterity had to be put into legal terms of a covenant with a legal unit that might and did come to be but a fraction of the whole. American courts have agreed from the beginning in pronouncing the position of the Indians an anomalous one (Miller, J., in *United States v. Kagama*, 118 U.S. 375, 381). When a situation legally so anomalous is presented, recourse must be had to generally recognized principles of justice and fair dealing in order to determine the rights of the individuals involved. The same considerations of equity that have repeatedly been invoked by the courts where strict regard to the legal personality of a corporation would lead to inequitable results or to results contrary to legal policy, may be invoked here. In such cases courts have not hesitated to look behind the legal person and consider the human individuals who were the real beneficiaries. Those considerations are even more cogent where we are dealing with Indians in a state of pupilage toward the sovereign with whom they were treating.

There is the more warrant for so doing under the terms of the treaty by virtue of which we are sitting. It provides that decision shall be made in accordance with principles of international law and of equity. Mériqnac considers that an arbitral tribunal is justified in reaching a decision on universally recognized principles of justice where the terms of submission are silent as to the grounds of decision and even where the grounds of decision are expressed to be the "principles of international law". He considers, however, that the appropriate formula is that "international law is to be applied with equity" (*Traité théorique et pratique de l'arbitrage international*, para. 303). It is significant that the present treaty uses the phrase "principles of international law and equity". When used in a general arbitration treaty, this can only mean to provide for the possibility of anomalous cases such as the present.

An examination of the provisions of arbitration treaties shows a recognition that something more than the strict law must be used in the grounds of decision of arbitral tribunals in certain cases; that there are cases in which—like the courts of the land—these tribunals must find the grounds of decision, must find the right and the law, in general considerations of justice, equity and right dealing, guided by legal analogies and by the spirit and received principles of international law. Such an examination shows also that much discrimination has been used in including or not including “equity” among the grounds of decision provided for. In general, it is used regularly in general claims arbitration treaties. As a general proposition, it is not used where special questions are referred for arbitration.

Three arbitration treaties between Great Britain and the United States contain provision for decision in accordance with “equity” or “justice”: the Claims Convention of 1853, article I (1 Malloy, *Treaties*, 664), using the words “according to justice and equity”; the Claims Convention of 1896, article II (1 Malloy, 766), calling for “a just decision”; and the Agreement for Pecuniary Claims Arbitration, 1910, article VII (3 Malloy, 2619), prescribing decision “in accordance with treaty rights, and with the principles of international law and of equity”. These are general claims arbitrations. They should be contrasted with the arbitration agreements between Great Britain and the United States in which there is no provision for equity as one of the grounds of decision. Articles IV, V and VI of the Treaty of Ghent provide for arbitration as to the islands on the Maine boundary, as to the north-eastern boundary, and as to the river and lake boundary. The arbitrators are to decide “according to such evidence as shall be laid before them”. Here the questions were of fact only. Hence in an arbitration of specific questions, all provision as to equity is omitted. So also in the Regulations for the Mixed Courts of Justice under the Treaty of April 7, 1862 (1 Malloy, 681), article I, the arbitrators are to “act in all their decisions in pursuance of the stipulations of the aforesaid treaty”. This was a special tribunal under a treaty for abolition of the slave trade. The contrast with the provisions of the treaties for general claims arbitrations is noteworthy. So also in the Fur Seal Arbitration Convention of 1892 (1 Malloy, 746), articles II, VI; the Alaskan Boundary Convention, 1903 (1 Malloy, 787), articles I, III, IV; and the Agreement for the North Atlantic Coast Fisheries Arbitration (1 Malloy, 835), article I. In each of these, certain specific questions were submitted. These agreements are either silent as to the grounds of decision or provide simply for a fair and impartial consideration.

In some of the arbitration agreements between Great Britain and the United States it has happened that clauses of both types have been included in one treaty. Thus, in the Jay Treaty of 1794, article V has to do with arbitration of the Maine boundary. In that matter the arbitrators are to decide “according to such evidence as shall . . . be laid before them”. But article VII, providing for arbitration of claims, requires a decision “according to the merits of the several cases, and to justice, equity, and the law of nations”. (1 Moore, *International Arbitrations*, 5,321.) Again in the Treaty of Washington, 1871, art. XXXIV and following, providing for arbitration of the San Juan water boundary, call for decision “in accordance with the true interpretation of the Treaty of June 15, 1846”. 1 Moore, *International Arbitrations*, 227. Also in the same treaty, article VI, submitting the Alabama claims, provides three carefully formulated rules, agreed on expressly by the parties, and requires decision by those rules and “such principles of international law, not inconsistent therewith, as the arbitrators shall determine to have been applicable to the case”. So also in article II, as to claims governed by rules agreed upon, the arbitrators are to examine and decide “impartially and carefully”. On the

other hand, in article XXIII, providing for the arbitration of fishing claims, the decision is to be "according to justice and equity" (1 Malloy, 710, 714). Here the careful discrimination, according to the subject matter dealt with in the several articles of the same treaty, speaks for itself.

Arbitration treaties of and with Latin American countries before 1910 (the date of the treaty here in question) tell the same story. Of these, some provide for decision according to international law, equity (or justice) and treaty provisions. Such are (with slightly varying language): Arbitration Convention between the United States and Mexico, 1839, 1 Malloy, 1101, art. IV (arbitration of claims); Ecuador-United States, 1862, 13 St. L. 631; Peru-United States, 1863, 13 St. L. 639, art. III; United States-Venezuela, 1866, 13 St. L. 713, art. I; Mexico-United States, 1868, 1 Malloy, 1128, art. I; Guatemala-Mexico, 1888, 71 Br. & For. State Pap. 255, art. IV; United States-Venezuela, 1892, 28 St. L. 1183, art. III; Chile-United States, 1892, 27 St. L. 965, art. IV; Guatemala-Honduras, 1895, 77 Br. & For. State Pap. 530, art. VI; Mexico-Venezuela, 1903, Manning, *Arbitration Treaties among the American States*, 343, art. I (arbitration of all pending claims); Brazil-Peru, 1904, U.S. Foreign Relations, 1904, p. 111, art. III (General claims arbitration); Argentina-Brazil, 1905, 3 Am. Journ. Int. Law, Suppl. p. 1, art. X (General arbitration); Brazil-Peru, 1909, Manning, 450, art. IX (General arbitration). It will be noted that these words are used where no specific claims are in question, but there is a general arbitration of claims of all kinds. In other cases the treaty speaks only of justice and equity. Such are: Costa Rica-Nicaragua, 1854, Manning, 31, art. III; New Granada-United States, 1857, 1 Malloy, 319, art. I; Chile-United States, 1858, 12 St. L. 1083; Paraguay-United States, 1857, Manning, 145, art. II; Costa Rica-United States, 1860, 12 St. L. 1135, art. II; Peru-United States, 1868, 16 St. L. 751, art. I; Chile-Peru, 1868, Manning, 78; United States-Venezuela, 1886, Manning, 150, art. VI; Mexico-United States, 1902, 32 St. L. 1916; Brazil-United States, 1902, U.S. Treaty Series, No. 413, art. I. Here it is significant that eight of the ten are arbitrations between the United States and Latin American States, in which, because of the difference in legal systems and technique of decision, it was expedient to give some latitude to the Tribunal. In this connexion the treaty between the United States and Venezuela in 1903 (U.S. Treaty Series, No. 420) is especially significant. It requires decision "upon a basis of absolute equity, without regard to objections of a technical character or of the provisions of local legislation" (as to what this meant, see Ralston, *International Arbitral Law and Procedure*, 69-71). In other cases, the language shows that the arbitrator was to be no more than an *amiable compositeur*: Honduras-Salvador, 1880, Manning, 1115, art. V ("just and expedient"); Honduras-Nicaragua, 1894, Manning, 211, art. II (5); Honduras-Salvador, 1895, Manning, 216, art. II; Chile-United States, 1909, U.S. Treaty Series, No. 535 1/2 ("as an *amiable compositeur*").

In the treaties cited, to which the United States has been a party, it will be noted how discriminatingly the language is chosen. How can it be said that the phrase "principles of equity" is of no significance when the different phrases are shown to have been so carefully chosen to fit different occasions?

This conclusion is borne out even more when we examine the arbitration treaties of and with the Latin American States in which no reference is made to equity. In some of these no reference is made to grounds of decision: Mexico-United States, 1897, 30 St. L. 1593 (a limited arbitration of specific issues of law and fact raised by prior diplomatic correspondence); Peru-United States, 1898, U.S. Treaty Series, No. 286 (limited arbitrations of the amount of indemnity only—all other questions excluded); Haiti-United States, 1899, Manning, 282 (special agreement to submit one claim of a citizen of the United

States to one of the Justices of the Supreme Court of the United States); Guatemala-United States, 1900. Manning, 288, art. I (refers "questions of law and fact" as to one specific claim); Nicaragua-United States, 1900. 2 Malloy, 1290 (reference to specific claims, as to the amount of indemnity only—question of liability expressly excluded); Salvador-United States, 1901, U.S. Treaty Series, No. 400 (specific claims, the issues having already been defined by diplomatic correspondence); Dominican Republic-United States, 1902, Manning, 320 (special arbitration of one claim on defined points); Dominican Republic—United States, U.S. Treaty Series, No. 417 (special arbitration as to terms of payment of agreed indemnity). In each of these cases the United States was a party, and the nature of the arbitration shows why it is that reference to general grounds of decision was omitted.

In another type of case provision is made for decision according to international law or "public law" and treaties. Such a case is: Colombia-United States, 1874, 1 Foreign Rel. U.S. 427, art. II (but here these general grounds were supplemented by special stipulations). In another type, the grounds of decision are expressly restricted to "the rules of international law existing at the time of the transactions complained of": Haiti-United States, 1884, 23 St. L. 785, art. IV (reference of two special claims of citizens of the United States to one of the Justices of the Supreme Court of the United States; naturally it was sought to restrict the scope of his choice of grounds of decision). In another group of treaties, the decision is to be "according to the principles of international law". Such are: Brazil-Chile, 1899, Manning, 259, art. V; Argentina-Uruguay, 1899, 94 Br. & For. State Pap. 525, art. X; Argentina-Paraguay, 1899, 92 Id. 485, art. X; Argentina-Bolivia, 1902, Manning 316, art. X; Argentina-Chile, 1902, Manning, 328, art. VIII; Costa Rica-Guatemala-Honduras-Nicaragua-Salvador, 1907, 100 Br. & For. States Pap. 836, art. XXI (treaty establishing the Central American Court of Justice as a Permanent Court of Arbitration). But these treaties (except the last) add that the terms of submission may otherwise provide, thus taking care of the possibility of anomalous situations. One treaty, Bolivia-Peru, 1901, 3 Am. J. Int. Law, Suppl. 378, art. VIII, requires "strict obedience to the principles of international law". In another type of this species of treaty there is minute specification of the exact grounds of decision. Such are Bolivia-Peru, 1902, Manning, 334; Costa Rica-Panama, 1910, 6 Am. J. Int. Law, Suppl. p. 1. Each is a boundary arbitration.

In these treaties of and with Latin American States, as in the case of treaties between Great Britain and the United States, it happens sometimes that different provisions as to the grounds of decision are made in different articles of the same treaty. Thus: Colombia-Ecuador, 1884, Manning, 140 (art. I, "impartiality and justice", art. II, "in accordance with the principles of international law and the legal principles established by analogous modern tribunals of high authority"); Ecuador-United States, 1893, 28 St. L. 1205 (art. II (*b*) "under the law of nations", art. IV, such damages "as may be just and equitable"—an arbitration of one specified claim); United States-Venezuela, 1908, U.S. Treaty Series, No. 522 1/2 (art. I "under the principles of international law", art. II whether "manifest injustice" was done, art. III "on its merits in justice and equity", art. V "in accordance with justice and equity"). This different language for different situations speaks for itself. It should be said also that the language of treaties with Continental Powers, both prior and subsequent to 1910, to which the United States is a party, entirely sustains the conclusions to which the examination of the treaties with Great Britain and with Latin-American States must lead (see United States-Norway, 1921, 3 Malloy, 2749, art. I; Allied Powers-Germany, 1920, 3 Malloy, 3469, art.

299 (b); Allied Powers-Hungary. 1921, 3 Malloy, 3644, art. 234 (b); United States-Great Britain-Portugal, 1891, 2 Malloy, 1460, art. 1; United States-Germany-Great Britain. 1899, 2 Malloy, 1589, art. I.)

Under the first and second Hague Conventions for the Pacific Settlement of International Disputes (32 St. L. 1779, art. XLVIII; 36 St. L. 2199, art. LXXIII) there is to be a special *compromis* in each arbitration which is to provide as to the basis of decision. But wide powers of determining the basis of decision are insured by art. 48. Also art. 38 of the Statute of the Permanent Court of International Justice (1920) provides specially that the Court may decide *ex æquo et bono*, if the parties agree thereto. As Anzilotti points out, however, that much-criticized provision is meant for cases such as we have seen above, which call, not for principles of equity, but for a degree of compromise (Anzilotti, *Corso di diritto internazionale*, 64 (1923)). Such a power is not necessarily non-judicial, as Magyary asserts (*Die internationale Schiedsgerichtsbarkeit im Völkerbunde*, 151-2 (1922)). But it is a different thing from what we invoke in the present case, namely, general and universally admitted principles of justice and right dealing, as against the harsh operation of strict doctrines of legal personality in an anomalous situation for which such doctrines were not devised and the harsh operation of the legal terminology of a covenant which the covenantees had no part in framing and no capacity to understand. It is enough to cite the opinions of Mérignhac (*Traité théorique et pratique de l'arbitrage international*, paras. 294-305); Bulmerincq (*Die Staatsstreitigkeiten und ihre Entscheidung ohne Krieg*, para. 11; Holtzendorff, *Handbuch des Völkerrechts*, VI, 42); and Lammasch (*Die Lehre von der Schiedsgerichtsbarkeit in ihrem ganzen Umfange*, II, 179-181, 185).

It remains to consider the United States-Norway Arbitration Award, 1922. (17 Am. J. Int. Law, 362, ff.) By article I of the agreement under which that award was made, the decision was to be "in accordance with the principles of law and equity". The meaning of this phrase is discussed on pages 383-385. Construing article LXXIII of The Hague Convention for the Settlement of International Disputes (1907) and article XXXVII of the Convention of 1908, the Tribunal considers, rightly, as we conceive, that the word *droit*, as used in those articles has a broader meaning than that of "law" in English, in its restricted sense of an aggregate of rules of law. It quotes Lammasch to the effect that the arbitrator should "decide in accordance with equity, *ex æquo et bono*, when positive rules of law are lacking". It then says of the words "law and equity" in the agreement under which it was sitting: "The majority of international lawyers seem to agree that these words are to be understood to mean general principles of justice as distinguished from any particular system of jurisprudence or the municipal law of any State" (p. 384). Not only is this the weight of opinion, but it is amply borne out by the language of arbitration treaties as adapted to the different sorts of arbitration and the types of questions which they present. The letter of Secretary Hughes to the Norwegian Minister, of date February 26, 1923 (17 Am. J. Int. Law, 287-289), in which he protests as to certain features of the awards, challenges the rule of international law found by the Tribunal and applied to the case. But it does not contest or refer to the Tribunal's construction of the words "law and equity", as used in the agreement; nor do we think that construction is open to question. Our conclusion on this branch of the cause is that, according to general and universally recognized principles of justice and the analogy of the way in which English and American courts, on proper occasions, look behind what in such cases they call "the corporate fiction" in the interests of justice or of the policy of the law (*Daimler Company, Ltd., v. Continental Tyre and Rubber Company, Ltd.* [1916] 2 A.C. 307, 315-316, 338 ff; 1 Cook (Corporations, 8 ed., para. 2)),

on the division of the Cayuga Nation the Cayuga Indians permanently settled in Canada became entitled to their proportionate share of the annuity and that such share ought to have been paid to them from 1810 to the present time.

But it is not necessary to rest the case upon this proposition. It may be rested upon the strict legal basis of article IX of the Treaty of Ghent, and in our judgment is to be decided by the application of that covenant to the equitable claim of the Canadian Cayugas to their share in the annuity.

Article IX of the Treaty of Ghent, so far as material, reads as follows: "The United States of America engage to put an end, immediately after the ratification of the present treaty, to hostilities with all the tribes or nations of Indians with whom they may be at war at the time of such ratification; and forthwith to restore to such tribes or nations, respectively, all the possessions, rights, and privileges which they may have enjoyed or been entitled to in one thousand eight hundred and eleven, previous to such hostilities." The former portion of this covenant clearly refers to the Indian tribes on the public domain of the United States known then as the Western Indians, and was so construed by the United States, which proceeded to make special treaties of peace with those tribes. On its face the remainder of the covenant seems to apply squarely to the Canadian Cayugas, who had been actually in the receipt and enjoyment of their share of the annuity from the Treaty of 1795 down to the eve of the war of 1812. In the answer of the United States there is an elaborate and ingenious argument, based upon the history of the negotiations leading to article IX, on the basis of which we are asked to hold that the article was only a "nominal" provision, not intended to have any definite application. We can not agree to such an interpretation. Nothing is better settled, as a canon of interpretation in all systems of law, than that a clause must be so interpreted as to give it a meaning rather than so as to deprive it of meaning. We are not asked to choose between possible meanings. We are asked to reject the apparent meaning and to hold that the provision has no meaning. This we cannot do. We think the covenant in article IX of the Treaty of Ghent must be construed as a promise to restore the Cayugas in Canada who claimed to be a tribe or nation and had been in the war as such, to the position in which they were prior to the division of the nation at the outbreak of the war. It was a promise to restore the situation in which they received their share of the money covenanted to be paid to the original undivided nation. There are but two alternatives, each quite inadmissible under every day rules of interpretation. One is that the promise has no meaning but was, as it was urged in argument, a provision inserted to save the face of the negotiators. The other is that the tribe or nation must be taken to be the entity of New York law, not the Canadian Cayugas as British nationals. As to this interpretation, the remark of Chief Justice Fuller, in *Burthe v. Dennis*, 133 U.S. 514, 520-21 is pertinent. He says: "It would be a remarkable thing, and we think without precedent in the history of diplomacy for the Government of the United States to make a treaty with another country to indemnify its own citizens for injuries received from its own officers". It would be no less strange and unprecedented for the United States to covenant with another power to restore the rights of its own nationals under its exclusive protection. In order to give this portion of the article any meaning, we must take it to promise that the Indians who had gone to Canada and had sided with Great Britain on the splitting up of the original nation, were to be put in the *status quo* as of 1811, even if legally the New York Cayuga organization was now the nation for the strict legal purposes of the covenant in the Treaty of 1795.

In 1843, in a letter to the then Governor of New York, written on behalf of the New York Cayugas with reference to the division of the annuity between

the Cayugas remaining in New York and those who had gone to the West, Peter Wilson, an educated Cayuga, and one of the Sachems of the New York nation, said: "The emigrating party of the New York Cayugas have invited the Canadian Indians to come over and accompany them to the western country, and we are apprehensive they will represent these as composing a part of their party having claims to the moneys of the Cayuga Nation arising from the annuities of the State of New York, which claim we do not recognize". Further on he adds: "We wish your excellency distinctly to understand that the Cayugas residing in a foreign country, to wit, Canada, have no just or legal claim to any part of the annuities arising from this State". Here, in its original form, the objection of the New York Cayugas to participation by the Canadian Cayugas rests on the proposition, obviously inadmissible, if for no other reason, in view of art. IX of the Treaty of Ghent, that the Canadian Cayugas reside in a foreign country. Six years later (1849), when the Canadian Cayugas were pressing their claim to a share before the Legislature of New York, the objection was rested on the ground of an agreement at the time of the division of the nation, whereby, to use Wilson's own words "It was mutually agreed that thereafter they should no longer participate in the annuities or emoluments flowing from the governments they were to oppose; but each division should take the whole from the government to which it is allied . . . that all property and interest on the British side should belong to the British Indians, while the property and interests on the American side must be the sole property of the American Iroquois". This is a plausible theory and, urged dramatically and with much detail of circumstance in Wilson's speech in 1849, it has undoubtedly played a controlling part in the subsequent denials of the claims of the Canadian Cayugas. But without adverting to the mystery that surrounds the speech itself, for it is not established that it was ever delivered, and conceding certain circumstances that appear to confirm it, we are of opinion that it has no foundation beyond the admitted division of the nation on the eve of the War of 1812, and the fact that during and after that war the Canadian Cayugas did not participate in the division of the payments. In reality the circumstances do not go beyond this. If there had been more, Wilson certainly would have said so in 1843. His letter of that date is too prolix to justify an assumption that he left out anything he knew that had a bearing on his case. Certainly he would not have left out the one conclusive argument in his armoury. Moreover, it ought to have been possible to establish a point of such importance by something more than the assertion in Wilson's speech. The only other evidence is a statement in a report of the Committee on Indian Affairs to the Senate of New York, in 1849, that the Council in which "that agreement was made, if any", had been graphically described to the committee by an Onondaga chief. It is clear enough from the whole report that the committee, at the least, was skeptical as to the alleged agreement. Certainly the whole conduct of the Canadian Cayugas from the conclusion of the War of 1812 was inconsistent with it. We are satisfied that they held the counterpart of the Treaty of 1795 from a time soon after its execution to the present, when they produce it before us. There is clear evidence that after 1815 their chiefs made repeated visits to New York, claiming a share and vouching their possession of the counterpart upon which, by the terms of the treaty, receipts for payment were to be indorsed. Almost immediately upon the close of the war they urged upon the British Colonial Office that they were no longer receiving their share of the annuity, as they had received it before the war. In 1819 they discussed their claim in a council and considered retaining counsel to present it. In 1849 they presented it by petition to the Legislature of New York, and continued to press it at intervals from that time. No one but Wilson testifies (if his speech may be called testimony)

to the agreement of partition. His speech, in many of its details, is palpably erroneous. The circumstances and the conduct of the parties are at variance with it. It cannot be that, if this solid and conclusive ground for excluding the Canadian Cayugas had existed, the ground of excluding them from a share in the annuity would have been doubtful in 1849.

We have next to consider whether the claim of Great Britain, on behalf of the Canadian Cayugas, that the latter should share in the payments of the annuity covenanted to be paid to the original Cayuga Nation, is barred by article V of the Claims Convention of 1853. That article reads:

"The High Contracting Parties engage to consider the result of the proceedings of this commission as a full, perfect, and final settlement of every claim upon either Government arising out of any transaction of a date prior to the exchange of the ratifications of the present convention; and further engage that every such claim, whether or not the same may have been presented to the notice of, made, presented, or laid before the said commission, shall from and after the conclusion of the proceedings of the said commission, be considered and treated as finally settled, barred, and thenceforth inadmissible."

On behalf of Great Britain it is contended that article V must be construed in connexion with article I and II. The United States, on the other hand, contends that article V is complete and unambiguous and hence calls for no interpretation, but must be applied according to its plain terms.

It will be noted that in order to be barred the claim must have: (1) "arisen": and (2) arisen out of "transactions" prior to the ratification of the convention. No doubt the Treaty of 1795, the division of the Cayuga Nation, and the Treaty of Ghent are "transactions" prior to 1853. But if no claim against the United States had "arisen" in 1853, there was no claim to be barred by the terms of article V, which does not purport to apply and certainly ought not to be construed as applying to claims to arise in the future, even if in part out of past transactions. If, as the United States insists, we must apply the language of article V as it stands, the word "arise" is quite as important as the word "transactions", and we must look to the transactions that are decisive for the "arising" of the claim, as one cognizable before an international tribunal, in order to determine whether the claim before us is barred.

What, then, are the grounds on which liability of the United States must be based, and what is the date of the "transactions" from which a claim "arises" in which that liability may be asserted?

First, we must ask whether the United States would be liable directly and immediately on the basis of the Treaty of 1795. It has been urged upon us that the United States would be liable upon that treaty on three grounds: (1) that the treaty is legally a Federal, not a New York, treaty, made in the presence of a Federal Indian agent; (2) that the treaty has to do with a matter of exclusively Federal cognizance, under the Constitution of the United States, and so must be presumed to have been executed under competent Federal authority, since the alternative would be that the treaty would be void; (3) that in any event the interest of the United States in the treaty, as one dealing with a matter of Federal cognizance under the Constitution of the United States, is such as to make the United States directly and immediately liable upon the treaty, even if it is the contract of the State of New York.

We are unable to assent to any of these propositions. Neither in form nor in substance was the Treaty of 1795 a Federal treaty; it was a contract of New York with respect to a matter as to which New York was fully competent to contract. In form it is exclusively a New York contract. The negotiators derived their authority from the State Legislature and purported to represent the State only. The United States does not appear anywhere in the negotia-

tions nor in the treaty. The United States Indian agent, who was present, at the request of the Indians because they had confidence in him, appears as a witness in his personal, not his official, capacity. Nor was the subject matter one of Federal cognizance. The title of the Cayuga Indians, one of occupation only, had been extinguished by the Treaty of 1789, which ceded the Lands of the Cayugas to New York, providing for a reservation which, we think, must be taken to have been held of New York by the Nation. It is argued that the language of the treaty is rather that of a common law reservation, so that the reserved land was reserved out of the grant. As to this, we are satisfied with the observations of Gray, J., in *Jones v. Meehan*, 175 U.S. 1, 11: "The Indians . . . are a weak and dependent people who have no written language and are wholly unfamiliar with all the forms of legale xpression, and whose only knowledge of the terms in which the treaty is framed is that imparted to them by the interpreter . . . ; the treaty must therefore be construed not according to the technical meaning of the words to learned lawyers, but in the sense in which they would naturally be understood by the Indians". We think the treaty meant to set up an Indian reservation, not to reserve the land from the operation of the cession. Such a construction is indicated by Marshall C. J., in *Cherokee Nation v. Georgia*, 5 Pet. 1, 17.

That treaty (1789) was made at a time when New York had authority to make it, as successor to the Colony of New York and to the British Crown. Long before the Revolution, the country of the Six Nations had been treated as "appendent to the government of New York" (*Baldwin, J. in Cherokee Nation v. Georgia*, 5 Pet. 1, 35). It was for the Legislature of New York to say who could bind the Cayuga Nation as a New York entity. The subsequent treaties of 1790 and 1795 purported simply to confirm the original treaty and were made because of dissatisfaction of the Indians, not because of any legal invalidity. The cases cited to us with respect to Indians on the public domain of the United States or on lands relinquished by some or other of the original thirteen States are not in point. The distinction is made clear in Dana's note to Wheaton, *Elements of International Law*, para. 38 (8 ed. 60). He says: "It is important to notice the underlying fact that the title to all lands occupied by the Indian tribes *beyond the limits of the thirteen original States*, is in the United States. The Republic acquired it by the treaties of peace with Great Britain, by cessions from France and Spain, and by *relinquishments from the several States*" (see also *Seneca Nation v. Appleby*, 127 App. Div. 770). The title of New York here was independent of and anterior to the Federal Constitution. At the time of the Treaty of 1795, the Cayuga Indians held the reservation of New York and the dealings of New York with the Cayuga Nation as a New York entity and with respect to lands held of New York were a matter for that State only (see Marshall, C. J., in *Cherokee Nation v. Georgia*, 5 Pet. 1, 16-18; Nelson, J. in *Fellows v. Blacksmith*, 19 How. 366, 369; 3 Kent, Commentaries, 380-386; Beecher v. Wetherbee, 95 U.S. 517, 525 and State decisions there cited; *Seneca Nation v. Christie*, 126 N.Y. 122; *Jemison v. Bell Telephone Co.*, 186 N.Y. 493, 498).

We must hold that the Treaty of 1795 was a contract of the State of New York and that it was not a contract on a matter of Federal concern or in which the Federal Government had an interest. Indeed, the fact that it has stood unchallenged as a New York contract for over a century and that New York has gone on for the whole of that time dealing with the provisions of the treaty and with the legal position of the Cayuga Nation as matters of New York law, speaks for itself. This Tribunal cannot know more as to what is a Federal treaty and what a New York treaty than the United States and the State of New York.

If the Treaty of 1795 is a contract of the State of New York, the United States would not be liable merely on the basis of a failure of New York to perform a

covenant to pay money. This proposition is established by repeated decisions of international tribunals: Thornton, Umpire, in Nolan's case, 4 Moore, International Arbitrations, 3484; Thompson's case, *ibid.*; Bainbridge, commissioner, in La Guaira Electric Light and Power Company's case; Ralston, Venezuela Arbitrations of 1903, 178, 181-2; Thomson-Houston Electric Company's case, *id.* 168-9; Schweitzer *v.* United States, 21 Ct. Cl. 303; Florida Bond Cases, 4 Moore, International Arbitrations, 3594, 3608-12. In the case last cited there is a full discussion by Bates, Umpire. See also Ralston, International Arbitral Law and Procedure, paras, 457-467, pp. 217-221; Borchard, Diplomatic Protection of Citizens Abroad, 200. Two *dicta*, cited to the contrary on the argument, are readily distinguishable. What is said in the Montijo, 2 Moore, International Arbitrations, 1421, 1439, had no reference to a contract of a State of a Federal union creating a debt of that State. There was a violation of a Federal treaty. And the letter of Secretary Fish, 6 Moore, Digest of International Law, 815-816, had reference to injuries to persons and property by the State authorities, not to Federal liability for debts incurred by the contract of a State.

In the cases in which a Federal government has been held upon the contract of a State, there has been: (1) an immediate connexion of the Federal government with the contract as a participant therein; or (2) an assumption thereof or of liability therefor; or (3) a connexion therewith as beneficiary, whether in the inception or as beneficiary of the performance, in whole or in part; or (4) some direct Federal interest therein. The United States is in no such relation to and had no such connexion with or interest in the contract of New York with the Cayuga Nation.

Liability of the United States must, therefore, be grounded upon article IX of the Treaty of Ghent, in which the United States covenanted that the Indians should be restored to the position in which they were before the War of 1812, and hence that they should share in the annuity, as they did before the war. That liability, in our opinion, did not accrue until, New York having definitely refused to recognize the claims of the Canadian Cayuga, the matter was brought to the attention of the authorities of the United States, and that Government did nothing to carry out the treaty provision. That situation and the Treaty of Ghent are the transactions out of which the claim arises. The earliest date at which the claim can be said to have accrued, as a claim against the United States under international law, is 1860.

In municipal law, failure of a promisor to perform gives rise to a cause of action than and there, without more. But it is otherwise when one State steps in to assert a claim against another State because the latter is in default with respect to some performance promised to a national of the former. "In the estimation of statesmen and jurists, international law is probably not regarded as denouncing the failure of a State to keep such a promise, until there has been a refusal either to adjudicate wholly the claim arising from the breach or, following an adjudication, to heed the adverse decision of a domestic court. Upon the happening of either of those events, the denial of justice is regarded as first apparent. Then there is seen a failure to respect a duty of jurisdiction which is distinct from the breach of the contract and subsequent to it in point of time." 1 Hyde, International Law, para 303, pp. 546-7. See to the same effect decisions cited in Ralston, International Arbitral Law and Procedure, para. 37, pp. 27-29; 6 Moore, Digest of International Law, para. 916, pp. 285-9; 1 Westlake, International Law 331-334.

Even in 1860, the Government of the United States referred the Indians to New York. Certainly in 1853, when it was by no means clear that something might not yet be done by the Legislature of New York, an international tribunal would have said that, while there might have been a breach of the covenant,

there had not as yet been a denial of justice by the United States. For these reasons we hold that the claim is not barred by article V of the Convention of 1853.

It is urged on behalf of the United States that the claim should be held to be barred by laches. There is no doubt that there has been laches on the part of Great Britain. The claim of the Canadian Cayugas to share in the annuity payments was brought to the attention of the British Colonial Office immediately after the War of 1812, and within a few years thereafter was repeatedly urged upon the Deputy Superintendent General of Indian Affairs in Canada. Yet it was not until 1899 that the British Minister at Washington presented the claim to the State Department of the United States. Also it must be conceded that the case is not as if New York had withheld the money entirely. That State had paid the whole amount of the annuity each year, in reliance upon its authority to decide who constituted the "Cayuga Nation". There is much to be said for an equity in favor of New York as to payments before the claim of the Canadian Cayugas was presented to the legislature of that State, in 1849. But no laches can be imputed to the Canadian Cayugas, who in every way open to them have pressed their claim to share in the annuities continuously and persistently since 1816. In view of their dependent position, their claim ought not to be defeated by the delay of the British Government in urging the matter on their behalf. Nor can New York be said to have been prejudiced by the delay after 1849, at which time the facts of the case had been brought to the notice of the legislature and a public commission had recommended that justice be done. On the general principles of justice on which it is held in the civil law that prescription does not run against those who are unable to act, on which in English-speaking countries persons under disability are excepted from the operation of statutes of limitation, and on which English and American Courts of Equity refuse to impute laches to persons under disability, we must hold that dependent Indians, not free to act except through the appointed agencies of a sovereign which has a complete and exclusive protectorate over them, are not to lose their just claims through the laches of that sovereign, unless at least there has been so complete and bona fide change of position in consequence of that laches as to require such a result in equity. In the present case by no possibility can there be said to have been a change of position without notice after 1849. Under all the circumstances, we think it will be enough to deny interest on the share of the Canadian Cayugas in past installments of the annuity and to let the payments from 1811 to 1849 stand as made.

By the third prayer of the Memorial, Great Britain seeks a declaration that the Canadian Cayugas are entitled to the annuity for the future. Great Britain, for reasons already stated, is not entitled to such a declaration. Nor have we jurisdiction to make a declaration that the Canadian Cayugas are entitled to share in the annuity for the future. Our powers are limited to a money award, and we must consider how we may frame a money award so as to give effect by that means to the substantive rights of the parties and reach a just result. Accordingly we think the award should contain two elements: (1) an amount equal to a just share in the payments of the annuity from 1849; (2) a capital sum which at 5 % interest will yield half of the amount of the annuity for the future. If by means of an award the United States is held to pay these sums, we think that Government will have been required to perform the covenant in article IX of the Treaty of Ghent so far as specific performance may be achieved through a money award. The Canadian Cayugas are in a legal condition of pupillage. A sum in the hands of their *quasi* guardian sufficient to pay their share of the annuities for the future will fully protect them and give them what they are entitled to under the Treaty of Ghent.

In explanation of the way in which we have arrived at the amount of the award, we may say that as to the second element we have taken a sum sufficient to yield an income equal to half of the annuity because the evidence is too uncertain and controversial and the relative numbers fluctuate too much to permit of an exact proportion. Hence, in the absence of any clear mathematical basis of distribution, we proceed upon the maximum that equality is equity. In view of all the evidence we are satisfied that it is not New York nor the United States that will suffer by reason of any margin of error. As to the first element, as it is palpable that in any possible reckoning the Canadian Cayugas have always been numerically much more than half the tribe, we feel that we should be quite justified in awarding sixty per cent of the payments after 1849. But out of abundant caution and in view of the fact that New York actually paid out the whole amount each year under claim of right, we fix the whole amount, including both the elements above set forth, at one hundred thousand dollars.

We award one hundred thousand dollars.

PART II

TRIPARTITE CLAIMS COMMISSION (UNITED  
STATES, AUSTRIA AND HUNGARY)  
CONSTITUTED UNDER THE AGREEMENT OF  
NOVEMBER 26, 1924



**PARTIES: United States of America, Austria, Hungary.**

---

**SPECIAL AGREEMENT: November 26, 1924.**

---

**COMMISSIONER: Edwin B. Parker (United States of America).**

---

**REPORT: Tripartite Claims Commission (United States, Austria and Hungary), Final Report of Commissioner and Decisions and Opinions (October 15, 1929). (U.S. Government Printing Office, Washington, 1933.)**



## HISTORICAL NOTE

When the Peace Treaties of Saint-Germain-en-Laye and Trianon, concluded between the Allied Powers and Austria on September 10, 1919, and between the same Powers and Hungary on June 4, 1920, had not been ratified by the United States, special treaties between the United States and Austria and Hungary were signed at Vienna and Budapest on August 24 and August 29, 1921, respectively, in which several provisions of the Treaties of Saint-Germain and Trianon were incorporated by reference. The Treaties of Vienna and Budapest secured to the United States and its nationals rights specified under a joint resolution of the Congress of the United States of July 2, 1921. They became effective on November 8 and December 17, 1921.

On November 26, 1924, a tripartite agreement was signed at Washington between the United States and Austria and Hungary. Article I of the Agreement which came into effect on December 12, 1925, provided for the selection of a Commissioner to pass upon most of the claims for losses, damages or injuries suffered by the United States or its nationals embraced within the terms of the Treaties of Vienna and Budapest and to determine the amounts to be paid to the United States by Austria and Hungary in satisfaction of all such claims. In pursuance of this provision, the Tripartite Claims Commission was established, consisting of Mr. Edwin B. Parker as sole Commissioner.

The Tripartite Claims Commission entered upon its duties on January 25, 1926. In the course of its 32 formal meetings, all held in Washington, D.C., it disposed of the claims presented. It concluded its judicial activities on May 11, 1929, in so far as Austria was concerned, and on September 27, 1929, with regard to Hungary.

The United States not having adopted the clearing system contemplated in the Treaties of Saint-Germain and Trianon, many claims presented before the Commission were settled out of court by the interested parties and subsequently withdrawn. This, and the fact that few reparation claims were filed, explains the small amount of decisions rendered by the Commission and the small total of its awards, i.e., \$370,032.14 against Austria and \$172,619.70 against Hungary, including interest.



## BIBLIOGRAPHY

- Agreement of November 26, 1924: L.N.T.S., vol. 48, p. 70; U.S. Treaty Ser., No. 730; State Papers, vol. 120, p. 57; de Martens, N.R.G., 3rd series, Vol. 15, p. 230.
- Friedensrecht. Ein Nachrichtenblatt über die Durchführung des Friedensvertrages enthaltend die Verlautbarungen des österreichischen Abrechnungsamtes, vols. 1-9 (Wien, 1921-1930).
- Ernst Prossinagg, Bericht des Sektionsrates Dr. —, österreichischer Staatsvertreter bei der Tripartite Claims Commission United States, Austria and Hungary errichtet durch das Übereinkommen zwischen Österreich, den Vereinigten Staaten von Amerika und Ungarn vom 26. November 1924 (Wien, 1929, Druck der Österreichischen Staatsdruckerei).
- Robert W. Bonyngé, Report of—, Agent of the United States before the Tripartite Claims Commission (United States, Austria, and Hungary), established under the Agreement which became effective December 12, 1925, between the United States, Austria and Hungary (United States Government Printing Office, Washington, 1930).
- Tripartite Claims Commission (United States, Austria and Hungary), Final Report of Commissioner and Decisions and Opinions (October 15, 1925) (U.S. Government Printing Office, 1933).



### Agreement

AGREEMENT BETWEEN THE UNITED STATES AND AUSTRIA  
AND HUNGARY FOR THE DETERMINATION OF THE AMOUNTS  
TO BE PAID BY AUSTRIA AND BY HUNGARY IN SATISFACTION  
OF THEIR OBLIGATIONS UNDER THE TREATIES CONCLUDED  
BY THE UNITED STATES WITH AUSTRIA ON AUGUST 24, 1921,  
AND WITH HUNGARY ON AUGUST 29, 1921

*Signed November 26, 1924, ratifications exchanged December 12, 1925<sup>1</sup>*

The United States of America and the Republic of Austria, hereafter described as Austria, and the Kingdom of Hungary, hereafter described as Hungary, being desirous of determining the amounts to be paid by Austria and by Hungary in satisfaction of their obligations under the treaties concluded by the United States with Austria on August 24, 1921, and with Hungary on August 29, 1921, which secure to the United States and its nationals rights specified under a joint resolution of the Congress of the United States of July 2, 1921, including rights under the Treaties of St. Germain-en-Laye and Trianon, respectively, have resolved to submit the questions for decision to a commissioner and have appointed as their plenipotentiaries to sign an agreement for that purpose:

The President of the United States of America, Charles Evans Hughes, Secretary of State of the United States of America,

The President of the Federal Republic of Austria, Mr. Edgar L. G. Prochnik, Chargé d'affaires of Austria in Washington, and

The Governor of Hungary, Count László Széchenyi, Envoy Extraordinary and Minister Plenipotentiary of Hungary to the United States,

Who, having communicated their full powers, found to be in good and due form, have agreed as follows:

#### ARTICLE I

The three Governments shall agree upon the selection of a Commissioner who shall pass upon all claims for losses, damages or injuries suffered by the United States or its nationals embraced within the terms of the Treaty of August 24, 1921, between the United States and Austria and/or the Treaty of August 29, 1921, between the United States and Hungary, and/or the Treaties of St. Germain-en-Laye and/or Trianon, and shall determine the amounts to be paid to the United States by Austria and by Hungary in satisfaction of all such claims (excluding those falling within paragraphs 5, 6 and 7 of annex I to section I of part VIII of both the Treaty of St. Germain-en-Laye and the Treaty of Trianon) and including the following categories:

(1) Claims of American citizens arising since July 31, 1914, in respect of damage to or seizure of their property, rights and interests, including any company or association in which they are interested, within the territories of

<sup>1</sup> Source: L.N.T.S., vol. 48, p. 70.

either the former Austrian Empire or the former Kingdom of Hungary as they respectively existed on August 1, 1914;

(2) Other claims for loss or damage to which the United States or its nationals have been subjected with respect to injuries to or death of persons, or with respect to property, rights and interests, including any company or association in which American nationals are interested, since July 31, 1914, as a consequence of the war;

(3) Debts owing to American citizens by the Austrian and/or the Hungarian Governments or by their nationals.

#### ARTICLE II

Should the Commissioner for any cause be unable to discharge his functions, a successor shall be chosen in the same manner that he was selected. The Commissioner shall hold a session at Washington within two months after the coming into force of the present agreement. He may fix the time and the place of subsequent sessions according to convenience. All claims shall be presented to the Commissioner within one year from the date on which he holds the first session required by the foregoing provision.

#### ARTICLE III

The Commissioner shall cause to be kept an accurate record of the questions and cases submitted and correct minutes of proceedings. To this end each of the Governments may appoint a secretary, and these secretaries shall act together as joint secretaries and shall be subject to the direction of the Commissioner.

#### ARTICLE IV

The three Governments may designate agents and counsel who may present oral or written arguments to the Commissioner under such conditions as he may prescribe.

The Commissioner shall receive and consider all written statements or documents which may be presented to him, in accordance with rules which he may prescribe, by or on behalf of the respective Governments in support of or in answer to any claim.

The Governments of Austria and Hungary shall be notified of all claims filed with the Commissioner and shall be given such period of time as the Commissioner shall by rule determine in which to answer any claim filed.

The decisions of the Commissioner shall be accepted as final and binding upon the three Governments.

#### ARTICLE V

Each Government shall pay its own expenses, including the compensation of the secretary appointed by it and that of its agent and counsel. All other expenses which by their nature are a charge on the three Governments, including the compensation of the Commissioner and such employees as he may appoint to assist him in the performance of his duties, shall be borne one-half by the Government of the United States and one-half by the Governments of Austria and Hungary in equal moieties.

#### ARTICLE VI

This agreement shall be ratified in accordance with the constitutional forms of the contracting parties and shall come into force on the date of the exchange of ratifications.

IN FAITH WHEREOF, the above-named plenipotentiaries have signed the present agreement and have hereunto affixed their seals.

DONE in triplicate at the City of Washington this twenty-sixth day of November, one thousand nine hundred and twenty-four.

[SEAL] Charles Evans HUGHES

[SEAL] Edgar PROCHNIK

[SEAL] László SZÉCHÉNYI

-----



## Decisions

### ADMINISTRATIVE DECISION No. I

(May 25, 1927. Pages 1-14.<sup>1</sup>)

TERMINOLOGY USED IN DECISIONS AND OPINIONS.—FUNCTIONS AND JURISDICTION OF COMMISSION: INTERPRETATION OF TREATIES, ENFORCEMENT OF AWARDS, PAYMENT OF OBLIGATIONS. Definitions set down for guidance of Agents and counsel. *Held* that Commission, whose jurisdiction is limited to interpretation of Treaty of Vienna (Budapest) and determination of Austria's (Hungary's) financial obligations thereunder, is not concerned with quality or legality of act causing damage claimed, nor with enforcement of awards or proper payment of obligations.

GENERAL PRINCIPLES FOR PREPARATION, PRESENTATION, DECISION OF CLAIMS: JURISDICTION AND NATIONALITY OF CLAIMS, RAISING *EX OFFICIO* OF QUESTIONS OF—, ESPOUSAL, WITHDRAWAL, COMPROMISING, PRIVATE INTEREST, EXTENT OF LIABILITY IN CASE OF STATE SUCCESSION, INTERPRETATION OF TREATY.—PRECEDENTS. *Held* that as preliminary question in each case Commissioner must determine jurisdiction. *Held* also that United States exercises untrammelled discretion with respect to espousing, presenting, pressing, withdrawing, or compromising claim of national, and that the latter bound by action. Since espousal does not vest title in United States, Commissioner will at any stage of proceeding require disclosure of private interest. Nationality of claims and jurisdiction will, so far as applicable, be determined by principles and rules laid down in decision of October 31, 1924, by Commissioner as umpire of United States-German Mixed Claims Commission. *Held* further that compensation in reparation claims and claims for damages resulting from acts of Austro-Hungary will be borne 63.6 per cent by Austria and 36.4 per cent by Hungary: (1) on this basis joint expenditures apportioned between Austria and Hungary before war, (2) no joint, but several liability instituted by Treaty of Vienna (Budapest).

*Cross-references:* Am. J. Int. Law, vol. 21 (1927), pp. 599-609; Friedensrecht, VI. Jahr, Nr. 6/7 (1927), pp. 42-47.

*Bibliography*<sup>2</sup>: Prossinagg, pp. 18-19, 21; Bonyngé, pp. 4-6.

In addition to the Rules of Practice and Procedure heretofore prescribed<sup>3</sup> there are here set down for the guidance of the American Agent, the Austrian Agent, and the Hungarian Agent and their respective counsel definitions of terms and definitions of the functions and jurisdiction of the Commission, as well as general governing principles, which will, so far as applicable, control the preparation, presentation, and decision of cases submitted to the Commission.

<sup>1</sup> References to page numbers following the date of each decision are to the final report of Commissioner referred to on p. 193 *supra*.

<sup>2</sup> References in this section are to publications referred to on p. 197 *supra*.

<sup>3</sup> *Note by the Secretariat*: see final report of Commissioner, pp. *et* 173 *seq.*

*Definition of terms*

The following terms as used in the decisions and opinions of the Commission shall be taken to have the meanings indicated below:

*United States:* the United States of America and/or the Government of the United States of America;

*Austro-Hungary:* the former Austro-Hungarian Dual Monarchy and/or the Imperial and Royal Austro-Hungarian Government as it or they existed on August 1, 1914,<sup>1</sup> or on December 7, 1917;

*Former Austrian Empire:* the Austrian Empire as it existed on and prior to August 1, 1914<sup>1</sup>;

*Former Kingdom of Hungary:* the Kingdom of Hungary as it existed on and prior to August 1, 1914;<sup>1</sup>

*Austria:* the Republic of Austria as now existing and as it existed on July 16, 1920, the date of the coming into effect of the Treaty of Saint-Germain-en-Laye, and on November 8, 1921, the date of the coming into effect of the Treaty of Vienna establishing friendly relations between the United States and Austria;

*Hungary:* the Kingdom of Hungary as now existing and as it existed on July 26, 1921, the date of the coming into effect of the Treaty of Trianon, and on December 17, 1921, the date of the coming into effect of the Treaty of Budapest establishing friendly relations between the United States and Hungary;

*Allied Powers:* the British Empire, France, Italy, Japan, Belgium, China, Cuba, Greece, Nicaragua, Panama, Poland, Portugal, Roumania, the Serb-Croat-Slovene State, Siam, and Czecho-Slovakia, which with the United States were designated "Allied and Associated Powers" in the Treaties of St. Germain and Trianon, the United States being an "Associated Power" engaged with the Allied Powers in the prosecution of the war against the Imperial and Royal Austro-Hungarian Government;

*Central Powers:* those with which the principal Allied Powers were at war, namely, the Imperial German Government, the Imperial and Royal Austro-Hungarian Government, Bulgaria, and Turkey;

*War period:* the period between August 1, 1914,<sup>1</sup> and July 2, 1921, both inclusive, the latter date being the effective date of the joint resolution passed by the Congress of the United States declaring at an end the state of war between the United States and the Imperial and Royal Austro-Hungarian Government;

*Period of American belligerency:* the period between December 7, 1917, and July 2, 1921, both inclusive, the former being the effective date of the joint resolution passed by the Congress of the United States declaring the existence of a state of war between the United States and the Imperial and Royal Austro-Hungarian Government;

*Period of American neutrality:* the period between August 1, 1914,<sup>1</sup> and December 6, 1917, both inclusive;

*American national:* a person wheresoever domiciled owing permanent allegiance to the United States of America;

*Treaty of Versailles:* the Treaty between the Allied Powers and Germany signed at Versailles on June 28, 1919, which came into effect on January 10, 1920;

<sup>1</sup> See section 5 of the Peace Resolution approved by the President of the United States July 2, 1921, incorporated in the Treaties of Vienna and of Budapest, and paragraphs numbered (1) and (2) of the article I of the Tripartite Agreement.

*Treaty of St. Germain:* the Treaty between the Allied Powers and Austria signed at Saint-Germain-en-Laye on September 10, 1919, which came into effect on July 16, 1920;

*Treaty of Trianon:* the Treaty between the Allied Powers and Hungary signed at Trianon on June 4, 1920, which came into effect on July 26, 1921;

*Treaty of Berlin:* the Treaty between the United States and Germany signed at Berlin on August 25, 1921, restoring the friendly relations existing between the two nations prior to the outbreak of war, which Treaty came into effect on November 11, 1921;

*Treaty of Vienna:* the Treaty between the United States and Austria signed at Vienna on August 24, 1921, establishing friendly relations between the two nations, which Treaty came into effect on November 8, 1921;

*Treaty of Budapest:* the Treaty between the United States and Hungary signed at Budapest on August 29, 1921, establishing friendly relations between the two nations, which Treaty came into effect on December 17, 1921;

*Tripartite Agreement:* the Tripartite Agreement between the United States and Austria and Hungary signed at Washington on November 26, 1924, which became effective on December 12, 1925, under which the Tripartite Claims Commission is constituted;

*Commission:* the Tripartite Claims Commission constituted under and in pursuance of the Tripartite Agreement above defined;

*Commissioner:* the Commissioner selected by the United States, Austria, and Hungary to pass upon all claims of the United States and its nationals arising under the Treaty of Vienna and/or the Treaty of Budapest, including the three categories defined in Article I of the Tripartite Agreement;

*Custodian Property:* all property or the proceeds of the liquidation thereof now held by the Treasury of the United States or by the United States Alien Property Custodian or to which he is entitled under the provisions of the United States Trading with the Enemy Act of October 6, 1917, and amendments thereto, which at the time of his taking possession thereof or making demand therefor was the property of Austro-Hungary, the former Austrian Empire or its nationals, or the former Kingdom of Hungary or its nationals, or in which any of them had an interest;

*Valorization:* the conversion into American currency of Austro-Hungarian or other non-American currency at the pre-war cable transfer rate of exchange as provided in sections III and IV of part X of the Treaty of St. Germain carried into the Treaty of Vienna and of the Treaty of Trianon carried into the Treaty of Budapest.

All of the Allied Powers participated in drafting and became parties to both the Treaties of St. Germain and Trianon and the rights and advantages therein stipulated were, generally speaking, for the benefit of each and all of them. Consequently the language used in those Treaties as applied to the United States on the one part and to Austria and/or Hungary on the other part, incorporated *in haec verba* as a part of the Treaties of Vienna and of Budapest respectively, is sometimes inapt and confusing. Throughout the opinions and decisions of this Commission the language thus incorporated will, for the sake of brevity and lucidity, be so paraphrased as to make it applicable only to the United States on the one part and Austria and/or Hungary on the other part.

To avoid possible confusion this and subsequent opinions will generally deal with the United States and its nationals on the one part and Austria and/or Hungary and their respective nationals on the other part as affected by the

Treaties of Vienna and of Budapest respectively. Such provisions of the Treaties of St. Germain and Trianon incorporated respectively in these two Treaties designated "parts", "sections", "articles", "paragraphs", etc., as are referred to or quoted in these opinions in the main employ literally the same language, differing occasionally in the numbering. For convenience, citations to both Treaties will be made, the first citation by number applying to the Treaty of Vienna and the second to the Treaty of Budapest, usually without designating the Treaty cited.

#### *Functions of Commission*

This Commission was constituted and exists in pursuance of the terms of the Tripartite Agreement between the United States and Austria and Hungary which became effective on December 12, 1925. Therein are found the source of, and the limitations upon, the Commission's powers and jurisdiction in the discharge of its task of determining the amount to be paid by Austria and/or Hungary in satisfaction of their financial obligations to the United States and to American nationals falling within the terms of the Treaties of Vienna and/or Budapest respectively. Article I of the Tripartite Agreement provides that the Commissioner shall determine the amounts to be paid to the United States by Austria and by Hungary in satisfaction of claims embraced within the terms of the said Treaties "including the following categories":

"(1) Claims of American citizens arising since July 31, 1914, in respect of damage to or seizure of their property, rights and interests, including any company or association in which they are interested, within the territories of either the former Austrian Empire or the former Kingdom of Hungary as they respectively existed on August 1, 1914;

"(2) Other claims for loss or damage to which the United States or its nationals have been subjected with respect to injuries to or death of persons, or with respect to property, rights and interests, including any company or association in which American nationals are interested, since July 31, 1914, as a consequence of the war;

"(3) Debts owing to American citizens by the Austrian and/or the Hungarian Governments or by their nationals."

The financial obligations of Austria and/or Hungary which this Commission is empowered to determine arise out of claims presented by the United States falling within the several categories specified in the Tripartite Agreement and more particularly defined or described in the Treaties of Vienna and of Budapest. American nationals who acquired rights under these Treaties are without a remedy to enforce them save through the United States. As a part of the means of supplying that remedy this Commission was, by the Tripartite Agreement, created as the forum for determining the amount of the obligations of Austria and of Hungary. These Treaties fix those obligations and prescribe what Austria and/or Hungary shall pay for. The Tripartite Agreement neither adds to nor subtracts from the rights or the obligations thus fixed but clothes this Commission with jurisdiction over all claims of the United States and its nationals based on the terms of the Treaties and lays on the Commissioner the duty of applying those terms to the claims presented and of determining the amount, if any, due to the several claimants thereunder.

The Commission is not concerned with the enforcement of its awards or with the payment by Austria and/or Hungary of their financial obligations save as the terms of the Treaties with respect to payment affect such obligations absolute or contingent, direct or indirect, and the amount thereof. The definitions of what Austria and/or Hungary shall pay *for* are found in the

Treaties. The *amount* which Austria and/or Hungary shall pay must be judicially determined by this Commission through the application of appropriate rules for ascertaining pecuniary obligations and for measuring damages to the facts of such claims of the United States and its nationals as fall within the terms of the Treaties. But the problems of *how and when* the awards of this Commission shall be *enforced* and *how and when payment* shall be made or secured are political in their nature and must be settled by the appropriate political agencies of the Governments concerned. The Commission's task is confined solely to construing the Treaties and deciding what are the financial obligations of Austria and/or Hungary and their respective nationals arising thereunder and the amount thereof.

The liability of Austria and/or Hungary must be determined by the application of the terms of the Treaty or Treaties to the facts of each case. The Treaties embody in their terms contracts by which Austria and Hungary accorded to the United States, as one of the conditions of peace, rights in behalf of American nationals which had no prior existence. While these doubtless include some obligations of Austria and/or Hungary arising from violation of rules of international law or otherwise and existing prior to and independent of the Treaties, they also include obligations of Austria and/or Hungary which were created and fixed by their terms. All of these obligations, whatever their nature, are merged in and fixed by the Treaties. The Commission's inquiry in this respect is confined solely to determining whether or not Austria and/or Hungary by the terms of the Treaty or Treaties assumed the pecuniary obligation asserted or accepted responsibility for the act causing the damage claimed, and it is not concerned with the quality of that act or whether it was legal or illegal as measured by rules of international law.

*Consolidation of machinery set up under other Treaties*

The Treaties of St. Germain and Trianon (and similar Treaties between the Allied Powers and the Central Powers) provided for:

(1) A Reparation Commission to determine the amount of reparation claims (and clothed with other powers of a political and administrative character not necessary here to notice);

(2) Clearing Offices mainly for the purpose of "clearing" and paying the debts of the nationals of opposing Powers and paying designated claims of Allied nationals;

(3) Mixed Arbitral Tribunals clothed with power to hear appeals from Clearing Office decisions, to hear and adjudicate all claims for compensation lodged against Austria and/or Hungary for damage or injury suffered by nationals of Allied Powers arising under paragraph (*e*) of article 249 [232], and to hear and determine certain controversies between nationals of Allied Powers and nationals of Austria or Hungary arising out of contracts (paragraph (*b*) of article 256 [239]); and

(4) An Arbitrator to determine the amounts of certain claims of Allied nationals and debts of Austria and its nationals and of Hungary and its nationals with which amounts so ascertained Austrian or Hungarian property seized as a war measure by an Allied Power may be charged (paragraph 4 of the annex to section IV of part X).

Eliminating those provisions of the Treaties of St. Germain and of Trianon not adopted by the United States, the Tripartite Agreement in practical effect combines these several functions in one tribunal and the Commissioner is clothed with the power and it is made his duty to adjudicate reparation claims arising under part VIII and compensation claims arising under paragraph (*e*)

of article 249 [232] and as Arbitrator<sup>1</sup> to assess the amount of claims and debts to the payment of which the Government of the United States may, at its election, apply the Custodian Property.

### *Jurisdiction*

At the threshold of the consideration of each case is presented the question of jurisdiction, which obviously the Commissioner must determine preliminarily to fixing the amount, if any, of Austria's and/or Hungary's financial obligations. When the allegations in a memorial presented by the United States bring a claim within the terms of the Treaty of Vienna and/or the Treaty of Budapest and the Tripartite Agreement, the jurisdiction of the Commission attaches—otherwise the claim as presented will be dismissed for want of jurisdiction. Should these allegations be controverted in whole or in part the issue or issues of fact thus made must be decided by the Commissioner, and if under such decision the claim does not fall within the terms of the Treaty or Treaties and the Tripartite Agreement it will be dismissed. But if the issue or issues of fact be so decided that the claim does fall within the terms of the Treaty or Treaties and the Tripartite Agreement, the Commissioner will apply such terms to the facts in the particular case and render judgment accordingly.

### *The claimant—Nationality of claims*

All claims presented to this Commission shall be asserted and controlled by the United States as claimant either on its own behalf or on behalf of one or more of its nationals. With respect to espousing or not the claim of its national at the latter's request, and if espoused in determining when and how the claim will be presented and pressed or withdrawn or compromised, the United States will exercise an untrammelled discretion and the private owner will be bound by the action taken. While the nation's absolute right to control a private claim espoused by it is necessarily exclusive, because of the national interest that may be or become involved, nevertheless the private nature of such claim continues to inhere in it and the claim only in a very restricted sense becomes a national claim. The act of espousal does not vest in the nation the title to the claim. For the purpose of ascertaining the nationality of a claim as determined by its being impressed with the nationality of the private claimant, or for any other purpose pertinent to the proper exercise of its jurisdiction, the Commission will at any stage of a proceeding require a full disclosure of the private interest therein.

The nationality of claims as affecting the financial obligations of Austria and/or Hungary as well as the jurisdiction of this Commission will, so far as applicable, be determined by the principles and rules laid down by the present Commissioner as the Umpire of the Mixed Claims Commission, United States and Germany, in a decision rendered on October 31, 1924, appearing at pages 175 to 194 inclusive of the printed Decisions and Opinions of that Commission. In so far as the effective date of the applicable Treaty or Treaties affects the nationality of a claim, the date mentioned in that decision (November 11, 1921, when the Treaty of Berlin became effective) will be substituted in the case of Austria by November 8, 1921, and in the case of Hungary by December 17, 1921, the effective dates of the Treaties of Vienna and of Budapest respectively.

<sup>1</sup> See paragraph 4 of the annex to section IV of part X of the Treaties. The third category of article I of the Tripartite Agreement confers jurisdiction on the Commission to pass upon "Debts owing to American citizens by the Austrian and/or the Hungarian Governments or by their nationals."

*Categories of claims*

With a view to facilitating the preparation, presentation, and disposition of claims they are classified as follows:

I. *Reparation claims*: those arising under part VIII, the reparation provisions of the Treaties, including:

- (a) Damage resulting from death of or injury to persons;
- (b) Damage resulting from any kind of maltreatment of prisoners of war;
- (c) Damage resulting from injury to or destruction of or taking of property.

II. *Economic claims*: those arising under part X, the economic clauses of the Treaties, including:

(a) Compensation for damage to or injury inflicted on property, rights, and interests by the application of war measures;

(b) Debts, including:

(1) those owing by Austrian (Hungarian) nationals including bank deposits and estate claims;

(2) State obligations;

(c) Public bonds, unmatured, and not subjected to war measures.

*Reparation claims*

Most of the claims of the United States or its nationals falling within the category of reparation claims grow out of damages resulting from death of or injury to persons or from injury to or destruction of or taking of property through physical force operating on physical property. With respect to such claims the principles and rules announced in the decisions and opinions of the Umpire of the Mixed Claims Commission, United States and Germany, will, so far as applicable, govern.

*Apportionment of compensation in reparation claims and in claims for damages resulting from acts of Austro-Hungary*

The Commissioner decides that the compensation for damages suffered by American nationals: (1) falling within the reparation provisions of the Treaties; or (2) resulting from acts of Austro-Hungary or its agents during the period of American neutrality, will be borne 63.6 per cent by Austria and 36.4 per cent by Hungary and awards made accordingly. The reasons for this decision follow.

Prior to the war the former Austrian Empire and the former Kingdom of Hungary were separate and distinct States. Each had its own governmental machinery, including a parliament. The citizenship of each was distinct from the other. Austro-Hungarian citizenship did not exist. An Austrian citizen could abandon his Austrian citizenship and acquire Hungarian citizenship and *vice versa*.

In 1867 a *de facto* and constitutional union with limited powers was formed whereby each of these States delegated to the Austro-Hungarian Dual Monarchy the power to act for them in the common administration of: (1) foreign affairs; (2) the common army and navy (excluding the special army of each State); and (3) matters of finance in so far as concerned joint expenditures for State purposes. This union was expressed in the common head who bore the title "Emperor of Austria and Apostolic King of Hungary". These joint expenditures were apportioned between the former Austrian Empire and the former Kingdom of Hungary by the Austro-Hungarian law of December 30, 1907, (B.L.I., No. 278) on the basis of 63.6 per cent to be borne by Austria and 36.4 per cent

to be borne by Hungary. This was the basis upon which contributions were made by the former Austrian Empire and the former Kingdom of Hungary to the Imperial and Royal Austro-Hungarian Government enabling it to wage war against the United States.

The former Austrian Empire and the former Kingdom of Hungary while existing as independent States had no international status. It was against the Imperial and Royal Austro-Hungarian Government that the United States waged war (see resolutions of Congress effective December 7, 1917, and July 2, 1921). Following the Armistice that Government ceased to exist (see recitations in preambles to the Treaties of Vienna and of Budapest). In pursuance of the terms of the several Treaties entered into between the opposing Powers after the Armistice, not only was the Austro-Hungarian Dual Monarchy dismembered but substantial parts of the territories of the former Austrian Empire and of the former Kingdom of Hungary were ceded some to new and some to existing States. The Austria and the Hungary dealt with by the United States in entering into the Treaties of Vienna and of Budapest respectively not only bore little resemblance either to the Government or the territory of the Dual Monarchy with which the United States had been at war but differed essentially from the former Austrian Empire and the former Kingdom of Hungary. Unlike the Treaty of Berlin "restoring friendly relations" between the United States and Germany, these Treaties in terms "establish" for the first time such relations between Austria and the United States and between Hungary and the United States.

The questions here presented are: what existing Government or Governments are liable for the acts of the Austro-Hungarian Government or its agents resulting in damage to American nationals; is that liability joint or several; and what is its extent?

The answer must be found in the provisions of the Treaties of Vienna and of Budapest. It will not be profitable to examine the divergent views maintained by European continental writers on international law as compared with those of Great Britain and the United States with respect to the liability of a Successor State for the obligations either *ex contractu* or *ex delicto* of a dismembered State. It is, however, interesting to note in passing that while one group maintains that such obligations pass with succession and are apportioned between the Successor States, and while the other group maintains that the obligations do not pass with succession, neither group maintains that a *joint* liability rests upon two or more Successor States where the territory of a dismembered State has been divided between them.

Under the financial clauses (part IX of the Treaties) elaborate provision is made for the apportionment between the Successor States, including Austria and Hungary as they now exist, of the pre-war indebtedness, secured and unsecured, of the former Austro-Hungarian Monarchy, the former Austrian Empire, and the former Kingdom of Hungary, fixing sole responsibility on each Successor State for the proportion of such indebtedness allocated to it.

All of the Successor States other than Austria and Hungary are classed as "Allied or Associated Powers" and under the Treaties it is entirely clear that none of them is held liable for any damages suffered by American nationals resulting from acts of the Austro-Hungarian Government or its agents during either the period of American neutrality or American belligerency.

By article 178 [162] of the Treaty Austria [Hungary] undertakes that she will make compensation for damage done, as defined in the annex thereto, to the civilian population of the United States and to their property by the aggression of Austro-Hungary and her allies. The language is the same in

both Treaties.<sup>1</sup> There is an undertaking by Austria to make compensation for specified damage and a separate undertaking by Hungary to make compensation for the same damage. Obviously it was not intended that double compensation should be made. Neither is there a joint undertaking.

Likewise in charging Custodian Property with the payment of neutrality claims identical provision is made in both Treaties (paragraph 4 of the annex to section IV of part X) for the "payment of claims growing out of acts committed by the former Austro-Hungarian Government or by any Austrian [Hungarian] authorities since July 28, 1914, and before... [the United States] entered into the war."

Having in mind the pre-war and war relationship between the former Austrian Empire and the former Kingdom of Hungary and their respective responsibilities for the acts of the Austro-Hungarian Monarchy, the Tripartite Agreement under which this Commission is constituted was executed. It recites that all three of the parties are "desirous of determining the amounts to be paid by Austria and by Hungary" under the Treaties of Vienna and of Budapest respectively and provides that the Commissioner "shall determine the amounts to be paid to the United States by Austria and by Hungary". This language imports a distributive and not a joint liability and a purpose to apportion damages for which both may be liable, allocating to each a definite amount. The notes exchanged between the United States and Austria during the negotiation of this Agreement clearly reflect this purpose. This is in harmony with the spirit of the Treaties considered as a whole which indicates a purpose not to create joint obligations as between Austria and Hungary as they now exist but to divide and to allocate to each its separate liabilities.<sup>2</sup>

The Reparation Commission, which under the Treaties of St. Germain and Trianon is clothed with the power to fix the amount of compensation to be paid by Austria and Hungary respectively under the reparation provisions of the Treaties, has not as yet directly dealt with this question of apportionment as between them. That Commission, however, acting within its jurisdiction has in a number of instances considered questions of credits on their reparation accounts to Austria and to Hungary respectively for warships, mine layers, abandoned war material, and other property formerly belonging to the Austro-Hungarian Government and passing under the Treaties through the Reparation Commission or otherwise to the Allied and Associated Powers. The Reparation Commission in apportioning these credits as between Austria and Hungary accorded to Austria 63.6 per cent and to Hungary 36.4 per cent of the aggregate amount thereof, this being the basis on which the former Austrian Empire and the former Kingdom of Hungary respectively contributed to the acquisition of the ceded property by the Austro-Hungarian Government. It is believed that the rule applicable to the apportionment of credits to which Austria and Hungary are respectively entitled under the reparation provisions of the Treaties is equally applicable to the apportionment of their liabilities thereunder. The Governments of Austria and of Hungary in the agreement of June 1,

---

<sup>1</sup> This language follows like provisions in the Treaty of Versailles (article 232 and annex I) where Germany undertakes to make compensation for defined categories of damages including those inflicted by Germany's allies as well as by Germany herself. No claim has been pressed by the United States and no award made against Germany in any case of injury inflicted solely by the Government of Austro-Hungary or the former Austrian Empire or the former Kingdom of Hungary or their respective agents.

<sup>2</sup> *Wapa v. République d'Autriche*, Austro-Yugoslavian Mixed Arbitral Tribunal, III, Decisions of Mixed Arbitral Tribunals (hereinafter referred to as "Dec. M.A.T." 720.

1926, adopted as between themselves a division of liabilities in harmony with the rule here announced.

While this decision, in so far as applicable, will control the preparation, presentation, and decision of all claims submitted to the Commission falling within its scope, nevertheless should the American Agent, the Austrian Agent, and/or the Hungarian Agent be of the opinion that the peculiar facts of any case take it out of the rules here announced such facts with the differentiation believed to exist will be called to the attention of the Commissioner in the presentation of that case.

---

## ADMINISTRATIVE DECISION No. II <sup>1</sup>

(May 25, 1927. Pages 15-36.)

---

**INTERPRETATION OF TREATY: INDIRECT CONSEQUENCES OF CARRYING INTO EFFECT OF TREATY PROVISIONS.** According to Treaty of St. Germain (Trianon), part X, section IV, annex, paragraph 14, "in the settlement of matters provided for in article 249 (232) . . . the provisions of section III respecting the currency in which payment is to be made and the rate of exchange and of interest" shall apply. *Held* that not all of the indirect consequences flowing from the carrying into effect of article 249 (232) are "matters provided for" therein. Enumeration of such matters.

**INTERPRETATION OF TREATY.—DEBTS, MEANING OF TERM IN TREATIES OF ST. GERMAIN (TRIANON), ART. 249 (232), (h) (2), AND VIENNA (BUDAPEST).** *Held* that term "debt" in Treaty of St. Germain (Trianon), article 249 (232), paragraph (h) (2), is short term for "debts, credits and accounts", which in turn is included in term "private property, rights and interests in an enemy country" used in article 249 (232), first clause, and section IV, annex, paragraph 14, first clause; that only "debts" owing by Austria (Hungary) or its nationals residing in Austrian (Hungarian) territory to American nationals are dealt with in article 249 (232), paragraph (h) (2); that term comprises four classes of pecuniary obligations including two classes of State debts, no limitation to private debts being found in article 249 (232), paragraph (h) (2); that generally cash demand deposits, and time deposits expiring "during the war", made prior to December 7, 1917, are included in term without affirmative proof of demand for payment by American depositor. Same meaning will apply wherever term found without qualifying word or phrase in Treaties of Vienna (Budapest) or in this and subsequent opinions of Commission.

**EXCEPTIONAL WAR MEASURES, MEASURES OF TRANSFER: DEFINITION, BURDEN OF PROOF.—PRINCIPLES, RULES FOR DETERMINATION OF DAMAGE, INJURY RESULTING FROM WAR MEASURES, COMPENSATION: CURRENCY, RATE OF EXCHANGE,**

---

<sup>1</sup> Reference is here made to Administrative Decision No. I for the definition of terms used herein. The language of the Treaties of St. Germain and Trianon incorporated in the Treaties of Vienna and Budapest respectively is in this opinion frequently paraphrased so as to make it applicable only to the United States on the one part and Austria and/or Hungary on the other part. The term "Treaty" or "Treaties" as used herein means as concerns Austria the Treaty of Vienna and as concerns Hungary the Treaty of Budapest. Citations to both Treaties will be made, the first citation by number applying to the Treaty of Vienna and the second to the Treaty of Budapest.

INTEREST. Statement of principles and rules for determination of extent of damage or injury inflicted in territory of Austrian Empire (Kingdom of Hungary) upon property, rights or interests (including debts, see *supra*) of American nationals by Austrian (Hungarian) war measures: (1) "exceptional war measures" are (a) those enumerated in section IV, annex, paragraph 3; and (b) all other measures which were in fact exceptional war measures; (2) "measures of transfer" are only those enumerated in section IV, annex, paragraph 3; (3) with respect to currency, rate of exchange, and interest provisions of section III will apply (see *supra*, compensation being a matter provided for in article 249 (232) paragraph (e) ); (4) pre-war rate of exchange to be applied by Commission (article 248 (231), paragraph (d) ) is 9.36 cents American currency to 1 Austro-Hungarian krone; (5) burden will be on United States to prove existence of general act or decree having general applicability to all property, rights, and interests of American nationals in territory of Austrian Empire (Kingdom of Hungary), or subjection in fact of such property, etc. to exceptional war measures or measures of transfer.

STATE LIABILITY FOR DEBTS OF NATIONALS: (1) DIRECT AND ABSOLUTE. (2) INDIRECT AND CONTINGENT.—STATE LIABILITY FOR CONSEQUENCES OF WAR: DEPRECIATION OF CURRENCY. *Held* that Austria (Hungary) is: (1) under direct and absolute liability to make compensation for damage or injury resulting from own acts in applying war measures, and to pay proceeds of liquidation of American property, including debts (article 249 (232), paragraphs (e) and (h) (2) ); and (2) under indirect and contingent liability for debts owing by its nationals (article 249 (232), paragraph (j) ) in the event the United States adopts method of payment through Custodian Property (article 249 (232), paragraph (h) (2), and section IV, annex, paragraph 4). *Held* also that Austria (Hungary) not liable for all direct and indirect, immediate and ultimate, consequences of war, and, therefore, not obligated to pay for losses due to depreciation during and after war in exchange value of Austro-Hungarian currency.

VALORIZATION OF DEBTS: CURRENCY, RATE OF EXCHANGE.—INTEREST. *Held* that no payment required in American currency at pre-war rate of exchange of Austrian (Hungarian) public debts or debts of Austrian (Hungarian) nationals owing to American nationals which by their terms are payable in non-American currency: since article 249 (232) does not deal with *settlement* of such debts, section III (rate of exchange) does not apply (section IV, annex, paragraph 14, see *supra*); and that payment in such currency at such rate will be obligatory only after adoption by United States of method of payment through Custodian Property (see *supra*).

PROCEDURE: INTERLOCUTORY, FINAL JUDGMENTS, JOINT DEFENDANTS.—INTEREST. Establishment of two classes of cases concerning debts and of system of interlocutory and final judgments therein. Determination of interest on amount of final judgment in cases based upon subjection of debts by Austria (Hungary) to war measures: 5 per cent per annum from date of damage or injury to date of payment. Claims based upon debts owing by Austrian (Hungarian) nationals to American nationals shall be asserted against Government of Austria (Hungary) and Austrian (Hungarian) private debtor jointly.

*Cross-references:* Am. J. Int. Law, vol. 21 (1927), pp. 610-627; Friedensrecht, VI. Jahr Nr. 6/7 (1927), pp. 47-56.

*Bibliography:* Prossinagg, pp. 12, 17, 29-31, 34-35; Bonyngé, pp. 6-21.

There are pending before the Commission claims asserted by the American Agent on behalf of American nationals under the Economic Clauses incorporated in the Treaty of Vienna and/or the Treaty of Budapest based on:—

- (a) Debts owing by Austrian or Hungarian nationals to American nationals;
- (b) Debts owing by the Government of Austria and/or the Government of Hungary to American nationals; and
- (c) Claims for compensation in respect of damage or injury inflicted upon the property, rights, or interests, including debts, credits, accounts, and cash assets, of American nationals in the territory of the former Austrian Empire or the former Kingdom of Hungary by the application either of exceptional war measures or measures of transfer as those terms are employed in the Treaties.

The Austrian and Hungarian Agents contend:

(1) That under the Treaty Austria [Hungary] is not primarily and directly obligated to pay debts owing by Austrian [Hungarian] nationals to American nationals which have not been subjected by Austria [Hungary] in the territory of the former Austrian Empire [former Kingdom of Hungary] to the application either of exceptional war measures or measures of transfer as those terms are employed in the Treaty;

(2) That with respect to debts owing in other than American currency by Austria [Hungary] or its nationals to American nationals the creditor is not entitled to the payment thereof in American currency at the pre-war rate of exchange;

(3) That with respect to debts owing by Austria [Hungary] or its nationals to American nationals the creditor is not entitled to the benefits of the provisions of paragraph 22 of the annex to section III of part X of the Treaty with respect to interest; and

(4) That debts owing by Austria [Hungary] or its nationals to American nationals do not constitute a charge upon the Custodian Property.

The Commissioner sustains the first contention of the Austrian [Hungarian] Agent and holds that under the Treaty Austria's [Hungary's] obligation to pay debts (which have not been subjected to war measures) owing by Austrian [Hungarian] nationals to American nationals is contingent and indirect and not absolute, primary, and direct.

The Commissioner provisionally sustains the second and third contentions of the Austrian [Hungarian] Agent, but holds that in the event the Government of the United States, through its law-making power, should elect to adopt the method of payment or procedure provided for by paragraph (h) (2) of article 249 [232] and paragraph 4 of the annex to section IV of part X of the Treaty and apply the Custodian Property to the payment of the claims and debts defined therein, then under the terms of the Treaty for the purposes of such payment the American creditors would be entitled to have their debts converted into American currency at the pre-war rate of exchange and also be entitled to the benefits of paragraph 22 of the annex to section III of part X of the Treaty with respect to interest.

The Commissioner holds that under the Treaty only the Government of the United States, acting through its law-making power, may determine whether or not the proceeds of the liquidation of the Custodian Property will be applied to the payment of such claims and of such debts as may be found by this Commission to have been owing by Austria [Hungary] or its nationals to American nationals.

The reasons upon which these conclusions rest<sup>1</sup> can be understood by a

<sup>1</sup> The precedents of the Mixed Claims Commission, United States and Germany, in dealing with debts, credits, and accounts, including cash assets, owing by Germany or its nationals to American nationals are of comparatively little value in solving the

review of the pertinent Economic Clauses of the Treaties and their application as between the United States and its nationals on the one part and Austria and/or Hungary and their respective nationals on the other part. Those clauses constitute part X of the Treaties. We are here concerned directly only with section IV and incidentally with section III thereof.

### *Section III--Clearing Offices*

Section III provides a "method of payment" (first clause of paragraph 14 of the annex to section IV). This is in the form of Clearing Office machinery for the settlement of four defined classes (article 248 [231]) of "pecuniary obligations" described as "enemy debts" (paragraph 2 of the annex to section III). Procedure is provided and reciprocal rules are prescribed for determining the relative rights and obligations of both groups of Powers when—but only when—this method of settlement is adopted.

The American delegates who participated in drafting the Versailles and similar Treaties declined to commit the United States to this Clearing Office plan<sup>1</sup> and an alternate method of settlement or payment was provided embraced in paragraph (h) (2) of article 249 [232] and paragraph 4 of the annex to section

problems here presented because of the difference in practice between Germany on the one part and Austria and/or Hungary on the other part in the application of exceptional war measures to American property; and also because by agreement between the Government of Germany and the Government of the United States Germany assumed primary liability with respect to all such claims and debts falling within the jurisdiction of that Commission, and by another agreement they fixed the basis for the valorization of all such claims and debts. No such agreements have been entered into between the Government of the United States on the one part and the Governments of Austria and/or Hungary on the other part.

<sup>1</sup> The American delegates insisted that the adoption of the Clearing Office plan should be made optional with each of the Allied and Associated Powers, because of the difference in the economic conditions with which each and its nationals had to deal in relation to the opposing Powers and their nationals. Most of the principal Allied Powers were plunged into war with practically no warning. Their nationals had little opportunity to withdraw funds from enemy territory or liquidate or adjust existing contracts with enemy nationals. Consequently some of them—notably Great Britain—in order to avoid general financial disaster to their nationals and through them to the nation, and to prevent as far as possible economic dislocation, guaranteed pre-war acceptances or carried bills of exchange and similar negotiable paper falling due after the declaration of war drawn on enemy nationals in the territory of the Central Powers. But the situation was quite different with respect to the United States and its nationals. The war between the principal Allied Powers and Austro-Hungary had been in progress for more than three years prior to the declaration of the existence of a state of war between the United States and Austro-Hungary, during which period American nationals had had ample opportunity in their discretion to withdraw their funds from Austrian and Hungarian territory and liquidate and adjust their contracts with Austrian and Hungarian nationals.

Had the United States adopted the Clearing Office plan it would have been required to complete the liquidation of all Custodian Property held by it and to account for the proceeds thereof through the Clearing Offices. These requirements ran counter to the express provisions of section 12 of the American Trading with the Enemy Act which expressly reserved to Congress after the end of the war the right to determine the disposition to be made of seized enemy property. The Clearing Office plan contemplated the guaranty by both the United States and Austria [Hungary] of the payment of the private debts of their respective nationals and prohibited the voluntary settlement of debts between such nationals. It was believed that such a guaranty would have been repugnant to American conceptions of the functions of government and such interference with private contract rights in time of peace would have been repugnant to the spirit of American institutions.

IV of part X of the Treaty of St. Germain [Trianon], incorporated by reference in the Treaty of Vienna [Budapest],<sup>1</sup> which will be hereinafter noticed. Under that Treaty the United States (but not Austria [Hungary]) had the right to elect, within one month from the coming into effect of that Treaty, to adopt the provisions of section III (consisting of article 248 [231] and the annex of 25 numbered paragraphs embracing the Clearing Office plan) by giving notice to that effect.

The Treaties of Vienna and of Budapest came into effect on November 8, 1921, and December 17, 1921, respectively. The United States did not elect to adopt this "method of payment" provided through "the intervention of Clearing Offices" within one month thereafter and hence, under the express provisions of paragraph (e) of article 248 [231], the provisions of section III do not apply as between Austria [Hungary] and the United States, save in so far as they are read into section IV by express provision or by necessary implication.

*The purpose and scope of section IV of part X of the Treaties*

This section in both Treaties deals with State measures and the disposition of property subjected thereto. It is comprised of articles 249 and 250 [232 and 233] and an annex consisting of 15 numbered paragraphs. The opening clause announces its purpose to be the laying down of principles for the settlement of questions of "private property, rights and interests in an enemy country"; that is, so far as concerns the problems here under consideration, the private property, rights, and interests of American nationals in the territory of the former Austrian Empire [former Kingdom of Hungary] and also the private property, rights, and interests of nationals of the former Austrian Empire [former Kingdom of Hungary] in the "territories, colonies, possessions and protectorates" of the United States.

The second clause of paragraph 14 of the annex to section IV stipulates that "In the settlement of matters provided for in article 249 [232]" between Austria [Hungary] and the United States "the provisions of section III [which are copied in the margin<sup>2</sup>] respecting the currency in which payment is to be

<sup>1</sup> These provisions for the application by the United States of Austrian and/or Hungarian property and the proceeds of the liquidation thereof as an alternate method of payment are in harmony with the American Trading with the Enemy Act, leaving to the Congress the untrammelled right to dispose of such property and the proceeds thereof in its discretion.

<sup>2</sup> Article 248 [231] (d) reads as follows:

"Debts shall be paid or credited in the currency of such one of the Allied and Associated Powers, their colonies or protectorates, or the British Dominions or India, as may be concerned. If the debts are payable in some other currency they shall be paid or credited in the currency of the country concerned, whether an Allied or Associated Power, Colony, Protectorate, British Dominion or India, at the pre-war rate of exchange.

"For the purpose of this provision the pre-war rate of exchange shall be defined as the average cable transfer rate prevailing in the Allied or Associated country concerned during the month immediately preceding the outbreak of war between the said country concerned and Austria-Hungary.

"If a contract provides for a fixed rate of exchange governing the conversion of the currency in which the debt is stated into the currency of the Allied or Associated country concerned, then the above provisions concerning the rate of exchange shall not apply.

"In the case of the new States of Poland and the Czecho-Slovak State the currency in which and the rate of exchange at which debts shall be paid or credited shall be determined by the Reparation Commission provided for in part VIII, unless they shall have been previously settled by agreement between the States interested".

made and the rate of exchange and of interest shall apply.”<sup>1</sup> Here is found the only express warrant for reading into section IV any of the provisions of section III as between non-clearing Powers and their nationals, and it will be noted: (1) that this warrant is strictly limited to the carrying into effect of the provisions of article 249 [232], or to the settlement and adjustment of rights, claims, obligations, or “matters” arising thereunder, and (2) that there are read into section IV only such provisions of section III as apply to or deal with currency and rates of exchange and interest. It is apparent, therefore, that those provisions of section III under which Austria [Hungary] guarantees the debts of its nationals (paragraph (b) of article 248 [231] and paragraph 4 of the annex to section III) cannot be directly invoked to fix liability on Austria [Hungary] for the private debts owing to American nationals by Austrian [Hungarian] nationals.

Reading together the opening clause of article 249 [232] and the second clause of paragraph 14 of the annex to section IV,<sup>1</sup> it is apparent that the first simply indicates in a general way the subject-matter of the provisions following and the field of their application.<sup>2</sup> A general definition of the scope of the matters provided for does not in itself make provision for such matters. Neither do all of the indirect consequences flowing from the carrying into effect of the provisions of article 249 [232] in themselves constitute “matters provided for” therein. In order to determine what matters the settlement of which is “provided for in article 249 [232]” the provisions following the introductory clause must be examined.

*Matters provided for in article 249 [232]*

The “matters provided for in article 249 [232]”, so far as pertinent to the problems here presented, are:

(1) Provision for the discontinuance by Austria [Hungary] of the application of exceptional war measures and measures of transfer to the property, rights,

Paragraph 22 of the annex to section III reads as follows:

“Subject to any special agreement to the contrary between the Governments concerned debts shall carry interest in accordance with the following provisions:

“Interest shall not be payable on sums of money due by way of dividend, interest or other periodical payments which themselves represent interest on capital.

“The rate of interest shall be 5 per cent. per annum, except in cases where, by contract, law or custom, the creditor is entitled to payment of interest at a different rate. In such cases the rate to which he is entitled shall prevail.

“Interest shall run from the date of commencement of hostilities (or, if the sum of money to be recovered fell due during the war, from the date at which it fell due) until the sum is credited to the Clearing Office of the creditor.

“Sums due by way of interest shall be treated as debts admitted by the Clearing Offices and shall be credited to the Creditor Clearing Office in the same way as such debts.”

<sup>1</sup> This second clause reads as follows:

“In the settlement of matters provided for in article 249 [232] between Austria [Hungary] and the Allied or Associated Powers, their colonies or protectorates, or any one of the British Dominions or India, in respect of any of which a declaration shall not have been made that they adopt section III, and between their respective nationals, the provisions of section III respecting the currency in which payment is to be made and the rate of exchange and of interest shall apply unless the Government of the Allied or Associated Power concerned shall within six months of the coming into force of the present Treaty notify Austria [Hungary] that one or more of the said provisions are not to be applied.”

<sup>2</sup> *Margaret Williams v. Berlinische Lebens-Versicherungs Gesellschaft*, Anglo-German Mixed Arbitral Tribunal, V Dec. M. A. T. at page 325; *National Bank of Egypt v. German Government and Bank für Handel und Industrie*, *ibidem*, page 26.

and interests of American nationals in Austrian [Hungarian] territory, and, where liquidation was not complete, the restoration of such property, rights, and interests to their owners (paragraph *(a)* of article 249 [232]);

(2) Provision reserving to the United States the right to retain and liquidate in accordance with its laws all Custodian Property (paragraph *(b)* of article 249 [232]);

(3) Provision for Austria [Hungary] making compensation to American nationals "in respect of damage or injury inflicted upon their property, rights or interests, including any company or association in which they are interested, in the territory of the former Austrian Empire [former Kingdom of Hungary], by the application either of the exceptional war measures or measures of transfer" as those terms are employed in the Treaty (paragraph *(e)* of article 249 [232]);

(4) Provision that the proceeds of the liquidation by Austria [Hungary] of American property, rights, and interests, including debts, credits, accounts, and cash assets, should be paid immediately by Austria [Hungary] to the American nationals entitled thereto or to the Government of the United States (paragraph *(h)* (2) of article 249 [232]);

(5) Provision that the Custodian Property shall be subject to disposal by the United States "in accordance with its laws and regulations and may be applied in payment of the claims and debts defined by this article or paragraph 4 of the annex hereto" (paragraph *(h)* (2) of article 249 [232]);

(6) Provision that the Custodian Property may be charged with the payment of *(a)* amounts due in respect of claims by American nationals against Austria [Hungary] "with regard to their property, rights and interests, including companies and associations in which they are interested, in territory of the former Austrian Empire [former Kingdom of Hungary]", *(b)* debts owing to American nationals by Austrian [Hungarian] nationals, and *(c)* claims growing out of acts committed by the former Austro-Hungarian Government or by any Austrian [Hungarian] authorities during the period of American neutrality (paragraph 4 of the annex to section IV, which, by the language of paragraph *(h)* (2) of article 249 [232] above quoted, is read into article 249 [232] and is one of the "matters provided for" therein); and

(7) Provision that "Austria [Hungary] undertakes to compensate her nationals in respect of the sale or retention" of Custodian Property by the United States (paragraph *(j)* of article 249 [232]).

In carrying into effect any of the foregoing provisions with respect to the rights of the United States or its nationals and making settlements and adjustments thereunder "the provisions of section III respecting the currency in which payment is to be made and the rate of exchange and of interest" will, so far as applicable, be taken into account (second clause of paragraph 14 of the annex to section IV).

From this survey of the somewhat confused provisions of sections III and IV of the economic clauses of the Treaties, we come to determine their application to the several distinct questions raised by the Austrian [Hungarian] Agent involving (1) a definition of the term "debts" as found in section IV; (2) *compensation* by Austria [Hungary] to American nationals for *damages* inflicted through the application of exceptional war measures or measures of transfer to the property, rights, and interests (including debts, credits, accounts, and cash assets) of American nationals in the territory of the former Austrian Empire [former Kingdom of Hungary]; (3) the nature and extent of Austria's [Hungary's] *liability* for claims of, or debts owing to, American nationals not subjected to exceptional war measures; (4) when and on what basis debts or obligations contracted in Austro-Hungarian kronen or currency other than American,

owing by Austria [Hungary] or its nationals to American nationals, shall be *valorized* and the rate and manner of computing interest thereon; (5) how the *amount* of such claims and debts shall be determined; and (6) the method of payment thereof.

#### *Definition of debts*

The Commissioner holds that the term "debts" as used in paragraph (h) (2) of article 249 [232] of the Treaty is a short term for "debts, credits and accounts" which in turn is included in the term "private property, rights and interests in an enemy country" (first clause of section IV; see also first clause of paragraph 14 of the annex to section IV).

Only debts owing by Austria [Hungary] or its nationals residing in Austrian [Hungarian] territory (enemy country) to American nationals are here dealt with<sup>1</sup>. The provisions of section III will be looked to as an aid in defining the very general term "debts". There are four classes of "pecuniary obligations" (first clause of article 248 [231]) described as "enemy debts" (paragraph 2 of the annex to section III) which are, by paraphrasing the language, defined thus:

(1) Debts payable before the war (December 7, 1917) and due by an Austrian [Hungarian] national residing<sup>2</sup> within Austrian [Hungarian] territory to an American national residing<sup>2</sup> within American territory;

(2) Debts which became payable during the war (period of American belligerency)<sup>2</sup> to American nationals residing<sup>2</sup> within American territory which arose out of transactions or contracts with Austrian [Hungarian] nationals residing<sup>2</sup> within Austrian [Hungarian] territory of which the total or partial execution was suspended on account of the existence of a state of war;

<sup>1</sup> Debts owing to American nationals by nationals of the former Austrian Empire [former Kingdom of Hungary] who under the Treaties became nationals of other States included in the designation "Allied and Associated Powers" are not here included. The nationals of such Succession States are not "enemy debtors"; the American creditors are not as to them "enemy creditors"; and the debts owing by them are not "enemy debts" and are not included within the term "debts" as here used (paragraph 2 of the annex to section III). Provision is made for the prompt return by Austria [Hungary] to the nationals of such Succession States of their property, rights, and interests, including debts, credits, and accounts, situated in Austrian [Hungarian] territory (article 266 [249]). Special provision was made for the settlement of debts between nationals of such Succession States and Austrian [Hungarian] nationals (article 271 [254] and paragraph (d) of article 248 [231]). Provision was made by the Congress of the United States for the release and return of the property, rights, and interests, and the proceeds of the liquidation thereof, of the nationals of such Succession States, which consequently are no longer charged with and cannot be applied to the payment of claims and debts of American nationals as provided in paragraph (h) (2) of article 249 [232] (see subsection (b) of section 9 of the Trading with the Enemy Act as amended by the Act of June 5, 1920, 41 Statutes at Large 978).

<sup>2</sup> The term "residing" as here used with respect to time as affecting debts means residing at any time falling within the period of American belligerency after the debt became due, *provided* all cash demand deposits will, for this purpose, be treated as due. The "period of American belligerency" is defined in Administrative Decision No. I as the period between December 7, 1917, and July 2, 1921, both inclusive, the former being the effective date of the joint resolution passed by the Congress of the United States declaring the existence of a state of war between the United States and the Imperial and Royal Austro-Hungarian Government and the latter being the effective date of the joint resolution passed by the Congress of the United States declaring such state of war at an end.

The terms "Austrian national" and "Hungarian national" as here used do not

(3) Interest which accrued due before and during the war to an American national in respect of securities issued or taken over by Austria [Hungary], provided that the payment of interest on such securities to Austrian [Hungarian] nationals or to neutrals was not suspended during the war; and

(4) Capital sums which became payable before and during the war to American nationals in respect of securities issued by Austria [Hungary], provided that the payment of such capital sums to Austrian [Hungarian] nationals or to neutrals was not suspended during the war.

Cash demand deposits, and time deposits expiring "during the war" as that term is defined in the Treaties, including ordinary bank demand and time deposits, made or established by American nationals with Austrian [Hungarian] nationals prior to December 7, 1917, are included in the term "debts" as used herein without affirmative proof of a demand for payment by the American depositor, subject to the right of the Austrian [Hungarian] Agent to prove that the facts of any particular case take it out of the general rule here announced.

The foregoing definitions will be applied to the term "debts" wherever found without a qualifying word or phrase in the Treaties or in this and subsequent opinions of the Commission.

The Commissioner rejects the contention of the Austrian and Hungarian Agents that because of the apparent limitation of the phrase "debts owing to them [American nationals] by Austrian [Hungarian] nationals", found in paragraph 4 of the annex to section IV, the term "debts" as here used does not include the State debts described in the foregoing paragraphs (3) and (4). No such limitation is found in the applicable paragraph (*h*) (2) of Article 249 [232]. The construction which the Commissioner gives to the term "debts", as here used, to embrace State debts of Austria [Hungary] finds support in the decisions of the Mixed Arbitral Tribunals constituted under the several Treaties and in the practice obtaining between the Allied Powers and the Central Powers.<sup>1</sup>

include nationals of the former Austrian [Hungarian] ceded territory who ceased to be Austrian [Hungarian] nationals upon the cession of such territory.

"Debts" as that term is used herein, or claims based thereon, are such as have been impressed with American nationality continuously during the period of American belligerency; *provided, however*, that if a debt or a claim based thereon became impressed with American nationality by the naturalization of the claimant or otherwise through operation of law after December 6, 1917, but before July 2, 1921, and remained to the latter date impressed with American nationality it will be separately dealt with by the Commissioner.

<sup>1</sup> See Agreement between the British and Hungarian Governments, ratifications of which were exchanged at London on April 20, 1922, copied in full in the supplement to volume 17 (1923), American Journal of International Law, pages 46-48. Paragraph 5 of that Agreement reads as follows: "To remove doubts the claims by British nationals with regard to their property, rights and interests with the payment of which all property, rights and interests of Hungarian nationals within British territory, and the net proceeds of the sale, liquidation or any other dealings therewith *may under paragraph 4 of the annex to section IV of part X of the Treaty be charged shall be deemed to include the classes of pecuniary obligations referred to in paragraphs (3) and (4) of article 231 of the Treaty.*"

Rubens *v.* Austrian Government, III Dec. M. A. T. 37; The Municipal Trust Co., Ltd., *v.* Hungarian Government, *ibidem* 248. While these cases were appeals from Clearing Office decisions, nevertheless they throw some light on the question here considered.

See also fourth annual report of the British Administrator of Austrian, Hungarian, and Bulgarian Property (1924), page 8, and the fourth paragraph of the Agreement of July 24, 1924, between the British Government and the Austrian Government appearing on page 26 of that report.

Liability for interest or capital surms due to American nationals in respect of securities issued or taken over by the former *Austro-Hungarian Government* will be dealt with in another decision.

*Compensation for damages arising under Article 249 [232] (e)*

Paragraph (e) of article 249 [232] provides in substance that Austria [Hungary] shall compensate American nationals "in respect of damage or injury inflicted upon their property, rights or interests, including any company or association in which they are interested, in the territory of the former Austrian Empire [former Kingdom of Hungary], by the application either of the exceptional war measures or measures of transfer".

This provision constitutes one of the "matters provided for in article 249 [232]", and hence in arriving at the measure of damages the provisions of section III with respect to currency and rates of exchange and interest will be taken into account.

The phrase "property, rights and interests" includes "debts, credits and accounts" (first clause of paragraph 14 of the annex to section IV).

Under the Tripartite Agreement the extent of the damage or injury, if any, inflicted upon an American national by the former Austrian Empire [former Kingdom of Hungary] through the application of war measures must be determined by the Commissioner.

In such determination the following principles and rules will apply:

(1) "Exceptional war measures" include those enumerated in the first clause of paragraph 3 of the annex to section IV<sup>1</sup> and all others which were in fact exceptional war measures whether or not expressly enumerated as such in the Treaty or expressly provided for in any administrative, legislative, or judicial act or decree. It will be noted that the enumeration of exceptional war measures is very broad and sweeping and seems to include all measures taken by Austria [Hungary] or her authorized agents or by any person connected with the administration or supervision of enemy property. However, it is significant that this enumeration while inclusive is not exclusive, and all measures and acts of the general nature of those enumerated will be held to have been exceptional war measures.

(2) "Measures of transfer" include only those defined in the Treaty provision copied in the margin, which definition is exclusive in its nature.

<sup>1</sup> The language of paragraph 3 of the annex to section IV follows:

"In article 249 [232] and this annex the expression 'exceptional war measures' includes measures of all kinds, legislative, administrative, judicial or others, that have been taken or will be taken hereafter with regard to enemy property, and which have had or will have the effect of removing from the proprietors the power of disposition over their property, though without affecting the ownership, such as measures of supervision, of compulsory administration, and of sequestration; or measures which have had or will have as an object the seizure of, the use of, or the interference with enemy assets, for whatsoever motive, under whatsoever form or in whatsoever place. Acts in the execution of these measures include all detentions, instructions, orders or decrees of Government departments or courts applying these measures to enemy property, as well as acts performed by any person connected with the administration or the supervision of enemy property, such as the payment of debts, the collecting of credits, the payment of any costs, charges or expenses, or the collecting of fees.

"Measures of transfer are those which have affected or will affect the ownership of enemy property by transferring it in whole or in part to a person other than the enemy owner, and without his consent, such as measures directing the sale, liquidation or devolution of ownership in enemy property, or the cancelling of titles or securities."

(3) In assessing the compensation to be paid by Austria [Hungary] for the damage or injury inflicted upon American nationals by the application of exceptional war measures or measures of transfer to their property, rights, or interests, the provisions of section III with respect to currency and rates of exchange and interest will be taken into account.

(4) The Commissioner finds that the average cable transfer rate prevailing in the United States during the month immediately preceding the declaration of the existence of a state of war between the United States and Austro-Hungary (paragraph (d) of Article 248 [231] ) was 9.36 cents American currency to one Austro-Hungarian krone. This is the rate which will be applied by this Commission whenever it is proper to apply the "pre-war rate of exchange".<sup>1</sup>

(5) The Government of Austria and the Government of Hungary through their respective Agents represent that Austro-Hungary, the former Austrian Empire, and the former Kingdom of Hungary did not issue, promulgate, or give effect to any exceptional war measures or measures of transfer applicable to American nationals; that they had no Government agent or agency corresponding to the German Treuhänder or the Alien Property Custodian of the United States; that the decrees preventing their nationals from trading with enemies which applied to the nationals of Great Britain, France, Belgium, Italy, and other Allied Powers were never extended to or applied to American nationals or their property, rights, and interests, and that there were no Austro-Hungarian, Austrian, or Hungarian statutes, regulations, or decrees of any nature designed to prohibit, or which did in fact prohibit, Austrian or Hungarian nationals from communicating, trading, or having intercourse with American nationals during the period of belligerency, or designed to prevent, or which did in fact prevent, Austrian or Hungarian nationals from paying their debts owing to American creditors.

The burden will be upon the United States to prove the existence of Austro-Hungarian and/or Austrian [Hungarian] legislative, administrative, judicial or other general act or decree having general applicability to all the property, rights, and interests of American nationals in territory of the former Austrian Empire [former Kingdom of Hungary]. In the absence of such proof the burden will be upon the United States in putting forward a particular claim on behalf of one of its nationals to prove that the property, rights, and interests of the claimant in the territory of the former Austrian Empire [former Kingdom of Hungary] were in fact subjected to measures in the nature of exceptional war measures or to measures of transfer taken by Austro-Hungary and/or by Austria [Hungary] resulting in damage or injury thereto.

*Austria's and Hungary's liability for claims and debts*

From the analysis of the portions of sections III and IV of part X of the Treaty applicable to the United States and Austria [Hungary] and their

<sup>1</sup> The term "pre-war" applicable to the United States and its nationals as used in paragraph (d) of article 248 [231] fixing the rate of exchange refers to a time prior to December 7, 1917, while the same term as applied to Great Britain, France, and other Allied Powers refers to a time prior to the entry (on July 28, 1914, or later) of each into war with the Central Power concerned in the particular Treaty. During this period of American neutrality many of the debts which form the basis of claims before this Commission were incurred. Likewise during this period of more than three years the Austro-Hungarian krone as measured by the American exchange value depreciated to less than one-half of its par value. Consequently the Treaty pre-war rate of exchange applicable to Great Britain, France, and some of the other Allied Powers and their respective nationals is more than double the Treaty rate applicable to the United States and its nationals.

respective nationals it appears that the only provisions fixing *direct* and *absolute* liability on Austria [Hungary] for *debts* owing by their nationals are those embodied in paragraphs (*e*) and (*h*) (2) of article 249 [232], in the first of which Austria [Hungary] is held liable to make compensation for damage or injury resulting from its own acts in applying war measures to American property, rights, or interests, including debts, credits, accounts, and cash assets, and in the second of which Austria [Hungary] is required to pay to American nationals or the American Government the proceeds of the liquidation of American property, including debts<sup>1</sup>.

An *indirect* liability is fixed on Austria [Hungary] for debts owing by its nationals (paragraph (*j*) of Article 249 [232]) *contingent, however*, on the Congress of the United States electing to retain and apply the Custodian Property to the payment of claims and/or debts in accordance with the provisions of paragraph (*h*) (2) of article 249 [232] and paragraph 4 of the annex to section IV.

Austria [Hungary] is, of course, independent of any Treaty provisions, primarily liable for its public debts, evidenced by its bonds, treasury notes, and the like.

But nowhere in such of the clauses of the Treaties as became effective with respect to the United States and its nationals is there found any provision fixing direct and primary liability on Austria [Hungary] for the debts of its nationals to American nationals in the absence of some act of the Austrian [Hungarian] Government operating upon such debts to the prejudice of the American creditors. The suggestion that, in the absence of such act by the Austrian [Hungarian] Government, it is obligated to pay American creditors for losses sustained by them due to depreciation during and after the war in the exchange value of Austro-Hungarian currency can be sustained only on the theory that Austria [Hungary] is liable for all of the direct and indirect, immediate and ultimate, consequences of the war. Clearly such a construction of the Treaty is not justified (see reasons set forth in the "Opinion in War-Risk Insurance Premium Claims" rendered by the Umpire of the Mixed Claims Commission, United States and Germany, Decisions and Opinions, pages 33 to 59 inclusive).

#### *Valorization of debts—Interest*

In the absence of a treaty so stipulating, there is no warrant for requiring the payment in American currency at the pre-war rate of exchange of Austrian [Hungarian] public debts or debts of Austrian [Hungarian] nationals owing to American nationals which by their terms are payable in Austro-Hungarian or other non-American currency. A contract obligation of the Austrian [Hungarian] Government or of an Austrian [Hungarian] national to pay Austro-Hungarian kronen is exclusively a krone obligation and is unaffected either by the purchasing power of the krone in Austria [Hungary] or by the exchange value of the krone as measured by other currencies.<sup>2</sup>

<sup>1</sup> In carrying these provisions into effect the provisions of section III respecting currency and rates of exchange and interest must be taken into account in measuring the extent of the damage inflicted by Austria's [Hungary's] act or the amount which Austria [Hungary] is required to pay from the proceeds of liquidation of American property.

<sup>2</sup> This is the effect of the decision rendered by the Supreme Court of the United States on November 23, 1926, in the case of *Die Deutsche Bank Filiale Nurnberg v. Charles Franklin Humphrey*. Mr. Justice Holmes in delivering the opinion of the court said:

"An obligation in terms of the currency of a country takes the risk of currency fluctuations and whether creditor or debtor profits by the change the law takes no account of it. *Legal Tender Cases*, 12 Wall. 457, 548, 549. Obviously in fact a dollar or a mark may have different values at different times but to the law that establishes

The Commissioner rejects the contention put forward by the American Agent that as paragraphs 4 and 14 of the annex to section IV treat debts owing to American nationals by Austrian [Hungarian] nationals as within the provisions of that section, therefore the second clause of paragraph 14 requires the application of the provisions of section III respecting currency and rates of exchange and interest to such debts. The Commissioner holds that the mere fact that such debts may fall within the scope of or be dealt with in section IV does not under any and all circumstances require the application to such debts of the provisions of section III with respect to currency and rates of exchange and interest. These provisions of section III may be applied to debts only in carrying into effect such provisions of section IV as deal with or operate upon debts. The clause invoked by the American Agent stipulates that "In the settlement of matters provided for in article 249 [232] between Austria [Hungary]" and the United States the provisions of section III respecting currency and rates of exchange and interest shall apply. Article 249 [232] makes no provision for the direct settlement of debts as between nationals of Austria [Hungary] and those of the United States or as between the Government of Austria [Hungary] and American nationals. Such debts (except those subjected to war measures) are not dealt with by article 249 [232] save in those clauses providing in effect that the Government of the United States may charge or apply Custodian Property to their payment. Or, to state the proposition in another form, the provisions of article 249 [232] do not deal with the settlement of debts as between private parties or as between American nationals and the Government of Austria [Hungary] but deal only with State measures taken by the United States (or by Austria [Hungary]) in respect of such debts. Should the United States elect to exercise the power of charging Custodian Property with or applying it to the payment of such debts in accordance with the provisions of paragraph (h) (2) of Article 249 [232] and paragraph 4 of the annex to section IV—one of the "matters provided for in article 249 [232]"—then in the application by the Government of the United States as against the Government of Austria [Hungary] of these State measures to such debts the provisions of section III with respect to currency and rates of exchange and interest will apply.<sup>1</sup>

it it is always the same. If the debt had been due here and the value of dollars had dropped before suit was brought the plaintiff could recover no more dollars on that account. A foreign debtor should be no worse off."

To the same effect is the decision of the Supreme Court of the United States rendered on May 16, 1927, in the case of *Zimmermann et al. v. Sutherland et al.* (Wiener Bank-Verein, of Vienna) brought by American nationals to enforce the application of funds seized during the war by the United States as the property of the Vienna bank to the payment at the pre-war rate of exchange of the pre-war bank deposit in kronen of the plaintiffs in the Vienna bank and payable there in accordance with the law of Austria. In denying the existence of the asserted right the court held: "The only primary obligation was that created by the law of Austria-Hungary and if by reason of an attachment of property or otherwise the courts of the United States also gave a remedy the only thing that they could do with justice was to enforce the obligation as it stood, not to substitute something else that seemed to them about fair." In disposing of the contention that this suit could be maintained under the Act of the Congress of the United States designated the "Trading with the Enemy Act" the court held: "That Act did not turn the Austrian into an American debt and impose a new and different obligation upon the Austrian Bank."

<sup>1</sup> The reasoned opinions of the Mixed Arbitral Tribunals constituted under the Treaty of Versailles and similar Treaties involving private debts between nationals of non-clearing States sustain the view here expressed. *National Bank of Egypt v. German Government and Bank für Handel und Industrie*, V Dec. M. A. T. 26; *Margaret Williams v. Berlinische Lebens-Versicherungs Gesellschaft*, *ibidem* 322.

See also *Goldschmiedt v. Heesch Hinrichsen et Cie.*, IV Dec. M. A. T. 530; *Loy*

The Treaty terms place the ultimate responsibility on the United States through its law-making power<sup>1</sup> to elect to apply or not to apply the Custodian Property to the payment of claims and debts of American nationals as defined therein. When the facts shall have been fully developed by this Commission, the debts ascertained and the claims adjudicated, this election may be made advisedly. Pending such election the Treaty provides that the Custodian Property shall be retained by the United States subject to the disposition of its law-making power until such time as Austria [Hungary] shall have made suitable provision for the satisfaction of all claims of American nationals against it. What those claims are must be determined by this Commission. What is suitable provision for their satisfaction must be determined by the law-making power of the United States. Should no other suitable provision be made by Austria [Hungary] for the satisfaction of American claims and debts, then the law-making power of the United States may at its election apply the proceeds of the liquidation of the Custodian Property to their payment in accordance with the provisions of paragraph (h) (2) of article 249 [232] and paragraph 4 of the annex to section IV of the Treaty, these being "matters provided for in article 249 [232]". In the event of such election—but only then—will the "debts" not subjected to war measures owing to American creditors by Austrian [Hungarian] debtors and by the Austrian [Hungarian] State payable in non-American currency be converted and stated for the purpose of payment in American currency at the pre-war rate of exchange, and the interest provisions of paragraph 22 of the annex to section III will apply. The amount so applied

and *Markus v. German Government et al.*, V Dec. M.A.T. 551; *Michalewski v. Deutsche Bank Berlin*, *ibidem* 463; *Tempel v. Deutsch-Russische Transport* (decided by German-Polish Mixed Arbitral Tribunal July 23, 1926); and *Zundhutschen und Patronenfabrik Aktiengesellschaft v. Westbank Aktiengesellschaft*, III Dec. M. A. T. 982.

The leading case apparently announcing a different rule, but without stating reasons therefor, is that of *George Stevenson & Co., Ltd., v. Banque Nationale de Bulgarie*, II Dec. M.A.T. 77. It was brought under the provisions of the Treaty of Neuilly by a British national against a Bulgarian national. While Great Britain had not adopted the Clearing Office system as a method of settlement of claims and debts between its nationals and Bulgarian nationals, it had by Order in Council, entered prior to the bringing of this suit, elected to adopt the alternate method of settlement and to apply the proceeds of Bulgarian property in its hands to the payment of debts owing by Bulgarian nationals to British nationals (see fifth annual report of the Controller of the Clearing Office of Great Britain dated September 15, 1925, on page 13 under the caption "Department for the Administration of Bulgarian Property"; *Armstrong's War and Treaty Legislation 1914-1922*, 2nd edition, page 313 *et seq.*). Having by this Order in Council—a State measure taken by Great Britain against Bulgaria—made such election, it necessarily followed that, under the express terms of the Treaty of Neuilly, the claims and debts owing to British nationals by Bulgaria and its nationals must be converted into British currency at the pre-war rate of exchange and that the interest provisions of section III must be applied. Likewise Great Britain, having made this election, was required to apply the same provisions of section III in accounting to Bulgaria for the property retained and liquidated. In the light of this analysis of what was really involved in that case, it is apparent that the disposition made of it is not in conflict with the rule here announced.

<sup>1</sup> Paragraph (h) (2) of article 249 [232] provides that the Custodian Property "shall be subject to disposal by such Power [United States] in accordance with its laws and regulations". Section 5 of the [Knox-Porter] Peace Resolution adopted by the Congress of the United States and incorporated in the Treaty of Vienna [Budapest] provides that the Custodian Property "shall be retained by the United States of America and no disposition thereof made except as shall have been heretofore or specifically hereafter shall be provided by law," etc.

will be a credit to Austria [Hungary] which will in turn compensate its nationals in respect of such application of the proceeds of the liquidation of their property (paragraph *(j)* of article 249 [232] ).

*Method of payment*

As heretofore noted, section III of part X of the Treaties, providing a "method of payment" of private debts and State obligations defined therein "through the intervention of Clearing Offices", was not adopted by the United States and hence has no application as between the United States and its nationals on the one hand and Austria [Hungary] and its nationals on the other hand.

But the provisions of paragraph *(h)* (2) of article 249 [232] and of paragraph 4 of the annex to section IV provide an alternate "method of payment" through the application by the Government of the United States of the Custodian Property to the payment of claims and debts of American nationals as defined therein. The Government of the United States by the terms of the Treaties reserved and it is expressly clothed with the power at its election<sup>1</sup> to make such application of the Custodian Property; but such election if made carries with it correlative burdens<sup>2</sup> and hence this alternate method of payment as well as the Clearing Office method is to some extent reciprocal.

*Machinery for determining the amount of claims and debts*

Eliminating those provisions of the Treaties not adopted by the United States, the Tripartite Agreement in practical effect clothes the Commissioner with the power and it is made his duty to adjudicate all claims presented by the Government of the United States on its own behalf or on behalf of its nationals against Austria [Hungary] or its nationals falling within the terms of the Treaties, including (1) reparation claims arising under part VIII, and (2) compensation claims for damage or injury falling within the terms of paragraph *(e)* of article 249 [232]; and, as Arbitrator appointed in pursuance of paragraph 4 of the annex to section IV of part X of the Treaties, to ascertain

<sup>1</sup> Paragraph *(h)* (2) of article 249 [232] and paragraph 4 of the annex to section IV. It will be noted that these clauses of the Treaties providing for this alternate method of payment are so drawn as to harmonize with the provisions of the American "Trading with the Enemy Act" which reserved to the Congress of the United States the right to dispose of the Custodian Property and also with section 4 of the Peace Resolution incorporated in the Treaties which reserved to the United States all rights "to which it is entitled by virtue of any Act or Acts of Congress", including the Trading with the Enemy Act, and also with section 5 of the Peace Resolution incorporated in the Treaties which provides that the Custodian Property "shall be retained by the United States of America and no disposition thereof made except as shall have been heretofore or specifically hereafter shall be provided by law until such time" as Austria and Hungary shall have respectively made suitable provision for the satisfaction of claims of American nationals against them.

<sup>2</sup> Should the United States elect to apply the Custodian Property to the payment of the claims and debts of American nationals it must to the extent of the amounts so applied credit Austria [Hungary] and the latter in turn is obligated to compensate its nationals in respect of the proceeds of the liquidation of their property so applied. Moreover, the United States to the extent it shall exercise the right reserved to it under paragraph *(b)* of article 249 [232] to retain and liquidate Custodian Property—one of the "matters provided for in article 249 [232]"—must, in the settlement of such liquidation, apply the provisions of section III respecting currency and rates of exchange and interest. *National Bank of Egypt v. German Government and Bank für Handel und Industrie, Anglo-German Mixed Arbitral Tribunal*, V Dec. M. A. T. 26.

and assess in the contract currency the amount of debts not subjected to war measures in order that an account may be stated as a basis for the interested Governments taking measures looking to final settlement and that the law-making power of the United States may act advisedly in making final disposition of the Custodian Property. <sup>1</sup> In the discharge of the last-named function action by the Congress of the United States must be awaited before the Commissioner can take final action with respect to the conversion of foreign into American currency, determine the rate of exchange applicable thereto, and the application, if any, of the interest provisions of paragraph 22 of the annex to section III of part X of the Treaties.

*Rules of procedure*

The Commissioner prescribes the following rules governing debts and claims based on debts presented to the Commissioner by the United States on behalf of American nationals:

I. All such cases will be grouped by the Commissioner into two major classes designated class A and class B respectively. Class A shall comprise those debts (or claims based thereon) found by the Commissioner to have been subjected by Austria [Hungary] to exceptional war measures or measures of transfer. Class B shall comprise those debts (or claims based thereon) which the Commissioner shall find were not subjected to or affected by any Austrian [Hungarian] State measures. Class B shall be subdivided into class B (1) and class B (2). Class B (1) shall comprise debts (or claims based thereon) impressed with American nationality throughout the period of American belligerency. Class B (2) shall comprise debts (or claims based thereon) which became impressed with American nationality by the naturalization of the claimant or otherwise through operation of law after December 6, 1917, but before July 2, 1921, and which remained to the latter date impressed with American nationality.

II. A final judgment will be entered by the Commissioner in all class A cases for an amount stated in American currency compensating the American creditor for the damage or injury inflicted with interest thereon at the rate of 5 per cent per annum from the date of such infliction to the date of payment, such judgment to be in favor of the United States on behalf of the claimant against Austria [Hungary].

III. An interlocutory judgment will be entered by the Commissioner in all class B cases reciting (*a*) the name and residence of the creditor, (*b*) the name and residence of the debtor, (*c*) the date the debt was incurred, (*d*) the date of its maturity, (*e*) the principal amount thereof, (*f*) the rate of interest stipulated if any, and (*g*) the contract currency. The interlocutory judgment entered in all class B (2) cases shall also recite the date on which debts or claims based thereon became impressed with American nationality. Final judgment in all class B cases will be reserved by the Commissioner pending further notice to the respective Agents. <sup>2</sup>

<sup>1</sup> See Administrative Decision No. 1 dealing with the functions and jurisdiction of the Commission. There is thus combined in one tribunal functions which under the Treaty of St. Germain [Trianon] and similar Treaties between the Allied Powers and the Central Powers were allocated to the Reparation Commission, the Mixed Arbitral Tribunals, and an Arbitrator appointed in pursuance of paragraph 4 of the annex to section IV of part X.

<sup>2</sup> *Note by the Secretariat.* On April 9, 1928, the Commissioner, in the eighteenth meeting of the Tripartite Claims Commission, announced the following Act (original report, pp. 196-198):

IV. All claims based upon debts owing by Austrian [Hungarian] nationals to American nationals shall be asserted against the Government of Austria [Hungary] and the Austrian [Hungarian] private debtor jointly. Thereupon the Austrian [Hungarian] Agent shall cause notice of such claim to be given to the said Austrian [Hungarian] debtor and require such debtor to furnish the Austrian [Hungarian] Agent within 45 days from the date of such notice with all necessary information and data for the proper defence, if any, of such claim.

-----  
 ACT OF THE COMMISSIONER OF THE TRIPARTITE CLAIMS COMMISSION (UNITED STATES, AUSTRIA AND HUNGARY) TAKEN IN PURSUANCE OF "SETTLEMENT OF WAR CLAIMS ACT OF 1928" FIXING THE RATE OF EXCHANGE AND OF INTEREST AND THE PERIOD DURING WHICH INTEREST SHALL RUN WITH RESPECT TO INTERLOCUTORY JUDGMENTS ENTERED BY THE COMMISSIONER.

Whereas the statute enacted by the Congress of the United States of America designated "Settlement of War Claims Act of 1928", which became effective on March 10, 1928, upon its approval by the President of the United States, provides in substance that the Commissioner of the Tripartite Claims Commission (United States, Austria and Hungary) is authorized and requested with respect to interlocutory judgments entered by him to fix such rate of exchange for the conversion of foreign currency into money of the United States and to fix such rate of interest applicable to said interlocutory judgments and such period during which such interest shall run as he may determine to be fair and equitable, and to give notice thereof within thirty days after the coming into force of said Act; and

Whereas the said Commissioner has considered all statements and arguments submitted by the Government of the United States and the Government of Austria and the Government of Hungary dealing with the fair and equitable rate of exchange and of interest and the period during which interest shall run, and is prepared to comply with the said request and to exercise the said authority conferred by said Act;

Now, therefore, the said Commissioner, being fully advised in the premises, does hereby comply with the said request and exercise the said authority conferred upon him and does hereby fix the rate of exchange at which all interlocutory judgments entered or to be entered by the Commissioner in foreign currency shall be converted into money of the United States, and the rate of interest applicable to all interlocutory judgments entered or to be entered by him and the period during which such interest shall run, as follows:

## SECTION I

### *Rate of Exchange*

(a) *Gold Currency.* Interlocutory judgments expressed in gold foreign currency shall be converted into United States currency at the rates following:

- (1) 20.26 cents to the Austro-Hungarian gold krone;
- (2) 48.237 cents to the Austro-Hungarian gold gulden or florin;
- (3) 19.3 cents to the French gold franc;
- (4) 23.82 cents to the German gold mark;
- (5) \$ 4.87 to the British gold pound.

(b) Interlocutory judgments classified by the Commissioner as B (1) and stated in foreign currency (other than gold) shall be converted into United States currency at the rates following:

- (1) 12 cents to the Austro-Hungarian paper or silver gulden or florin;
- (2) 6 cents to the Austro-Hungarian krone;
- (3) 10 cents to the German mark;
- (4) 12 cents to the French franc;
- (5) \$ 4.76 to the British pound sterling.

This practice, in pursuance of which final judgments stated in terms of American currency will be entered by the Commissioner in all cases save in class B cases as above defined, and interlocutory judgments will be entered in all class B cases, will enable the Governments of the United States, of Austria,

(c) All interlocutory judgments classified by the Commissioner as B (2) stated in a foreign currency (other than gold) shall be converted into United States currency at the cable transfer rate of exchange found by the Commissioner to have been in effect (at New York in case of British or French currency and at Zurich in case of all other currencies) at the time the claim became impressed with American nationality, by the naturalization of the claimant or otherwise through operation of law, not exceeding, however, the rate fixed for conversion of interlocutory judgments classified by the Commissioner as B (1).

(d) Interlocutory judgments, if any, which may hereafter be entered by the Commissioner expressed in a foreign currency other than those hereinbefore enumerated shall be converted into United States currency at a rate of exchange to be fixed by the Commissioner, at the time of the entry of such judgments.

## SECTION II

### *Interest*

The rate of interest applicable to interlocutory judgments and the period during which such interest shall run are fixed as follows:

(a) Prior to January 1, 1929, interest shall not be payable on judgments based on dividends, interest, or other periodical payments which themselves represent interest on capital. Beginning with January 1, 1929, such judgments if any, remaining unpaid shall bear interest at the rate of 5 per cent per annum.

(b) Where the obligation upon which the judgment is founded expressly stipulates that the obligation shall not bear interest after maturity, interest shall not run prior to January 1, 1929; but beginning with that date interest shall run at the rate of 5 per cent per annum.

(c) In all cases not falling within the preceding paragraphs (a) or (b) where the obligation upon which the judgment is based matured prior to December 7, 1917, interest shall run beginning on December 7, 1917, until paid; and where the obligation matured on or subsequent to December 7, 1917, interest shall run from the date of maturity until paid.

(d) The rate of interest shall be 5 per cent per annum except in cases where the judgment finds a different contractual rate of interest stipulated, in which event the rate shall be the contractual rate.

(e) A deposit in the Austrian special deposit account or in the Hungarian special deposit account, as the case may be, in pursuance of the provisions of the Settlement of War Claims Act of 1928, of an amount sufficient to make the payments in respect of the awards (as defined in said Act) against Austria or against Hungary, as the case may be, authorized by subsection (b) of section 5 of said Act, shall be treated as a payment within the meaning of this Section II.

DONE at Washington April 9, 1928.

Edwin B. PARKER

*Commissioner of the Tripartite Claims Commission*

*Cross-references.* Am. J. Int. Law, vol. 23 (1929), pp. 179-181; Friedensrecht, VIII. Jahr, Nr. 6/7 (1929), pp. 38-39.

*Bibliography:* Bonyge, pp. 21-23; Prossinagg, pp. 15-21.

and of Hungary to act advisedly in adopting measures for the ultimate payment of such judgments—measures political rather than juridical in their nature; and will enable the law-making power of the United States to act advisedly in making final disposition of the Custodian Property as contemplated by section 5 of the Peace Resolution constituting a part of the Treaties of Vienna and of Budapest.

This decision in so far as applicable will control the preparation, presentation, and decision of all claims based on debts owing to American nationals by Austrian [Hungarian] nationals or by Austria [Hungary] presented to the Commission and falling within its scope. In any case in which the American Agent, the Austrian Agent, and/or the Hungarian Agent is of the opinion that the peculiar facts of that case take it out of the rules here announced, such facts, with the differentiation believed to exist, will be called to the attention of the Commissioner in the presentation of that case.

---

HERBERT PAYNE (UNITED STATES) *v.* AUSTRIA AND HUNGARY

(*April 12, 1927. Pages 46-47.*)

---

RESPONSIBILITY FOR ACTS OF MILITARY AUTHORITIES.—WAR: SEIZURE, REQUISITION OF PRIVATE PROPERTY.—DAMAGES: MARKET VALUE. Austria and Hungary held responsible for seizure and requisition in Karlsbad of automobile by military authorities on or about November 15, 1915. Reasonable market value at time and place of seizure allowed.

In case styled and numbered as above <sup>1</sup> the claimant, an American national, in July, 1914, was motoring through Europe using an Italian automobile belonging to him. He stored his car at Karlsbad at the outbreak of the World War on or about August 1, 1914, and returned through The Hague to the United States. On or about November 15, 1915, this automobile was seized and requisitioned by the Austro-Hungarian military authorities and although demand for its return to the claimant was made through diplomatic channels it has never been returned to him.

On the record submitted the Commissioner finds that the reasonable market value of this automobile at the time and place of seizure in its then condition was \$3,000.

Wherefore the Commission decrees that under the Treaty of Vienna the Government of Austria is obligated to pay to the Government of the United States on behalf of Herbert Payne the sum of one thousand nine hundred eight dollars (\$1,908.00) with interest thereon at the rate of 5 per cent per annum from November 15, 1915, and that under the Treaty of Budapest the Government of Hungary is obligated to pay to the Government of the United States on behalf of Herbert Payne the sum of one thousand ninety-two dollars (\$1,092.00) with interest thereon at the rate of 5 per cent per annum from November 15, 1915.

---

<sup>1</sup> Original report: United States of America on behalf of Herbert Payne, claimant, *v.* Austria and Hungary, docket No. 17.

MRS. JULIUS BIRO (UNITED STATES) *v.* HUNGARY*(April 12, 1927. Pages 47-48.)*

JURISDICTION.—ARREST OF ALIEN, SEIZURE OF PRIVATE PROPERTY.—EXCEPTIONAL WAR MEASURES. Arrest of claimant's husband, charged with being money smuggler, and seizure of money found on him by Hungarian civil authorities in Hungarian territory on or about May 13, 1920. *Held* that act was no exceptional war measure within terms of Treaty of Budapest.

On behalf of Mrs. Julius Biro, claimant in case styled and numbered as above,<sup>1</sup> it is alleged that she is an American citizen; that in 1920 her late husband visited Hungary and while there the Hungarian authorities, purporting to act in pursuance of Hungarian law, seized \$700.00 in American currency belonging to him which was never returned; and that the claimant as the surviving spouse of her husband is entitled to receive all property and enforce all claims belonging to her husband during his life.

The record indicates that claimant's husband, being in Hungary, crossed the frontier ostensibly to visit his mother, who resided in that part of Czechoslovakia which lately was embraced within the territorial limits of Hungary; that he had several times previously crossed the Hungarian frontiers; that on or about May 13, 1920, he was arrested by the Hungarian authorities in Hungarian territory, charged with being a money smuggler in violation of Hungarian laws, at which time the \$700 in cash found on his person was seized and retained by the Hungarian authorities. There is nothing in the record indicating or even suggesting that the act complained of was in any sense an exceptional war measure as that term is defined in the economic clauses of the Treaty of Budapest. On the contrary, the arrest was made and the funds seized by the Hungarian civil authorities 18 months after the signing of the Armistice. It is not within the competency of this Commission to adjudicate the rights, if any, which claimant may have arising under Hungarian municipal law (not partaking of the nature of war measures), administered by Hungarian domestic tribunals, or arising under international law and espousable diplomatically by the United States, when as in this case the claim does not fall within the terms of the Treaty of Budapest.

Wherefore the Commission decrees that under the Treaty of Budapest the Government of Hungary is not obligated to pay to the Government of the United States any amount on behalf of the claimant, Mrs. Julius Biro, on account of the acts herein complained of.

WILLIAM SCHNEIDER AND JOSEPH BLEIER (UNITED STATES)  
*v.* HUNGARY*(April 12, 1927. Page 48.)*

JURISDICTION.—ALIENS: TAXATION. Exaction of tax on December 19, 1920, by Hungary on funds sent in 1920. *Held* that claim falls outside terms of Treaty of Budapest.

<sup>1</sup> Original report: United States of America on behalf of Mrs. Julius Biro, claimant, *v.* Hungary, docket No. 375.

On behalf of the claimants in case styled and numbered as above,<sup>1</sup> an award is sought against Hungary for \$66.11, the amount of a tax levied on December 19, 1920, by the Hungarian Government on funds sent by claimants to Hungary during 1920. It is alleged that a Hungarian court decision rendered in 1925 based on a statute passed in 1921 declared such taxes illegal with respect to foreigners.

Claimants' demand against Hungary arises under Hungarian statutes and is governed by Hungarian municipal law administered by Hungarian domestic tribunals. It is not a claim falling within the terms of the Treaty of Budapest.

Wherefore the Commission decrees that under the Treaty of Budapest the Government of Hungary is not obligated to pay to the Government of the United States any amount on behalf of the claimants on account of the acts herein complained of.

---

KURT HEPPE (UNITED STATES) *v.* HUNGARY AND HUNGARIAN  
COMMERCIAL BANK OF PEST

(April 12, 1927. Page 49.)

---

**JURISDICTION.—WAR, CONSEQUENCES: DEPRECIATION OF SECURITIES.** Purchase of bonds during war or after signing of Armistice. *Held* that claim for subsequent depreciation in value falls outside terms of Treaty of Budapest.

On behalf of the claimant in case styled and numbered as above<sup>2</sup> it is alleged that in 1918 (the exact date is not stated) the claimant sent 100,000 Hungarian crowns in the form of a bank check to the Hungarian Commercial Bank of Pest with instructions to invest same for his account in such manner as in the bank's judgment would prove safe and desirable; that the bank replied that it had invested the remittance in its own bonds which it assured him were absolutely safe, but that said bonds had so depreciated that they are now practically worthless. It is apparent that the bonds were acquired by the claimant while the war was in progress or after the signing of the Armistice and the claim is put forward for the depreciation in their value after such acquisition. There is no suggestion that the claim grows out of any pre-war transaction or that the bonds were subjected to any exceptional war measures.

The Commissioner holds that the claim does not fall within the terms of the Treaty of Budapest.

Wherefore the Commission decrees that under the Treaty of Budapest the Government of Hungary is not obligated to pay to the Government of the United States any amount on behalf of the claimant herein on account of the acts herein complained of.

---

<sup>1</sup> Original report: United States of America on behalf of William Schneider and Joseph Bleier, claimants, *v.* Hungary, docket No. 1168.

<sup>2</sup> Original report: United States of America on behalf of Kurt Heppe, claimant, *v.* Hungary and Hungarian Commercial Bank of Pest, *Impleaded*, docket No. 1275.

GRIFF GLOVER (UNITED STATES) *v.* AUSTRIA AND  
OESTERREICHISCHER-LLOYD

(June 9, 1927. Pages 50-51.)

JURISDICTION.—DEBTS, NATIONALITY OF CLAIM.—EXCEPTIONAL WAR MEASURES.

—EVIDENCE: BURDEN OF PROOF. Purchase of boat tickets from Trieste Company in July, 1914. Cancellation of trip on August 3, 1914. Refund of fare by payment, without claimant's authority, to Vienna branch of Prague firm which failed to transmit amount to United States. *Held* that, since on July 16, 1920, Company became Italian, and proprietor of firm became Czechoslovakian national, claimant did not discharge burden to prove that on July 2, 1921, debt was owing to him by national of Republic of Austria. *Held* also that no evidence in record of exceptional war measure.

*Bibliography:* Bonyngce, pp. 28-29.

On behalf of the claimant in case styled and numbered as above<sup>1</sup> it is alleged that in July, 1914, the claimant, an American national, purchased from the Oesterreichischer-Lloyd three tickets for passage on its steamship *Thalia* from Amsterdam to Norway and return; that the sailing of the *Thalia* was cancelled on August 3, 1914, whereupon claimant demanded of the Oesterreichischer-Lloyd's representative a refund of the purchase price of said tickets, 2,740 kronen; that this amount was, without claimant's authority, transmitted in October, 1915, by the Oesterreichischer-Lloyd to L. & G. Halphen in Vienna; that claimant instructed the Halphen firm to transmit said amount in dollar currency to him in the United States, but these instructions were never complied with; and that the said Oesterreichischer-Lloyd is still indebted to the claimant in the sum of 2,740 kronen valorized at the pre-war rate of exchange, or \$257.56, with interest thereon at the rate of 5 per cent per annum from August 3, 1914. It is further alleged that the failure of the said Oesterreichischer-Lloyd and the said Halphen firm to transmit these funds to claimant was due to the existence of exceptional war measures promulgated and enforced by the Austrian Government.

The Commissioner finds:

(1) That the principal office of the Oesterreichischer-Lloyd was in July, 1914, and still is at Trieste;

(2) That the principal office of L. & G. Halphen and its successor was in July, 1914, and still is at Prague;

(3) That upon the coming into effect of the Treaty of St. Germain on July 16, 1920, Trieste became Italian territory and Prague became Czechoslovakian territory; and

(4) That upon the coming into effect of the Treaty of St. Germain the Oesterreichischer-Lloyd became an Italian national with the name Lloyd-Triestino and the proprietor of L. & G. Halphen became a Czechoslovakian national.

It follows that the claimant has failed to discharge the burden resting on him to prove that on July 2, 1921, the debt declared upon was owing to him by a national of the Republic of Austria as then and now existing.

The Commissioner further finds that there is no evidence in this record of any exceptional war measure taken by the former Austrian Government or any other Government which interfered with the transmission to claimant of funds claimed by him.

<sup>1</sup> Original report: United States of America on behalf of Griff Glover, claimant, *v.* Austria and Oesterreichischer-Lloyd, *Impleaded*, docket No. 9.

Applying the rules announced in Administrative Decision No. II to the facts as disclosed by the record herein, the Commission decrees that under the Treaty of Vienna the Government of Austria is not obligated to pay to the Government of the United States any amount on behalf of the claimant herein.

---

JOSEPH AMSCHLER (UNITED STATES) *v.* AUSTRIA AND BANCA COMMERCIALE TRIESTINA

(June 9, 1927. Pages 51-52.)

---

JURISDICTION.—DEBTS, NATIONALITY OF CLAIM. Deposit in Austrian bank which on July 16, 1920, became Italian national. *Held* that debt is not “enemy debt” within terms of Treaty of Vienna.

*Bibliography:* Bonynge, pp. 28-29.

On behalf of the claimant in case styled and numbered as above <sup>1</sup> an award is sought against Austria based exclusively on a bank deposit of 5,248 kronen and 75 heller to the credit of claimant in the Banca Commerciale Triestina, located at Gorizia, which prior to the war was embraced in the territory of the former Austrian Empire. On the coming into effect of the Treaty of St. Germain on July 16, 1920, Gorizia became a part of and the debtor bank a national of Italy. <sup>2</sup>

The Commissioner holds that the Banca Commerciale Triestina is not with respect to claimant an “enemy debtor” within the meaning of that term as found in the Treaty of Vienna and that the claim here asserted is not an “enemy debt” falling within the terms of that Treaty.

Applying the rules announced in Administrative Decision No. II to the facts as disclosed by the record herein the Commission decrees that under the Treaty of Vienna of August 24, 1921, the Government of Austria is not obligated to pay to the Government of the United States any amount on behalf of the claimant herein.

---

FRIEDERIKE GOTTLIEB (UNITED STATES) *v.* AUSTRIA AND BOHEMIAN SAVINGS BANK

(June 9, 1927. Pages 52-53.)

---

JURISDICTION.—DEBTS, NATIONALITY OF CLAIM. Deposit in Austrian bank which prior to July 16, 1920, became Czechoslovakian national. *Held* that debt is not “enemy debt” within terms of Treaty of Vienna.

*Bibliography:* Bonynge, pp. 28-29.

---

<sup>1</sup> Original report: United States of America on behalf of Joseph Amschler, claimant, *v.* Austria and Banca Commerciale Triestina, of Gorizia, Italy, *Impleaded*, docket No. 337.

<sup>2</sup> See Banca Commerciale Triestina *v.* Banque des pays de l'Europe centrale before Italo-Austrian Mixed Arbitral Tribunal, decided on November 12, 1924, V Dec. M.A.T. 523.

On behalf of the claimant in case styled and numbered as above <sup>1</sup> an award is sought against Austria based exclusively on a savings bank deposit of 38.57 kronen to the credit of claimant in the Bohemian Savings Bank, located at Prague, which before the war was embraced in the territory of the former Austrian Empire. Prior to the coming into effect of the Treaty of St. Germain on July 16, 1920, the principal Allied and Associated Powers had recognized the existence of Czechoslovakia as an independent State, and it was a party to that Treaty as an Allied Power (see preamble to Treaty of St. Germain).

The deposit upon which this claim is based is in a bank located at Prague in Czechoslovakia, which bank is not with respect to claimant an "enemy debtor" within the meaning of that term as found in the Treaty of Vienna, and the claim here asserted is not an "enemy debt" falling within the terms of that Treaty.

Applying the rules announced in Administrative Decision No. II to the facts as disclosed by the record herein the Commission decrees that under the Treaty of Vienna of August 24, 1921, the Government of Austria is not obligated to pay to the Government of the United States any amount on behalf of the claimant herein.

---

ALEXANDER KARL RUDOLPH (UNITED STATES) *v.* AUSTRIA

(June 9, 1927. Page 53.)

---

**JURISDICTION.—WAR: CONFISCATION OF PRIVATE PROPERTY.** *Held* that claim based upon confiscation of property in 1805 during Napoleon's campaign falls outside terms of Treaty of Vienna.

On behalf of the claimant in case styled and numbered as above <sup>2</sup> an award is sought against Austria for \$250,000, the value of property belonging to the claimant's grandfather who fought in the Prussian army allied with the Austrian army and whose property was confiscated in 1805 during Napoleon's campaign.

The Commissioner holds that the claim here asserted does not fall within the terms of the Treaty of Vienna.

Applying the rules announced in Administrative Decision No. II to the facts as disclosed by the record herein the Commission decrees that under the Treaty of Vienna of August 24, 1921, the Government of Austria is not obligated to pay to the Government of the United States any amount on behalf of the claimant herein.

---

HENRY NEUGASS (UNITED STATES) *v.* AUSTRIA AND HUNGARY

(January 6, 1928. Pages 54-59.)

---

**BONDED PUBLIC DEBTS AND STATE SUCCESSION: LIABILITY FOR INTEREST.—**  
**INTERPRETATION OF TREATIES: RULE OF EFFECTIVENESS.—INTERLOCUTORY**

---

<sup>1</sup> Original report: United States of America on behalf of Friederike Gottlieb, claimant, *v.* Austria and Bohemian Savings Bank, of Prague, *Impleaded*, docket No. 553.

<sup>2</sup> United States of America on behalf of Alexander Karl Rudolph, claimant, *v.* Austria, docket No. 891.

JUDGMENTS. Purchase in 1884 of six bonds 5 per cent "unsecured unified public debt" of Austrian Empire, issued October 1, 1868. Contribution by Austria and Hungary to service of debt proportionate to 71.348 per cent and 28.652 per cent, respectively (Austro-Hungarian conventions concluded in 1867, ratified and confirmed by statutes). Conversion of 71.348 per cent of debt into part of "Austrian unsecured debt", and of 28.652 per cent of debt into part of "Hungarian unsecured debt" (Treaty of St. Germain (Trianon), article 203 (186), annex). Distribution of "Austrian (Hungarian) unsecured debt" among Succession States by Reparation Commission, so that Austria (Hungary), being one of Succession States, solely responsible for liabilities incurred prior to July 28, 1914, which by their terms became due and payable prior to coming into force of Treaty (article 203 (186), paragraph 2). Issuance of new obligations by Succession States for period after that date. Relevant provisions of Treaty of St. Germain (Trianon) carried into Treaty of Vienna (Budapest). As each provision of Treaty must be given such reasonable construction in connexion with every other provision as to give effect to all of them, *held* that phrase "securities issued or taken over by the former Austro-Hungarian Government" (article 248 (231), Treaty of St. Germain (Trianon)) refers to "unsecured unified public debt" *supra*, and that, therefore, Austria liable for interest due on or prior to July 16, 1920 (date of coming into force of Treaty of St. Germain), and Hungary liable for interest due on or prior to July 2, 1921 (date on which United States declared state of war with Austro-Hungary ended), in respect of pre-war "Austrian (Hungarian) unsecured debt" and that bond-holders must look to new obligations issued by Succession States for interest accruing subsequent to these dates. Interlocutory judgments will be entered.

*Cross-references:* Am. J. Int. Law, vol. 22 (1928), pp. 693-698; Friedensrecht, VIII, Jahr Nr. 1/2 (1929), pp. 12-14.

*Bibliography:* Prossinagg, pp. 25-26; Bonyngé, pp. 35-37.

This claim is asserted by the United States on behalf of Henry Neugass, an American national through naturalization, against Austria and Hungary jointly for 705.60 gulden, the aggregate amount of 48 coupons detached from six bonds and filed herein, six of which coupons became payable by their terms on October 1, 1917, and six on April 1 and October 1 of each year thereafter, ending with April 1, 1921.

The bonds in question were all acquired by the claimant in 1884. They were of the issue of October 1, 1868, and have not matured. While they are in terms obligations of the former Austrian Empire, they recite (in translation) that they form:

"... an integral part of the 5 per cent unified public debt... which said debt arose in accordance with the law of 20th June 1868 from the transforming of the different sorts of the funded general public debt as existing at the end of 1867, and for the payment of the interest of which the lands of the Crown of Hungary contribute, according to agreement, the yearly quota determined in Article XV, 1867".

The coupons upon which this claim is based are payable in silver gulden or florin, which terms are used interchangeably, one of them appearing on some and the other on the rest of the coupons.

The record presents two questions for decision:

1. To what extent, if at all, is Hungary liable for the coupons here presented, and

2. When, did the liability of Austria and/or Hungary for the payment of said coupons terminate and the liability of the Succession or Cessionary States

(including Austria and Hungary), resulting from the dismemberment of the former Austrian Empire and the former Kingdom of Hungary, attach?

From the record it appears that for some 18 years prior to 1867 the State known internationally as the Empire of Austria claimed and exercised jurisdiction over the lands of the Holy Hungarian Crown. In 1867 the former Austrian Empire and the former Kingdom of Hungary as they existed on and prior to July 28, 1914 began to function under separate constitutions, and the Austro-Hungarian Dual Monarchy came into existence as a *de facto* and constitutional union with limited powers. The debt evidenced by the bonds to which the coupons here presented appertained was created prior to 1868.

By formal conventions entered into between the former Austrian Empire and the former Kingdom of Hungary, as independent States, ratified and confirmed by statutes enacted by their respective lawmaking bodies,<sup>1</sup> it was agreed that Hungary should annually contribute to the service of the debts incurred prior to 1868, which debts came to be known as the "unsecured unified public debt", the liability of Austria and of Hungary therefor being 71.348 per cent and 28.652 per cent respectively.

This was the situation with respect to the bonds and coupons in question when the Treaty of St. Germain and the Treaty of Trianon were negotiated and signed. So far as concerns the questions here presented the provisions of these Treaties are substantially identical. Under them the Austro-Hungarian Dual Monarchy was dismembered and substantial parts of the territories of the former Austrian Empire and of the former Kingdom of Hungary were ceded, some to new and some to existing States, all of which, including the existing Republic of Austria and the existing Kingdom of Hungary, will be hereinafter referred to as "Succession States".<sup>2</sup> The financial clauses (part IX) of the Treaties made elaborate provision for the apportionment between the Succession States as they now exist, including Austria and Hungary, of the secured and unsecured pre-war indebtedness of the former Austrian Empire and the former Kingdom of Hungary, fixing sole responsibility on each Succession State for the portion of such indebtedness allocated to it. We are here concerned only with the pre-war unsecured bonded debts of Austria and/or Hungary as they existed on July 28, 1914, which consisted of (a) the bonded debt of the former Austrian Government for which it alone was liable, (b) the bonded debt of the former Hungarian Government for which it alone was liable, and (c) the unsecured unified public debt already referred to created prior to 1868, nominally of the former Austrian Government but for the payment of interest on which Austria and Hungary were liable in the proportions of 71.348 per cent and 28.652 per cent respectively.

A feature of the comprehensive refunding plan worked out by the makers of these Treaties was the segregation of the liability of the former Austrian Government from that of the former Hungarian Government with respect to the unsecured unified public debt and the allocation to each of a sole liability computed on the percentages hereinbefore mentioned.

This was the purpose of the first paragraph of the annex following article

<sup>1</sup> Austrian laws of December 21 and December 24, 1867, of June 20, 1868, and of December 30, 1907, and Hungarian laws Nos. XII of December 27, 1867, VII of June 11, 1868, and XVI of 1908.

<sup>2</sup> As to Austria these States are: Austria, Czechoslovakia, Italy, Poland, Roumania, and the Serb-Croat-Slovene Kingdom (Jugoslavia). As to Hungary these States are: Hungary, Austria, Czechoslovakia, State of Fiume, Poland, Roumania, and the Serb-Croat-Slovene Kingdom.

203 of the Treaty of St. Germain<sup>1</sup> and the corresponding provision of the Treaty of Trianon,<sup>2</sup> the practical effect of which was to convert 71.348 per cent of the unsecured unified bonded debt into a part of the "Austrian unsecured debt" and the remainder, or 28.652 per cent, thereof into "Hungarian unsecured debt". This conversion of the joint liability with respect to the unsecured *unified* bonded debt into several liabilities left but two classes of *unsecured* bonded debts to be dealt with, namely, Austrian debts and Hungarian debts, and removed many of the difficulties of apportioning and fixing liability with respect to these debts and interest thereon, as from the dates of the coming into force of the relevant Treaties, among the two groups of Succession States (including Austria and Hungary), which differed in their composition. Such segregation, allocation, and distribution was in fact made by the Reparation Commission in pursuance of the authority conferred upon it by the terms of the Treaties (see authorized publication of the Reparation Commission numbered VII, entitled "Distribution of the Pre-War Austrian and Hungarian Debt").

The Treaty of St. Germain provides that each Succession State, including Austria, shall be liable for such portion of the unsecured bonded debt of the former Austrian Government as may be fixed by the Reparation Commission calculated on a prescribed basis, such liability to attach from "the date of the coming into force of the present treaty", viz., July 16, 1920. The Treaty further provides that "The Austrian Government shall be solely responsible for all the liabilities of the former Austrian Government incurred prior to July 28, 1914", save where otherwise specifically provided. Under this provision the pre-war liabilities of the former Austrian Government which by their terms became due and payable prior to the coming into force of the Treaty became a liability of the existing Austrian Republic.

But from the coming into force of the Treaty on July 16, 1920, the liabilities of the former Austrian Government as such ceased to exist and in lieu thereof there was substituted a new liability of the Succession States, including Austria.

The Treaty of Trianon, which came into force on July 26, 1921, contains like provisions with respect to Hungary.

All these provisions constitute part of the program for making effective a comprehensive but complicated debt-refunding plan made necessary by the dismemberment of the territories of the debtor nations. They are carried into the Treaties of Vienna and of Budapest entered into between the United States

---

<sup>1</sup> The first paragraph of the annex following article 203 of the Treaty of St. Germain reads as follows:

"The amount of the former unsecured Austrian Government bonded debt, the responsibility for which is to be distributed under the provisions of article 203, shall be the amount of that debt as it stood on July 28, 1914 after deducting that portion which represents the liability of the former Hungarian Government for that debt as provided by the additional Convention relating to the contribution of the countries of the Sacred Hungarian Crown to the charges of the general debt of Austria-Hungary approved by the Austro-Hungarian Law of December 30, 1907, B.L.I. No. 278."

<sup>2</sup> The corresponding provision of the annex following article 186 of the Treaty of Trianon reads as follows:

"In addition to the former unsecured Hungarian Government bonded debt to be divided as above, there shall also be divided among the several States, in the same proportion, the amount of the former unsecured Austrian Government bonded debt which represents the liability of the former Hungarian Government for that debt, as provided by the additional Convention relating to the contribution of the countries of the Sacred Hungarian Crown to the charges of the general debt of the Austro-Hungarian State approved by the Austro-Hungarian Law of December 30, 1907, B.L.I., No. 278."

on the one part and Austria and Hungary respectively on the other. The United States on behalf of its nationals is taking the benefit of this plan. Its nationals are bound thereby. The American Department of State has, in accordance with the provision of the annex following article 203 of the Treaty of St. Germain [article 186 of the Treaty of Trianon],<sup>1</sup> delivered to the Reparation Commission lists of bonds of Austria and of Hungary reported by American nationals, who upon their surrendering the old obligations of Austria or Hungary are entitled to receive, through the Caisse Commune established under the sanction of the Reparation Commission, new obligations of the Succession States. Where the obligations surrendered are a part of the "Austrian unsecured debt" the new obligations are under the Treaty to provide for interest from July 16, 1920, and where the surrendered obligations are a part of the "Hungarian unsecured debt" the new obligations are to provide for interest from July 26, 1921.

In Article 248 [231] of section III of part X of the Treaty of St. Germain [Trianon], dealing with and defining "debts" falling within that section,<sup>2</sup> it is provided:

"In the case of interest or capital sums payable in respect of securities issued or taken over by the former Austro-Hungarian Government the amount to be credited and paid by Austria [Hungary] will be the interest or capital in respect only of the debt for which Austria [Hungary] is liable in accordance with part IX (financial clauses) of the present Treaty, and the principles laid down by the Reparation Commission."

There were no "securities issued or taken over by the former Austro-Hungarian Government" as such, and the only securities answering the substance but not the letter of this description is the unsecured unified public debt hereinbefore dealt with. As each provision of the Treaty must be given such reasonable construction in connection with every other provision as to give effect to all of them, the Commissioner holds that the phrase "securities issued or taken over by the former Austro-Hungarian Government" found in these paragraphs refers to the unsecured unified public debt the liability for which, for all of the purposes of the Treaties, had been apportioned 71.348 per cent of the total and no more to Austria to be treated as a part of "the Austrian unsecured debt" and 28.652 per cent of the total and no more to Hungary to be treated as part of "the Hungarian unsecured debt".

The Commissioner holds that the existing Republic of Austria is liable (other Treaty requisites of liability being present) for all interest which became due on or prior to July 16, 1920, in respect of the pre-war "Austrian unsecured debt". Bondholders must look to the new obligations issued by the Succession States for interest accruing subsequent to that date.

Likewise the Commissioner holds that the existing Kingdom of Hungary is liable (other Treaty requisites of liability being present) for all interest which

<sup>1</sup> The provision referred to reads as follows:

"Holders of unsecured bonds of the old Austrian Government Debt [Hungarian Government debt] held outside the boundaries of the States to which territory of the former Austro-Hungarian Monarchy is transferred, or of States arising from [out of] the dismemberment of that Monarchy, including Austria [Hungary], shall deliver through the agency of their respective Governments to the Reparation Commission the bonds which they hold, and in exchange therefor the Reparation Commission shall deliver to them certificates entitling them to their due proportionate share of each of the new issues of bonds corresponding to and issued in exchange for their surrendered bonds under the provisions of this annex."

<sup>2</sup> See also "Definition of debts", Administrative Decisions No. II, pp. 22-25 inclusive (note of the Secretariat: this volume, pp. 219 *et seq. supra*).

became due on or prior to July 2, 1921 (the date on which the United States declared the state of war with Austro-Hungary ended), in respect of the pre-war "Hungarian unsecured debt". Bond-holders must look to the new obligations issued by the Succession States for interest accruing subsequent to that date.<sup>1</sup>

It follows that the United States on behalf of the claimant herein is entitled to an award against Austria for 377.57 silver gulden, being 71.348 per cent of the aggregate amount of the coupons presented herein which by their terms became due on or prior to July 16, 1920, and also an award against Hungary for 202.17 silver gulden, being 28.652 per cent of the coupon, presented herein which by their terms became due on or prior to July 2, 1921.

Interlocutory judgments herein will be entered in accordance with the rules of procedure announced in Administrative Decision No. 11 at page 35.<sup>2</sup>

---

ESTATE OF ALEXANDER ORTLIEB (UNITED STATES) *v.* AUSTRIA  
AND EDWARD COUMONT, EXECUTOR OF ESTATE OF LOUIS  
ORTLIEB

(January 6, 1928. Page 60.)

---

**JURISDICTION.—DEBTS.** *Held* that claim for unpaid annuities over period 1917-1920 falls outside terms of Treaty of Vienna: no debt which fell due during period of belligerency arising out of pre-war transaction or contract.

*Bibliography:* Prossinagg, p. 31.

This case having come before the Commission for decision upon the statement of facts submitted by the American Agent, and due consideration having been had, the Commissioner finds that the claim does not fall within the terms of the Treaty of Vienna of August 24, 1921, it appearing that it is based exclusively on a demand for payment of four annuities of \$2,000.00 each payable in the United States on December 25 of the years 1917, 1918, 1919, and 1920, under the will of decedent claimant's brother, an Austrian national, which annuities remain unpaid except for three sums aggregating \$1,650,000 received in 1923 and 1924, the last annuity fully paid being that for the year 1916, and it further appearing that there is no debt herein asserted which fell due during the period of belligerency arising out of a pre-war transaction or contract within the meaning of the Treaty of Vienna and Administrative Decision No. II; therefore it is by the Commission.

*Decreed,* That under the Treaty of Vienna of August 24, 1921, and in accordance with its terms the Government of Austria is not obligated to pay to the Government of the United States any amount on behalf of the claimant, Estate of Alexander Ortlieb, deceased, and the case numbered and styled as above<sup>3</sup> is hereby dismissed.

---

<sup>1</sup> The conclusion here reached is in harmony with the decisions of the Anglo-Hungarian Mixed Arbitral Tribunal (see *British Clearing Office v. Hungarian Clearing Office, J. H. Gosschalk v. Hungarian Government*, V. Dec. M. A. T. pp. 53-58).

<sup>2</sup> This volume, p. 227 *supra*.

<sup>3</sup> Original report: United States of America on behalf of Estate of Alexander Ortlieb, deceased, claimant, *v.* Austria and Edward Coumont, Executor of Estate of Louis Ortlieb, deceased, *Impleaded*, docket No. 811.

KARL KLEIN (UNITED STATES) *v.* AUSTRIA

(March 8, 1928. Pages 61-62.)

BONDED PUBLIC DEBTS AND STATE SUCCESSION: LIABILITY FOR INTEREST.—INTERLOCUTORY JUDGMENTS. Acquisition in 1916 of bonds constituting portion of Austrian debt specifically secured on railways and in existence on July 28, 1914. Decision by Reparation Commission pursuant to article 203, Treaty of St. Germain, that as from July 1, 1919, Austria liable for 20.023 per cent, and Czechoslovakia for 79.977 per cent of debt. *Held* that Austria liable for interest due on or before July 16, 1920 (reference made to Henry Neugass award, see p. 235 *supra*). Interlocutory judgment will be entered for half of amount claimed.

*Cross-reference:* Am. J. Int. Law, vol. 22 (1928), pp. 698-699.

*Bibliography:* Prossinagg, p. 32; Bonyngé, p. 39.

This claim is asserted by the United States on behalf of Karl Klein, an American national through naturalization in 1906, against Austria for 384 German marks, the aggregate amount of thirty-two coupons detached from bonds acquired by claimant in the year 1916 and since owned by him. These coupons matured by their terms November 1, 1919, May 1, 1920, November 1, 1920, and May 1, 1921, so that ninety-six marks became payable on each of these four dates. The bonds from which the coupons were detached constitute a "portion of the debt of the former Austrian Government which is specifically secured on railways . . . and which was in existence on July 28, 1914" dealt with in article 203 of the Treaty of St. Germain. In pursuance of the provisions of that article the Reparation Commission decided that as from July 1, 1919, Austria should be held liable for 20.023 per cent of this debt and Czechoslovakia for 79.977 per cent thereof.

The Austrian Agent contends that Austria is not liable for coupons maturing on or after July 1, 1919; while the American Agent contends that so far as American-owned bonds are concerned Austria is liable for all interest which matured on or before July 2, 1921, when the state of war came to an end.

For the reasons set out in the opinion of this Commission of January 6, 1928, in docket No. 1147, Henry Neugass, claimant, and in the decision of the Anglo-Hungarian Mixed Arbitral Tribunal in the case of the North British and Mercantile Insurance Company, Limited, *v.* the Hungarian Government, III Dec. M. A. T. 788 *et seq.*, and in the decision of the Anglo-Austrian Mixed Arbitral Tribunal in the case of the North British and Mercantile Insurance Company, Limited, *v.* the Austrian Government, IV Dec. M. A. T. 292 *et seq.*, the Commissioner holds that Austria is liable as for a debt on each of the coupons which matured on or before July 16, 1920, the date of the coming into force of the Treaty of St. Germain, but not liable for the coupons which matured subsequent to that date.

It follows that the United States on behalf of the claimant herein is entitled to an interlocutory judgment against Austria for 192 German marks, which will be entered in accordance with the rules of procedure announced in Administrative Decision No. II at page 35.<sup>1</sup> This judgment will decree the dismissal of the balance of the claim, amounting to 192 German marks.

Leave is hereby granted the American Agent to withdraw from the record herein all coupons which matured subsequent to July 16, 1920, in order that

<sup>1</sup> This volume, p. 227 *supra*.

they may be returned to the claimant, who may desire to present them to the Succession States liable therefor under the terms of the Treaty of St. Germain.

ANTON PENTZ (UNITED STATES) *v.* AUSTRIA, HUNGARY, AND  
AUSTRO-HUNGARIAN BANK

(*March 28, 1928. Pages 62-66.*)

JURISDICTION.—DEBTS; EVIDENCE, CURRENCY NOTES.—DUAL NATIONALITY, LIQUIDATION OF AUSTRO-HUNGARIAN BANK. Acquisition in 1914 of currency notes issued by Austro-Hungarian Bank. *Held* that claim against Austria (Hungary) for value of notes converted into American currency at pre-war rate of exchange falls outside terms of Treaty of Vienna (Budapest), article 206 (189) thereof and the annex following it making express provision for liquidation of Austro-Hungarian Bank, which was legal entity possessing dual nationality, and special and exclusive provision for payment of its notes, which are no evidence of "debts" as term is used in Treaty.

*Cross-reference:* Am. J. Int. Law, vol. 22 (1928), pp. 699-702.

*Bibliography:* Prossinagg, p. 25; Bonyngé, p. 35.

This is one of a group of cases put forward by the United States on behalf of American nationals who seek awards against Austria [Hungary] for the value of currency notes issued by the Austro-Hungarian Bank. From the record in this particular case it appears that the claimant, Anton Pentz, an American national by naturalization, sold property in Hungary in 1914 and in payment therefor came into possession of Austro-Hungarian Bank currency notes aggregating in amount 4,050 kronen which have since been in his possession and ownership, and for which, converted into American currency at the rate of exchange in effect in 1914, an award is sought.

The Commissioner holds that the Treaties of Vienna and of Budapest contain no warrant for entering an award on behalf of the claimant. The reasons for this holding can best be stated by briefly reviewing the provisions of the Treaties dealing with the Austro-Hungarian Bank and the measures taken in pursuance thereof looking to its liquidation.

The Austro-Hungarian Bank was a private stock company constituted in pursuance of a statute of Austria and a similar statute of Hungary. It possessed a legal exclusive right to issue banknotes for both countries, each of which exercised equal supervision over it. The last concession granted to it by the two Governments was for a term of years to expire December 31, 1919.

The by-laws of the bank obligated it "to redeem immediately on demand at its head offices at Vienna and Budapest, against legal coin of Austrian or Hungarian coinage, the notes issued by it". This provision of the by-laws, however, was, by the statutes of both Austria and Hungary, "suspended for such time until they come into force in accordance with the provisions of article V of the Austrian law and paragraph V of the Hungarian law, respectively, concerning the prolongation of the license of the Austro-Hungarian Bank. or shall be made valid by the legislatures of both States" (Imperial Law Gazette, 1911, No. 157, and 1917, No. 513). The provision requiring redemption of these currency notes remained suspended, although prior to the war the bank in practice maintained these notes at a parity with gold.

The Commissioner finds that the Austro-Hungarian Bank was a legal entity possessing a dual nationality and was both an Austrian national and a Hun-

garian national within the purview of the Treaties of Vienna and Budapest respectively.<sup>1</sup>

The framers of part IX—financial clauses—of the Treaties of St. Germain and Trianon, in the adjustment of the rights and obligations of the Successor States growing out of the dismemberment of the territory embraced in the Austro-Hungarian Dual Monarchy, made express provision for the liquidation of the Austro-Hungarian Bank “as from the day succeeding the day of the *signature*” of the Treaty of St. Germain (article 206 [189] and the Annex following it).

It was in substance provided that:

(1) The Austro-Hungarian Bank should be liquidated as from the day following the signature of the Treaty of St. Germain, by receivers appointed by the Reparation Commission, in accordance with the statute of the bank and the regulations laid down by the Treaties.

(2) Each Successor State was required to stamp all the Austro-Hungarian Bank notes existing within its own territory within two months from the coming into force of the Treaty of St. Germain, and

(3) Replace them, within 12 months from the coming into force of that Treaty, by its own or a new currency, and

(4) Deliver to the Reparation Commission, within 14 months from the coming into force of that Treaty, the notes, stamped or unstamped, which had been previously withdrawn from circulation, together with all records of the conversions, and

(5) Receive from the Reparation Commission, in return for such notes so delivered, certificates showing the number of notes converted within and without the limits of the former Austro-Hungarian Monarchy. It was provided that these certificates should entitle the bearer to lodge a claim with the receivers of the bank for currency notes thus converted which are entitled to share in the assets of the bank.

(6) No notes issued on or *prior to* October 27, 1918, wherever they may be held, rank as claims against the bank unless they are presented through the Government of the country in which they are held, but if so presented they rank equally (so far as they have any claim at all under these provisions) against the general assets of the bank other than the specially deposited Government securities.

(7) Notes issued *after* October 27, 1918, rank against securities issued by the Austrian or Hungarian Governments at any time and deposited with the bank as security for the notes, for which securities the new Austria and the new Hungary are to remain responsible; but such notes do not share in the distribution of the general assets of the bank. And finally it was provided that:

(8) “The holders of currency notes of the Austro-Hungarian Bank shall have no recourse against the Governments of Austria or the present Hungary or any other Government in respect of any loss which they may suffer as the result of the liquidation of the bank.”

On January 1, 1920, the bank was divided into an Austrian section and a Hungarian section, and in August, 1920, three receivers in liquidation were appointed as provided in the Treaties, who undertook to get in all of the assets for distribution in pursuance of the Treaty terms. While the status of this liquidation is not disclosed by the records before this Commission, it

<sup>1</sup> *Luxardo v. Public Trustee* (1923), British Supreme Court of Judicature, Chancery Division, [1924] 1 Ch. 1.

*French Office of Private Goods and Interests v. Liquidators of the Austro-Hungarian Bank*, I Dec. M. A. T. 611, decided November 28, 1921.

apparently is not yet complete. Property belonging to the Austro-Hungarian Bank was, during the war period, seized by the Alien Property Custodian of the United States and the major portion of such property or its proceeds is still held by him. The Act of the Congress of the United States effective March 10, 1928, designated "Settlement of War Claims Act of 1928", provides in effect that such property or its proceeds shall in pursuance of the provisions of that Act be returned to the liquidators of the Austro-Hungarian Bank. It is for such liquidators to make distribution in conformity with the Treaty terms.

From the foregoing statement it is apparent that special and exclusive provision for the payment of Austro-Hungarian Bank notes was made by the Treaties. A compliance therewith was and is the only remedy available to these note-owners. These provisions furnished an orderly method for the equitable liquidation and distribution of the bank's assets. The Treaties in express terms deny to the note-owners recourse against the Government of Austria or of Hungary "or any other Government in respect of any loss which they may suffer as the result of the liquidation of the bank".

The Government of the United States, through its Department of State, recognizing this exclusive method for the payment of these currency notes, has from time to time presented, directly or indirectly to the liquidators of the bank, notes owned by American nationals, and received in exchange payments as provided by the terms of the Treaties.

It is not for the Commissioner to determine whether or not this method of payment is still available to the American owners of these notes. This is rather a matter for negotiation between the Government of the United States and the liquidators of the Austro-Hungarian Bank. The Commissioner only decides that the Austro-Hungarian Bank notes are not evidence of "debts" as that term is used in the Treaties and in this Commission's Administrative Decision No. II, and that the United States is not entitled to an award against Austria and Hungary on behalf of the owners of these notes for the amount thereof.

Wherefore the Commission decrees that under the Treaty of Vienna of August 24, 1921, and the Treaty of Budapest of August 29, 1921, and in accordance with their terms, the Government of Austria and/or the Government of Hungary are not obligated to pay to the Government of the United States any amount on behalf of the claimant herein.

---

CHARLES R. CRANE (UNITED STATES) *v.* AUSTRIA AND CITY OF VIENNA

(May 25, 1928. Pages 66-69.)

---

BONDED PUBLIC DEBTS, INTEREST: FOREIGN CURRENCY CLAUSE, PLACE OF PAYMENT.—INTERPRETATION OF CONTRACT: RULE OF EFFECTIVENESS, TERMS OF CONTRACT. Possession prior to December 7, 1917, and ever since, of interest coupons detached from City of Vienna bonds, each coupon, like each bond, bearing clause that, *inter alia*, 8 crowns equal 1.60 dollars United States gold coin payable in New York. *Held* that clause not simply intended for convenience of holder without affecting amount received abroad, but clear undertaking to pay in dollars at fixed rate of exchange: clause otherwise meaningless. *Held* also that claimant not required to make demand for payment in New York: under Tripartite Agreement Commissioner empowered to determine amount of such debts as declared upon in

this case. Interlocutory judgment will be entered for amount claimed to which no contract rate of interest applies.

*Bibliography:* Prossinagg, pp. 32-33; Bonynge, pp. 37-38.

This claim is put forward by the United States on behalf of Charles R. Crane, an American national, who, prior to December 7, 1917, and ever since, has held and owned 24 interest coupons detached from bonds of the City of Vienna, of which the coupons maturing on July 1, 1915, typical of all others, read as follows [translation]:

“Interest Coupon Loan of the City of Vienna (*Investitions-Anlehen*):

Eight Crowns = 6.80 Marks = 8.40 Francs = 6 Sh. 7½ d. = 4.02 Dutch Florins = 1.60 Dollars United States gold coin, payable on the 1st July 1915 at the Chief Cashier's Office of the City of Vienna, further at such other places as will be designated by special advertisement, to wit: in Austria in crowns and in foreign countries in the money of the places of payment, at the choice of the bearer, in Berlin, Frankfurt a. M., Paris, Lyons, Amsterdam, Brussels, Zurich, Basle, Geneva, London and New-York, free from every deduction and any Austrian tax, present or future. This coupon becomes void if not presented within three years from maturity.”

The bonds to which these coupons appertained contain among others the following provisions [translation]:

“This bond forms part of the loan of the City of Vienna contracted under resolution of 27th December 1901, Z. [registration index number] 15142, of the Municipal Council of the City of Vienna and under the law of the country of Lower Austria of 20th February 1902 (L. G. Bl. number 15) bearing 4 per cent annual interest repayable within ninety years and amounting to Crowns 285,000,000 equal to Marks 242,250,000, equal to Francs 299,250,000, equal to Pounds Sterling 11,827,500, equal to Dutch Florins 143,355,000, equal to Dollars United States gold coin 57,000,000.”

“The payment of interest as well as the redemption of the capital of this bond takes place at the Chief Cashier's Office of the City of Vienna, further at such other places as will be designated by special advertisement, to wit: in Austria in Crowns, and in foreign countries, at the choice of the bearer, in Berlin, Frankfurt a. M., Paris, Lyons, Amsterdam, Brussels, Zurich, Basle, Geneva, London and New York, in the money of the place of payment, at the fixed rates of exchange of 100 Crowns = 85 Marks = 105 Francs = 4 Pounds Sterling 3 Shillings = 50.30 Dutch Florins = 20 Dollars United States gold coin.”

The American Agent contends that the claimant has the right at his election to require that these bonds and coupons be paid in United States gold coin, and that each coupon is an obligation of the City of Vienna to pay in gold \$1.60.

The Austrian Agent contends that the obligation of the City of Vienna is to pay in crowns, the dominant currency, and that the provisions above quoted for the payment at designated financial centers outside of Austria were simply for the convenience of the holder of bonds and coupons in receiving payment, but were not intended to affect the amount received as measured by the dominant currency, crowns.

It is further contended that no right to demand payment in currency other than Austrian crowns exists save in cases where the bond or coupon is actually presented at the place designated for payment and then only in the currency of the place designated.

The Commissioner rejects both of the contentions of the Austrian Agent.

While the Commissioner holds crowns to be the primary currency of the obligations in question, there was a clear undertaking on the part of the City

of Vienna to pay in other currency at a fixed rate of exchange at the election of the bearer. That obligation was not to pay crowns translated into the currency of a designated place of payment at the current rate of exchange, but was to pay in the currency of the designated place at a rate of exchange expressly fixed by the terms of the bond.

The maker of the bond agreed at the election of the bearer to pay at New York at the fixed rate of exchange of one hundred crowns equal twenty dollars United States gold coin. This provision is equally binding with all other provisions of the bond. To hold that the bearer for his convenience could demand payment in New York, but that the amount which he could demand must be stated in crowns translated into dollars at the current rate of exchange at the time of payment, would be to hold the quoted provisions meaningless.

While not applicable here<sup>1</sup> it is interesting to note that the Treaty of St. Germain, incorporated in the Treaty of Vienna, in dealing with debts (section III of part X) and providing for the conversion of Austrian currency into the currency of an Allied or Associated Power "at the pre-war rate of exchange", recognized the existence of Austrian debts arising out of contracts providing for a fixed rate of exchange and carefully safeguarded and preserved such contract rights (article 248 (*d*)).

As, under the Tripartite Agreement in pursuance of which this Commission was created, the Commissioner is empowered to determine the amount of such debts as are declared upon in this case, the claimant is not required as a condition to the assertion of this dollar claim to go through the idle ceremony of making demand for payment in New York even if the City of Vienna had an agency in New York upon which such demand could be made.

This opinion, in so far as applicable, will control the preparation, presentation, and decision of all claims falling within its scope. It will not control claims where the obligation, simply for the convenience of the bearer, is to pay at designated places outside of Austria or Hungary in kronen translated into the currency of the place of payment at the current rate of exchange at that time. Whenever the American, Austrian, or Hungarian Agent is of the opinion that the peculiar facts of any case take it out of the rules here announced, such facts with the differentiation believed to exist will be called to the attention of the Commissioner in the presentation of that case.

For the reasons stated an interlocutory judgment class B (1) will be entered in accordance with the rules of procedure announced in this Commission's Administrative Decision No. II (pages 34 and 35)<sup>2</sup> which shall among other things recite that the City of Vienna is indebted to Charles R. Crane in the principal amount of thirty-eight dollars forty cents (\$38.40) to which indebtedness no contract rate of interest applies.

---

BENJAMIN ALBERT KAPP (UNITED STATES) *v.* HUNGARY

(May 25, 1928. Pages 69-71.)

---

NATIONALITY OF CLAIM.—EVIDENCE: INTERROGATORIES, CLAIMANT AS WITNESS, UNSUPPORTED BUT UNREBUTTED TESTIMONY, PRIMA FACIE EVIDENCE. Ameri-

<sup>1</sup> This Commission's Administrative Decision No. II, pages 29 to 32, inclusive (note of the Secretariat: this volume, pp. 223-226 *supra*); Settlement of War Claims Act of 1928, enacted by the Congress of the United States, section 7 (d) (2); Act of the Commissioner of the Tripartite Claims Commission dated April 9, 1928, taken in pursuance of the Settlement of War Claims Act of 1928.

<sup>2</sup> This volume, p. 227 *supra*.

can objection against interrogatories propounded by Hungarian Agent to claimant for answer under oath concerning nationality. *Held* that, since record suggests possibility of relinquishment by claimant of American citizenship, and since interrogatories designed to elicit information in order to establish whether debts upon which claim based were impressed with American nationality throughout period of American belligerency, interrogatories are material and relevant. *Held* also that claimant is competent witness and that his unsupported but unrebutted testimony on material fact *prima facie* establishes that fact. American objection overruled.

A preliminary question is presented in this case to the Commissioner on motion of the American Agent objecting to interrogatories Nos. 4, 5, 6, and 7 propounded by the Hungarian Agent to the claimant for answer under oath.

The record as it now stands indicates that the claimant, born a German citizen, became an American citizen by naturalization on June 1, 1883.

The claim as originally filed was signed and sworn to by claimant on December 10, 1925, before the Vice-Consul of the United States of America at Frankfurt a. M., Germany. In this document claimant gives his address as Frankfurt a. M., Germany, Schumannstrasse 55. There is in the record another document signed by claimant October 6, 1927, and likewise sworn to before the American Vice-Consul at Frankfurt.

This is the extent of the record disclosure with respect to the citizenship of the claimant on and prior to December 7, 1917, and since that time. The memorial presented by the United States on behalf of the claimant recites that the claimant "became a naturalized citizen of the United States on June 1, 1883" but does not allege that the claimant has since remained, or remained until the coming into effect of the Treaty of Budapest, an American citizen.

The record as it stands suggests the possibility of claimant's having returned to the land of his birth and taken up his residence there under circumstances which would operate as a relinquishment of his American citizenship. Not only the Hungarian Agent but the Commissioner is entitled to a full disclosure of the facts with respect to claimant's residence in Germany as affecting his citizenship and as affecting the impressment of this claim with American nationality.

The interrogatories propounded by the Hungarian Agent to the claimant to which the American Agent objects are designed to elicit information concerning the citizenship of the claimant in order to establish whether or not the debts respecting the bonds upon which this claim is based were impressed with American nationality throughout the period of American belligerency. They are therefore directed to the very root of the right of the United States to maintain this claim and are material and relevant. Whether or not they go far enough to require a full disclosure by the claimant with respect to steps if any taken by him to preserve his American citizenship while residing in the land of his birth, is a question which the American Agent may well wish to consider.

The Commissioner has heretofore held<sup>1</sup> that a claimant is a competent

<sup>1</sup> *Note by the (Commissioner's) Secretary.*—The holding referred to is set forth in the minutes of the Commission as follows:

January 6, 1928, page 89: "The American and Austrian Agents gave oral notice of submission, in the case of United States of America on behalf of Edward Cucuel, claimant, *v. Austria*, docket No. 1103-A, of the question whether or not the claimant had established a *prima facie* case by his affidavit as to the time of his acquisition of the bonds which are the subject-matter of the claim."

January 28, 1928, page 97: "The Commissioner announced his oral opinion as to the admissibility and weight to be given to the affidavit of the claimant as to when

witness before this Commission and that his unsupported but unrebutted testimony on a material fact *prima facie* establishes that fact. But where the Agent of either respondent Government is not satisfied with the claimant's testimony in any particular case or wishes to test the source or accuracy of the information upon which such testimony is based, or the credibility of the witness, or require a disclosure of other material facts within the claimant's knowledge, such Agent under such circumstances will be accorded the privilege of propounding interrogatories to the claimant to be forwarded by the American Agent to and answered under oath by the claimant and thereupon returned to this Commission and filed as evidence in the case in question.

The Commissioner confidently expects the Agent of Austria and the Agent of Hungary to exercise this privilege in good faith and in no case to propound interrogatories that are immaterial or irrelevant or for delay only.

The objection of the American Agent to the interrogatories propounded by the Hungarian Agent is overruled.

---

ALEXANDER TELLECH (UNITED STATES) *v.* AUSTRIA AND  
HUNGARY

(*May 25, 1928. Pages 71-73.*)

--

JURISDICTION: DUAL NATIONALITY, DETERMINATION OF NATIONALITY BY MUNICIPAL LAW.—RESPONSIBILITY FOR ACTS OF CIVIL, MILITARY AUTHORITIES: ARREST, INTERNMENT, IMPRESSMENT INTO MILITARY SERVICE. Arrest in August, 1914, of claimant, a national of Austria and United States, residing in Austria, as an agitator, followed by his internment and his being impressed into service in Austro-Hungarian army. *Held* that claim for compensation for lost time, suffering and privation falls outside terms of Treaty of Vienna (Budapest): citizenship is determined by municipal law, and since under Austrian law, to which claimant voluntarily subjected himself, he was Austrian citizen, Austrian and Austro-Hungarian authorities were within their rights.

*Cross-reference:* Friedensrecht, VII. Jahr Nr. 6 (1928), pp. 49-50.

*Bibliography:* Prossinagg, p. 22; Bonyngé, p. 28.

This claim is put forward by the United States on behalf of Alexander Tellech for compensation for time lost and for alleged suffering and privation to which he was subjected, first through internment in Austria, and then through enforced military service in the Austro-Hungarian army. The claimant was born in the United States of Austrian parents on May 14, 1895. Under the Constitution and laws of the United States he was by birth an American national. Under

---

he acquired the bonds which are the subject-matter of the claim in Docket No. 1103-A, United States of America on behalf of Edward Cucuel, claimant, *v.* Austria. The Commissioner held that the claimant's affidavit is admissible and makes a *prima facie* case and in the absence of rebutting evidence will sustain an interlocutory judgment and that this rule will be applied generally in all such cases but that each respondent Agent shall be permitted to propound to the claimant (to be transmitted by the American Agent) interrogatories for the purpose of searching the conscience and testing the credibility of the claimant as a witness in his own behalf and ascertaining the facts, in any case in which such Agent entertains doubt as to the truth of the testimony in the record."

the laws of Austria he also possessed Austrian nationality by parentage. This created a conflict in citizenship, frequently described as "dual nationality". When the claimant was five years of age he accompanied his parents to Austria, where he continued to reside.

In August, 1914, the claimant, while residing in Austria a short distance from the Russian border, was subjected to preventive arrest as an agitator engaged in propaganda in favor of Russia. After investigation he was interned and confined in internment camps for 16 months. He then took the oath of allegiance to the Emperor of Austria and King of Hungary and was impressed into service in the Austro-Hungarian army. A decision of the sharply controverted claim that this oath was taken under duress and that he protested that he was an American citizen is not necessary to a disposition of this case. It appears that in 1915 and later representatives of the Government of the United States in Austria interested themselves in securing his release, but the application was denied.

In July, 1916, the claimant deserted from the Austro-Hungarian army and escaped into Russia, where he was arrested and held by the Russian army authorities as a prisoner of war until the outbreak of the Kerensky revolution, when he was released and thereupon returned to Prague, where he still lives and where he is practicing medicine.

The action taken by the Austrian civil authorities in the exercise of their police powers and by the Austro-Hungarian military authorities, of which complaint is made, was taken in Austria, where claimant was voluntarily residing, against claimant as an Austrian citizen. Citizenship is determined by rules prescribed by municipal law. Under the law of Austria, to which claimant had voluntarily subjected himself, he was an Austrian citizen. The Austrian and the Austro-Hungarian authorities were well within their rights in dealing with him as such. Possessing as he did dual nationality, he voluntarily took the risk incident to residing in Austrian territory and subjecting himself to the duties and obligations of an Austrian citizen arising under the municipal laws of Austria.

Assuming that the claimant suffered the loss and injury alleged and had not lost his American citizenship by taking the Austrian Army oath, the Commissioner finds no provision of the Treaty of Vienna or of Budapest obligating Austria and/or Hungary to make compensation therefor.

Wherefore the Commission decrees that under the Treaty of Vienna and the Treaty of Budapest the Government of Austria and the Government of Hungary are not obligated to pay to the Government of the United States any amount on behalf of the claimant herein.

---

MAX FOX (UNITED STATES) *v.* AUSTRIA AND HUNGARY

(*May 25, 1928. Pages 73-74.*)

---

JURISDICTION: DUAL NATIONALITY, DETERMINATION OF NATIONALITY BY MUNICIPAL LAW.—RESPONSIBILITY FOR ACTS OF MILITARY AUTHORITIES.—ENROLMENT IN ARMY, IMPRESSMENT INTO MILITARY SERVICE, DURESS. Enrolment in 1914 of claimant, a national of Hungary and United States, residing in Hungary, in Austro-Hungarian army, followed in May, 1915, by his being compelled to render military service. Oath of allegiance to Emperor (King) of Austria (Hungary), taken under duress. *Held* that claim for compensation

of damages growing out of enforced military service falls outside terms of Treaty of Vienna (Budapest): reference made to Alexander Tellech award, see p. 248 *supra*.

*Bibliography:* Bonyngé, p. 28.

This claim is put forward by the United States on behalf of Max Fox (formerly Fuchsbalg) to recover damages alleged to have been sustained by him growing out of enforced military service in the Austro-Hungarian army.

The claimant was born in the United States May, 1, 1896, of Hungarian parents. When claimant was some three years of age he returned with his parents to Hungary, where his mother died and where he continued to live with relatives after his father (who remained an Hungarian national until 1923 at least) returned to the United States. After attending the schools he entered the employ of a bank about 1912 and continued his studies in a college. At the outbreak of the European war he was enrolled for military duty. He claims that he protested that he was an American citizen and not subject to military services in the Austro-Hungarian army, but beginning with May, 1915, was compelled to render such service. The representatives of the Government of the United States in Hungary interested themselves in claimant's application for relief from service but the application was denied. In October, 1916, as a result of a flesh wound, he was in a hospital for several months. He was promoted to the rank of lieutenant and continued in the active service until the Armistice was signed. He returned to the United States in 1920 and has since remained there.

While he took an oath of allegiance to the Emperor of Austria and King of Hungary, he claims that this was under duress. While controverted, for the purposes of this decision the truth of his statement is assumed.

The facts in this case are very similar to those in the case of Alexander Tellech, claimant, docket No. 2, this day decided. For the reasons therein set out neither Austria nor Hungary is obligated to make compensation on account of the damages alleged to have been sustained by claimant.

Wherefore the Commission decrees that under the Treaty of Vienna and the Treaty of Budapest the Government of Austria and the Government of Hungary are not obligated to pay to the Government of the United States any amount on behalf of the claimant herein.

---

GRUBNAU BROS., INC., AND ATLANTIC MUTUAL INSURANCE  
COMPANY (UNITED STATES) *v.* AUSTRIA AND HUNGARY

(May 25, 1928. Pages 74-76.)

---

RESPONSIBILITY FOR ACTS OF MILITARY AUTHORITIES.—WAR: SEIZURE OF PRIVATE PROPERTY.—DAMAGES: INVOICE VALUE. Seizure on October 2, 1914, at Trieste, by Austro-Hungarian military authorities, of wool sold by Carl Grübnau & Son, to all of whose rights the first claimant succeeded, and insured by the second claimant. *Held* that Austria obligated to pay 63.6 per cent, and Hungary 36.4 per cent, of price owing on December 31, 1914, by purchaser, with interest thereon at 5 per cent per annum from December 31, 1914, less sum paid through Austrian Clearing Office since claim was filed.

From the record it appears that in 1914 Carl Grübnau & Son (a co-partnership composed at all material times of American nationals) sold 42 bales of

wool to J. Ginzkey, of Maffersdorf, Austria, for which the purchaser agreed to pay on December 31, 1914, the sum of \$4,569.60. On October 2, 1914, the wool in question while in transit was seized at Trieste by the Austro-Hungarian military authorities under circumstances rendering Austria and Hungary liable under the Treaties of Vienna and Budapest. The wool was insured by the Atlantic Mutual Insurance Company, an American corporation, which paid Carl Grünbau & Son the sum of \$3,677 under circumstances operating as an assignment of this claim to the extent of the amount so paid.

Grünbau Bros, Incorporated, an American corporation, has, with respect to this claim, succeeded to all of the rights of the former partnership of Carl Grünbau & Son and acquired all of the interests of Carl Grünbau & Son.

Since this claim was filed there has been paid through the Austrian Clearing Office to the claimant the sum of \$387.61.

The Commissioner finds that the claimant Grünbau Bros., Incorporated, is entitled to an award of \$892.60 with interest thereon at the rate of 5 per cent per annum from December 31, 1914, which interest is to be credited with the aforesaid amount of \$387.61, and that the claimant Atlantic Mutual Insurance Company is entitled to an award of \$3,677 with interest thereon at the rate of 5 per cent per annum from December 31, 1914, of which awards 63.6 per cent will be borne by Austria and 36.4 per cent will be borne by Hungary (see Administrative Decision No. I, page 10.)<sup>1</sup>

Wherefore the Commission decrees that under the Treaty of Vienna the Government of Austria is obligated to pay to the Government of the United States on behalf of Grünbau Bros, Incorporated, the sum of five hundred sixty-seven dollars sixty-nine cents (\$567.69) with interest at the rate of 5 per cent per annum from September 6, 1923, and Atlantic Mutual Insurance Company the sum of two thousand three hundred thirty-eight dollars fifty-seven cents (\$2,338.57) with interest at the rate of 5 per cent per annum from December 31, 1914, and that under the Treaty of Budapest the Government of Hungary is obligated to pay to the Government of the United States on behalf of Grünbau Bros., Incorporated, the sum of three hundred twenty-four dollars ninety-one cents (\$324.91) with interest at the rate of 5 per cent per annum from September 6, 1923, and Atlantic Mutual Insurance Company the sum of one thousand three hundred thirty-eight dollars forty-three cents (\$1,338.43), with interest at the rate of 5 per cent per annum from December 31, 1914.

---

ROSA H. KOHN (UNITED STATES) *v.* HUNGARY

(*May 25, 1928. Page 76.*)

---

PUBLIC DEBTS, TREASURY NOTES. Acquisition on August 2, 1916, of interim certificate obligating American firm to deliver Hungarian Treasury notes.

Compliance with obligation on July 27, 1920. *Held* that Hungary not liable since acquisition of note not a pre-war transaction.

The Commissioner holds:

*First*, with respect to that part of the claim embraced in paragraph (1) of the Agreed Statement, the claimant paid to an American firm, Zimmermann & Forshay, \$187.50 and received in lieu thereof on August 2, 1916, interim certificate No. 4051 signed by Zimmermann & Forshay obligating them to

<sup>1</sup> This volume, p. 209 *supra*.

deliver to claimant 5% Hungarian Treasury notes due in 1918 in the principal amount of marks 1,000. From the record it appears that Zimmermann & Forshay did not comply with their obligation to claimant but on July 27, 1920, delivered to the claimant a Hungarian Treasury note for marks 1,000 dated August 29, 1918, which matured on April 1, 1921. The claim is based on this treasury note. While the transaction as between the claimant and Zimmermann & Forshay was a pre-war transaction, the acquisition by claimant of the Hungarian Treasury note from Hungary through Zimmerman & Forshay was not a pre-war transaction. On this count of the claim Hungary is not liable.

*Second*, with respect to that part of the claim dealt with in paragraph (2) of the Agreed Statement Hungary is liable and an interlocutory judgment B (1) will be entered against Hungary in the usual form for Kronen 30.

---

INDIAN MOTOCYCLE COMPANY (UNITED STATES) *v.* AUSTRIA  
AND HUNGARY

(*May 25, 1928. Pages 77-78.*)

---

RESPONSIBILITY FOR ACTS OF MILITARY AUTHORITIES.—WAR: SEIZURE OF PRIVATE PROPERTY.—DAMAGES: INVOICE VALUE. Seizure at Trieste, by Austro-Hungarian military authorities, of motorcycles and parts shipped by claimant. Surrender of shipment, some of the parts missing, to American Consul, followed by sale. Proceeds paid to claimant on May 25, 1915. *Held* that Austria obligated to pay 63.6 per cent and Hungary 36.4 per cent, of difference between proceeds and invoice value, with interest thereon at 5 per cent per annum from May 25, 1915.

While the evidence adduced in the above captioned case is meager and unsatisfactory, the Commissioner finds:

(1) That on July 18, 1914, the Hendee Manufacturing Company, an American corporation, forwarded a shipment of Indian motorcycles and parts by steamship *Belvedere* consigned to Odessa, Russia, via Trieste, Austria, covered by shipper's order bill of lading notify F. Zorn, Odessa, and at the same time drew on Zorn for the invoice value of the shipment, \$402.

(2) On October 26, 1923, the corporate name of the Hendee Manufacturing Company was changed to Indian Motorcycle Company.

(3) This shipment was seized by the Austro-Hungarian military authorities at Trieste. On the representations of the claimant through the American Department of State and the American Consul at Trieste, the austro-Hungarian military authorities recognized the shipment as the property of an American national and delivered it to the American Consul for account of claimant.

(4) On account of some of the parts being missing from the shipment at the time it was surrendered by the military authorities and sold, the net proceeds of the sale were only \$240.20, which amount was paid to the shipper on May 25, 1915.

(5) The Commissioner finds that the claimant has been damaged by the acts of the Austro-Hungarian military authorities in the sum of \$161.80 with interest thereon at the rate of 5 per cent per annum from May 25, 1915, of which 63.6 per cent will be borne by Austria and 36.4 per cent by Hungary.

Wherefore the Commission decrees that under the Treaty of Vienna the Government of Austria is obligated to pay to the Government of the United

States on behalf of the Indian Motorcycle Company the sum of one hundred two dollars ninety cents (\$102.90) with interest thereon at the rate of 5 per cent per annum from May 25, 1915, and that under the Treaty of Budapest the Government of Hungary is obligated to pay to the Government of the United States on behalf of the Indian Motorcycle Company the sum of fifty-eight dollars ninety cents (\$58.90) with interest thereon at the rate of 5 per cent per annum from May 25, 1915.

---

HENRY ROTHMANN (UNITED STATES) *v.* AUSTRIA AND HUNGARY

(July 11, 1928. Pages 78-87.)

---

NATIONALITY OF CLAIM.—NATIONALITY AND RIGHT TO PROTECTION.—NATURALIZATION: MISUSE OF NEW NATIONALITY, EXPATRIATION, EFFECT OF RETURN TO ADOPTED COUNTRY.—INTERPRETATION OF MUNICIPAL LAW.—RESPONSIBILITY FOR ACTS OF MILITARY AUTHORITIES: PERFORMANCE OF MILITARY SERVICE. Arrival of claimant, Austrian by birth, in United States on or about June 6, 1901. Naturalization as United States citizen on June 6, 1906. Return to Austria not later than February 18, 1910, followed by marriage, pecuniary investments and personal activities in local business, conclusion on June 6, 1913, of non-assignable contract with Austrian military authorities for term ending December 31, 1920. Application on April 30, 1915, to American Embassy, Vienna, for passport. Declination of passport by American Department of State on May 28, 1915, on account of statutory presumption of expatriation (Act of Congress, March 2, 1907), but issuance of emergency passport valid only for journey to United States, conditioned on claimant's agreement that he could and would return forthwith to United States for permanent residence. Failure to comply with condition. Order on July 15, 1916, to report to Austro-Hungarian military authorities for military service. Performance of military service until November 3, 1918. Issuance on January 8, 1917, of second emergency passport on same condition as first one. Application on March 22, 1917, to American Embassy, Vienna, for extension of second emergency passport. Denial of extension and cancellation of passport on ground of misrepresentation: claimant applied for emergency passports not for immediate return to United States for permanent residence, but for use in effecting release from military service in order to return to his business. Continued residence in Austria until latter part of 1919, when claimant returned to United States. *Held* that during period when acts complained of occurred claimant not entitled to recognition and protection as American citizen and claim, therefore, not impressed with American nationality: Commission construes and applies to facts Act of Congress, March 2, 1907, *supra*, which provides against misuse of new nationality to avoid obligations to native land, and which for time being deprives of right to recognition and protection as American citizens those against whom statutory presumption of expatriation has arisen, even though presumption is not conclusive and residence abroad for period prescribed by statute does not of itself terminate permanently American citizenship. *Held* also that, even did claimant's return to United States retroactively overcome statutory presumption, this cannot affect nationality of claim.

*Cross-reference:* Am. J. Int. Law, vol. 23 (1929), pp. 182-186.

*Bibliography:* Prossinagg, pp. 23-25; Bonyngé, pp. 25-27.

This claim is put forward on behalf of Henry Rothmann as a naturalized citizen of the United States to recover \$151,613.01 against Austria and Hungary on account of damages alleged to have been sustained by him resulting from enforced military service in the Austro-Hungarian army and from alleged confiscation of real and personal property located in territory of the former Austrian Empire now constituting a part of Poland and also on account of an indebtedness alleged to be due him by the respondent Governments.

The Commissioner finds (1) that the claimant has failed to prove that the Austro-Hungarian military authorities or representatives of either respondent Government seized, confiscated, or damaged any property belonging to him or that either of the respondent Governments is indebted to him and (2) that the claimant has failed to prove that the property located in Austria belonging to the partnership of which he was a member was confiscated by the Austro-Hungarian military authorities or by representatives of Austria or Hungary. It results from these findings that with respect to the items based upon alleged indebtedness and confiscation of and damage to property no liability has been established against the respondent Governments.

With respect to the only remaining item, based upon enforced military service in the Austro-Hungarian army, the respondent Governments admit that claimant was forced to perform certain services in connection with their armies. They deny that claimant was ever an American citizen; they allege that if he ever obtained a certificate of naturalization as a citizen of the United States it was by fraud, and that even if he had obtained naturalization he had by his subsequent acts and under the laws of the United States ceased to be an American citizen and had placed himself beyond the protection of the American Government.

In the absence of convincing proof of fraud in obtaining naturalization, and in view of the facts reflected by the record, the inquiry arises. At the time of the alleged occurrences of which complaint is made did claimant have such status of American citizenship as to impress this claim with American nationality?

The Commissioner's conclusions of fact relevant to this question, drawn from the hopelessly conflicting evidence contained in the voluminous and unsatisfactory record, follow.

(1) The claimant, Henry Rothmann, arrived in the United States from Austria on or about June 6, 1901.

(2) On the record presented the Commissioner finds that Rothmann became a citizen of the United States by naturalization on June 6, 1906.

(3) There is evidence in the record tending to prove that claimant left the United States soon after the date of his naturalization and returned to Austria. The date of his return is uncertain. He arrived at Przemysl, Galicia, not later than and probably much earlier than February 18, 1910, on which date, according to the official records contemporaneously made, he entered into a pre-nuptial contract, which was followed by his marriage on March 15, 1910. The registry of marriages described him as a "merchant in Tarnow", Galicia. Soon thereafter he made pecuniary investments and engaged actively in business of a local nature having no relation to American trade or commerce.

(4) On May 4, 1912, claimant purchased an interest in a partnership owning and operating a laundry located at Przemysl. On June 6, 1913, he, as managing partner of the firm of which he was a member, entered into a non-assignable contract with the Austrian military authorities binding the firm and all of its members for a term ending with December 31, 1920.

(5) So far as disclosed by the record, for more than five years after his return to Austria he did not by word or deed indicate any intention ever to return to the United States. On the contrary he apparently held himself out as a resident and citizen of Austria.

(6) On April 30, 1915, claimant applied to the American Embassy at Vienna for a passport, when, so far as disclosed by the record, he for the first time since his return to Austria claimed American citizenship. In passing on this application for a passport the American Department of State, acting through Robert Lansing for the Secretary of State, expressly held that the claimant had not "overcome the statutory presumption of expatriation which has arisen against him, and it [the Department of State] must, therefore, decline to issue a passport to him." However, the issuance of an emergency passport "valid only for the journey hither" was authorized "if he [claimant] makes arrangements to return *forthwith* to this country for permanent residence." There is evidence in the record indicating that such an emergency passport was issued on claimant's application, but if issued it was never used.

(7) There are in the record what purport to be copies of three affidavits made by claimant in connection with his applications for passports. In two of them he stated that he resided uninterruptedly in the United States from 1901 to 1912. In the other he stated that he resided uninterruptedly in the United States from 1901 to 1913. All are misstatements of fact with respect to the date of his return to Austria, material to his application for an American passport.

(8) On July 19, 1916, he was ordered to report to the Austro-Hungarian military authorities for military service, which service, according to his own statements, he sought to avoid on the ground that he was engaged in Austria in an essential war industry and on the further ground that he was an American citizen. Notwithstanding his protests he was required to perform military service as a clerk and interpreter and continued in the service until November 3, 1918, when the army was disbanded and he was discharged.

(9) While this impressment into military service occurred during the period of American neutrality, claimant then made no attempt to obtain the assistance of the diplomatic agents of the United States stationed in Austria to effect his release. The American Department of State had on May 28, 1915, expressly held that claimant was not entitled to the protection of the United States because of failure to "overcome the statutory presumption of expatriation which has arisen against him". If an emergency passport was in fact issued to claimant in the spring of 1915, it was conditioned on claimant's agreement that he could and would return *forthwith* to the United States for permanent residence. He knew that this condition had not been complied with. He knew that the American authorities had held that he was not entitled to protection as an American citizen. He therefore did not seek their assistance to effect his release from military service. On the contrary when, on January 5, 1917, he again applied to the American Embassy at Vienna for a passport he suppressed the fact that he was then and had for some six months been serving in the Austro-Hungarian army, and represented that he was in a position to, and would in fact, proceed immediately to the United States. On these representations an emergency passport limited to use within two months was on January 8 issued to him. On March 22, 1917, he applied to the American Embassy at Vienna for an extension of this passport and then for the first time asked for the interposition of the Embassy to effect his discharge from the Austro-Hungarian army. His application was denied, the passport issued January 8, 1917, was taken up and cancelled on the ground that it had been procured through

misrepresentation, and the protection of the American Government was expressly denied him.

(10) Throughout the period of the happenings complained of the claimant's actual status as viewed by the competent American authorities was that of a naturalized American citizen who had failed to overcome the statutory presumption (Act of March 2, 1907) that he had ceased to be an American citizen arising from a residence of more than two years in the foreign state from which he came.

(11) The evidence points strongly to the conclusion (as expressed in the findings of the American Embassy of March 22, 1917), that claimant misrepresented the facts in order to procure emergency passports which he did not intend to use for immediate return to the United States for permanent residence, and that his sole purpose in attempting to have such passports issued to him was to procure evidence to bolster up his claims of American citizenship for use in effecting his release from military service in order that he might return to look after his business in Galicia.

(12) The claimant at different times and under varying conditions has given irreconcilable testimony with respect to the date of his return from the United States to Austria, the purpose of his return, and the length of his stay in his native land—all material to the determination of his citizenship status then in issue. Some of this testimony was given under circumstances clearly indicating that the misstatements were deliberate and could not have been due to faulty memory on claimant's part.

(13) Claimant's credibility is impeached by his own testimony as well as that adduced by the Agents of the respondent Governments. His oft-repeated statement that from the time of leaving the United States to return to his native land, Austria, it was and continued to be his fixed intention to return and reside permanently in the United States is not supported by testimony, direct or circumstantial, of any other witness and is negated by his own acts.

(14) In court proceedings in which claimant was a defendant, instituted to liquidate the partnership hereinbefore mentioned of which claimant was a member, a decree was on June 9, 1917, entered by an Austrian civil court directly impeaching claimant's integrity and credibility.

(15) Although released from military service on November 3, 1918, claimant remained in Austria looking after his property interests certainly until the latter part of 1919 and the date of his return to the United States is not disclosed by the record.

In determining the status of claimant's citizenship at the time of the occurrence of the events of which he complains, it becomes necessary to construe and apply to the foregoing conclusions of fact section 2 of the Act of the Congress of the United States effective March 2, 1907, entitled "An Act in reference to the expatriation of citizens and their protection abroad", which provides:

"That any American citizen shall be deemed to have expatriated himself when he has been naturalized in any foreign state in conformity with its laws, or when he has taken an oath of allegiance to any foreign state.

"When any naturalized citizen shall have resided for two years in the foreign state from which he came, or for five years in any other foreign state it shall be presumed that he has ceased to be an American citizen, and the place of his general abode shall be deemed his place of residence during said years: *Provided, however,* that such presumption may be overcome on the presentation of satisfactory evidence to a diplomatic or consular officer of the United States, under such rules and regulations as the Department of State may prescribe: *And provided also,* that no American citizen shall be allowed to expatriate himself when this country is at war."

Opinions and decisions construing and applying the provisions of this statute are not readily reconciled.<sup>1</sup> In seeking its purpose it must be borne in mind that the admission by a nation of an individual to citizenship implies not only the duty of protection by that nation but the assumption by the individual of the correlative obligations and duties inherent in citizenship. When an individual forswears allegiance to his native country and takes the oath of allegiance to the United States of America, that nation will exact from its new citizen the assumption by him in fact as well as in name of the duties which he owes to it, and cannot tolerate his treatment of his new allegiance as a mere form to be used as a cloak to be put on or laid off to suit his convenience and merely to protect him against the discharge of the duties and obligations which he previously owed to his native country or which he assumed toward his adopted country. To permit such use to be made of the privilege of acquiring American citizenship through naturalization would be to permit the perpetration by the individual of a fraud on both his native and his adopted nation.

In an attempt to provide against such imposition by naturalized citizens, the Congress of the United States enacted the second paragraph of section 2 of the Act of March 2, 1907, above quoted. Its purpose is thus expressed by the Committee on Foreign Affairs in reporting the bill to the House of Representatives:

"... The citizenship of the United States should not be sought or possessed for commercial or dishonest ends. To guard against this evil, this bill provides that a naturalized citizen who leaves this country and dwells elsewhere continuously for five years shall be presumed to have abandoned his citizenship. This presumption can be overcome, but such a provision as this would be a great assistance to the Department of State, would avoid possibilities of international complications, and will prevent those who are not entitled to its protection from dishonestly hiding under the American flag".

This statute provides a definite rule, in terms of time of residence in a foreign state, fixing the status of one who after acquiring American citizenship through naturalization takes up his residence abroad. Previous to its adoption competent Government authorities were required, under circumstances of great difficulty, to apply general principles to the facts of each particular case in determining the right to protection abroad of one who had become an American citizen through naturalization. This involved inquiring into the motives prompting the individual to reside in a foreign state and his intentions with respect to remaining there or returning to the United States. The statute substituted a definite rule, comparatively simple and uniform in its application—a rule of expediency. It is a rule of evidence but something more. It fixes the correlative rights and obligations of the Government of the United States and the individual concerned for the period during which it remains in effect. While the presumption of law is not conclusive and residence abroad for the period prescribed by the statute does not of itself terminate permanently American citizenship, nevertheless when the statutory period has run and the legal presumption has arisen against the individual he has for the time being forfeited all right to be recognized as an American citizen and protected as such. He can overcome

<sup>1</sup> *Sinjen v. Miller*, 281 Federal Reporter (hereinafter cited as Fed.) 889; *Miller v. Sinjen*, 289 Fed. 388; *United States ex rel. Anderson v. Howe*, 231 Fed. 546; *Banning v. Penrose*, 255 Fed. 159; *Stein v. Fleischmann Co.*, 237 Fed. 679; *Nurge v. Miller*, 286 Fed. 982; *Thorsch v. Miller*, 5 Fed. (2nd) 118; *Nelson v. Nelson*, 113 Nebraska 453; 28 Opinions of Attorneys-General 504; Opinion of Attorney-General Sargent rendered February 8, 1928; Compilation of Certain Departmental Circulars, etc., Department of State, 1925, pages 119 to 126; Departmental Order No. 438 issued by Secretary of State, dated March 6, 1928.

this statutory presumption (at least so long as he resides abroad) by complying with the rules prescribed by the Department of State in pursuance of the statute, which rules while in effect are as binding as the terms of the statute itself.

The real question here presented is, what is the nationality of the claim here asserted as determined by the status of claimant's citizenship during the material period when the acts complained of by him occurred? This status must be determined by the law then in effect as applied to evidence now produced but then available. Neither the United States nor Austria could foresee, or were required to foresee, future events or the future state of mind of claimant which would impel him or not at some indefinite future time to pursue a course tending to overcome the legal presumption raised by the statute against him.

Claimant was voluntarily in Austria, the land of his birth, and subject to its jurisdiction. He sought to avoid obligations of citizenship to his native land on the ground that through naturalization he had become an American citizen. But he had voluntarily placed himself beyond the jurisdiction of his adopted country and sought to be recognized by it as its citizen, not in order to return to the United States and serve it but to avoid serving Austria. He was concerned with promoting his selfish interests free from obligation to either his native or his adopted country. At a time when the relations between the United States and the Central Powers were reaching the breaking point, when the United States was interested in having within its jurisdiction all of its citizens capable of rendering military service, its Embassy at Vienna issued to claimant an emergency passport for immediate use in returning to the United States. In applying for this passport claimant deliberately suppressed the fact that he was then and had for some six months been serving in the Austro-Hungarian army. The passport was issued on claimant's misrepresentation that he was in a position to proceed at once to the United States and would do so. When these facts came to the knowledge of the American authorities they at once took up and cancelled the passport, refused so interpose to assist him in procuring release from military service, for which assistance he then for the first time applied, and expressly declined to recognize him as an American citizen. Prior to that time the American Department of State had expressly held that the statutory presumption of expatriation had arisen against claimant and this presumption and holding remained in effect.

On behalf of the claimant it is contended that his return in the latter part of 1919 to the United States, where he has since resided, has retroactively overcome the legal presumption which the statute raised against him during the material period and the presumption must be treated as if it had never existed. The Commissioner expressly declines to deal with the effect, operating prospectively, of a return to the United States by one against whom the statutory presumption of expatriation has arisen while residing abroad, or how this presumption can be overcome after such return, as a decision of these questions is not necessary to a disposition of this case. The Commissioner rejects the contention that the subsequent overcoming of the presumption can affect the nationality of this claim which had arisen during the time when claimant was not entitled to recognition and protection as an American citizen; especially as the very existence of the claim turns on the status of claimant's citizenship at the time it arose.

The effect of the rule here contended for would be to permit the Government of the United States to say to the Government of another State: This man is not today entitled to protection as an American citizen, but if today you do not treat him as such he may, at his election and by his voluntary act, at some indefinite time in the future, change his status, whereupon the United

States will then on his behalf demand that your Government pay damages for its failure to give to him now the recognition to which he is not entitled.

The purpose of the statute is to deny the protection due an American citizen to one against whom an unrebutted presumption of expatriation has arisen. That purpose would be defeated if claimant could, subsequent to the events forming the basis of a claim, overcome the presumption, and then as an American citizen demand and receive compensation as damages resulting from acts against which he was not entitled to protection.

The nationality of the claim here asserted is determined by the status of claimant's citizenship at the time the claim arose, and as at that time the claimant was not entitled to and was expressly denied recognition and protection as an American citizen the claim cannot be impressed with American nationality through the subsequent acts of claimant, even should such acts operating prospectively be held to overcome the legal presumption which the statute had raised against him. His citizenship, as determined by the statutory rule then in effect, and all of his rights dependent thereon were permanently impressed upon the claim here asserted, and the nationality thereof cannot be affected by claimant's subsequent acts.

On the record submitted the Commissioner holds that throughout the material period claimant was not entitled to recognition or protection as an American citizen; that because of his then status the competent authorities, designated to act for the United States in dealing with him and others similarly situated, expressly declined then to recognize him as an American citizen or to interpose then to obtain his release from military service in the Austro-Hungarian army; that on claimant's behalf the Government of the United States cannot now complain that the Austrian authorities then pursued a like course and declined to recognize claimant as an American citizen; and that this claim, based on enforced military service by claimant, who at the time had presumptively ceased to be an American citizen, is not one which from its inception was impressed with American nationality, and hence does not fall within the terms of the Treaties of Vienna and of Budapest.

For the reasons stated the Commission decrees that neither the Government of Austria nor the Government of Hungary is obligated under the Treaty of Vienna or of Budapest to pay to the Government of the United States any amount on behalf of Henry Rothmann, claimant herein.

---

LOUIS ZECCHETTO (UNITED STATES) *v.* AUSTRIA AND HUNGARY  
(July 11, 1928. Pages 87-88.)

---

NATIONALITY OF CLAIM.—NATIONALITY AND RIGHT TO PROTECTION.—NATURALIZATION: EXPATRIATION, EFFECT OF RETURN TO ADOPTED COUNTRY.—INTERPRETATION OF MUNICIPAL LAW. Naturalization of claimant, Italian by birth, as United States citizen on April 14, 1902. Return to Italy not later than 1914. Purchase on September 5, 1916, of real property in Italy. Alleged damage caused by Austro-Hungarian troops on November 11-21, 1918. Return to United States after 1918 to reside. *Held* that claimant failed to prove that his claim on account of damage, if any he ever had, was impressed with American nationality at time it arose (reference made to Henry Rothmann award, p. 253 *supra*). Claim disallowed.

This claim is put forward on behalf of Louis Zecchetto as a naturalized citizen of the United States to recover the sum of \$10,904.00 against Austria

and Hungary on account of damages alleged to have resulted from the occupancy of claimant's lands and three houses located in Italy and the seizure of claimant's livestock and personal property by the Austro-Hungarian army.

From the meager record submitted it appears:

(1) That claimant, a native of Italy, became through naturalization a citizen of the United States on April 14, 1902.

(2) Thereafter he returned to Italy. The date of his return is not disclosed by the record, but it is apparent that he was living in Italy in 1914.

(3) On September 5, 1916, he purchased 17 acres of land in the town of Annone Veneto, Italy, upon which were located three houses. Claimant with his wife and children resided on this property as did also claimant's aged parents. There appears to have been a vineyard located on the property and it was well stocked with poultry.

(4) It is alleged that the Austro-Hungarian army occupied and damaged these premises and confiscated livestock, poultry, feed, wine, and other personal property belonging to claimant. The only statement in the record with respect to the time the acts complained of occurred is that "it was in the latter part of November 1918, that is, from the 11th to the 21st of November".

(5) From the record it appears that the Austro-Hungarian troops occupying the Italian territory began a hasty retreat on October 29, 1918, so that when the Armistice of November 3, 1918, was signed no Austro-Hungarian troops remained on Italian territory save those who had been taken prisoners by the pursuing Italian armies.

(6) At some time after 1918 not disclosed by the record claimant returned to the United States to reside.

On the record submitted the Commissioner holds that the claimant has failed to discharge the burden resting upon him to prove that his property was appropriated or damaged by Austro-Hungarian troops or that he was otherwise damaged as a consequence of hostilities or of any operations of war bringing his claim within the terms of the Treaty of Vienna or the Treaty of Budapest.

For the reasons set forth in the opinion this day handed down in the case of Henry Rothmann, claimant, docket No. 8, the Commissioner further holds that the claimant has failed to prove that his claim, if any he ever had, was impressed with American nationality at the time it arose.

Wherefore the Commission decrees that neither the Government of Austria nor the Government of Hungary is obligated under the Treaty of Vienna or of Budapest to pay to the Government of the United States any amount on behalf of Louis Zecchetto, claimant herein.

---

LOUIS JOHN HOIS (UNITED STATES) *v.* AUSTRIA AND WIENER  
BANK-VEREIN

(July 24, 1928. Pages 37-45.)

---

DEBTS, APPLICABLE LAW, *LEX LOCI SOLUTIONIS*. INTERPRETATION OF MUNICIPAL LAW.—DISCHARGE OF DEBT: EFFECT OF COURT DEPOSIT, LEGAL TENDER.—INTERPRETATION OF CONTRACTS: INTENTION OF PARTIES.—INTERPRETATION OF TREATIES: CLEAR LANGUAGE. General checking account, established by claimant on August 15, 1916, with Vienna bank. Conditions *inter alia*: (1) right of bank to cancel account at any time; (2) place of performance: Vienna; (3) applicability of Austrian law. Offer by bank on October 24, 1919, to repay pre-war credit balance. Failure of claimant to reply. Court

deposit by bank on November 14, 1919, in accordance with section 1425, Austrian General Civil Law Code, of balance in old kronen unstamped banknotes. *Held* that in the absence of agreement to the contrary applicable law is *lex loci solutionis*: intention of parties, basis of construction of all contracts. *Held* also that under terms of contract and under Austrian law bank's debt to claimant definitely and completely discharged and extinguished as of November 14, 1919, and that not then Austrian State or those acting for it became debtor to claimant. *Held* further that Court deposit not void because aimed at protection of bank against Clearing Office provisions of Treaty of St. Germain: (1) Court deposit made before date of coming into force of Treaty, from which date (and not from date of signing) Clearing Office provisions effective: clear language of Treaty; (2) United States no party to Treaty, and Clearing Office provisions not incorporated into Treaty of Vienna. *Held* finally that under Austrian law bank entitled to pay in old kronen unstamped banknotes, though at time of Court deposit German-Austrian stamped banknotes were legal tender in Austria.

*Cross-references*: Am. J. Int. Law, vol. 23 (1929), pp. 187-193; Friedensrecht, VII. Jahr (1928), Nr. 6, pp. 46-49.

*Bibliography*: Prossinagg, pp. 35-38; Bonyngé, pp. 31-32.

In accordance with the rules of procedure of this Commission announced in Administrative Decision No. II. the United States on behalf of the claimant, Louis John Hois, an American national, seeks an interlocutory judgment for 11,012 kronen, the amount with interest of the credit balance of an account opened by claimant on August 15, 1916, in the Wiener Bank-Verein, a corporate Austrian national (hereinafter designated bank).

The uncontroverted facts briefly stated are:

(1) On December 10, 1912, the claimant through naturalization became and has since remained a citizen of the United States.

(2) On August 15, 1916, the claimant, who then and has since resided in Milwaukee, Wisconsin, established in his own name with the bank in Vienna a general checking account in the amount of 10,000 kronen which bore interest at the rate of 3% per annum.

(3) On January 1, 1917, and at semi-annual intervals thereafter the bank sent to the claimant, who received and retained without objections, regular statements of account calling the claimant's attention to the general conditions governing the relations between the bank and claimant printed on the statement, among these being the following:

"Unless otherwise agreed upon we are entitled to cancel existing connections at any time and according to our free decision.

"The relations existing between us and our business friends are in general being governed by the laws in force in Austria. So far as transactions with our main office come into consideration, the city of Vienna is to be considered the place where payment is to be made or where obligations are to be met as the case may be."

(4) On July 21, 1919, the claimant in addressing the bank by letter with respect to his deposit of 10,000 kronen wrote: "I presume that the Austrian Government has sequestrated this sum and, as in this case I will apply to the American Government for indemnification, I ask you to kindly inform me how this matter stands."

(5) To this inquiry the Austrian bank replied under date of August 18, 1919, assuring the claimant that his account had not been subject to sequestration, but that with accumulated interest he then had a credit balance with the bank of 10,846 old kronen which he was at liberty to dispose of in any way he saw fit.

(6) Section 1425 of the Austrian General Civil Law Code, which has been continuously in effect since the date of its enactment in 1812 provides:

"If a debt cannot be paid because the creditor is unknown, absent or dissatisfied with the offer or because of other important reasons, the debtor may deposit in court the subject matter in dispute; or if it is not susceptible of such action, he may take legal steps for its custody. If legally carried out and the creditor has been informed thereof, either of these measures discharges the debtor of his obligations and places the subject matter delivered at the risk of the creditor."

(7) On October 24, 1919, the bank cabled the claimant: "Offer you prompt repayment of your pre-war credit balance. Cable immediately to avoid depositing to law courts as trustee."

(8) Receiving no reply from the claimant, the bank on November 14, 1919, in pursuance of section 1425 of the Austrian General Civil Law Code, quoted above, deposited in the office of the Circuit Court of Vienna (which was the appropriate court in which to make this deposit, pursuant to this section of the code) old kronen unstamped banknotes in the amount of 11,012 kronen, being the full amount of claimant's deposit with the bank with accrued interest, which notes were received at the deposit office, put in an envelope, sealed and earmarked as held for claimant's account. These notes have since been and now are held in the physical custody of the deposit office of the court. Due notice of the fact of such deposit was promptly given to the claimant by the bank as well as by the court, and was received by claimant during December, 1919. The claimant was advised that these banknotes were at his free disposal and held subject to his order.

(9) From the letters of the bank to the claimant of December 3, 1919, and January 20, 1920, it is apparent that the action taken by the bank in seeking to discharge its indebtedness to the claimant through making this court deposit was taken to protect itself against the terms of the Clearing Office provisions of the Treaty of St. Germain which was signed on September 10, 1919, and which became effective on July 16, 1920.

(10) From claimant's letter to the bank of December 29, 1919, it is apparent that the claimant received the bank's cable of October 24 offering prompt repayment of claimant's pre-war credit balance and advising that if not accepted by claimant it would be deposited in the law courts, but in claimant's own language as he "did not know how to act intelligently . . . I refrained from taking any action".

The deposit established by the claimant with the bank on August 15, 1916, constitutes a debt within the meaning of the Treaty unless it has been discharged and extinguished. The sole question for decision in this case is; on the facts stated what if any debt is due and owing by the bank or other Austrian national to the claimant within the meaning of the Treaty of Vienna?

The contract which established the relation of creditor and debtor between claimant and the bank expressly stipulated that "the City of Vienna is to be considered the place where payment is to be made, or where obligations are to be met, as the case may be," and that the contract should be "governed by the laws in force in Austria."

These stipulations express the rule which would obtain in this case in the absence of any express agreement of this nature. Its basis is that governing the construction of all contracts—the intention of the parties, who when they stipulate that transactions shall occur in a particular place manifestly intend, in the absence of an agreement to the contrary, that their performance shall be governed by the laws of that place. In considering contract claims, international tribunals have applied and given effect to the law of the place of

performance.<sup>1</sup> This rule has been adopted and applied by the several Mixed Arbitral Tribunals constituted and functioning under the Treaty of Versailles, the Treaty of St. Germain, and similar treaties of peace.<sup>2</sup> It is recognized as the law by publicists and jurists, including those of Austria and of the United States,<sup>3</sup> and by the highest courts of both.<sup>4</sup> Effect will be given to this rule, where applicable, in all cases coming before this Commission.

The relation of creditor and debtor was established between the claimant and the bank on August 15, 1916. At that time section 1425 of the Austrian General Civil Law Code, quoted above had been in effect and constantly availed of for more than a century. It was in full force and effect so far as concerns this claimant and the bank on November 14, 1919. when the court deposit above mentioned was made. The bank was entitled at any time by payment to terminate the relation of debtor and creditor which existed between it and the claimant. To its offer so to do the claimant made no reply. Following this default by claimant the statute authorized the bank to make the deposit in court, for the creditor cannot by remaining passive deprive the debtor of a legal right.<sup>5</sup> In making this deposit all of the requirements of the statute were fully met by the bank. It follows that in pursuance of the provisions of the applicable Austrian law the bank's debt to claimant was discharged and extinguished and the relation of debtor and creditor terminated<sup>6</sup> as of November 14, 1919.<sup>7</sup>

<sup>1</sup> Puerto Cabello & Valencia Railroad Co. (Venezuelan Arbitrations Mixed Claims Commission, Ralston's report, Senate Document 316, 58th Congress, 2nd session, p. 455); Pacific Mail Steamship Company (Convention between the U. S. and New Grenada), Moore's Arbitrations, p. 1412; Henry Woodruff v. Venezuela, Morris' report, 1904, p. 321-3; "Manoa Cases," Morris' report, 1904, p. 451; Henry Woodruff and Flannagan, Bradley, Clark & Co. (United States and Venezuelan Claims Commission, 1889-1890, p. 425).

<sup>2</sup> Wolf v. Morley, 5 M.A.T. 670; Haeraeus v. Griffin, 5 M. A. T. 675; Gruening v. Frankel Brothers before the Anglo-German Mixed Arbitral Tribunal (1 M. A. T. 726).

<sup>3</sup> Savigny, System of the Present Roman Law, 8, 200 *et seq.*; Unger, System of Austrian General Civil Law, I, 179; Story, Commentaries on the Conflict of Laws, 7th edition, section 342, p. 279; Wharton, A Treatise on the Conflict of Laws, 3rd edition, section 401, p. 862 and 3; Phillimore, Commentaries on International Law, etc., 3rd edition, p. 525; Westlake, A Treatise on Private International Law, 7th edition, section 212, p. 302; Foote, A Concise Treatise on Private International Law, 5th edition, p. 429; Dicey, Conflict of Laws, 3rd edition, p. 602; Dernburg, The Civil Law of the German Empire, I, 103.

<sup>4</sup> Zimmermann & Forshay v. Wiener Bank-Verein, 274 U. S. 253; London Assurance v. Companhia de Moagens, 167 U. S. 149; Austrian Supreme Court, S. Z. III No. 79, IX No. 56, No. 152 (Spr. Rep. No. 13), V No. 30, Slg XVI No. 6352 (Spr. Rep. No. 219).

<sup>5</sup> Hasenoehrl, Austrian Law of Obligations, 2nd vol., 1898, p. 498 and 510; Ehrenzweig, System of Austrian General Private Law, 2nd vol., 1st half, 6th edition, 1920, section 347, p. 302.

<sup>6</sup> Zimmermann & Forshay v. Wiener Bank-Verein, 274 U. S. 253; Bamberger v. Steinhauser, decided by the Supreme Court of Austria, Dec. 14, 1927; Hasenoehrl, Austrian Law of Obligations, 2nd edition, section 94, p. 510; Schey, Concept and Substance of the *mora creditoris* in Austrian and in General Law (1884, p. 39); Frind, Austrian Court Journal for 1911, No. 8, p. 62; Decision of Supreme Court of Austria, June 28, 1921, Ob II 425; Marelli v. Haas, Italo-Austrian Mixed Arbitral Tribunal, 7 M. A. T. 249; Efsio Paris v. Impresa Auteried & Co., Austrian-Italian Mixed Arbitral Tribunal, 6 M. A. T. 436.

<sup>7</sup> Hasenoehrl, Z, Sec. 94, p. 498; Krainz-Pfaff, System, 2nd vol., 4th ed., 1907, sec. 344, p. 161; Ehrenzweig, System, 2nd vol., 6th ed., sec. 347, p. 305; Czyhlarz, Gruenhut's Zeitschrift, 6 (1879), p. 669.

On behalf of the claimant it is contended that even if the bank's indebtedness to him was discharged by the court deposit the same debt is still due him by an Austrian national, viz.: the Government of Austria, or the Austrian Court, or the clerk or other officer having the custody of the court deposit. This contention is rejected. The deposit office in receiving and holding the deposit for and subject to the order of the claimant acted in strict accordance with the Austrian statute. In so doing it performed a governmental function. In no sense did the Austrian State or those acting for it become debtor to the claimant. The kronen deposited never became the property of the State, which had no pecuniary interest therein. The State and all those acting for it, in receiving and holding the deposit, acted in a public and not a private capacity, and what they did in pursuance of the Austrian statute did not operate to keep alive the indebtedness which had been due the claimant and which was terminated as definitely and completely as if payment had been made directly to the claimant and full acquittance executed and delivered by him.<sup>1</sup>

On behalf of claimant it is further contended that by the "device" of a court deposit made by the bank in pursuance of the municipal law in effect in Austria, for the express purpose of protecting itself against the terms of the Clearing Office provisions of the Treaty of St. Germain, which had been signed but had not then come into force, the debtor is seeking to defeat the very purpose of that Treaty, and Austria is seeking to evade the burden of valorization of debts which the terms of that Treaty place upon her, and that all acts taken in furtherance of these purposes are void. Paraphrasing the language of Mr. Justice Holmes of the Supreme Court of the United States,<sup>2</sup> the short answer to this contention is that claimant's rights against the bank were ended before the Treaty became effective.

But there are other answers. Assuming that the bank did make the court deposit in question for the express purpose of protecting itself against the terms of the Clearing Office provisions of the Treaty of St. Germain, neither the United States nor its nationals can complain of its so doing, for the reasons, amongst others, that the United States declined to become a party to the Treaty of St. Germain, and while the provisions of that Treaty, here under consideration, were incorporated into the Treaty of Vienna, the United States by deliberate inaction, refused to adopt the Clearing Office plan, and by so doing refused to put into effect the provisions against which the bank sought to protect itself. It is manifest that neither the United States nor its nationals can complain that the bank took measures to protect itself against treaty provisions which never became effective as between the United States and Austria.

Section III of part X (Economic Clauses) of the Treaty of St. Germain provided for the *reciprocal* settlement of "debts" between the nationals of the opposing powers through the intervention of Clearing Offices. Each of the Allied and Associated Powers had the option to adopt or not the Clearing Office plan. Paragraph (a) of article 248 of the Treaty provided that:

"(a) Each of the High Contracting Parties shall prohibit, as from the coming into force of the present Treaty, both the payment and the acceptance of payment of such debts, and also all communications between the interested parties with regard to the settlement of the said debts otherwise than through Clearing Offices."

It is clear that these provisions prohibiting payment of debts were as between Austria and other nations applicable only to those nations adopting

<sup>1</sup> *Tannenbaum v. The Prussian Treasury*, 5 M. A. T. 632; *Solomon & Co. v. Staatsanwalt, etc.*, Anglo-German Mixed Arbitral Tribunal, case No. 2214, decided Sept. 30, 1924.

<sup>2</sup> *Zimmermann & Forshay v. Wiener Bank-Verein*, 274 U. S. 253.

the Clearing Office plan; that they were to be effective, if at all, only as from July 16, 1920, the date of "the coming into force of the present Treaty;" and that they were reciprocal, applying alike to the United States and to Austria. The treaty makers could readily have stipulated that the prohibition-of-payment provisions should be effective as from the date of the *signing* of the Treaty; or could have gone further and provided that all such payments made after the Armistice of November 3, 1918, should be void<sup>1</sup>—but they did not do so. On the contrary in this respect they left nothing to construction but *expressly* stipulated that these prohibitory provisions should be effective "as from the coming into force of the present Treaty". It is not permissible for the Commissioner to speculate with respect to what the treaty makers might or could or should have provided when their language is clear.

While the United States signed the Treaty of St. Germain, it never through ratification became a party to it. However, all of the provisions of the Treaty of St. Germain here under consideration were carried into and became a part of the Treaty of Vienna between the United States and Austria signed August 24, 1921, which became effective November 8, 1921. But the United States did not, as it had the right to do, adopt the Clearing Office provisions of the Treaty of Vienna and consequently did not enact any legislation to make effective the reciprocal prohibition-of-debt-payment provisions above referred to. Of the extent to which American nationals, in the absence of any legislation prohibiting their so doing, used depreciated kronen currency in voluntarily discharging their kronen obligations to Austrian nationals, the Commissioner is not advised. But the records of this Commission disclose that such transactions took place without impediment. Obviously the United States and its nationals were not in a position to demand that Austria should prohibit its nationals from paying or discharging, according to the law in effect at the contract place of payment, the debts owing by them to American nationals.

Austria could not foresee that the United States would not ultimately become a party to the Treaty of St. Germain which it had signed and within one month thereafter elect to adopt the Clearing Office plan. Therefore, the prohibition-of-payment decrees which Austria was required to and did enact, in pursuance of the provisions of the Treaty, by their terms prohibited Austrian nationals from paying debts owing by them to American nationals. The Supreme Court of Austria has held<sup>2</sup> that these Austrian prohibition-of-payment decrees presented no impediment to an Austrian debtor discharging his indebtedness to an American creditor through a court deposit made in pursuance of section 1425 of the Austrian General Civil Law Code. The basis of this holding is that while the decrees in question nominally forbade payment, in any form, of debts due by Austrian to American nationals, nevertheless the reason for their enactment was the carrying out of the Clearing Office provisions of the Treaty, and as the United States rejected the Clearing Office plan the reason for the decrees failed in so far as they applied to American nationals, and hence the letter of the decrees will not be applied and enforced as between the United States and Austria and their respective nationals.

The Commissioner declines to deal with the effect, if any, of these Austrian decrees, on their coming into force, on the right of an Austrian national through a court deposit to discharge a debt owing by him to an American national,

---

<sup>1</sup> A precedent for such a stipulation is found in the last sentence of paragraph 1 of the annex to section IV of part X of the Treaty making void all exceptional war measures taken by Austria and Austrian authorities since November 3, 1918.

<sup>2</sup> *Bamberger v. Steinhauser*, decided by the Supreme Court of Austria, December 14, 1927.

as a decision of this question is not necessary to a disposition of this case. The decrees prohibiting payment had not been passed and could not therefore have presented any impediment to the bank's action when the debt due by the bank to the claimant was lawfully discharged.

The further contention is made on behalf of the claimant that the court deposit made by the bank is without legal effect because made in old unstamped kronen, not legal tender, instead of "German-Austrian stamped kronen", then legal tender in Austria where payment was made. It would not be profitable to examine here in detail the Treaty provisions and the several decrees passed in pursuance thereof bearing on the question here raised. The Commissioner holds that while at the time the court deposit was made German-Austrian stamped banknotes were the legal tender in Austria, nevertheless under the provisions of section 6 of the Austrian decree of March 25, 1919, it was permissible for the bank to use old kronen unstamped banknotes in the payment of its debt direct to claimant or in discharging this debt through a court deposit.

The Commissioner holds that the debt due by the bank to claimant was lawfully discharged and extinguished through the court deposit made by the bank on November 14, 1919, approximately two years before the coming into force of the Treaty of Vienna on November 8, 1921, under the terms of which Treaty this claim is asserted. It follows that no debt exists upon which the interlocutory judgment prayed for can be based.

Wherefore the Commission decrees that the Government of Austria is not obligated under the Treaty of Vienna to pay to the Government of the United States any amount on behalf of Louis John Hois, claimant herein.

---

THE FIRST NATIONAL BANK OF BOSTON (UNITED STATES) *v.*  
AUSTRIA AND WIENER BANK-VEREIN

(November 9, 1928. Pages 89-91.)

---

DEBTS, APPLICABLE LAW, *LEX LOCI SOLUTIONIS*, INTERPRETATION OF MUNICIPAL LAW.—DISCHARGE OF DEBT: EFFECT OF COURT DEPOSIT, EXCEPTIONAL WAR MEASURES.—INTERPRETATION OF CONTRACTS: INTENTION OF PARTIES.—INTERPRETATION OF TREATIES: CLEAR LANGUAGE. Open account, established by claimant with Vienna bank. Court deposit by bank, in accordance with section 1425, Austrian General Civil Law Code, of balance in banknotes. Notice of deposit to claimant on December 3, 1919. *Held* that Court deposit operated as discharge for reasons stated in Louis John Hois award (p. 260 *supra*), and because, prior to Court deposit, claimant's balance not subjected to exceptional war measures of general applicability to property, rights, and interests of American nationals in territory of former Austrian Empire (reference made to Administrative Decision No. II, p. 212 *supra*), the existence of which measures claimant failed to prove.

*Cross-reference:* Am. J. Int. Law, vol. 24 (1930), pp. 186-188.

*Bibliography:* Prossinagg, pp. 27-29; Bonyngé, p. 24.

The United States on behalf of the claimant, The First National Bank of Boston, an American corporate national (hereinafter designated "American bank"), seeks an interlocutory judgment for kronen 100,952, the balance alleged to have been due it on open account on December 7, 1917, from the

impleaded debtor, the Wiener Bank-Verein, an Austrian corporate national (hereinafter designated "Austrian bank").

The Austrian bank deposited banknotes in the amount claimed with the Circuit Court Innere Stadt, Vienna, which court was at that time the court of competent jurisdiction, and gave the American bank notice of such deposit on December 3, 1919. All of the provisions of section 1425 of the Austrian General Civil Law Code were complied with by the Austrian bank and, under the decision of the Commission in the Hois case,<sup>1</sup> the court deposit made by the Austrian bank operated as a discharge and extinguishment of its pre-war debt to the American bank *unless*, prior to such court deposit, the Government of Austria or the competent Austrian authorities had subjected the American bank's credit balance with the Austrian bank to "exceptional war measures" as that term is used in the Treaty of Vienna.

The American Agent on behalf of the claimant contends that during the war the former Empire of Austria generally so applied exceptional war measures to bank deposits owing to American nationals as to entitle the claimant herein to a present final award in dollars "in respect of damage or injury inflicted upon their property, rights or interests" as provided in paragraph (*e*) of article 249 of the Treaty of St. Germain carried into the Treaty of Vienna, and in pursuance of the rules laid down by this Commission in Administrative Decision No. II at pages 25 to 28, inclusive.<sup>2</sup> This contention presents the sole question arising on the record in this case remaining for decision.

No case has been called to the attention of the Commissioner in which American-owned property was in fact subjected to supervision or compulsory administration during the war by virtue of any decree of the Austrian Government, but the American Agent relies on the provisions of several decrees of the former Empire of Austria, particularly those of March 10, 1916, December 19, 1916, and June 18, 1918, which he contends constituted exceptional war measures. These have all been carefully examined by the Commissioner. It will not be profitable to discuss them in detail. One of them prohibited, among numerous other articles, the exportation of gold and other coined metals. Others attempted to regulate traffic and commerce in foreign exchange and in general traffic with foreign countries in an effort to save foreign exchange and Austrian currency for lawful purposes and to prevent speculation to the disadvantage of the Austrian currency as well as the flight of capital from Austria at a time when the preservation of the value of the currency was of vital importance. The obvious purpose of these decrees was to save Austria's liquid resources in gold, foreign exchange, and its own currency for the purchase abroad of the materials most vitally needed. They were applicable to Austrian nationals as well as all other residents of Austria. They were in no sense exceptional war measures *directed against American or other enemy nationals*.

The expression "exceptional war measures" as defined in the Treaty<sup>3</sup> "includes measures of all kinds, legislative, administrative, judicial or others, that have been taken or will be taken hereafter *with regard to enemy property*, and which have had or will have the effect of removing from the proprietors the *power of disposition* over their property, though without affecting the ownership, such as measures of supervision, of compulsory administration, and of sequestration; or measures which have had or will have as an object *the seizure of*, the use of, or the interference with *enemy assets*", etc. It is apparent that the decrees

<sup>1</sup> See p. 260 *supra*.

<sup>2</sup> This volume, pp. 221-222 *supra*.

<sup>3</sup> Paragraph 3 of the annex to section IV of part X of the Treaty of St. Germain carried into the Treaty of Vienna.

referred to by the American Agent were not directed at or taken "with regard to enemy property" any more than Austrian or neutral property. It is apparent that such decrees did not remove from the American depositors in Austrian banks the power of disposition over their deposits such as "measures of supervision, of compulsory administration, or of sequestration" would have done. It is apparent that these decrees did not have for their object "the seizure of, the use of, or the interference with enemy assets". On the contrary, the records before this Commission indicate that during the years 1917 to 1920 kronen in considerable amounts were transferred directly from Austria to the United States. These do not include payments, believed to have been large, made to neutrals for the purpose of ultimate transfer to the United States where direct transfer was difficult because of the provisions of the United States Trading with the Enemy Act, which had no counterpart in the statutes and decrees of Austria as applied to the United States and its nationals.

The Commissioner holds that the claimant herein has failed to discharge the burden which rests upon it to prove the existence of exceptional war measures of general applicability to the property, rights, and interests of American nationals in the territory of the former Austrian Empire or that its bank deposit was "in fact subjected to measures in the nature of exceptional war measures"<sup>1</sup> within the meaning of the Treaty.

Wherefore the Commission decrees that the Government of Austria is not obligated under the Treaty of Vienna to pay to the Government of the United States any amount on behalf of The First National Bank of Boston, claimant herein.

---

MARY FEDERER, ADMINISTRATRIX OF THE ESTATE OF JOHN J. FEDERER (UNITED STATES) *v.* AUSTRIA AND WIENER BANK-VEREIN

(November 9, 1928. Pages 92-97.)

---

DEBTS, APPLICABLE LAW, *LEX LOCI SOLUTIONIS*.—INTERPRETATION OF MUNICIPAL LAW, *DEPOSITUM IRREGULARE, REGULARE*, CUSTODY DEPOSIT, BAILMENT. General checking account, established by Mr. Federer, claimant's husband, on January 18, 1917, with Vienna bank. Custody deposit by bank on October 10, 1919, in agreement with Mr. Federer, of balance of account, free of charges, bearing no interest, and at depositor's free disposal: amount placed in special safe for custody deposits, never commingled with bank's own moneys nor treated as part of its assets. *Held* that applicable law is Austrian law: Austrian contract to be performed in Vienna. *Held* also that under sections 1376 and 1377, Austrian General Civil Law Code, the original account (*depositum irregulare*), a debt within meaning of Treaty of Vienna, terminated on October 10, 1919, and that contract of bailment (*depositum irregulare*, recognized by Austrian Courts and publicists) concluded instead, not giving rise to such debt. *Cross-reference*: Am. J. Int. Law, vol. 24 (1930), pp. 181-185.

*Bibliography*: Prossinagg, pp. 38-40; Bonyngé, pp. 32-34.

In accordance with the rules of procedure of this Commission announced in Administrative Decision No. II, the United States, on behalf of the claimant, Mary Federer, the widow and the administratrix of the estate of John J. Federer,

---

<sup>1</sup> Administrative Decision No. II at page 28 (this volume, p. 222 *supra*).

deceased, who was an American national through naturalization, seeks an interlocutory judgment for a kronen debt as hereinafter stated.

The facts are these:

(1) On January 18, 1917, John J. Federer resided in the State of New Jersey where he continued to reside to the time of his death, May 7, 1927. On May 23, 1927, his widow was duly appointed and qualified as administratrix of his estate.

(2) On January 18, 1917, Federer established in his own name in Vienna with the Wiener Bank-Verein, an Austrian corporate national (hereinafter designated "bank"), a general checking account in the amount of kronen 30,000 which bore interest at the rate of  $\frac{3}{100}$  per annum.

(3) On September 6, 1919, the bank dispatched to Federer at his address in West New York the following letter:

"In view of the regulations of Peace Treaty we must request you herewith to kindly dispose of your old kronen credit balance by return mail as we would otherwise be compelled to deposit same with the local court. Owing to the complications and inconveniences which through those proceedings may arise for you, we are prepared to place your balance in banknotes into a special custody depot with us, free of any charges, such depot not to bear interest and to be held at your free disposal at any time. We beg to point out to you that your respective instructions must expressly indicate that the deposit with the court is to be avoided by us.

"The mail service between the States and our country being still rather unreliable we would suggest that you upon receipt of the present, cable us as follows: 'Avoid court deposit' from which we shall gather, that you wish us to take your balance into custody depot as outlined above. Should you on the other hand feel disposed to transfer your credit balance to somebody else, please instruct us accordingly and by so doing oblige", etc.

(4) On or about October 10, 1919, the bank received from Federer a cable reading:

"Avoid court deposit".

(5) On October 10, 1919, the bank wrote Federer to his address in West New York as follows:

"We received to-day your cable reading as follows: 'Avoid court deposit' in compliance with which we have today closed your account with us as per enclosed statement, showing a balance in your favor of *K* 32.237.—for which we are debiting you *val. 9th inst.*

"We have placed this amount into your custody deposit with us, bearing no interest but being kept at your free disposal at any time".

(6) The special custody deposit referred to in that letter was erected by placing banknotes to the amount of kronen 32.237, representing Federer's balance, in a special safe which served solely as a receptacle for so-called "custody deposits" accepted by the bank. No other moneys or securities were placed in that safe nor were the contents of that safe ever commingled in any way with the bank's own moneys nor were they ever treated as part of its assets. A cashier of the bank (see exhibit Bb in docket No. 335) testified with respect to the custody deposits of Federer and other American customers as follows:

"... upon the transfer of a customer's account from a current account to a custody deposit, banknotes in the amount of the balance were actually placed in a separate safe which served solely as a receptacle for such custody deposits. In case of a disposition being ordered, banknotes in the amount required were removed from this safe and disposed of in accordance with the order of the party. Today also the custody deposits remain separately kept."

The deposit of kronen 30,000 established by Federer with the bank on January 18, 1917, was a general deposit—*depositum irregulare*—known to the jurisprudence of both Austria and America.<sup>1</sup> Under it the bank acquired the ownership of the funds deposited which were intermingled with its other funds. The security of the depositor was based solely on the credit of the depositary. The equivalent of the funds deposited were at the disposal of the depositor, yet they were not withdrawn from commerce but belonged to and were used by the depositary. The depositor was not entitled to the return of the fungible things deposited but only to things of equal quantity and quality, that is, of the same amount and the same kind. This deposit constituted a debt within the meaning of the Treaty of Vienna.

The sole question for decision in this case is, on the facts stated what, if any, debt is now due and owing by the bank to the claimant within the meaning of the Treaty of Vienna?

Upon receipt of the bank's letter to him of September 6, 1919, three courses were open to Federer:

- (1) To withdraw his credit balance or transfer it to another;
- (2) To agree that the bank should convert this credit balance into a "custody deposit"; or
- (3) To decline to pursue either of these courses, whereupon the bank would have deposited the amount of the credit balance in the local court at Vienna in pursuance of the provisions of section 1425 of the Austrian General Civil Law Code.

Under the Hois case,<sup>2</sup> had Federer declined to pursue either course (1) or (2) the bank would clearly have been within its rights in pursuing the third course, which would have resulted in the discharge and extinguishment of its indebtedness to Federer. The latter, however, with a view to avoiding the court deposit, expressly agreed that the bank should place his balance in banknotes into a special custody deposit to be erected by the bank, free of any charge to him, to bear no interest, and to be held by the bank, at his free disposal at any time. In pursuance of this express agreement Federer's balance in banknotes was placed by the bank in a special safe which served solely as a receptacle for such custody deposits and Federer so informed. These banknotes were never commingled with the bank's own money or treated as part of its assets. They have been held ever since subject to Federer's free disposal.

The contract between the bank and Federer was an Austrian contract to be performed in Vienna and is governed by the laws of Austria.<sup>3</sup> Under those laws the general deposit, the original account current, the *depositum irregulare*, was terminated and a new liability, based on the custody deposit agreement, was created in its stead. Sections 1376 and 1377 of the Austrian General Civil Law Code in translation read:

Section 1376. "The change without the addition of a third party takes place when the legal basis or when the principal substance of a debt is changed, so that the old obligation is transformed into a new one."

<sup>1</sup> Serafini, *Del Deposito Irregolare*, *Giurista d. Napoli* VI; u. 36 e. 53 (1863); Muchlhauser, *Umfang und Geltung des depositum irregulare* (1879); Niemeyer, *Depositum irregulare* (1889); Neumann-Hofer, *Depositoren-Geschäfte und Depositen-Banken* (1894); Schey, *Obligations-Verhältnisse*, Sec. 50, S. 351; Ehrenzweig's *System*, Sec. 358, S. 383 f.; Pfaff, *Geld als Mittel Pfandrechtlicher Sicherstellung*, 39; Schey, Sec. 50, S. 353 f.; Morse on *Banks and Banking*, 5th edition, sec. 186 and 289.

<sup>2</sup> See p. 260 *supra*.

<sup>3</sup> Hois case, p. 260 *supra*.

*Section 1377.* "Such a change is called a novation. By virtue of this contract the principal obligation ceases and the new one simultaneously comes into force."

The decisions of the Austrian courts and the writings of Austrian publicists recognize in Austrian commercial and banking usage and practice the existence of a custody deposit, a special deposit, the *depositum regulare*, where the depositary has no right to use the thing deposited but is obligated to return it. In such a case the property deposited does not become part of the assets of the bank and must not be mingled therewith. The title to the deposit remains in the depositor whose relation to the bank is not that of creditor to his debtor but of a bailor to his bailee.

The rule, in so far as applicable to this case, is thus stated by Ehrenzweig, *System des Österreichischen allgemeinen Privatrechtes*, volume 2, paragraph 358, page 335 (translation):

"In the ordinary *Summendepositum* [aggregate deposit] the recipient obliges himself to return, if not the things received, the same number of things of the same kind, which must, however, be always kept separate from his own property and must be held in custody as the property of another. The depositor remains the owner; the custodian is merely entitled to replace individual pieces by others of the same kind. The rule is the same when money is (specially) deposited unsealed, as also in the case of a bank deposit of securities without a list of specific serial numbers. The banker in such deposits is not required to exercise any special caution to prevent the exchange between the same kinds of securities belonging to different customers. The interests of the depositor are not affected by such change."

"By the regular *Sammeldepositum* [mingled deposit], the property taken over is mingled with other property of similar depositors. The banker mingles securities of the same kind in a common mass. Possibly even lottery pieces in which the gain or loss is proportionately allocated amongst the depositors. In the case of the mingled deposit, the bailee does not become the owner . . . each depositor is the owner of the amount which belongs to him and he is entitled to reclaim the same in any denominations or things out of the common mass."

Professor Joseph von Schey, an outstanding Austrian publicist (*Die Obligationsverhältnisse des Österreichischen allgemeinen Privatrechtes*, paragraph 54, in translation) says:

"The growth of commercial relations has developed another form of deposit of substitutable things, in which the things given in custody are not kept separately in specie, but are mingled in one mass with similar deposits of other customers. The name *Sammeldepot* or *Vermengungsdepositum* suggests itself for deposits of this class (the words *Sammeldepot* and *Vermengungsdepositum* both mean the same thing, a commingled deposit). The depositor in this case is not entitled to demand the return of the identical things, but only the delivery of the same amount of things of the same kind out of the aggregate mass of deposits of the same kind. At the same time, it cannot be said that because the depositor is responsible not for the return of the same things, but for the same amount of similar things, this deposit becomes an irregular deposit; for the fungibles so received have not been placed at the custodian's free disposal, but were delivered to him for actual though not for separate custody. He must at all times hold in actual custody the actual amount of the same things which he has received for custody from his different depositors and not have merely, as in the case of an irregular deposit, usual 'banking cover' for the same. He is therefore economically not in a position to make even the slightest use of deposits of this sort for his own account. The individual depositor does not 'credit'

him; every depositor remains the owner of his portion of the total mass of deposits, is entitled to alienate the same and to reclaim it in case of bankruptcy. This modification of the agreement of deposit therefore also belongs to the category of regular deposits."

The Commissioner holds that on the erection of the "custody deposit" on or about October 10, 1919, the relation of creditor and debtor which was established between Federer and the bank on January 18, 1917, was terminated and replaced by an entirely new contract of bailment. Therefore on the coming into effect of the Treaty of Vienna there existed no debt owing by the bank to Federer upon which to base the interlocutory judgment prayed for.

Wherefore the Commission decrees that the Government of Austria is not obligated under the Treaty of Vienna to pay to the Government of the United States any amount on behalf of the claimant, Mary Federer, administratrix of the estate of John J. Federer, deceased.

GEORGE AND THERESA ZOHRER (UNITED STATES) *v.* AUSTRIA  
AND POSTSPARKASSEN-AMT IN WIEN

(November 9, 1928. Pages 97-99.)

BONDED PUBLIC DEBTS: COLLECTION OF INTEREST COUPONS.—DEBTS: RATE OF INTEREST. Purchase of Austrian War Loan bonds through American broker and Austrian bank. Bonds held for claimants by bank which collected interest coupons but, without authority from claimants, credited proceeds to broker who paid only part of them to claimants. *Held* that interlocutory judgment should be entered for part of proceeds not turned over to claimants, with interest on amount of each coupon from date of maturity at 2 per cent per annum (contractual rate between broker and bank).

*Bibliography:* Prossinagg, pp. 40-41; Bonyngé, pp. 38-39.

In accordance with the rules of procedure of this Commission announced in Administrative Decision No. II, the United States on behalf of the claimants, George and Theresa Zohrer, seeks an interlocutory judgment for a kronen debt alleged to be due them by the Postsparkassen-Amt in Wien (Austrian Postal Savings Bank in Vienna), hereinafter called "impleaded debtor".

The facts are these:

(1) The claimants are American citizens by virtue of their naturalization on July 6, 1915.

(2) On or about February 28, 1916, the claimants, through the Transatlantic Trust Company (a corporation created under the laws of New York), jointly subscribed and paid for bonds of the Third Austrian War Loan of the face value of kronen 20,000 bearing interest at the rate of 5½% per annum.

(3) The impleaded debtor issued to and in the name of the claimants a deposit certificate (*Rentenbuch*) which it delivered to the claimants through the Transatlantic Trust Company. The bonds subscribed and paid for by claimants were held by the impleaded debtor for the claimants.

(4) In these transactions the Transatlantic Trust Company acted solely as a broker. The impleaded debtor knew that the bonds, for which it had issued to the claimants a deposit certificate (*Rentenbuch*), had been paid for and were owned by the claimants.

(5) The deposit certificate (*Rentenbuch*) issued by the impleaded debtor and held by the claimants, among other things, provided (translation): "The coupons of the bonds deposited shall be collected by the Postal Savings Bank

[impleaded debtor] at the time they become due and shall be credited to the respective savings bank account or check account, unless requested otherwise."

(6) The impleaded debtor clipped the coupons from the claimants' bonds and credited not the claimants but the Transatlantic Trust Company with the amount thereof as follows:

<i>Date</i>	<i>Amount Kronen</i>
July 1, 1916 . . . . .	550
January 1, 1917 . . . . .	550
July 1, 1917 . . . . .	550
December 31 1917 (coupons of January 1, 1918) . . . . .	550
June 28, 1918 (coupons of July 1, 1918) . . . . .	550
December 31, 1918 (coupons of January 1, 1919) . . . . .	550

It appears from the record that of the amounts so credited to the Transatlantic Trust Company it paid to the claimants (on January 1, 1917) the sum of \$68.75, and no more.

(7) The record is barren of any evidence of authority given by the claimants to the impleaded debtor to credit the Transatlantic Trust Company with the proceeds of claimants' interest coupons. It is likewise barren of any authorization by claimants to the Transatlantic Trust Company to act for them in the collection of the interest coupons in question.

(8) The claimants in the early part of 1928 surrendered to the impleaded debtor the deposit certificate (*Rentenbuch*) issued by it which they held and received in lieu thereof Third Austrian War Loan Bonds of the face value of kronen 20,000. From these bonds the claimants have clipped interest coupons maturing July 1, 1919, to July 1, 1921, both inclusive, of the total face value of kronen 2,750 which have been filed with the Commission, and an interlocutory judgment has been heretofore entered on account thereof (docket No. 1083-B).

(9) There is pending before the Commission docket No. 96, United States of America on behalf of Transatlantic Trust Company, claimant, *v.* Austria and Postsparkassen-Amt in Wien, impleaded, in which an interlocutory judgment is sought on behalf of the Transatlantic Trust Company based on kronen credits accorded it by the impleaded debtor for the proceeds of interest coupons clipped from the bonds of the claimants herein, George and Theresa Zohrer, and others similarly situated who purchased Austrian War Loan bonds through the Transatlantic Trust Company acting as a broker.

On the facts stated the Commissioner holds that the impleaded debtor was obligated to account to the claimants for the proceeds of coupons collected by it and this obligation was not discharged by its crediting the Transatlantic Trust Company with such proceeds. It follows that an interlocutory judgment should be entered on behalf of the claimants as follows:

<i>Coupons due</i>	<i>Amount Kronen</i>
July 1, 1916 . . . . .	550
July 1, 1917 . . . . .	550
January 1, 1918 . . . . .	550
July 1, 1918 . . . . .	550
January 1, 1919 . . . . .	550
	2,750

with interest on each of said amounts from the date of maturity of the coupons at the rate of 2 per cent per annum (the contractual rate governing the Transatlantic Trust Company account with the impleaded debtor).

It is so ordered.

TRANSATLANTIC TRUST COMPANY (UNITED STATES) *v.* AUSTRIA  
AND POSTSPARKASSEN-AMT IN WIEN

(November 9, 1928. Pages 99-100.)

BONDED PUBLIC DEBTS: COLLECTION OF INTEREST COUPONS.—EVIDENCE: BURDEN OF PROOF. *Held* that claimant failed to prove existence of debt within meaning of Treaty of Vienna in circumstances analogous to those discussed in George and Theresa Zohrer award (see p. 272 *supra*).

*Bibliography:* Prossinagg, pp. 41-42; Bonyngé, p. 39.

The Commissioner's decision in docket No. 1083-A, George and Theresa Zohrer, claimants, this day decided is here referred to.

An interlocutory judgment is sought herein on behalf of the Transatlantic Trust Company, alleged to be an American corporate national (hereinafter referred to as "claimant"), for a kronen debt alleged to be due it from the Postsparkassen-Amt in Wien (hereinafter referred to as "impleaded debtor").

The record in this case is meager and unsatisfactory notwithstanding the efforts of both the American and the Austrian Agents to develop the facts. On the record submitted the Commissioner finds that the indebtedness in the form of a credit balance alleged to be due the claimant by the impleaded debtor is made up largely of items credited by the impleaded debtor to the claimant as the proceeds of interest coupons clipped from Austrian War Loan bonds which belonged—not to the claimant—but to claimant's customers, for whom it acted as a broker in the purchase of such bonds, and who occupied the same position with respect to the claimant and the impleaded debtor herein as did George and Theresa Zohrer in docket No. 1083-A.

On the record submitted the Commissioner further finds that the claimant herein has failed to prove that it was entitled to these credits, and that when they are eliminated from the account between the claimant and the impleaded debtor it appears that the claimant is in the latter's debt.

The Commissioner holds that the claimant has failed to discharge the burden resting upon it to prove the existence of a debt due it by Austria or an Austrian national within the meaning of the Treaty of Vienna and of this Commission's Administrative Decision No. II.

Wherefore the Commission decrees that the Government of Austria is not obligated under the Treaty of Vienna to pay to the Government of the United States any amount on behalf of the Transatlantic Trust Company, claimant herein.

HENRY HOWARD ELLISON, WILLIAM RODMAN ELLISON, AND  
HENRY HOWARD ELLISON, Jr., AMERICAN PARTNERS IN THE  
LATE FIRM OF JOHN B. ELLISON & SONS (UNITED STATES) *v.*  
AUSTRIA AND LEOPOLD KURANDA

(March 22, 1929. Pages 101-102.)

DEBTS, DEATH OF DEBTOR.—EVIDENCE: BURDEN OF PROOF. *Held* that claimant failed to prove existence of debt within meaning of Treaty of Vienna: debtor died on December 7, 1917, leaving neither assets, nor heirs or legal successor(s).

*Bibliography:* Prossinagg, p. 31; Bonyngge, p. 29.

This claim is put forward by the United States on behalf of claimants, American nationals, against Austria and Leopold Kuranda, impleaded Austrian debtor, asserting an indebtedness to claimants by Kuranda due and owing prior to December 7, 1917, which has never been paid.

The American and Austrian Agents agree that on February 11, 1918, Kuranda died, leaving no assets and no heirs or legal successor or successors.

It follows that subsequent to his death and on the coming into effect of the Treaty of Vienna there was no Austrian national indebted to the claimants and no debt due and owing by an Austrian national to the claimants. In these circumstances the asserted claim does not fall within the terms of the Treaty of Vienna.<sup>1</sup>

The rules invoked on behalf of the claimants, which are incorporated in Administrative Decision No. II of this Commission, apply to questions of nationality and of residence of claimant creditors and impleaded debtors. They are not applicable here where the question presented turns on the existence of a debt due and owing by an Austrian national to the claimants at the time of the coming into force of the Treaty creating rights on behalf of the claimants which had no prior existence.

The Commissioner holds that the claimants have failed to discharge the burden resting on them to prove the existence of a debt falling within the terms of the Treaty of Vienna and the claim is dismissed.

---

CYRUS WILFRED PERKINS (UNITED STATES) *v.* AUSTRIA AND  
WIEN-FLORIDSDORFER MINERALOEL FABRIK

(*March 22, 1929, Pages 102-104.*)

---

DEBTS.—INTERPRETATION OF CONTRACTS, DATE OF CONCLUSION OF PEACE.—  
DECISION BY MUNICIPAL COURT, *RES JUDICATA*.—INTERPRETATION OF TREATY:  
PRE-WAR TRANSACTION, NATIONALITY OF CLAIM. Sale, late 1916, after  
beginning of war between Great Britain and Austria, by Mr. Jacob Perkins,  
British national, of stock to Austrian corporation, which on January 2, 1917,  
accepted to retain purchase price until "after the conclusion of peace",  
and to pay meanwhile interest. Death of vendor on July 21, 1917. Naturaliz-  
ation of claimant, vendor's son, and one of his heirs, as American citizen  
on March 6, 1918, and "delivery" to him on July 24, 1919, of three-twentieths  
of father's estate by competent Polish probate court. *Held* that phrase "conclu-  
sion of peace" in contract means conclusion of peace between Austria and  
Great Britain, which peace was concluded on July 16, 1920, when Treaty of  
St. Germain became effective. *Held* also that claimant on July 16, 1920,  
entitled to three-twentieths of purchase price bearing contractual interest  
from January 2, 1917, less three-twentieths, as of September 23, 1915, of  
claim against father's estate then acquired by corporation. *Held* further  
that sale (1916) was pre-war transaction so far as concerns claimant (naturaliz-

---

<sup>1</sup> *Delius v. German Government*, 2 M. A. T. 213; *Bank für Handel und Industrie v. H. Goldstein*, 5 *ibid.* 288; *Garve Bros. v. Ballantyne*, 6 *ibid.* 595; also *Reed v. Rieder & Peratoner G. m. b. H.*, 5 *ibid.* 270; *Midland Bank, Ltd., v. Louis Littauer and the heirs of Ernst Littauer*, 6 *ibid.* 598; and *Gordon L. Jacobs & Co v. Heirs of Walter Flatow*, 6 *ibid.* 601.

ed 1918), and that his claim became impressed with American nationality on July 24, 1919 (decision Polish court).

This case having come before the Commission for decision, the American Agent and the Austrian Agent having been heard, the case having been finally submitted. and due consideration having been had, the Commissioner finds:

1. Claimant's father, Jacob Perkins, a British national resident in Austria, late in 1916 (after the beginning of the war between Great Britain and Austria) sold certain shares of capital stock to the impleaded debtor herein, an Austrian corporation. The transaction was confirmed in a letter of January 2, 1917, which stated that the purchase price, kronen 400,000, was to be retained by the impleaded debtor and could not be disposed of by the vendor until "after the conclusion of peace" and that the debtor meanwhile was to pay interest thereon at the same rate it received from its bankers,  $3\frac{1}{2}\%$  unless changed. There is nothing in the record to indicate that this rate did change.

2. Jacob Perkins died in Austria intestate on July 21, 1917, leaving a widow and four children, British nationals, and another child, the claimant herein, who became an American national through naturalization on March 6, 1918.

3. The contract between Jacob Perkins and the impleaded debtor was binding on the heirs of this British national irrespective of their nationality.

4. There was "delivered" to the claimant herein on July 24, 1919, by order of the competent Polish probate court, an interest of three-twentieths of his father's estate. From that time forward three-twentieths of that estate vested in him.

5. As the contract referred to was entered into between a British national and an Austrian national, the Commissioner holds that the phrase "conclusion of peace" therein means conclusion of peace between Austria and Great Britain. That peace was concluded when the Treaty of St. Germain became effective on July 16, 1920.

6. The impleaded debtor on September 23, 1919, acquired by assignment a claim against the estate of claimant's father in the amount of kronen 8,712.89. The claimant on July 16, 1920, was entitled to receive three-twentieths of the purchase price, kronen 400,000, which three-twentieths bore interest from January 2, 1917, from which should be deducted three-twentieths of kronen 8,712.89 as of September 23, 1919.

Accordingly the Commissioner further finds:

That a debt was and is due and owing to (a) Cyrus Wilfred Perkins, an American national residing in the United States, by (b) Wien-Floridsdorfer Mineraloel Fabrik, an Austrian corporation having its principal place of business in Vienna, Austria, (c) which debt was incurred as a result of a pre-war transaction so far as concerns this claimant and (d) matured on July 16, 1920. (e) in the principal amount (representing this claimant's interest) of kronen sixty thousand (60,000.00), (f) that the rate of interest stipulated between the parties to the said transaction was  $3\frac{1}{2}\%$  (g) that the impleaded debtor was entitled to deduct from interest accrued (on said principal amount of kronen 60,000.00) through July 16, 1920, aggregating kronen seven thousand four hundred thirty and thirty-three one-hundredths (7,430.33), the sum of kronen one thousand three hundred six and ninety-three one-hundredths (1,306.93) in accordance with paragraph numbered 6 above, leaving on account of interest through July 16, 1920, kronen six thousand one hundred twenty-three and forty one-hundredths (6,123.40), (h) that said debt was and is payable in Austrian

kronen, and (*i*) that this claim became impressed with American nationality on July 24, 1919.

Final judgment in this case is reserved.

---

HUGO DYLLA (UNITED STATES) *v.* AUSTRIA; JOHN SZANTO AND SZEKELY VARGA KATALIN SZANTO *v.* AUSTRIA; CHARLES GASPER (UNITED STATES) *v.* AUSTRIA

(*March 22, 1929. Pages 104-105.*)

---

BONDED PUBLIC DEBTS: COLLECTION OF INTEREST COUPONS.—EVIDENCE: BURDEN OF PROOF. Purchase of Austrian War Loan bonds through American and Austrian banks. Understanding, acquiesced in by claimants, that bonds shall be held, interest coupons shall be collected, and proceeds shall be placed, by Austrian bank in deposit of American banks. *Held* that claimants failed to prove existence of debts due by Austrian national.

*Bibliography:* Prossinagg, p. 42.

In each of these three cases the bonds involved were purchased by the claimant through American bankers from the impleaded Austrian debtor.<sup>1</sup> The impleaded debtor was notified that the bonds had been subscribed for account of the claimant but notified the claimant in writing that the bonds would be held by it in the deposit of the American banker, the latter being "the only one who may dispose of the subscribed War Loan". So far as appears from the records the claimant in each case acquiesced in this arrangement, and the bonds continued to be held by the impleaded debtor in the deposit of the American banker. When the coupons matured they were collected by the impleaded debtor and the proceeds placed to the credit of the American banker, which was in accordance with the understanding, acquiesced in by the claimant, that the bonds (and hence the interest thereon) should remain with the impleaded debtor in the deposit of the American banker. These cases are distinguishable from the Zohrer case (docket No. 1083-A)<sup>2</sup> in that in each of these cases the claimant was not entitled to receive the interest payments on the bonds save through the American banker through whom the bonds were purchased. The claimant in each case has failed to discharge the burden resting on him to establish a debt due him by an Austrian national. The cases are dismissed.

---

HARALD WALDEMAR VON CAMPEN (UNITED STATES) *v.* AUSTRIA

(*March 22, 1929. Pages 105-106.*)

---

JURISDICTION: DEBTS, EXCEPTIONAL WAR MEASURES.—DEPRECIATION OF SECURITIES, CURRENCY NOTES.—EVIDENCE: BURDEN OF PROOF. *Held* that alleged indebtedness to claimant of claimant's brother, a Danish national, alleged payment by the latter with depreciated securities and currency notes

---

<sup>1</sup> Wiener Bank-Verein, Budapest Branch.

<sup>2</sup> See p. 272 *supra*.

made after the United States entered war, and alleged exceptional war measures against claimant's brother and his property fall outside jurisdiction of Commission, and that claimant, therefore, failed to prove existence of claim within terms of Treaty of Vienna.

The debt on which this claim is based represents the proceeds of the sale of real estate located in Austria the legal title to which was in claimant's brother, a Danish national. The claimant asserts that the equitable title in this real estate was in him. Under the laws of Austria the claimant could not have enforced as against his brother any claim or interest in this real estate or the proceeds thereof. Claimant's brother, however, admits that he was indebted to the claimant to the amount of the proceeds received by him for this real estate but asserts that he has discharged this indebtedness by payments already made to the claimant and by depreciated currency and securities which he has set aside and holds for claimant's account.

The indebtedness declared upon by claimant was an indebtedness due him by a Danish national and therefore not within the jurisdiction of the Commission. The securities and currency notes which claimant now holds were acquired by him from his brother after the United States entered the war and therefore not within the jurisdiction of the Commission. The alleged exceptional war measures, if they were such, were taken against claimant's brother and his property and not against the claimant or his property. On the record submitted, giving the claimant the benefit of every doubt, the facts do not bring the claim within the jurisdiction of this Commission. The claim is dismissed on the ground that the claimant has failed to discharge the burden resting on him to establish facts bringing his claim within the terms of the Treaty of Vienna.

---

CAMILLA SHORT (UNITED STATES) *v.* AUSTRIA AND HUNGARY

(*March 29, 1929. Pages 106-107.*)

---

**BONDED PUBLIC DEBTS: COLLECTION OF INTEREST COUPONS.—EVIDENCE: BURDEN OF PROOF, AFFIDAVITS OF CLAIMANT AND HUSBAND.—NATIONALITY OF CLAIM.** *Held* that from affidavits of claimant and husband it appears that until January, 1920, claimant's mother, an Austrian national, entitled to proceeds of interest coupons of bonds Austrian "unified public debt" owned by claimant, and that claimant, therefore, failed to prove that during period of belligerency of United States claim was or became impressed with American nationality.

From the meager record in this case it appears that the claimant inherited from her father, an Austrian national, certain bonds issued by Austria, known as Unified Public Debt bonds, which have been held by her for some 25 years, and that these bonds were deposited in the Austro-Hungarian Bank in Vienna in a trust fund, the interest thereon to be paid to the claimant's mother, Countess Hoyos, during her lifetime. The instrument creating this trust fund is not in the record and its terms are not disclosed. It is apparent from the affidavit of the claimant and the later affidavit of her husband, Charles W. Short, that the claimant's mother had and claimed the right to receive the proceeds of the interest coupons, which right she undertook in January, 1920, to relinquish to the claimant. The record indicates that the claimant and her husband are at least morally obligated to claimant's mother for all amounts which claimant

may collect on account of said coupons. The claimant's mother was on the death of her husband, and so far as is disclosed by the record still remains, an Austrian national.

On the unsatisfactory record submitted the Commissioner holds that the claimant has failed to discharge the burden resting on her to prove that during the period of the belligerency of the United States the claim for the interest coupons or the proceeds thereof was impressed with American nationality or became so impressed by operation of law. The claim is dismissed.

---

JACOB MARGULIES (UNITED STATES) *v.* AUSTRIA AND HUNGARY

(May 11, 1929. Pages 107-111.)

---

NATIONALITY OF CLAIM.—NATIONALITY AND RIGHT TO PROTECTION.—NATURALIZATION: EXPATRIATION, EFFECT OF RETURN TO ADOPTED COUNTRY.—INTERPRETATION OF MUNICIPAL LAW.—RESPONSIBILITY FOR ACTS OF FORCES.—EVIDENCE: CLAIMANT AS WITNESS, PROOF OF NATIONALITY.—PROCEDURE: RELAXATION OF RULES, EXAMINATION OF CLAIMANT, ADDITIONAL BRIEFS, ORAL ARGUMENTS BY CLAIMANT'S PERSONAL ATTORNEY. Emigration of claimant, Austrian by birth, to United States in May, 1888. Naturalization as United States citizen on October 26, 1893. Return to Austria in 1903, followed by marriage, operation after father's death of farm held on lease by the latter, conclusion in 1906 of unassignable lease for another farm extending well beyond 1914, and investment of considerable sums in equipping that farm. Failure of claimant to register in Austria as United States citizen, though on November 25, 1912, he claimed to be United States citizen in letter to United States Consul General at Vienna, from which inference to be drawn is that he intended not to return to United States but to continue to live in Austria. Occupation on September 12, 1914, by Russian troops of territory where claimant was residing. Flight to Vienna where, on false sworn statements made by claimant and wife to United States Embassy, emergency passports issued. Arrival in United States, late 1914, where claimant and family have since continuously resided. Claim brought before Commission for value of personal property alleged to have been requisitioned by Austro-Hungarian Army, and for damage to other property. Personal appearance and testimony by claimant. Relaxation of Commission's rules: claimant's personal attorney permitted to examine claimant, file additional briefs, and make oral argument. *Held* that issuance of passports is neither material in determining prior citizenship status of claimant, nor evidence of citizenship at time of issuance. *Held* also that claim was not impressed with American nationality at time it arose (reference made to Henry Rothmann award, p. 253 *supra*).

*Bibliography*: Prossinagg, p. 25; Bonyngge, p. 27.

This claim is put forward on behalf of Jacob Margulies as a naturalized citizen of the United States for the value of personal property alleged to have been requisitioned by the Austro-Hungarian Army in August, 1914, and for damage to other property, all located in territory of the former Austrian Empire now constituting a part of Poland.

This case was first submitted to the Commissioner by the Agents of the United States, of Austria, and of Hungary on briefs and oral arguments on November 9, 1928. Thereafter on March 22, 1929, at the request of the American Agent the

claimant was permitted personally to appear and testify before the Commissioner and also, at the request of the American Agent, the rules of the Commission were relaxed and the claimant's personal attorney was permitted to examine the claimant, file additional briefs, and make an oral argument before the Commissioner.

On the record as it now stands the Commissioner finds:

(1) The claimant was born in Galicia, Austria, May 20, 1872.  
(2) He emigrated to the United States in May, 1888, landing at New York.  
(3) He became a citizen of the United States by naturalization on October 26, 1893.

(4) He returned to his father's home in Austria in 1903. Shortly after his return his father died.

(5) During his residence in the United States he was employed in an establishment for the manufacture of women's clothing, operating a sewing machine for the greater part of that time. He had accumulated no property at the time of his return to Austria in 1903.

(6) A few months after his father's death the claimant married in Galicia a girl whom he had known prior to first leaving for the United States.

(7) This was his first and only marriage. His wife is still living. At the time of the marriage she had never been in the United States.

(8) There were born in Galicia to claimant and his wife three children, all of whom are living.

(9) Claimant was the second of two sons, and he had a sister younger than himself. Both his brother and sister were living in Galicia at the time of his return in 1903, engaged in farming under separate leases held by them. The claimants' father was also engaged in farming under a lease. Upon his father's death the claimant with the assistance of his brother and sister took over and operated his father's farm.

(10) When the lease on his father's farm expired in 1906 the claimant entered into a lease for another farm which was equivalent in size to about four or five hundred American acres. The term of this lease is not accurately established, but on the record submitted, including the sworn testimony of the lessor, the Commissioner holds that it ran several years beyond the year 1914, with an option of the lessee to renew. It was not assignable, but the claimant had the conditional right to sublet.

(11) The claimant's brother, an Austrian national, while not nominally a party to this lease was a "silent party" thereto and interested with the claimant therein. The extent of their respective interests is not disclosed by the record.

(12) The claimant never registered in Austria as an American citizen.

(13) On November 25, 1912, the claimant addressed a letter to the Consul General of the United States at Vienna in which he claimed to be an American citizen; called attention to the fact that he lived on the Russian frontier and that disturbances had broken out in that vicinity, and asked advice as to how he should proceed in case the Russians should interfere with his property. There is nothing in this communication indicating that he sought to register as an American citizen or that he contemplated returning to the United States. On the contrary, the inference to be drawn from his letter is that it was his purpose to continue to live in Galicia where he was a leaseholder. Consul General Denby on November 27 made a routine reply to this letter advising that "In case of war, the Austrian authorities at your place will undoubtedly advise you as to what to do". This exchange of letters between the claimant and Consul General Denby is the only correspondence which claimant ever had with the American authorities, following his return to Austria in 1903 and prior to August, 1914, at the time the claim here put forward arose.

(14) On September 12, 1914, Russian troops occupied the territory in which claimant was residing, and a few hours prior to such occupancy the claimant fled to Vienna, reaching there September 19. On that day he applied to the American Embassy for an emergency passport which was issued to him. On October 10, 1914, Mrs. Margulies and the three children reached Vienna and applied for emergency passports which were issued to them.

(15) In the application for passport the claimant under oath stated that he had resided uninterruptedly in New York City for 22 years from 1888 to 1910; that he returned to Austria in October, 1910, for the purpose of disposing of his father's property; that their three children were born in New York, Laura in 1902, Israel in 1907, and Abraham in 1909. Like statements were made in the application of Mrs. Margulies for a passport for herself and children, and she further stated that she resided in the United States uninterruptedly for 15 years from 1895 to 1910. The claimant now admits that all of these statements were untrue. His attempt to explain them and to make it appear that he had not wilfully misrepresented the facts is not convincing.

(16) The claimant landed in New York in the early fall of 1914, where he was joined by his wife and children a short time later and where they have since continuously resided. Prior to that time his wife and children had never been in the United States.

(17) From the claimant's testimony it appears that, measured by pecuniary standards, he was more successful in Galicia than in the United States either before his return to Galicia or since his return to the United States in 1914.

(18) The claimant had returned to the land of his origin where he married and was rearing a family. He had, through borrowings and otherwise, invested considerable sums in equipping a farm, which he held under a long and non-assignable lease which in 1914, at the expiration of his ten years' continuous residence in Galicia, still had several years to run. He was more prosperous than he had been at any time before or since. On the record as a whole the inferences are strong that had it not been for the World War and the losses which he sustained as a consequence thereof he would have continued to reside with his family in the land of his birth. The Commissioner finds that during his ten years' residence in Galicia the claimant had no fixed intention ever to return to the United States.

The Commissioner agrees with the statement contained in claimant's recent brief that the false statements under oath referred to in the foregoing paragraph numbered (15) were, in the language of claimant's counsel, "made after the claimant's claim arose, and hence after the time as of which the claimant's citizenship status and the nationality of his said claim became fixed" and therefore cannot affect the nationality of this claim. The fact that passports were issued to claimant and to his wife and children on applications containing these misstatements of fact is not material in determining the prior citizenship status of the claimant, nor is it even evidence that the persons to whom they were granted were citizens of the United States at the time of issuance.<sup>1</sup> The false statements in these affidavits are immaterial save as they affect claimant's credibility.

Applying the rule laid down by this Commission in the Rothmann case<sup>2</sup> to the findings of fact as above set out, it is apparent that under the laws of the United States then in effect the claimant had presumptively ceased to be an American citizen in August, 1914, at the time the claim here asserted arose; that the claimant had at that time done nothing to rebut this presumption of

<sup>1</sup> *Miller v. Sinjen*, 289 Fed. at p. 394, and cases there cited.

<sup>2</sup> See p. 253 *supra*.

expatriation arising under the Act of March 2, 1907, from a residence of more than two years in the foreign state from which he came; that the nationality of the claim is determined by the status of the claimant's citizenship at that time; and that, as the claimant was not at that time entitled to protection as an American citizen, the claim at its inception was not impressed with American nationality. The reason for this rule is fully stated in the Rothmann case and need not be repeated here.

It is unnecessary for the Commissioner to consider other questions arising on the record.

For the reasons stated the Commission decrees that neither the Government of Austria nor the Government of Hungary is obligated under the Treaty of Vienna or of Budapest to pay to the Government of the United States any amount on behalf of Jacob Margulies, claimant herein.

---

EMIL FRENKEL (UNITED STATES) *v.* AUSTRIA

(*May 11, 1929. Pages 111-115.*)

---

**PUBLIC DEBTS: GOVERNMENT OBLIGATION TO PAY ANNUAL AMOUNT TO RAILROAD COMPANY, LIABILITY FOR DIVIDENDS ON COMPANY'S SHARES.** Guaranty by Austria, in 1864 and 1867, respectively, to Austrian railroad company, of certain net annual income from two railroads in Austria, superseded in 1894 with fixed obligation to pay annually certain amount. Guaranty by Romania, in 1868, to same company, of certain net annual income from branch lines in Romania. Payments to company made by Austria until October 15, 1918, and by Romania until October 13, 1916. Failure of company to declare and pay dividends on claimant's shares on May 1, 1918, and subsequent thereto, due in part at least to default of Romania, and not to any default of Austria. No payments to company made by Austria after Armistice, November 1918, the railroads in question lying outside post-war Austria. Claim brought before Commission for payment by Austria of dividends which claimant alleges should have been paid him between May 1, 1918, and November 11, 1921, inclusive. *Held* that unpaid dividends are not debts owing claimant by Austria within meaning of Treaty of Vienna: Austria never agreed to pay or guaranteed payment of dividends to company's shareholders.

*Bibliography:* Prossinagg, p. 33; Bonyngé, p. 40.

This claim is put forward on behalf of Emil Frenkel as a naturalized citizen of the United States, hereinafter referred to as claimant. The facts, as disclosed by the record, are as follows:

(1) In the year 1864 the Government of the former Austrian Empire, to encourage the construction of a railroad from Lemberg to Czernowitz, guaranteed to the company building it a net annual income of 1,500,000 florins, Austrian silver currency.

(2) In the year 1867 the Government of the former Austrian Empire, to encourage the construction of a railroad from Czernowitz to Suczawa, guaranteed to the company building it a net annual income of 700,000 florins, Austrian silver currency.

(3) Both of these lines were constructed and operated by the Lemberg-Czernowitz-Jassy Railway Company, an Austrian corporation. The amounts for which the Government of the former Austrian Empire was obligated under

these guarantees were in substance subsidies varying from year to year according to the earnings of the railway company, but repayable by it out of surplus and in the event of liquidation from the proceeds of the railway company's assets after satisfying all other claims.

(4) In 1868 the Romanian Government entered into similar agreements with the Lemberg-Czernowitz-Jassy Railway Company to encourage the building of branch lines in Romania, guaranteeing to the railway company an annual net income of 3,865,173.86 francs.

(5) The Lemberg-Czernowitz-Jassy Railway Company from time to time issued founders' or guaranteed shares of its stock. The claimant owns 751 of such shares, of which 483 are of the second issue, of November 1, 1868, and 268 are of the fourth issue. The second issue, of November 1, 1868, carries a clause reading:

"Bearing 7 % interest secured by the guaranty of a net revenue granted to the Company by the Austrian and Romanian Governments."

Provision was also made for the amortization and redemption of these shares "within the time of the concessions according to the plans approved by the Governments." Claimant also owns four *Genuss-Scheine* (use and share certificates) of the railway company which relate to extra dividends for 1918-1921.

(6) In 1894 through a law enacted by the Government of the former Austrian Empire, formally assented to by the general assembly of stockholders of the Lemberg-Czernowitz-Jassy Railway Company, it was provided that the Austrian Government's guaranties of a yearly net income of 1,500,000 florins and 700,000 florins respectively should be superseded with a fixed obligation of the Government to pay annually 2,200,000 florins to the railway company.

(7) All payments stipulated to be made under the readjustment of 1894 and which fell due prior to the Armistice of November, 1918, were promptly met by the Government of the former Austrian Empire. The Romanian Government made no corresponding payments due by it subsequent to October 13, 1916.

(8) Due in part at least to the default of the Romanian Government, the railway company was not in funds to declare and pay dividends on its founders' or guaranteed shares on May 1, 1918, and subsequent thereto, although the Austrian Government had on January 15, 1918, paid to the railway company the amount due by it with respect to the Lemberg-Czernowitz line and on October 15, 1918, paid to the railway company the amount due by it with respect to the Czernowitz-Suczawa line. The failure of the railway company to declare and pay dividends on its founders' shares on May 1, 1918, was not attributable to any default on the part of the Austrian Government.

(9) The payments falling due subsequent to the Armistice of November, 1918, were not made by Austria because the railway lines in question lie wholly outside the territory of the present Republic of Austria, partly within the territory of Romania and partly within the territory of Poland.

(10) Article 203 of the Treaty of St. Germain provides for the apportionment among the Successor States of the secured debts of the former Austrian Empire. The Reparation Commission, acting in pursuance of the authority conferred upon it by that Treaty, has as of July 1, 1919, apportioned the obligations of the former Austrian Empire to the Lemberg-Czernowitz-Jassy Railway Company between Poland and Romania.

The claimant has received no dividends on his founders' or guaranteed shares of stock in the Lemberg-Czernowitz-Jassy Railway Company since January 15, 1917, and now seeks to recover from Austria dividends which he alleges should have been paid between May 1, 1918, and November 11, 1921,

inclusive. He also alleges that the failure of the Government of the former Austrian Empire to meet its payments to the railway company prevented the latter from carrying out the plan to amortize the shares by annual drawings thereby impairing the value of the claimant's shares, to his damage the amount of which he seeks to recover.

Unless the claim asserted falls within some provision of the Treaty of Vienna obligating Austria to pay it, the claimant is not entitled to an award before this Commission. He is not seeking to establish an indebtedness owing him by an Austrian national, because the Lemberg-Czernowitz-Jassy Railway Company is not now a national of the Republic of Austria and perhaps was not an Austrian national on July 2, 1921, or upon the coming into effect of the Treaty of Vienna. But the claimant contends that as a stockholder of the railway company he is entitled to recover from Austria the dividends which he would have received from the railway company had Austria met her obligations to it.

In the stipulation entered into between the Agent of the United States and the Agent of Austria in the submission of this case, the claimant's position is stated thus:

"It is the contention of the claimant that if the Austrian Government had paid to the aforesaid railway company the annual payment, that said railway company could have paid the coupons calling for payment of semi-annual dividends maturing on his bonds, and redemption of the original capital investment, and that by reason of the failure and neglect of the Austrian Government to pay said annual payment, he is entitled to recover from said Austrian Government the amount of the unpaid dividends belonging to him, which he alleges became payable between May 1, 1918, and November 11, 1921, inclusive."

In the brief filed by claimant's counsel and adopted by the Agent of the United States, there is put forward this proposition:

"The failure to pay the guaranteed income as provided by law and stated on the face of the shares is a debt owed by the Austrian Government to the claimant herein and gives the claimant a standing before this Commission."

The question presented is: do the unpaid dividends on claimant's stock which accrued May 1, 1918, to November 11, 1921, inclusive, constitute debts owing claimant by Austria within the meaning of the Treaty of Vienna? The Commissioner holds that they do not.

The obligation of the Government of the former Austrian Empire was to pay the Lemberg-Czernowitz-Jassy Railway Company definite amounts at stated intervals. That Government first guaranteed to the railway company certain net revenues and by the readjustment of 1894 that guaranty was converted into a fixed obligation to pay a stipulated amount, but that Government never at any time itself agreed to pay or guaranteed the payment of dividends in any amount to the railway company's shareholders. The railway company had obligated itself to declare and to pay to holders of its founders' shares stipulated dividends, but the Government of the former Austrian Empire was not a party to this undertaking and there was no privity of contract between that Government and such shareholders. The railway company from other sources of income might have been in a position to declare and pay dividends notwithstanding a default by the Government of the former Austrian Empire. On the other hand, it appears from this record that, notwithstanding that Government met its obligations and paid throughout the year 1918 the stipulated amounts which it had agreed to pay, nevertheless the railway company was unable to declare and to pay the dividends due throughout that year. This default by the railway company was not attributable to the Government of the former Austrian Empire, which had not then defaulted. The failure of Austria

and Romania or of either of them to meet their contract obligations to the railway company doubtless did affect the ability of the latter to declare and pay dividends, but such failure would not give to the claimant and others similarly situated a direct cause of action against those Governments for debts. It follows that there is no debt owing to the claimant by Austria within the meaning of the Treaty of Vienna. Such losses as may have been suffered by the claimant belong to that numerous class suffered as a consequence of the war or of post-war Treaty adjustments, for the payment of which the Treaties make no provision.

The claimant's counsel have cited cases decided by the Franco-German Mixed Arbitral Tribunal growing out of exceptional war measures taken by Germany. These cases are governed by the terms of the Treaty provisions applicable to damage resulting from exceptional war measures. It is not contended that claimant suffered as a result of any exceptional war measures taken by Austria and hence the decisions cited have no application to this case.

It is unnecessary to consider the effect upon the claim here asserted of the financial clauses of the Treaty of St. Germain and of the Treaty of Vienna dealing with secured debts of the former Austrian Empire and the apportionment between Poland and Romania by the Reparation Commission of the obligations of the former Austrian Empire to the Lemberg-Czernowitz-Jassy Railway Company.

The Commission decrees that under the Treaty of Vienna the Government of Austria is not obligated to pay to the Government of the United States any amount on behalf of Emil Frenkel, claimant herein.

---

ERNA McARTHUR (UNITED STATES) *v.* AUSTRIA

(*May 11, 1929. Page 116.*)

---

BONDED PUBLIC DEBTS: EXCEPTIONAL WAR MEASURES.—EVIDENCE: BURDEN OF PROOF. *Held* that claimant, who on April 17, 1916, inherited from her father funds which were invested in War Loan bonds and now seeks award for damages through alleged application of exceptional war measures, failed to prove loss or damage within terms of Treaty of Vienna.

*Bibliography:* Prossinagg, p. 29.

This claim is put forward on behalf of Erna McArthur, born an Austrian national, who acquired American nationality on July 6, 1912, through her marriage to Albert Chase McArthur, an American citizen.

Claimant inherited from her father, who died April 17, 1916, funds which, after being supplemented by her mother, were invested in various War Loan bonds having a total face value of kronen 410,000. The claimant seeks an award for damages alleged to have been sustained by her through the alleged application of exceptional war measures to these bonds by the Government of the former Austrian Empire.

The case has been carefully prepared, and the evidence submitted and the voluminous briefs have had the careful consideration of the Commissioner in the light of the provisions of the Treaty of Vienna as construed in the previous decisions of this Commission. It would serve no useful purpose here to repeat and apply to the facts as disclosed by this record what has already been stated in those decisions.

The Commissioner finds that the claimant has failed to discharge the burden resting on her to prove any loss or damage for which Austria is financially obligated under the terms of the Treaty of Vienna.

The Commission decrees that under the terms of the Treaty of Vienna the Government of Austria is not obligated to pay to the Government of the United States any amount on behalf of Erna McArthur, claimant herein.

ELIZABETH FILO AND BERTHA SALAY (UNITED STATES) *v.*  
HUNGARY

(June 28, 1929. Pages 117-121.)

RESPONSIBILITY FOR ACTS OF REVOLUTIONARY (BELA KUN) RÉGIME: PROPERTY DAMAGE, PERSONAL INJURIES.—INTERPRETATION OF TREATY: END OF AGGRESSION, CAUSAL CONNEXION BETWEEN AGGRESSION AND ACTS OF REVOLUTIONARY RÉGIME. Seizure of power in Hungary by revolutionary (Bela Kun) régime, military invasion of Czechoslovakia by that régime in June, 1919, occupation of Kassa, arrest of claimants, custody, and alleged brutal and degrading treatment, physical injuries, mob violence, looting of, and damage to, apartment. Claim brought before Commission for personal injuries, humiliation, mental suffering, value of personal property, damage to apartment. *Held* that claim for property lost and damaged, if established, would fall within part X, section IV, article 232, II, Treaty of Trianon, incorporated in Treaty of Budapest, but that remainder of claim falls outside Treaty, and in particular outside part VIII obliging Hungary to make compensation for defined categories of damage (including injuries to the person) inflicted "by the aggression of Austria-Hungary and her allies" (article 161): with signing of Armistice, November 3, 1918, Hungary's aggression as contemplated by Treaty, part VIII, came to an end, and no causal connexion exists between this aggression and invasion of Czechoslovakia by Bela Kun régime some seven months or more thereafter.

EVIDENCE: BURDEN OF PROOF, NEGLIGENCE IN COLLECTING EVIDENCE; CLAIMANT AS WITNESS; UNCORROBORATED, IMPROBABLE TESTIMONY, REBUTAL BY OWN PREVIOUS STATEMENTS. *Held* that claimants failed to prove claim for property lost and damaged (see *supra*): their own testimony uncorroborated (though numerous individuals seem available to testify), improbable, and rebutted by testimony of disinterested witnesses, official records, and previous statements by claimant B. Salay.

*Bibliography*: Bonyngé, pp. 40-41.

This claim is put forward on behalf of Elizabeth Filo and Bertha Salay, mother and daughter, to recover against Hungary \$59,852.50 and \$758,302.00 respectively on account of damages alleged to have been inflicted upon them during June and July, 1919, by representatives of the Bela Kun régime which had temporarily and forcibly wrested the administration of the Government of Hungary from the duly constituted authorities. The claimants allege that while residing in Kassa in the newly-constituted Czechoslovakian republic they were arrested and taken into custody by Bolshevik soldiers of the Bela Kun régime who invaded and took possession of Kassa; that while under arrest they were brutally treated and subjected to physical injuries of a permanent nature; that they were unprotected by the soldiers and left to the mercy

of a mob of Bolshevik sympathizers, including communist women, who stripped them of their belongings and beat them; that they were subjected to degrading treatment; and that while they were confined, first in prison and later in a hospital, their apartment at Kassa was looted and damaged. They seek to recover for personal injuries, for humiliation and mental suffering, for the value of personal property taken from their persons by the mob, for the value of personal property taken from their apartment in Kassa, and for damage done to the apartment itself.

The jurisdiction of this Commission is challenged by Hungary on the ground that, at the time of the happenings complained of, claimants were not entitled to protection as American citizens and hence that the claims were not at their inception impressed with American nationality. On this issue the Commissioner finds that both claimants were born in Hungary; that John Filo, husband of the claimant Elizabeth Filo, emigrated to the United States in the "early eighties" and with claimants established a residence at Butte, Montana; that John Filo became an American citizen through naturalization on October 8, 1898; that the claimant Bertha Salay married at Butte, Montana, on November 22, 1896, Joseph Salay, a native of Hungary but then an American citizen through naturalization; that John Filo died at Butte, Montana, June 24, 1901; that in 1902 the claimants returned to Hungary where on September 3, 1902, Mrs. Filo reported to the police as residing at 40 Kovacs Street, Kassa; that on July 7, 1903, Mrs. Salay, at 41 Kovacs Street, Kassa, gave birth to a son named Alexander; that on December 24, 1904, a decree was entered at Butte in the District Court for Silver Bow County, Montana, at the instance of Joseph Salay, divorcing him from the claimant Bertha Salay on the ground that she had wrongfully deserted him and taken up her residence in Kassa, Hungary; that on June 17, 1906, Mrs. Filo purchased residence property at Kassa upon which she erected an apartment house in which the claimants and the minor Alexander Salay lived; and that the record is not clear with respect to the claimants' whereabouts from the middle of 1903 to 1910 but it is admitted by both that they resided in Kassa from 1910 to 1920, when, with Alexander Salay, they returned to the United States.

On this record and under the rule announced in the cases of Henry Rothmann<sup>1</sup> and Jacob Margulies<sup>2</sup> there is much support for the contention of Hungary that claimants herein were not entitled to protection as American citizens in June and July, 1919, at the time of the happenings complained of. But the record on this issue is far from satisfactory and the Commissioner will, for the purposes of this decision, assume that the claimants, having through the naturalization laws of the United States become American citizens prior to their return to the land of their birth, continued to be entitled to American protection until their return to the United States in 1920.

Leaving out of consideration for the moment the allegations with respect to the comparatively small items based on property lost and damaged at Kassa, which if established would fall within paragraph 2 of subdivision II of article 232 of the Treaty of Trianon, incorporated in the Treaty of Budapest, the Commissioner holds that the remainder of the claim does not fall within the Treaty. It is not embraced within section IV of part X, the "Economic Clauses" of the Treaty, that section being limited in its application to property.<sup>3</sup>

<sup>1</sup> See p. 253 *supra*.

<sup>2</sup> See p. 279 *supra*.

<sup>3</sup> *Brueninger v. Germany* (1923), III Dec. M. A. T. 20, Anglo-German Mixed Arbitral Tribunal; *Richelle v. Germany* (1922), II *ibid.* 403, Belgo-German Mixed Arbitral Tribunal; *Edgley v. Germany* (1923), III *ibid.* 217, Anglo-German Mixed Arbitral Tribunal, etc.

On behalf of the claimants it is sought to bring this part of the claim within part VIII. the "Reparation" provisions of the Treaty, under which Hungary is obligated to make compensation for damage, falling within defined categories (including injuries to the person), inflicted "by the aggression of Austria-Hungary and her allies." But in reparation claims originating after the United States became a belligerent only damages for which Hungary is jointly responsible with Germany and Austria because arising out of their joint aggression are within the Reparation provisions. So far as Hungary is concerned the "joint aggression" of the Central Powers terminated with the signing of the Armistice on November 3, 1918, whereby Hungary severed all relations with Germany and bound herself to prohibit the transport of troops or munitions to the German troops in Rumania. With the signing of that armistice Hungary's aggression, forming the basis of her liability arising under part VIII of the Treaty, came to an end. The invasion of Czechoslovakia by the Bela Kun régime seven months or more thereafter does not constitute an aggression of Hungary against the Allied and Associated Powers within the meaning of the Treaty provisions. This construction is in harmony with the decision of the Reparation Commission holding that Czechoslovakia could not maintain a reparation claim against Germany, Austria, or Hungary for damages inflicted by the invasion of Czechoslovakia by the Bela Kun régime. <sup>1</sup> It is also in harmony with the decision of the Umpire of the Mixed Claims Commission in the Eisenbach case <sup>2</sup> cited on behalf of claimant, where Germany was held liable for the planting of a mine during the period of American belligerency and prior to the armistice which resulted in damage to the claimant subsequent to the armistice. There it was held that the act of a belligerent in planting the mine, "while remote in time from the damage it caused, is not remote in natural and normal sequence. . . . The damage wrought was directly attributable to the hostile act of planting the mine and was directly in consequence of hostilities within the meaning of the Treaty of Berlin."

But in this case there was in legal contemplation no causal connection between the joint aggression of Hungary and her allies against the Allied and Associated Powers dealt with in part VIII of the Treaty, which terminated with the signing of the armistice, and the acts of the Bela Kun régime in forcibly seizing the reins of the Government of Hungary and invading Czechoslovakia some seven months or more after the armistice was signed.

Coming now to that branch of the claim made for property alleged to have been lost or damaged, which if established would fall within paragraph 2 of subdivision II of article 232 of the Treaty, the Commissioner holds that the claimants have failed to discharge the burden resting on them to prove their claim. The American Agent has been diligent in his efforts to have developed and to present to the Commission all of the facts bearing on the issues raised by the pleadings herein. The claimants have not exercised a like diligence. They have offered no evidence corroborating their own testimony. Alexander Salay, the minor son of the claimant Bertha Salay, was living with claimants in

<sup>1</sup> See opinion of Legal Service of Reparation Commission February 16, 1921, annex 656, opinion No. 183-B, dealing with "Right of Czechoslovakia to reparation"; decision of Reparation Commission No. 1019, dated March 11, 1921; and opinion of Legal Service of Reparation Commission dealing with Austrian and Hungarian claims, dated February 14, 1923, holding "that the Treaty of Trianon does not admit of a claim for reparation under annex I of part VIII in respect of military operations against the Bela Kun Government."

<sup>2</sup> United States of America on behalf of Eisenbach Brothers and Company, claimants, v. Germany, decided May 13, 1925, Decisions and Opinions, Mixed Claims Commission, United States and Germany, pp. 269-272.

June and July, 1919. He was not arrested but remained in Kassa. The material facts with respect to this claim must be fully known to him. It has been made to appear to the Commission that he is now and for some time has been residing in California. While the American Agent has urged that his testimony be taken by the claimants, it is not in the record nor is its absence accounted for. The same is true of numerous other individuals residing in Kassa who must have first-hand knowledge of the facts. In addition to the improbability of many of the material statements which claimants make, they are rebutted by the testimony of disinterested witnesses and in some particulars by official records and by statements previously made by the claimant Bertha Salay. Assuming that some of the claimants' statements are true, the truth is so blended with the false that it cannot be isolated.<sup>1</sup> This is a condition for which claimants alone are responsible and the consequences must be borne by them.

For the reasons stated the Commission decrees that the Government of Hungary is not obligated under the Treaty of Budapest to pay to the Government of the United States any amount on behalf of Elizabeth Filo and Bertha Salay, claimants herein.

---

JOHN UJVARI (UNITED STATES) *v.* HUNGARY

(June 28, 1929. Pages 121-122.)

---

**JURISDICTION: OBJECTION.—BONDED PUBLIC DEBTS: SUSPENSION OF INTEREST PAYMENT BY REVOLUTIONARY (BELA KUN) RÉGIME.—INTERPRETATION OF TREATY.—INTERLOCUTORY JUDGMENT.** Decree of March 29, 1919, issued by revolutionary (Bela Kun) régime, suspending payment of interest *inter alia* on bonded public debts of Hungary, and declared void by *de jure* Government in 1920. *Held* that payment not suspended within meaning of article 231, paragraph (3), Treaty of Trianon, carried into Treaty of Budapest, and that Commission, therefore, has jurisdiction over claim for interest matured between March 29, 1919, and December 31, 1919, and interlocutory judgment should be entered for amount of it.

*Bibliography:* Bonyngé, p. 40.

In accordance with the rules of procedure of this Commission announced in Administrative Decision No. II the United States on behalf of the claimant, John Ujvari, an American national, seeks an interlocutory judgment for 245 kronen based upon certain interest coupons and talons appertaining to bonds owned by the claimant issued by the Kingdom of Hungary, which interest became due during the war period. Hungary admits the debt and that an interlocutory judgment as prayed should be entered save in respect to the coupons which matured between March 29, 1919, and December 31, 1919, aggregating in amount 17.50 kronen. With respect to this amount only Hungary challenges the jurisdiction of this Commission, contending that during the period mentioned the payment of interest on all Hungarian Government securities was suspended within the meaning of the proviso of paragraph (3) of article 231 of the Treaty of Trianon carried into the Treaty of Budapest, and therefore that the amount of interest so suspended does not constitute

---

<sup>1</sup> The Santissima Trinidad, 20 U. S. 283; Quock Ting *v.* United States, 140 U. S. 417; Wellman *v.* United States, 297 Fed. 925.

a debt within the meaning of the Treaty and of the decisions of this Commission construing it.<sup>1</sup>

The Commissioner rejects this contention and holds that there was no general suspension during the war of the payment of interest on securities issued by the Kingdom of Hungary within the meaning of the Treaty clause invoked.<sup>2</sup>

The revolutionary régime of Bela Kun, which had temporarily forcibly usurped the administration of the Hungarian Government, issued a decree dated March 29, 1919, reading:

"The payment of matured coupons of all domestic securities is herewith suspended."

This abortive attempt on the part of the Bela Kun régime through this decree to suspend interest payments accruing on the lawful obligations of Hungary was promptly repudiated by the *de jure* Government of Hungary on its resuming the exercise of its authority. This repudiation is embodied in article 9 of statute I of the year 1920 which declares "that all the people's laws, ordinances, or decrees issued by the People's Republic or by the Soviet Republic are void."

In the light of this very proper action on the part of the present Government of Hungary which with the United States subsequently entered into the Treaty of Budapest, it does not now lie with Hungary through a plea to the jurisdiction of this Commission to seek to avoid the payment under the Treaty of an obligation otherwise confessedly binding upon it, on the ground that such obligation was, within the meaning of a provision of that Treaty, suspended by a decree which Hungary has formally and effectively denounced as void.

An interlocutory judgment will be entered herein for the amount prayed for in accordance with the rules of procedure prescribed by Administrative Decision No. II.

---

#### ADOLFO STAHL (UNITED STATES) *v.* HUNGARY

(*June 28, 1929. Pages 123-125.*)

---

**BONDED PUBLIC DEBTS: UNAUTHORIZED EXCHANGE OF PRE-WAR BONDS FOR BONDS ISSUED DURING WAR.—PROCEDURE: SWORN STATEMENT BY CLAIMANT.—PRE-WAR DEBT.** Purchase on November 11, 1913, through German firm, of 4½% Hungarian Staatskassenscheine, held for claimant by firm and due January 4, 1916. Exchange of bonds by firm, when due, for 5% Hungarian Kassenscheine due January 10, 1918, which in turn exchanged by firm, when due, for 5% Hungarian Staatskassenscheine, series C, due April 1, 1921. Claim brought before Commission for amount of bonds issued January 10, 1918, with interest thereon. Statement under oath by claimant that he neither authorized nor ratified extensions. *Held* that claim falls outside terms of Treaty of Budapest: if claimant did neither authorize nor ratify extensions, he has claim against firm, a German national, and no title to bonds issued January 10, 1918, and if he has title to bonds, debt owing him by Hungary is not pre-war debt: new bonds evidence new obligation.

---

<sup>1</sup> Administrative Decision No. II, pages 22 to 25, particularly at 24 (Note of the Secretariat: this volume, p. 220 *supra*).

<sup>2</sup> The North British & Mercantile Insurance Co. Ltd. *v.* Hungarian Government, decided January 23, 1924, III Dec. M. A. T. at page 791.

This claim is put forward on behalf of Adolfo Stahl as a naturalized citizen of the United States to recover from Hungary 56,250 reichsmarks, the amount with interest thereon of 10 certificates of 5,000 reichsmarks each issued by the Hungarian Government on January 10, 1918, and which matured April 1, 1921.

The facts as disclosed by the record are as follows:

(1) On November 11, 1913, the claimant purchased through L. Behrens & Söhne of Hamburg, Germany, marks 50,000  $4\frac{1}{8}\%$  Hungarian Staatskassenscheine evidenced by 10 certificates of marks 5,000 each numbered 460 to 469, both inclusive, which certificates were held for claimant by L. Behrens & Söhne.

(2) When the above-mentioned certificates became due on January 4, 1916, L. Behrens & Söhne surrendered them and took in exchange therefor 5 % Hungarian Kassenscheine due January 10, 1918, evidenced by 10 certificates of marks 5,000 each, numbered 3478 to 3487, both inclusive.

(3) When the certificates mentioned in the next preceding paragraph became due L. Behrens & Söhne surrendered them and took in exchange therefor 5 % Ungarische Staatskassenscheine, series C, evidenced by 10 certificates of marks 5,000 each numbered 4093 to 4102, both inclusive.

(4) The claimant under oath states that he:

“... was not consulted by L. Behrens & Sohne as to whether or not the extensions above referred to should be made at the time that this was done, and did not then authorize the making of said extensions and has not since the re-establishing of communications with L. Behrens & Söhne ratified said extensions”.

The Commissioner holds that the claimant was entitled to payment by Hungary of his pre-war certificates when they matured, January 4, 1916. If, as he states, he did not then authorize L. Behrens & Sohne, through whom he purchased these certificates and with whom they were deposited by him, to exchange them for a new issue of certificates bearing a different rate of interest and maturing two years later, and has not since ratified their act, then it would seem he has a claim against L. Behrens & Söhne for the amount he was then entitled to receive from Hungary, but is not entitled to the new certificates or those subsequently received in exchange and upon which this claim is based.<sup>1</sup>

The new certificates accepted by L. Behrens & Söhne for the claimant evidenced a new obligation of Hungary. The owners of the old certificates were entitled to demand payment in cash, or at their election were entitled to receive in lieu of cash new certificates bearing a higher rate of interest and maturing at a later date. If claimant has title to the certificates upon which this claim is based he acquired such title through L. Behrens & Sohne who, purporting to act for claimant, received these certificates for him. They were issued January 10, 1918, and constitute an obligation of Hungary as of that date. They are not, therefore, as between the claimant and Hungary, pre-war obligations and do not constitute a debt owing by Hungary to the claimant within the terms of the Treaty of Budapest.

This decision is in harmony with that of the Anglo-German Mixed Arbitral Tribunal which in the case of *The Lautaro Nitrate Co. Ltd. (creditor) v. L. Behrens and Sohne (debtor)* had before it in another form practically the question here presented. In that case L. Behrens & Sohne since 1913 had in their custody for *The Lautaro Nitrate Co. Ltd.* bonds of the City of Vienna

<sup>1</sup> *The Lautaro Nitrate Co. Ltd. v. L. Behrens and Sohne* (case 608), decided by the Anglo-German Mixed Arbitral Tribunal, February 20, 1924, IV Dec. M. A. T., pp. 37 *et seq.*

bearing interest at the rate of  $4\frac{1}{2}\%$  per annum, which by their terms matured May 15, 1916. Without authority from the creditor company L. Behrens & Söhne on the maturity of these bonds exchanged them for new bonds of the City of Vienna bearing interest at the rate of 5 % per annum and maturing May 15, 1921. The Tribunal held that:

“ . . . the reinvestment made by the Debtors is not an answer to the Creditors' claim, and that since it cannot be taken into account the Debtors are to be considered as having, on behalf of the Creditors, received payment of the loan at the proper date and that therefrom arose, on their part, towards the Creditors firm a debt coming within the provisions of article 296.

“ . . . On the other hand they have no right to the new bonds, which belong to the Debtors.”

The Tribunal held that the exchange of the securities by L. Behrens & Söhne was in legal effect:

“ . . . a payment and reinvestment, by the working of which the City of Vienna was liberated from their old debt, and the Debtors invested the amount of the former loan in a new loan for which new bonds were issued by the City of Vienna, and appear to have been delivered to the Debtors.”

It follows from what is above written that, if claimant has title to the bonds upon which the claim is based, the debt evidenced by such bonds owing him by Hungary is not a pre-war debt falling within the terms of the Treaty of Budapest. If claimant did not authorize L. Behrens & Söhne to accept new certificates in lieu of payment in cash and has not since ratified their act, then they are indebted to claimant for the amount which claimant was entitled to receive on his pre-war certificates which matured January 4, 1916. Such a debt would be owing by a German national to claimant and hence would not fall within the terms of the Treaty of Budapest.

For the reasons stated the Commission decrees that the Government of Hungary is not obligated under the Treaty of Budapest to pay to the Government of the United States any amount on behalf of Adolfo Stahl, claimant herein.

---

PART III

GENERAL CLAIMS COMMISSION UNITED  
STATES AND PANAMA CONSTITUTED UNDER  
THE CLAIMS CONVENTION OF JULY 28, 1926,  
MODIFIED BY THE CONVENTION OF  
DECEMBER 17, 1932



**PARTIES: United States of America, Panama.**

---

**SPECIAL AGREEMENT: July 28, 1926, modified December 17, 1932.**

---

**COMMISSIONERS: Dr. Miguel Cruchaga Tocornal (Chile), Presiding Commissioner (1932), Baron Daniel Wigbold van Heeckeren (Netherlands), Presiding Commissioner (1933), Joseph R. Baker, American Commissioner (1932), Elihu Root, Jr., American Commissioner (1933), Horacio F. Alfaro, Panamanian Commissioner (1932-1933).**

---

**REPORTS: American and Panamanian General Claims Arbitration under the Conventions between the United States and Panama of July 28, 1926, and December 17, 1932, Report of Bert L. Hunt, Agent for the United States. (United States Government Printing Office, Washington, 1934.)**

**Comisión General de Reclamaciones entre Panamá y Estados Unidos de América. (Publicación Oficial, Panamá, Imprenta Nacional, 1934.)<sup>1</sup>**

---

<sup>1</sup> A series of separate publications concerning each claim.



## HISTORICAL NOTE

The General Claims Arbitration under the Convention concluded on July 28, 1926, between the United States and Panama had for its object virtually all claims arisen on either side since November 3, 1903, when Panama declared its independence from Colombia. Excepted from the arbitration were the so-called Colón fire claims dating back to March 31, 1885, and which the parties hoped it would be possible in the future to submit to arbitration together with Colombia, and claims for compensation on account of damages caused in connexion with the construction of the Panama Canal, which would continue to be disposed of as usually by the Joint Land Commission under the Panama Canal Convention of November 18, 1903. The parties agreed, nevertheless, that two claims of the latter kind, the Caselli and Monteverde claims, would be submitted to the Commission provided for by the Convention of July 28, 1926.

Ratification of the Convention of July 28, 1926, did not take place sooner than September 11, 1931, as far as the United States, and September 25, 1931, as far as Panama is concerned. Ratifications were exchanged on October 3, 1931. According to article II of the Convention, the Commission was to meet for the first time in Washington within six months after the exchange of ratifications of the Convention, i.e., before April 4, 1932. Under Article VI, the Commission was bound to decide within one year from its first meeting all claims filed, i.e., before April 4, 1933.

The first meeting of the Commission actually took place on April 1, 1932. The Commission then adopted its rules, setting August 22, 1932, as the last date on which memorials of claims should be filed, and adjourned to reconvene not before November 21, 1932. When thus it became clear that the work of the Commission could not be completed within the period allowed by the Convention, a second Convention was concluded by the parties on December 17, 1932, modifying the first one by extension of the original time-limit to July 1, 1933. Ratifications of the second Convention were exchanged on March 25, 1933.

After the selection of a new President, Baron D. W. van Heeckeren (Netherlands), who took the place of Dr. Cruchaga Tocornal (Chile) who had become Minister for Foreign Affairs of his country, the Commission from March 2, 1933, met regularly and brought its task to an end on June 29, 1933.

The Commission rendered 19 awards in favour of the United States, awarding \$114,396.25, and four in favour of Panama, awarding \$3,150.

---



## BIBLIOGRAPHY

- Convention of July 28, 1926: L.N.T.S., vol. 138, pp. 120-126; U.S. Treaty Ser., No. 842; State Papers, vol. 131, pp. 604-608; de Martens, N.R.G., 3rd series, vol. 25, p. 3.
- Convention of December 17, 1932: L.N.T.S., vol. 138, pp. 131-133; U.S. Treaty Ser., No. 860; State Papers, vol. 135, pp. 670-671; de Martens, N.R.G., 3rd series, vol. 27, p. 328.
- L. H. Woolsey, "United States-Panama Claims Commission", Am. J. Int. Law, vol. 25 (1931), pp. 520-523.
- George A. Finch, "The Panama-United States Claims Commission", Am. J. Int. Law, vol. 27 (1933), pp. 750-752.
- Bert L. Hunt, American and Panamanian General Claims Arbitration under the Convention between the United States and Panama of July 28, 1926, and December 17, 1932, Report of—, Agent for the United States. (United States Government Printing Office, Washington, 1934.)
- "The United States-Panama General Claims Commission", Am. J. Int. Law, vol. 28 (1934), pp. 61-73.
- Edwin M. Borchard, "The United States-Panama Claims Arbitration", Am. J. Int. Law, vol. 29 (1935), pp. 99-105.
- Wilhelm Friede, "*Entscheidung der auf Grund der Abkommen zwischen den Vereinigten Staaten von Amerika und Panama vom 28. Juli 1926 und 17. Dezember 1932 eingesetzten General Claims Commission im Falle de Sabla, vom 29. Juni 1933*", Z.a.ö.R.u.V., Band IV (1934), pp. 925-928.
- "*Die Entscheidungen der auf Grund der Abkommen zwischen den Vereinigten Staaten von Amerika und Panama vom 28. Juli 1926 und 17. Dezember 1932 eingesetzten General Claims Commission*", Z.a.ö.R.u.V., Band V (1935), pp. 452-466.
-



### Conventions

#### CLAIMS CONVENTION BETWEEN THE UNITED STATES OF AMERICA AND PANAMA

*Signed July 28, 1926. Ratifications exchanged October 3, 1931*<sup>1</sup>

The United States of America and the Republic of Panama, desiring to settle and adjust amicably claims by the citizens of each country against the other, have decided to enter into a Convention with this object, and to this end have nominated as their plenipotentiaries:

The President of the United States of America, the Honorable Frank B. Kellogg, Secretary of State of the United States of America; and

The President of the Republic of Panama, the Honorable Doctor Ricardo J. Alfaro, Envoy Extraordinary and Minister Plenipotentiary of Panama to the United States and the Honorable Doctor Eusebio A. Morales, Envoy Extraordinary and Minister Plenipotentiary of Panama on special mission;

Who, after having communicated to each other their respective full powers found to be in due and proper form, have agreed upon the following articles:

#### ARTICLE I

All claims against the Republic of Panama arising since November 3, 1903, except the so-called Colón Fire Claims hereafter referred to, and which at the time they arose were those of citizens of the United States of America, whether corporations, companies, associations, partnerships or individuals, for losses or damages suffered by persons or by their properties, and all claims against the United States of America arising since November 3, 1903, and which at the time they arose were those of citizens of the Republic of Panama, whether corporations, companies, associations, partnerships or individuals, for losses or damages suffered by persons or by their properties; all claims for losses or damages suffered by citizens of either country, by reason of losses or damages suffered by any corporation, company, association or partnership, in which such citizens have or have had, a substantial and bona fide interest, provided an allotment to the claimant by the corporation, company, association or partnership, of his proportion of the loss or damage suffered is presented by the claimant to the Commission; and all claims for losses or damage originating from acts of officials or others acting for either Government, and resulting in injustice, and which claims may have been presented to either Government for its interposition with the other, and which have remained unsettled, as well as any other such claims which may be filed by either Government within the time hereinafter specified, shall be submitted to a Commission consisting of three members for decision in accordance with the principles of international law, justice and equity. As an exception to the claims to be submitted to such Commission, unless by later specific agreement of the two Contracting Parties,

<sup>1</sup> Source: L.N.T.S., vol. 138, pp. 120-126.

are claims for compensation on account of damages caused in the manner set forth in article VI of the Treaty of November 18, 1903, for the construction of the Panama Canal, which shall continue to be heard and decided by the Joint Commission provided for in that article of the Treaty.

With regard to the exception above made respecting the claims for losses suffered by American citizens as a result of the fire that occurred in the City of Colón on March 31, 1885, the Government of Panama agrees in principle to the arbitration of such claims under a Convention to which the Republic of Colombia shall be invited to become a party and which shall provide for the creation or selection of an arbitral tribunal to determine the following questions: first, whether the Republic of Colombia incurred any liability for losses sustained by American citizens on account of the fire that took place in the City of Colón on the 31st of March 1885; and, second, in case it should be determined in the arbitration that there is an original liability on the part of Colombia, to what extent, if any, the Republic of Panama has succeeded Colombia in such liability on account of her separation from Colombia on November 3, 1903, and the Government of Panama agrees to co-operate with the Government of the United States by means of amicable representations in the negotiation of such arbitral agreement between the three countries.

The hearing and adjudication of particular claims in accordance with their merits in order to determine the amount of damages to be paid, if any, in case a liability is found, shall take place before a special tribunal to be constituted in such form as the circumstances created by the tri-partite arbitration shall demand.

As a specific exception to the limitation of the claims to be submitted to the Commission against the United States of America it is agreed that there shall be submitted to the Commission the claims of Abbondio Caselli, a Swiss citizen, or the Government of Panama, and Jose C. Monteverde, an Italian subject, or the Government of Panama, as their respective interests in such claims may appear, these claims having arisen from land purchased by the Government of Panama from the said Caselli and Monteverde and afterwards expropriated by the Government of the United States, and having formed in each case the subject matter of a decision by the Supreme Court of Panama.

The Commission shall be constituted as follows: One member shall be appointed by the President of the United States; one by the President of the Republic of Panama; and the third, who shall preside over the Commission, shall be selected by mutual agreement between the two Governments. If the two Governments shall not agree within two months from the exchange of ratifications of this Convention in naming such a third member, then he shall be designated by the President of the Permanent Administrative Council of the Permanent Court of Arbitration at The Hague described in article 49 of the Convention for the Pacific Settlement of International Disputes concluded at The Hague October 18, 1907. In case of the death, absence or incapacity of any member of the Commission, or in the event of the member omitting or ceasing to act as such, the same procedure shall be followed for filling the vacancy as was followed in appointing him.

## ARTICLE II

The Commissioners so named shall meet at Washington for organization within six months after the exchange of ratifications of this Convention, and each member of the Commission before entering upon his duties, shall make and subscribe a solemn declaration stating that he will carefully and impartially examine and decide according to the best of his judgment and in accordance with

the principles of international law, justice and equity, all claims presented for his decision, and such declaration shall be entered upon the record of the proceedings of the Commission.

The Commission may fix the time and place of its subsequent meetings, either in the United States or in Panama as may be convenient, subject always to the special instructions of the two Governments.

### ARTICLE III

The Commission shall have authority by the decision of the majority of its members to adopt such rules for its proceedings as may be deemed expedient and necessary, not in conflict with any of the provisions of this Convention.

Each Government may nominate agents or counsel who will be authorized to present to the Commission orally or in writing, all the arguments deemed expedient in favor of or against any claim. The agents or counsel of either Government may offer to the Commission any documents, affidavits, interrogatories or other evidence desired in favor of or against any claim and shall have the right to examine witnesses under oath or affirmation before the Commission, in accordance with such rules of procedure as the Commission shall adopt.

The decision of the majority of the members of the Commission shall be the decision of the Commission.

The language in which the proceedings shall be conducted and recorded shall be English or Spanish.

### ARTICLE IV

The Commission shall keep an accurate record of the claims and cases submitted, and minutes of its proceedings with the dates thereof. To this end, each Government may appoint a Secretary; those Secretaries shall act as joint Secretaries of the Commission and shall be subject to its instructions. Each Government may also appoint and employ, any necessary assistant secretaries and such other assistants as may be deemed necessary. The Commission may also appoint and employ any other persons necessary to assist in the performance of its duties.

### ARTICLE V

The High Contracting Parties being desirous of effecting an equitable settlement of the claims of their respective citizens, thereby affording them just and adequate compensation for their losses or damages, agree that no claim shall be disallowed or rejected by the Commission through the application of the general principle of international law that the legal remedies must be exhausted as a condition precedent to the validity or allowance of any claim.

### ARTICLE VI

Every such claim for loss or damage accruing prior to the signing of this Convention, shall be filed with the Commission within four months from the date of its first meeting, unless in any case reasons for the delay, satisfactory to the majority of the Commissioners, shall be established, and in any such case the period for filing the claim may be extended not to exceed two additional months.

The Commission shall be bound to hear, examine and decide, within one year from the date of its first meeting, all the claims filed.

Three months after the date of the first meeting of the Commissioners and every three months thereafter, the Commission shall submit to each Government a report setting forth in detail its work to date, including a statement of the claims filed, claims heard and claims decided. The Commission shall be bound to decide any claim heard and examined, within six months after the conclusion of the hearing of such claim and to record its decision.

#### ARTICLE VII

The High Contracting Parties agree to consider the decision of the Commission as final and conclusive upon each claim decided, and to give full effect to such decisions. They further agree to consider the result of the proceedings of the Commission as a full, perfect and final settlement of every such claim upon either Government, for loss or damage sustained prior to the exchange of the ratifications of the present Convention. And they further agree that every such claim, whether or not filed and presented to the notice of, made, preferred or submitted to such Commission, shall from and after the conclusion of the proceedings of the Commission, be considered and treated as fully settled, barred, and thenceforth inadmissible, provided in the case of the claims filed with the Commission that such claims have been heard and decided.

This provision shall not apply to the so-called Colón Fire Claims, which will be disposed of in the manner provided for in article I of this Convention.

#### ARTICLE VIII

The total amount awarded in all the cases decided in favor of the citizens of one country shall be deducted from the total amount awarded to the citizens of the other country, and the balance shall be paid at the City of Panama or at Washington, in gold coin or its equivalent within one year from the date of the final meeting of the Commission, to the Government of the country in favor of whose citizens the greater amount may have been awarded.

#### ARTICLE IX

Each Government shall pay its own Commissioner and bear its own expenses. The expenses of the Commission including the salary of the third Commissioner shall be defrayed in equal proportions by the two Governments.

#### ARTICLE X

The present Convention shall be ratified by the High Contracting Parties in accordance with their respective Constitutions. Ratifications of this Convention shall be exchanged in Washington as soon as practicable and the Convention shall take effect on the date of the exchange of ratifications.

In witness whereof, the respective plenipotentiaries have signed and affixed their seals to this Convention.

Done in duplicate in Washington this twenty-eighth day of July 1926.

[SEAL] Frank B. KELLOGG

[SEAL] R. J. ALFARO

[SEAL] Eusebio A. MORALES

CONVENTION BETWEEN THE UNITED STATES OF AMERICA  
AND PANAMA MODIFYING CLAIMS CONVENTION OF JULY 28, 1926

*Signed December 17, 1932. Ratifications exchanged March 25, 1933.*<sup>1</sup>

The United States of America and the Republic of Panama desiring to modify certain provisions of a Convention for the settlement and amicable adjustment of claims presented by the citizens of each country against the other, signed at Washington July 28, 1926, have decided to conclude a Convention for that purpose and have nominated as their plenipotentiaries:

The President of the United States of America, Mr. Roy Tasco Davis, Envoy Extraordinary and Minister Plenipotentiary of the United States to Panama; and

The President of the Republic of Panama, His Excellency Doctor J. Demóstenes Arosemena, Secretary for Foreign Affairs of the Republic of Panama;

Who after having communicated to each other their respective full powers found to be in due and proper form, have agreed upon the following articles:

ARTICLE I

The second paragraph of Article VI of the Convention between the United States of America and the Republic of Panama for the settlement and amicable adjustment of claims by citizens of each country against the other, signed at Washington July 28, 1926, is amended to read as follows:

"The Commission shall be bound to hear, examine and decide, before July 1, 1933, all the claims filed on or before October 1, 1932."

ARTICLE II

Article VIII of the Claims Convention signed at Washington on July 28, 1926, by plenipotentiaries of the United States of America and the Republic of Panama is amended to read as follows:

"The total amount awarded in all the cases decided in favor of the citizens of one country shall be deducted from the total amount awarded to the citizens of the other country, and the balance shall be paid at the city of Panama or at Washington, in gold coin or its equivalent the first of July, 1936, or before, to the Government of the country in favor of whose citizens the greater amount may have been awarded."

ARTICLE III

The present Convention shall be ratified by the High Contracting Parties in accordance with their respective Constitutions. Ratifications of this Convention shall be exchanged in Panama as soon as practicable and the Convention shall take effect on the date of the exchange of ratifications.

In witness whereof, the respective Plenipotentiaries have signed and affixed their seals to this Convention.

Done in duplicate in Panama this seventeenth day of December, 1932.

[SEAL] Roy T. DAVIS

[SEAL] J. D. AROSEMENA

<sup>1</sup> Source: L.N.T.S., vol. 138, pp. 131-133.



### Decisions

AGNES EWING BROWN (UNITED STATES) *v.* PANAMA  
(May 22, 1933. Pages 92-94.)<sup>1</sup>

CONTRACT.—EVIDENCE: PROOF OF CONTRACT, CLAIMANT'S AFFIDAVIT. PREVIOUS STATEMENT, CORRESPONDENCE.— INTERPRETATION OF MUNICIPAL LAW. Appointment as Directress of school in Panama City by Presidential Decree of May 13, 1918, accepted by claimant on June 10, 1918. Dismissal by Presidential Decree of July 30, 1918. Claim brought before Commission for breach of contract and violation of administrative law. *Held* that, in the absence of other evidence, and against denial of defendant and previous statement made by claimant (letter to editor of newspaper), her affidavit cannot prove existence of contract. *Held* also that claimant was subject to discretionary removal under Panamanian administrative law: her correspondence shows her engaged in political controversy.

*Cross-reference:* Comisión General de Reclamaciones entre Panamá y Estados Unidos de América, Reclamación de la Norteamericana Agnes Ewing Brown, Registro No. 2, (Publicación Oficial, Panamá, 1934.)

*Bibliography:*<sup>2</sup> Hunt, Report, pp. 94-96; Friede, "*Die Entscheidungen . . .*", Z.a.ö.R.u.V., Band V (1935), p. 466.

After the completion of the pleadings provided for in the rules of procedure, the Agents by consent of the Commission filed memoranda in lieu of oral arguments.

This claim is made against the Republic of Panama by the United States of America, on behalf of Agnes Ewing Brown.

Miss Brown was at all material times, and is now, an American citizen.

During the year 1912-1913 she filled the position of Directress of the Girls' Normal School in Panama City. The recollection of the services then rendered by her induced the President of the Republic of Panama in the spring of 1918, to make her, through the intermediary of the Consul General of the Republic at New York, an offer of reappointment in that position. The conditions offered were: the salary to be \$2,400 per year, with an additional allowance of \$840 per year for living expenses; the term of the contract to be for five years; claimant to be required to live in the school building; first-class passage to Panama and return fare from Panama to New York to be paid by Panama.

For different reasons the claimant hesitated to accept this offer. Meanwhile, the then Panamanian Secretary of Instruction, Señor Preciado, asked the American Minister in Panama to urge her to accept, which the Minister did by cablegram sent on May 1, 1918.

Miss Brown sailed for Panama in that month. Her passage was paid for by

<sup>1</sup> References to page numbers are to the report of Bert L. Hunt referred to on p. 295 *supra*.

<sup>2</sup> References in this section are to publications referred to on p. 299 *supra*, and to the Annual Digest.

the Panamanian Government, but no contract had been signed. She was appointed by Presidential Decree nr. 60 of May 13, 1918, signed by President Valdés, and officially accepted her appointment on June 10, 1918.

In the month of July certain correspondence took place between the Secretary of Instruction, Señor Andreve, and the directress, which led to her being dismissed by Presidential Decree nr. 116 of July 30, 1918, signed by President Urriola. The claimant alleges that this dismissal was without just cause and in violation of a contract and without any breach thereof on her part.

She claims \$5,000 for injury to reputation: \$16,200 for salary and living allowance for five years, from which sum she deducts \$540 being two months salary and living allowance received for the months [of] June and July 1918, and \$4,900 earned by her otherwise, leaving a sum of \$10,760; and \$106 for cost of transportation from Panama to New York; making a total of \$15,866.

A contract has not been produced and the defendant Government denies the alleged contractual relations.

In her affidavit of November 24, 1931, the claimant states: that she was offered a written contract; that she informed the Consul General of Panama at New York that she would accept the contract, if she found the living conditions in the school building desirable; that upon arrival in Panama she found them such; that she received her official appointment and accepted it. She further states that when she was received by President Valdés she communicated to him her satisfaction of the living conditions and her acceptance of the contract and that he expressed his pleasure thereat.

In the absence of other evidence and against the denial of the defendant Government these statements cannot prove that the alleged contract did materialize; moreover, in a letter to the editor, published in the *Panama Weekly News*, and put in evidence by the defendant Government, the claimant mentioned on August 15, 1918, that she had been offered a contract but had refused to accept it.

In the course of the pleadings the American Agent argued that at any rate a contract for one year was entered into by the claimant being appointed on an annual salary and accepting such appointment. There is however nothing to show that Miss Brown's position as Directress of the Girls' Normal School at Panama was governed by other conditions than those resulting from the appointment in the usual form, which she accepted.

It has further been contended on behalf of the claimant that anyhow her dismissal disregarded her rights under that appointment, as she was not subject to discretionary removal under art. 629 sub 18 of the Administrative Code, but was in the class of employees which can only be dismissed for the reasons given in art. 414 of that code. Miss Brown's correspondence however makes it clear, that she was engaged in a political controversy in violation of art. 423, and was subject to removal therefor under art. 424.

The claim must be disallowed.

---

WALTER A. NOYES (UNITED STATES) *v.* PANAMA

(May 22, 1933, dissenting opinion of Panamanian Commissioner, undated.  
Pages 190-194.)

---

JURISDICTION, OBJECTION TO: CLAIMS ARISEN AFTER SIGNATURE OF CLAIMS CONVENTION.—INTERPRETATION OF TREATIES: TERMS. *Held* that Commission has jurisdiction to entertain claims arisen after signature of Claims Convention, July 28, 1926: clear wording of article VII.

PROTECTION OF ALIENS: MOB VIOLENCE, PROSECUTION OF OFFENDERS. Acts of violence committed June 19, 1927, by mob attending political meeting. No increase of police force before crowd became unruly. Active police protection of claimant when attacked. No prosecution of assailants. *Held* that neither mere fact of aggression which could have been averted by sufficient police force, nor failure, in prevailing conditions, to institute prosecution against assailants make government liable for damages under international law.

*Cross-references:* Annual Digest, 1933-1934, pp. 252-254; Comisión General de Reclamaciones entre Panamá y Estados Unidos de América, Reclamación del Norteamericano Walter A. Noyes, Registro No. 5. (Publicación Oficial, Panamá, 1934.)

*Bibliography:* Hunt, Report, pp. 196-197, and "The United States-Panama General Claims Commission", Am. J. Int. Law, vol. 28 (1934), pp. 67, 73; Borchard, "The United States-Panama Claims Arbitration", Am. J. Int. Law, vol. 29 (1935), p. 101; Friede, "*Die Entscheidungen . . .*", Z.a.ö.R.u.V., Band V (1935), pp. 453, 460-461.

The Agents, by consent of the Commission, filed memoranda in lieu of oral arguments on the issues raised in the pleadings. Oral arguments were presented on March 23, 1933, on the question of jurisdiction.

In this case a claim is made against the Republic of Panama by the United States of America on behalf of Walter A. Noyes, who was born, and has ever remained, an American citizen. The sum of \$1,683 is claimed as an indemnity for the personal injuries and property losses sustained by Mr. Noyes through the attacks made upon him on June 19, 1927, in, and in the neighborhood of, the village of Juan Díaz, situated not far from Panama City. The claim is based upon an alleged failure to provide to the claimant adequate police protection, to exercise due diligence in the maintenance of order and to take adequate measures to apprehend and punish the aggressors.

The facts in this claim occurred after the signing of the convention to which this Commission owes its jurisdiction and the only article of the convention referring to such claims is art. VII, which says:

"The High Contracting Parties agree to consider the decision of the Commission as final and conclusive upon each claim decided, and to give full effect to such decisions. They further agree to consider the result of the proceedings of the Commission as a full, perfect and final settlement of every such claim upon either Government, for loss or damage sustained prior to the exchange of the ratifications of the present Convention. And they further agree that every such claim, whether or not filed and presented to the notice of, made, preferred or submitted to such Commission, shall from and after the conclusion of the proceedings of the Commission, be considered and treated as fully settled, barred, and thenceforth inadmissible, provided in the case of the claims filed with the Commission that such claims have been heard and decided.

"The provision shall not apply to the so-called Colón Fire Claims, which will be disposed of in the manner provided for in art. I of this Convention."

Counsel for the United States has argued that the Commission has jurisdiction to decide this claim, because, whereas art. I of the convention fixes the date (November 3, 1903) since which claims must have arisen in order to be within the jurisdiction of the Commission, but is silent on the date before which such claims must have arisen, art. VII shows that claims arising before the exchange of ratifications are within the jurisdiction of the Commission.

The Agent for Panama, whilst recognizing that the Panamanian Govern-

ment has also filed claims arising after the signing of the convention, has contended that the Commission has no jurisdiction with regard to such claims. He referred to the claims convention between the United States and Mexico of September 8, 1923, the wording of which has to a certain extent been followed in the convention between Panama and the United States. Art. VII of the convention of September 8, 1923, contains an express provision giving the Commission constituted under that convention jurisdiction to decide claims arising after the signature of the convention. This provision was not inserted in the draft of the present convention and the Agent submitted that the reference to such claims which is found in art. VIII of the claims convention of September 8, 1923, was inadvertently copied in art. VII of that draft. He admitted however that the draft had been presented by the American Government and that, although, as the result of negotiations between the two Governments, the extent of the jurisdiction of the Commission as foreseen in the draft was modified, the question now under examination was not discussed in the course of these negotiations.

Art. VII of the convention between the United States and Mexico provides that claims for loss or damage accruing after the signing of the convention may be filed at any time during the period fixed in art. VI for the duration of the Commission and it also provides that, should at the end of that same period any such claim or claims not be decided as specified in art. VI, the Government will by agreement extend that period for such time as is necessary to hear, examine and decide such claim or claims. Whereas, therefore, that convention provides a complete machinery for the filing and deciding of claims arising after the signing of the convention, the convention between the United States and Panama contains no provisions on the subject. As, moreover, art. I of this convention confers upon the Commission jurisdiction over claims "filed by either Government within the time hereinafter specified" and as art. VI specifies a time with regard only to claims arising before the signing of the convention, the jurisdiction of the Commission over Mr. Noyes' claim would seem to be excluded by the convention but for the provision of art. VII, to which the Commission has to give effect according to its meaning. It may be conceded that, by reason of the absence of any reference in the preceding articles to claims arising between the signing of the convention and the exchange of the acts of ratification, the inclusion of such claims within the jurisdiction of the Commission is somewhat out of place in this article, but nevertheless the article clearly recognizes such jurisdiction and an interpretation to the contrary would be altogether inconsistent with its wording.

Accordingly the Commission decides that it has jurisdiction to entertain the claim.

The village of Juan Díaz has only a small population, but on June 19, 1927, several hundreds of adherents of the party then in control of the Government had gathered there for a meeting. The police on the spot had not been increased for the occasion; it consisted of the usual three policemen stationed there. In the course of the day the authorities in Panama City learned that the crowd in Juan Díaz had become unruly under the influence of liquor. The chief of the police, General Pretelt, thereupon drove thither with reinforcements.

After a careful examination of the evidence produced by both Agencies the Commission feels no doubt as to the facts concerning the incidents in which Mr. Noyes became involved on that day. These facts can be concisely stated as follows:

At about 3:00 p.m. the claimant passed through the village in his automobile, on his return to Panama City from a trip to the Tapia River bridge. In the

center of the village a crowd blocked the road and Mr. Noyes stopped and sounded his horn, whereupon the crowd slowly opened. Whilst he was progressing very slowly through it, he had to stop again, because somebody lurched against the car and fell upon the running-board. Thereupon members of the crowd smashed the windows of the car and attacked Mr. Noyes, who was stabbed in the wrist and hurt by fragments of glass. A police officer who had been giving orders that gangway should be made for the automobile, but who had not before been able to reach the car, then sprang upon the running-board and remained there, protecting the claimant and urging him to get away as quickly as possible. He remained with Mr. Noyes, until the latter had got clear of the crowd. At some distance from Juan Díaz the claimant was further attacked by members of the same crowd, who pursued him in a bus and who forced him to drive his car off the road and into a ditch. He was then rescued by General Pretelt who, having come from the opposite direction, had, after reaching the plaza of the village, returned upon his way in order to protect Mr. Noyes against his pursuers.

The facts related above show that in both instances the police most actively protected the claimant against his assailants and that in the second instance the protection was due to the fact, that the authorities sent reinforcements from Panama City upon learning that the conditions in Juan Diaz rendered assistance necessary. The contention of the American Agent however is, that the Panamanian Government incurred a liability under international law, because its officials had not taken the precaution of increasing for that day the police force at Juan Diaz, although they knew some time in advance that the meeting would assemble there.

The mere fact that an alien has suffered at the hands of private persons an aggression, which could have been averted by the presence of a sufficient police force on the spot, does not make a government liable for damages under international law. There must be shown special circumstances from which the responsibility of the authorities arises: either their behavior in connection with the particular occurrence, or a general failure to comply with their duty to maintain order, to prevent crimes or to prosecute and punish criminals.

There were no such circumstances in the present case. Accordingly a lack of protection has not been established.

The claim is also based upon the failure of the Panamanian authorities to prosecute the perpetrators of the aggressions upon the claimant. It is a fact that no prosecutions were instituted. Taking into account however the conditions under which the events had taken place, the Commission cannot conclude to a liability of the Panamanian Government in this respect.

The claim is disallowed.

*Dissenting opinion of Panamanian Commissioner*

The undersigned in concurring in the above decision considers it pertinent to state that he is not able to agree on the question of jurisdiction for the following reasons.

It is unquestionable that the convention of July 28, 1926, contains two provisions which have a contradictory text. According to article VI, damages on which claims are based must have accrued prior to the signing of the convention. Article VII refers to claims for loss or damage sustained prior to the exchange of ratifications of the convention. How this contradiction occurs can only be explained by the fact that the Panama-United States General Claims Convention of 1926 was substantially copied from the Mexico-United States General Claims Convention of September 8, 1923; that the latter compact had an

article, the seventh, which permitted the presentation of claims arising out of damages sustained after the signing of the convention; that such article seventh of the Mexican-American Convention was suppressed in the Panama-United States Convention and that article VIII of the convention between Mexico and the United States, was left in the convention with Panama as article VII, without advertency of the fact that it contained a phrase which was incompatible with the suppression agreed upon.

It would seem, therefore, that if in negotiating the Panama convention, the clause was suppressed which allowed claims for loss or damage accruing after the signing of the compact, the intention of the High Contracting Parties was that claims should be restricted to those in which the loss or damage accrued before such signing and not afterwards.

Moreover, the undersigned Commissioner entertains the opinion that apart from the intention of the parties, as gathered from the antecedents of the convention, the nature of the two conflicting texts would also indicate that article VI should prevail over article VII, because the latter deals with the effect of the proceedings and decisions of the Commission while the former deals with the question of terms. Therefore, in determining the term within which a certain claim must have arisen in order to be admissible, it would appear to be more natural to follow the provision dealing with the general subject of terms than following another provision dealing with some other subject. In support of this reasoning, it may be noted that article VII of the Panama convention would have been more in harmony with the other provisions therein if the phrase above referred to had been omitted.

---

LETTIE CHARLOTTE DENHAM AND FRANK PARLIN DENHAM  
(UNITED STATES) *v.* PANAMA  
(*May 22, 1933. Pages 244-246.*)

---

PROTECTION OF ALIENS: MURDER, PROSECUTION, PUNISHMENT OF OFFENDER.

Murder in March, 1918, of employer by discharged employee, promptly sentenced to 18 years and 4 months imprisonment. Release after 3 years and 1 month due to reductions under Panamanian Penal Code and general Panamanian law. *Held* that, though original sentence was not inadequate by international standards, reduction by general law enacted on occasion of Armistice following World War resulted in inadequate punishment for which Panama liable. Damages allowed for each of claimants.

*Cross-references:* Annual Digest, 1933-1934, pp. 248-249; Comisión General de Reclamaciones entre Panamá y Estados Unidos de América, Reclamación de los Norteamericanos Lettie Charlotte Denham y Frank Parlin Denham, Registro No. 6. (Publicación Oficial, Panamá, 1934.)

*Bibliography:* Hunt, Report, p. 246, and "The United States-Panama General Claims Commission", Am. J. Int. Law, vol. 28 (1934), pp. 68-69; Borchard, "The United States-Panama Claims Arbitration", Am. J. Int. Law, vol. 29 (1935), pp. 101, 102; Friede, "*Die Entscheidungen . . .*", Z.a.ö.R.u.V., Band V (1935), pp. 461-462; Annual Digest, 1933-1934, p. 249.

In March 1918, in the Province of Chiriquí, Panama, Segundo González, a discharged employee of James F. Denham, waylaid and murdered his former employer.

González was promptly arrested, tried and convicted. He was sentenced to imprisonment for 18 years and 4 months. After serving three years and a month

he was released on May 14, 1921, by an executive resolution. The brevity of his actual imprisonment was due to a conditional reduction of the term for which he was sentenced by one third on account of good behavior, in conformity with the Penal Code, and to a further reduction of the original term by one-half under the provisions of a general law enacted by the National Assembly, whereby a partial remission of penalties was granted to prisoners of good conduct, on the occasion of the signing of the armistice at the close of the World War.

The United States claims that Panama is liable to Denham's widow and legitimate son, first, on the ground that Denham's murder resulted from a failure to furnish proper protection to aliens in the Province of Chiriquí; and, second, on the ground that Denham's murderer was not adequately punished.

The Commission finds that the evidence is insufficient to prove that the murder of Denham resulted from a failure on the part of the authorities to afford proper protection to aliens in the Province of Chiriquí, and therefore finds no liability on the first ground asserted by the United States.

It is the opinion of the Commission, however, that González was not adequately punished. The original sentence was not in the opinion of the Commission inadequate by international standards. Nor would the conditional reduction of the term of that sentence by one-third under the provisions of the Penal Code of Panama, have given rise to an international liability. The conclusion of the Commission rests solely upon the result brought about by the act of the National Assembly above referred to. The Commission recognizes that the reduction under that act did not arise from any inclination on the part of the Government to favor this particular prisoner or to extenuate offenses against aliens. But, liability for failure to punish adequately crimes against aliens is not based upon discrimination in favor of the individual offender or upon any breach of the local laws. The international obligation is clearly established and each country has the power of so arranging its interior jurisprudence as to give that obligation effect. The failure of an individual criminal to serve an adequate term may give rise to an international liability even where the original sentence is adequate. *Putnam v. Mexico*, 1927, *Opinions of Commissioners* under 1923 Convention, p. 222. It has been held also that a nation is not relieved from its obligation by the fact that the failure to punish results from a general amnesty. *West v. Mexico*, 1927, *Opinions of Commissioners* under 1923 Convention, p. 404. In the *West* case the amnesty prevented even the beginning of a prosecution. The Commission sees no logical distinction between that case and a case where an act of the legislature interrupts the service of a sentence before adequate punishment has been inflicted.

In arriving at the measure of the liability, the Commission has taken into account the fact that González was actually imprisoned for a period of slightly more than three years. There was not a total failure to punish.

The Commission decides that the Government of Panama is obligated to pay to the Government of the United States \$2,500 in behalf of Lettie Charlotte Denham and \$2,500 in behalf of Frank Parlin Denham, without interest.

---

FRANCISCO AND GREGORIO CASTAÑEDA AND JOSÉ DE LEÓN R.  
(PANAMA) *v.* UNITED STATES  
(May 22, 1933. Pages 676-677.)

---

JURISDICTION: CLAIMS ARISEN AFTER SIGNATURE OF CLAIMS CONVENTION.—  
INTERPRETATION OF TREATIES. *Held* that Commission has jurisdiction to

entertain claims arisen after signature of Claims Convention, July 28, 1926: reference to Walter A. Noyes award, p. 308 *supra*.

**COLLISION OF VESSELS IN GULF OF PANAMA.—APPLICABLE LAW: INTERNATIONAL RULES OF NAVIGATION.—UNLAWFUL CHANGE OF COURSE.** Collision on July 10, 1931, in Gulf of Panama, between United States destroyer *Fulton* and sloop *Estrella Marina*. *Held* that collision due to change of course by *Estrella Marina* unlawful under International Rules of Navigation.

*Cross-references:* Annual Digest, 1933-1934, pp. 480-481; Comisión General de Reclamaciones entre Panamá y Estados Unidos de América, Reclamación de la República de Panamá en su propio nombre y en representación de Francisco y Gregorio Castañeda y José de León R., Registro No. 20. (Publicación Oficial, Panamá, 1934.)

*Bibliography:* Hunt, Report, p. 677, and "The United States-Panama General Claims Commission", Am. J. Int. Law, vol. 28 (1934), pp. 71-72; Friede, "Die Entscheidungen . . .", Z.a.ö.R.u.V., Band V (1935), pp. 453, 465; Annual Digest, 1933-1934, p. 481.

This is a claim by the owners of the sloop *Estrella Marina* for the damages which they suffered in a collision between that vessel and the U.S. destroyer *Fulton*. The collision occurred in the Gulf of Panama near Pacheca Island before daylight in the early morning of July 10th, 1931. On the grounds stated in the case of Walter E. Noyes (Registry No. 5) the Commission holds that it has jurisdiction to decide upon this claim. The evidence shows that the *Fulton* was keeping an adequate look-out and that 13 minutes before the collision she sighted a yellow light carried by the sloop. This light as seen from the *Fulton* seemed to be passing to starboard. The *Fulton* changed her course somewhat to port to give a wider clearance when the approaching light suddenly changed direction and a collision occurred. Testimony from the crew of the sloop shows that she changed course sharply to starboard just before the collision, that she was keeping no regular watch and that she did not make out the sailing lights of the destroyer. The testimony of the sloop's captain also indicates that the port light of the sloop was not burning. It is the opinion of the Commission that the collision was due not to any negligence on the part of the *Fulton*, but to an *unlawful* change of course by the *Estrella Marina* just before the collision (International Rules of Navigation, arts. 20, 21).

#### *Decision*

The Commission decides that the claim must be dismissed.

---

### JUAN MANZO (PANAMA) *v.* UNITED STATES

(May 26, 1933. Pages 693-694.)

---

**LABOUR ACCIDENT, NEGLIGENCE OF EMPLOYER.—APPLICABLE LAW: CLAIMS CONVENTION.—COMPENSATION: FACTORS.** Labour accident in 1905 to youthful water carrier allowed by United States agent to oil heavy machinery in motion. *Held* that allowing him to do so was equivalent to employing him therefore, and that employing him to that end was negligence *per se*. *Held* also that case governed neither by Panamanian, nor by United States law, but by Claims Convention, July 28, 1926, under article I of which United States responsible. Amount of damages: seriousness of injury, delay of compensation taken into account.

*Cross-references:* Annual Digest, 1933-1934, pp. 481-482; Comisión General de Reclamaciones entre Panamá y Estados Unidos de América, Reclamación de la República de Panamá en su propio nombre y representación de Juan Manzo, Registro No. 21. (Publicación Oficial, Panamá, 1934.)

*Bibliography:* Hunt, Report, pp. 695-696, and "The United States-Panama General Claims Commission", Am. J. Int. Law, vol. 28 (1934), p. 71; Borchard, "The United States-Panama Claims Arbitration", Am. J. Int. Law, vol. 29 (1935), p. 101; Friede, "*Die Entscheidungen . . .*", Z.a.ö.R.u.V., Band V (1935), pp. 462-463; Annual Digest, 1933-1934, pp. 482-483.

In 1905 Juan Manzo, then a boy between 10 and 13 years of age, was working as a water carrier for the Municipal Engineering Division of the Isthmian Canal Commission. The testimony for both parties is in agreement that Manzo was regularly allowed by his superiors to oil the sheaves, through which ran a cable used for hoisting material to a reservoir at Ancon, Canal Zone. It is the opinion of the Commission that the practice of allowing Manzo to oil the sheaves was equivalent to directing or employing him to do so, and that it was negligence *per se* to employ so young a child as an oiler of heavy machinery in motion.

On September 4, 1905, Manzo, while oiling, caught his right hand in one of the sheaves and lost his fingers and half of his palm.

The principal point argued by the parties is whether the case is governed by the municipal law of Panama, which gave private persons a right to sue the Government in tort, or by the municipal law of the United States which did not give such a right. It is the opinion of the Commission that the liability in this case does not depend upon the decision of this question. Manzo's injury was brought on by the negligent conduct of an agent of the Government of the United States. The responsibility for such an injury depends not on the right to maintain an action under the municipal law, but directly upon the terms of the treaty which provides *inter alia* for decision by the Commission upon "all claims for losses or damages originating in acts of officials or others acting for either government and resulting in injustice . . .".

The Commission, taking into account the seriousness of the injury and the length of time for which compensation has been delayed, decides that the Government of the United States is obligated to pay to the Government of Panama, on behalf of Juan Manzo, \$2,500, without interest.

---

#### JAMES PERRY (UNITED STATES) *v.* PANAMA

(May 27, 1933, dissenting opinion of Panamanian Commissioner, undated. Pages 71-77.)

---

ARREST, IMPRISONMENT, DETENTION OF ALIEN, INTERPRETATION OF MUNICIPAL LAW.—CRIMINAL PROCEEDINGS AGAINST ALIEN.—PRINCIPLES OF INTERNATIONAL LAW, JUSTICE, EQUITY. Arrest and imprisonment of claimant, October 28, 1910, on charge of theft. Proper order for arrest and provisional detention, November 7, 1910, on ground of grave indications against him. Order, February 14, 1911, that accused should answer on charge in Court. Acquittal of claimant, April 21, 1911. *Held* that there were no undue delays in proceedings. *Held* also that Commission, in view of articles I ("equitable settlement") and V ("principles of international law, justice and equity"), Claims Convention, July 28, 1926, shall be guided by broad rather than by narrow conceptions. *Held* further that evidence did not provide grave indications and, there-

fore, that detention and imprisonment were in violation of Panamanian law. Damages allowed.

*Cross-references:* Annual Digest, 1933-1934, pp. 477-479; Comisión General de Reclamaciones entre Panamá y Estados Unidos de América, Reclamación del Norteamericano James Perry, Registro No. 1. (Publicación Oficial, Panamá, 1934.)

*Bibliography:* Hunt, Report, pp. 82-84, and "The United States-Panama General Claims Commission", Am. J. Int. Law, vol. 28 (1934), p. 72; Borchard, "The United States-Panama Claims Arbitration", Am. J. Int. Law, vol. 29 (1935), p. 102; Friede, "Die Entscheidungen . . .", Z.a.ö.R.u.V., Band V (1935), pp. 457-458; Annual Digest, 1933-1934, pp. 479-480.

After the completion of the pleadings provided for in the rules of procedure, the Agents, by consent of the Commission, filed memoranda in lieu of oral arguments.

This claim is made by James Perry, whose American citizenship is not contested, against the Republic of Panama and arises out of an alleged unjust imprisonment which the claimant, who at the time of his arrest was living in Colón, suffered on a charge of having taken some jewels and other objects, belonging to his employer Everhart, from a trunk found broken open in Everhart's room. An amount of \$26,250, with interest, is claimed as an indemnity for his imprisonment during 175 days.

A copy of the official record of the criminal proceedings against Perry has been produced and has been thoroughly discussed in the pleadings. Hereafter follows a summary of the proceedings, indicating the evidence collected as to Perry's supposed guilt: the record begins with the denunciation made by Everhart on October 29, 1910, which caused the examining magistrate to start his investigation. In it Everhart said that he suspected Perry of being the perpetrator of the theft, alleging different actions of the latter to show his unreliability. On that same day Everhart confirmed the denunciation; also the depositions of E. H. W. Mayers and William Loud were taken. Mayers testified to certain proposals concerning ways of robbing Everhart which he said Perry made to him on October 27 and of which he informed Everhart in the evening of that day. William Loud, an employee of Perry [Everhart], said that he suspected Perry, alleging as his reason for this suspicion that the latter had, two weeks before, taken keys from Everhart's pocket. On November 1, Perry's indagatory declaration was taken. Perry denied that he made the proposals which Mayers said he had made; as to the actions alleged against him by Everhart and Loud, he denied them, stating at the same time that Everhart used to trust him with two of his keys. On being asked whether he knew why he was on bad terms with William Loud, he answered that Loud harbored ill-will against him on account of his having reported to Everhart improper things which Loud had done. On November 7, the magistrate ordered Perry's provisional detention on the ground that there were on record grave indications against him. On November 25 he took the deposition of Maria Weston. According to her testimony Perry had on October 27 asked her when and how often Everhart was accustomed to return to the house during the day and if she herself was accustomed to do so after her work was concluded and she answered him that when she had finished her work at 11 a.m. she did not return until the next day at 8 a.m. On the same day Jack Everhart appeared before the magistrate and stated that his wife had found on November 18 in a clothes closet in the room, where the alleged theft was committed, a twisted screwdriver, which in his opinion had served to break open the trunk wherefrom the valuables were taken. He said that five days before the theft was

committed he had bought from a person whom he did not know, but whom he could identify, three screwdrivers; that he gave one of these to William Loud to do some work and he still had the other two in his desk; that the one he gave to Loud was lost or taken from the latter, from a handbag in which he kept it; and that the screwdriver was in good condition when he bought it and when it was used by Loud. On December 12 the magistrate forwarded the record of these preliminary proceedings to the Second Judge of the Circuit, who on December 18 stated that the case was within the jurisdiction of the Superior Judge, as the value of the stolen goods exceeded 250 balboas. On December 20 the record was transmitted to the Superior Judge, who, on January 12, 1911, ordered that the preliminary proceedings should be completed, *inter alia* by a confrontation between the accused and the witness Mayers and between the accused and the witness Maria Weston, and by a deposition of William Loud stating: the date he received the screwdriver; the day and hour he found he had lost it; whether he was accustomed to lock the handbag in which he kept it; the place where the handbag was, when the screwdriver was taken from it; whether it was true or not that enmity existed between him and Perry. The confrontation with Mayers did not take place, as he was at Gorgona in the Canal Zone; being confronted with Maria Weston on January 25, Perry denied that he asked her the questions which she alleged he had asked; he maintained that denial throughout the confrontation. Loud was interrogated on January 26. He did not remember the date when he received the screwdriver and could not say when he found that he had lost it; the handbag was not locked and was in a cupboard under the bar in Everhart's saloon when the screwdriver was taken from it; there was no enmity between him and Perry to the point that he wished to harm the latter, but he did consider Perry a treacherous and dangerous man. On February 14 the Superior Judge decided that the testimony of Mayers and Maria Weston furnished grave indications that the accused had committed the theft and ordered that Perry should answer in court on that charge; he also gave order for his imprisonment. The proceedings thereupon followed their course, the jury was formed on March 14, and the trial, which resulted in an acquittal, took place on April 21.

The Commission finds that at the outset two irregularities were committed; Perry was arrested and imprisoned in the morning of October 28, 1910, but his indagatory declaration, which should have been taken within 24 hours, was only taken on November 1, and a proper order for his arrest and provisional detention was not issued before November 7. The Commission does not sustain the contention of the American Agency, that there were undue delays in the proceedings.

In order to establish that the Republic of Panama has incurred a liability under international law by the action of her judicial authorities, the American Agency has asserted that upon the evidence of the witnesses Perry's detention and imprisonment were not justified under Panaman law. The Panaman Agency on the other hand has contended that there was just cause for these measures.

Before dealing with these allegations, the Commission thinks it necessary to examine the scope of the provisions of the convention of July 28, 1926, which lay down the law which the Commission shall apply. These provisions are found in arts. I and V. The latter article provides: "The High Contracting Parties being desirous of effecting an equitable settlement of the claims of their respective citizens, thereby affording them just and adequate compensation for their losses or damages, agree that no claim shall be disallowed or rejected by the Commission through the application of the general principle of international law that the legal remedies must be exhausted as a condition precedent to the validity or allowance of any claim." This article is clear, it calls for no

comment, but it may be noted that the High Contracting Parties express as the reason for this provision their desire of effecting an equitable settlement of the claims of their respective citizens, a desire which may be considered significant as to the general trend of the intention of the Parties. However, the article contains a special provision. The general rule is found in art. I, which lays down that the Commission shall decide "in accordance with the principles of international law, justice and equity". There is no reason to scrutinize whether these terms embody an indivisible rule or mean that international law, justice, and equity have to be considered in the order in which they are mentioned, because either of these constructions leads to the conclusion that the Commission shall be guided rather by broad conceptions than by narrow interpretations.

The Commission now comes to the allegations of the Agents with regard to the evidence recorded in the criminal proceedings against the claimant.

Upon examining that evidence, the Commission finds that the testimony of Everhart and Loud did not furnish any indication that Perry had committed the alleged theft. Nor did the finding of the screwdriver in any way connect Perry with the crime, as the object neither belonged to him nor had been seen in his possession. There remains the evidence of Mayers and Maria Weston, on which the judge in his order of February 14, 1911, based his finding that the grave indications, required by the law, did exist. Maria Weston's statements and the negative result of her confrontation with Perry have been related above. Mayer's evidence was taken on October 29. It follows from Perry's indagatory declaration (November 1), that the latter denied that in his conversation with the witness on October 27 he had made the proposals, attributed to him by the witness; the position did not change after that date; the confrontation ordered by the judge on January 12, 1911, did not take place, because Mayers was not in Colón.

The statements of Mayers and Maria Weston, alleging wholly different facts, in no way support each other; they have both been contradicted by the accused and they have no bearing upon the criminal act of which Everhart complained.

The Commission believes that the detention of Perry was a violation of the municipal law of Panama. Under art. 340 of law 105 of 1890, since Perry was not caught in the act, he could only be detained "if there should be against him, at least, the declaration of one competent witness, even though such declaration may not yet have been reduced to writing, or a strong indication (*indicio grave*) that he is the perpetrator, accomplice, abettor or concealer of the criminal act under investigation". (And see Judicial Code, art. 1627, for the same requirements for the order for *plenario* proceedings.) The requirement of the declaration of one competent witness obviously means that of an eyewitness. There was none here, and Perry's detention was expressly put on the ground that there were *indicios graves* against him. But, as has been pointed out above, the testimony upon which the detention was based did not justify the inference that Perry had anything to do with "the criminal act under investigation", which was breaking into Everhart's trunk on the night of October 27 and stealing jewels and other objects therefrom. There was therefore no *indicio grave*, and no right to detain Perry under Panaman law. It may also be noted that even had there been *indicios*, they would have to be *plenamente probados* under art. 1709 of the Judicial Code, and that *plena prueba* can, by art. 1675, be furnished only by the testimony of at least two witnesses who agree as to the act and do not differ notably as to the manner, time, and other circumstances. No two witnesses at any time testified to any act which could be considered an *indicio* of Perry's guilt, and the Panaman authorities concerned in the case should have realized that upon the evidence before them a conviction could not be procured.

The Commission finds that the claimant, after having been arrested and imprisoned without a proper order, remained imprisoned through the failure of the authorities to give to his case proper attention, which failure resulted in a violation of the principle of respect for the personal liberty of the individual recognized by the Panaman law.

The Commission decides that the Republic of Panama is obligated to pay to the United States of America, on behalf of James Perry, the sum of \$10,000, without interest, on account of his imprisonment during the period comprised between October 28, 1910, and April 21, 1911.

*Dissenting opinion of Panamanian Commissioner*

I do not concur in the foregoing decision.

The claimant, James Perry, was arrested for the purpose of being tried, he was tried, and acquitted. He could not be released on bail because the crime for which he was placed on trial did not admit of bail under the law.

The damage is considered to consist in the confinement to which the claimant was necessarily subjected while held for trial.

Responsibility is considered to consist in that the holding of the claimant in confinement was improper in view of the absence of the element of evidence required under article 340 of law 105 of 1890 for decreeing detention, to wit, a declaration of a qualified witness or an *indicio* of being the perpetrator of the criminal act imputed to him.

The law applicable to the claimant (art. 340 above cited) required for the purpose mentioned one of two things:

Either that he be charged with a criminal act in the testimony of a qualified witness, even though the testimony might not have been in writing;

Or that there exist an *indicio grave* against him, sufficient to raise a reasonable suspicion that his guilt or his innocence should be investigated by trial.

When Perry was placed under detention there existed against him the following aggregate of *indicios*:

1st. Everhart's testimony which pointed to Perry as the perpetrator of the robbery and his testimony as to different actions of Perry which brought him under suspicion;

2nd. Mayers' testimony that Perry approached him with proposals to rob Everhart the same day of the robbery, namely, on the 27th day of October, a fact which Mayers communicated to Everhart on the same day;

3rd. Loud's testimony that Perry had taken some keys from Everhart's pocket;

4th. Maria Weston's testimony that Perry had asked her when and how often during the course of the day Everhart was in the habit of going to the house;

5th. The fact that Perry was an employee in Everhart's saloon.

With this aggregate of *indicios*, it was impossible for the judge not to have a reasonable suspicion that Perry might possibly have committed the crime and hence that he should be tried.

Against these *indicios* there was only one thing: Perry's denials.

It has been maintained that the *indicios* should be fully proved, that is to say, that regarding each *indicio* there should be two witnesses agreeing as to the manner, the place, and the time.

In the first place, this reasoning is contrary to the nature of this kind of evidence (*indicios*), which consists essentially of the *aggregate of circumstances*

which they establish. For that reason evidence founded upon *indicios* is very accurately designated in English "circumstantial evidence".

In the second place the *indicios* consist at times of a physical fact or circumstance within the range of the judge's observation or knowledge, and at other times of the testimony of witnesses. In the latter case the *indicio* consists in the *fact* of the testimony of the witness, in which case the testimony is a fact fully proved in itself. As I have stated, the evidence of *indicios* is essentially evidence in the aggregate, that is to say, based upon the concurrence of a number of distinct facts or circumstances which allow only one conclusion; that the individual *is guilty*, when it is the case of a *conviction*, that is, after a full trial; or that an individual *may be guilty* when it is the case of holding him for *trial*.

Let it be observed that a person may be held under confinement (art. 340 of the law cited) when there exists against him *just one declaration* of a qualified witness.

If one declaration is sufficient upon which to base detention for trial, and if moreover one declaration by itself establishes an *indicio*, how can it be maintained that a judge cannot hold an accused person when there exist against him *four declarations of qualified witnesses* who relate concordant facts pointing to an individual as the probable perpetrator of a crime?

The majority of the Commission considers that a Panaman judge violated the law because, relying upon an aggregate of concordant *indicios* he brought Perry up for criminal trial.

It is an accepted principle of modern penal law that the weighing of evidence is a matter left to the free conscience of the judge. If this principle obtains in pronouncing final sentences, it should be all the more applicable to the mere temporary holding for, and bringing to, trial. International responsibility can be held to exist only when there is a clear and flagrant violation of the law, deliberately committed and in bad faith, as a result of which a person suffers damage. Even assuming that the Panaman judge committed an error in bringing Perry to trial, it is not possible to establish a violation of international law, based only on the value which the judge, in accordance with his conscience, assigned to the circumstantial evidence before him for the sole purpose of bringing the accused to trial.

In this connection it seems pertinent to quote the following passage from the opinion of the eminent Dr. van Vollenhoven in the Chatten case (General Claims Commission between Mexico and the United States, *Decisions of 1927*):

"In Mexican law, as in that of other countries, an accused cannot be convicted unless the judge is convinced of his guilt and has acquired this view from legal evidence. An international tribunal never can replace the important first element, that of the judge's being convinced of the accused's guilt; it can only in extreme cases, and then with great reserve, look into the second element, the legality and sufficiency of the evidence".

I likewise consider pertinent to the Perry case the following conclusions taken from the Dissenting Opinion of the Mexican Commissioner, Licenciado Genaro Fernández MacGregor, also in the Chatten case:

"I consider that this is one of the most delicate cases that has come before the Commission and that its nature is such that it puts to a test the application of principles of international law. It is hardly of any use to proclaim in theory respect for the judiciary of a nation, if, in practice, it is attempted to call the judiciary to account for its minor acts. It is true that sometimes it is difficult to determine when a judicial act is internationally improper and when it is so from a domestic standpoint only. In my opinion the test which consists in ascertaining if the act implies damage, wilful neglect, or palpable deviation from the established customs becomes clearer by having in mind the damage

which the claimant could have suffered. There are certain defects in procedure that can never cause damage which may be estimated separately, and that are blotted out or disappear, to put it thus, if the final decision is just. There are other defects which make it impossible for such decision to be just. The former, as a rule, do not engender international liability; the latter do so, since such liability arises from the decision which is iniquitous because of such defects. To prevent an accused from defending himself, either by refusing to inform him as to the facts imputed to him or by denying him a hearing and the use of remedies; to sentence him without evidence, or to impose upon him disproportionate or unusual penalties, to treat him with cruelty and discrimination; are all acts which *per se* cause damage due to their rendering a just decision impossible. But to delay the proceedings somewhat, to lay aside some evidence, there existing other clear proofs, to fail to comply with the adjective law in its secondary provisions and other deficiencies of this kind, do not cause damage nor violate international law. Counsel for Mexico justly stated that to submit the decisions of a nation to revision in this respect was tantamount to submitting her to a régime of capitulations. All the criticism which has been made of these proceedings, I regret to say, appears to arise from lack of knowledge of the judicial system and practice in Mexico, and, what is more dangerous, from the application thereto of tests belonging to foreign systems of law . . .”.

In the case under consideration there was no positive acquittal. Perry's innocence was not demonstrated by establishing an alibi, or by showing that it was another who committed the crime, the existence of which was conclusively proved. Perry was acquitted for the negative reason of there not being sufficient evidence against him. The possibility that he was the culprit subsisted, notwithstanding his being definitely freed from any subsequent penal action for the same crime.

Under the circumstances of this case, the Republic of Panama should have been exonerated. If the Tribunal believes it proper to award Perry damages for simple reasons of equity, as the finding of the majority suggests, and taking into account the fact that he was subjected to confinement without being declared guilty, the award should be moderate and proportional to the damage actually suffered.

The record shows that Perry at the time the facts took place was an employee of a saloon and in charge of certain gambling slot machines which the proprietor was exploiting at different locations in the city of Colón. He had previously been a soldier in the army. From his enlistment papers it is shown that when he enlisted he gave his profession or trade as waiter. The claimant has not tried to establish, as is usual in such cases, the amount of Perry's income at that time.

The amount of the damage resulting from confinement must be determined taking into consideration the position and the earning capacity of the person confined.

For the reasons set forth, I am of the opinion that under law this claim should be disallowed, and that if for reasons of equity alone an award should be allowed, it should be for a considerably smaller amount.

---

GUST ADAMS (UNITED STATES) *v.* PANAMA

(June 21, 1933. Pages 304-306.)

---

PROTECTION OF ALIENS: ILL TREATMENT BY POLICE, PROSECUTION, PUNISHMENT OF OFFENDER.—EVIDENCE: CLAIMANT'S AFFIDAVIT, PREVIOUS STATE-

MENTS, INHERENT PROBABILITIES. Ill treatment and alleged robbery of alien on or before May 1, 1921, by policeman whose request for money was refused. Sentence to dismissal of policeman and 30 days' imprisonment by disciplinary Court for breach of police discipline and regulations. Order of June 10, 1921, to enforce sentence. Sending of policeman to criminal Court on June 23, 1921, "detention" in and about police station, institution of criminal proceedings, discontinued on September 27, 1921. *Held* that claim for robbery should be dismissed as unproven: conflicting statements made by claimant shortly after occurrence and in affidavit of October 27, 1931, concerning money he had when attacked, inherent probabilities. *Held* also that policeman not adequately punished and Panama liable. Damages allowed.

*Cross-references:* Annual Digest, 1933-1934, pp. 246-247; Comisión General de Reclamaciones entre Panamá y Estados Unidos de América, Reclamación del Norteamericano Gust Adams, Registro No. 8. (Publicación Oficial, Panamá 1934.)

*Bibliography:* Hunt, Report, p. 309, and "The United States-Panama General Claims Commission", Am. J. Int. Law, vol. 28 (1934), pp. 67-68; Borchard, "The United States-Panama Claims Arbitration", Am J. Int. Law, vol. 29 (1935), pp. 101, 102; Friede, "*Die Entscheidungen . . .*", Z.a.ö.R.u.V., Band V (1935), p. 462; Annual Digest, 1933-1934, p. 247.

The amount of \$7,500, with interest, is claimed by Gust Adams, a citizen of the United States, as compensation for injuries inflicted upon him, and money taken from him, by a Panaman policeman. There is a substantial agreement on the following facts: on or before May 1, 1921, in the course of a journey from Panama City to Boquete, Adams stopped at a bar in the town of David. He found two policemen there and asked them where he could get a horse to continue his journey. They promised to help him, he bought them drinks, and they departed. While he was looking over his money for a small bill to make payment, a third policeman, Manuel Iriarte, asked him for a few pesos. Adams refused, and Iriarte struck him on the forehead with a police club, inflicting an ugly wound and making him unconscious.

As to the request for money, the refusal and the delivery of the blow, Adams and Iriarte are in substantial agreement. As to the other details of the episode they differ, Adams in his affidavit of October 27, 1931, says:

" . . . another policeman approached me, grabbed my arm and demanded that I give him five dollars. I started to jerk my arm away and remonstrate with him when he dealt me a severe blow on the head with his club and I fell back in my chair unconscious".

Adams' affidavit also says, "When I was able to check up my money I found that the policeman had robbed me of \$12". The statement which the claimant made shortly after the occurrence, and which was on June 1, 1921, forwarded by the American Minister at Panama City to the Panaman Minister of Foreign Affairs *ad interim*, is not before the Commission, nor has the evidence rendered by Adams in the Panaman investigation been produced, but there is an indication in the record that Adams at the time varied in his statements as to the amount of which he was robbed. This evidence of robbery is worthless unless Adams knew with certainty how much money he had when he was attacked. The variation of his own estimates as well as the inherent probabilities cast doubt on this. The Commission dismisses the claim of robbery as unproven.

Iriarte, in a statement made to the police authorities, claims that he had been drinking with Adams before the request for money, that he asked for a loan only, that his request was repulsed with insults and an attack by butting, and

that his own blow was intended to land on Adams' shoulder but hit his head by accident. The Commission disbelieves the story of butting and the accidental nature of the blow, and finds that there was a request for money, that it was refused, perhaps in offensive terms, and that following the refusal, and perhaps in anger at the words used, Iriarte intentionally struck Adams on the head with his club, wounding him and rendering him unconscious.

Iriarte was tried by a police disciplinary court in Panama City on the charge of wounding Adams with his stick because of Adams' refusal to lend him money. He was found guilty and was sentenced to dismissal from the police force and 30 days' imprisonment, not for the crime committed, but for the breach of police discipline and regulations. On June 10, 1921, this sentence was ordered to be enforced. On June 23, 1921, Iriarte was sent to David by the police chief, to be held at the disposal of the municipal judge of that district, for criminal proceedings. After some investigations, the exact facts regarding which are in dispute, the criminal proceedings were, on September 27, 1921, discontinued provisionally. They have never been reopened. After being sent to David and during the investigations there, Iriarte was "detained" in and about the police station at the disposal of the judge for a maximum of 10 weeks.

The Commission has taken into account the fact that Iriarte was dismissed from the force, imprisoned in Panama City for at least 13 days, and detained in David for 10 weeks, and that he may have acted in anger provoked by offensive words. But for a uniformed and armed police officer to demand money of a traveler and fell him with a club when he refuses the demand is a serious matter. The Commission feels that the offender was not adequately punished and that from this arises international liability.

The Commission is not concerned with the formal correctness or incorrectness of the criminal proceedings. As this Commission has said in the case of Denham (Registry No. 6):

"... liability for failure to punish adequately crimes against aliens is not based upon discrimination in favor of the individual offender or upon any breach of the local laws. The international obligation is clearly established and each country has the power of so arranging its interior jurisprudence as to give that obligation effect".

The Commission finds it unnecessary here to pass upon the question of whether a state is liable for the wrongful act of a police officer irrespective of failure to punish, or of whether the rule regarding liability for the acts of police applies in a case like this where the officer being on duty and in uniform does an act clearly outside of his duty and inconsistent with his duty to protect.

The Commission finds that the Government of Panama is obligated to pay to the Government of the United States, on behalf of Gust Adams, \$500, without interest.

#### *Dissenting Opinion of Panamanian Commissioner*

It is a proven fact that between the claimant, Gust Adams, an American citizen, and Manuel Iriarte, a former member of the national police, an incident occurred in a saloon in the city of David, Province of Chiriqui, Republic of Panama. As a result of that incident Adams received a wound on the forehead which it has been shown was inflicted by Iriarte. Adams charged that Iriarte had robbed him of a certain amount of money, availing himself of a moment during which he was unconscious as a result of the blow which the latter dealt him with his club and which caused the wound referred to. It has not been possible to clarify the circumstances surrounding the dispute, as it appears

that the participants were completely alone when it occurred. The charge of robbery has been excluded as unfounded by the majority of the Commission, who holds it has been discredited by contradictions in the testimony of the claimant himself.

Regarding the wound which the latter sustained, the majority considers that Iriarte was not properly punished and that for this reason the Republic of Panama has incurred international liability.

The undersigned regrets that he cannot share this opinion because, pursuant to the evidence in this claim, Iriarte was severely punished for the offense he committed, which was a matter of exclusively police character. According to the communication addressed to Iriarte by the captain of the police section of David under date of May 4, 1921, there were drawn against the former charges of violation of the rules and orders of the corps and of having used his club to inflict a wound on the head of the American, Gust Adams. The *Consejo de Calificación y Disciplina* of the National Police Corps held the charges to be fully substantiated and recommended that Iriarte be dismissed from the corps as being unworthy of belonging thereto and he was sentenced to 30 days of incarceration. The sentence was confirmed by the inspector general on June 10.

It is evident that the officials of the police corps who handled this matter considered that the penalties to which Iriarte was subjected constituted adequate punishment for the offense committed.

Nethertheless, in view of Adams' overtures before the police authorities and through the American Legation in Panama, Iriarte was sent to the city of David under arrest and placed at the disposal of the judge of that district on June 23, with the object that the said functionary should initiate the corresponding *sumario* for ascertaining whether, in addition to the violations of an exclusively police character for which he had already been tried and punished with all severity, the former was criminally liable, in view of the possibility that the wound sustained by Adams might have been more serious or that the charge of robbery of some amount of money might be proved.

The proceedings carried out by the judge at David were fruitless and, under the laws of criminal procedure, on September 29 he decreed the provisional discontinuance (*sobreseimiento*) of the case because of lack of evidence for bringing the accused to trial. The corresponding court order sets forth the steps taken and the legal bases for the order. This decision of the judge left open the door to any subsequent investigation under the second section of article 2138 of the Judicial Code which reads:

"Provisional discontinuance (*sobreseimiento*) does not close the process. At any time that new evidence is filed the investigation can be continued against the beneficiaries of such discontinuance (*sobreseimiento*)."

From the evidence which the Commission has before it, it is not proved that through negligence on the part of the judge at David or of any other authority a greater penalty was not assessed against Iriarte and therefore it is not possible to impute international liability to Panama as a result.

The claim of the United States of America on behalf of Gust Adams should be disallowed.

---

CHARLIE R. RICHESON, GEORGE KLIMP, JAMES LANGDON,  
*ET AL.* AND W. A. DAY (UNITED STATES) *v.* PANAMA

(June 26, 1933. Pages 268-273.)

PROTECTION OF ALIENS: FOREIGN TROOPS, MOB VIOLENCE, INADEQUATE POLICE PROTECTION.—DAMAGES: SUPPORT OF DEPENDANTS, PUNITIVE DAMAGES. Disturbances between United States soldiers and Panamanian police and civilians on April 2, 1915, at Colón, resulting in death and wounding of United States military personnel. Assistance of insufficient local police force by *ad hoc* United States provost guard. *Held* that no claim lies against Panama for incidental wounding of Richeson when as an onlooker he came close to group of United States soldiers interfering with action of police: no evidence that the latter overstepped limit of permissible measures for asserting authority. *Held* also that Langdon's death due to inadequate police protection and improper police action: police failed to maintain order notwithstanding United States assistance, and instead of dispersing civilians fired on soldiers; and that, there being no evidence that any of his heirs depended upon deceased for support, no larger amount should be allowed than very minimum of reparation due by one State to another on account of responsibility for death of the latter's citizen. *Held* further that Panama not responsible for wounding of Day by missile just after outbreak of disturbance near military train to which he returned. Claim on behalf of Klimp withdrawn; claims on behalf of Richeson and Day disallowed; damages allowed on behalf of heirs of Langdon.

*Cross-references:* Annual Digest, 1933-1934, pp. 264-265; Comisión General de Reclamaciones entre Panamá y Estados Unidos de América. Reclamación de los Norteamericanos Charlie R. Richeson . . . etc.. Registro No. 7. (Publicación Oficial, Panamá, 1934.)

*Bibliography:* Hunt, Report, pp. 273-274, and "The United States-Panama General Claims Commission", Am. J. Int. Law, vol. 28 (1934), pp. 67, 69-70, 73; Borchard, "The United States-Panama Claims Arbitration", Am. J. Int. Law, vol. 29 (1935), p. 101; Friede, "*Die Entscheidungen . . .*", Z.a.o.R.u.V. Band V (1935), p. 460; Annual Digest, 1933-1934, p. 265.

In this case the United States of America have presented claims of, respectively, \$12,500 on behalf of the heirs of Maurice Langdon; \$6,000 on behalf of Charlie R. Richeson; \$500 on behalf of W. A. Day; \$1,000 on behalf of George Klimp. Interest on these amounts is also claimed. In the course of the proceedings the claim on behalf of George Klimp has been withdrawn because the claimant was not an American citizen at the material time. The claims arise out of the events which happened at Colón on April 2, 1915, and are based on an alleged failure to afford police protection, improper conduct of the police and failure to prosecute the offenders.

On the afternoon of April 2, 1915, a game of baseball was played at Colón between the team of the Fifth United States Infantry and the Cristóbal team. The latter was composed of enlisted men of the Coast Artillery Corps stationed at Cristóbal and of civilians, most of whom were employees of the Panama Canal or the Panama Railroad. The game was largely attended by local inhabitants and a special train had brought to Colón between 1,200 and 1,500 soldiers from Camp Otis and the Camp of Empire, both in the Canal Zone. The train was left standing opposite the baseball field. There were also at the game

and in town men from the Coast Artillery Corps at Cristóbal. During the game soldiers left the field and went into town.

The military authorities do not seem to have thought of the possibility of any disturbance occurring during the return of the soldiers to the train after the game or of trouble being caused by soldiers in town. A patrol (see for the status of these patrols the Commission's Opinion in the Baldwin case, Registry No. 9) was only ordered for the night. The authorities of Colón had been equally improvident: the police force on the baseball field consisted of four men under a sublieutenant; the number of spectators, including the soldiers, was about 3,000. The Governor of Colón had noticed, while going to attend the game, that soldiers in the town were drinking and that there was no patrol present. On the field he approached a captain of the Fifth Infantry informing him that he foresaw trouble and requesting that a patrol be provided. The captain thereupon arranged for a patrol of 12 men to be assembled on the field at the end of the game.

While the game was still going on, news reached the field that a soldier had been wounded by the police. This probably referred to the wounding of Richeson and Klimp. The general in command of the Canal Zone forces, who was a spectator at the game, thereupon gave orders that the infantrymen from Camp Otis and from the Camp of Empire should be made to go to the awaiting train. He also ordered the turning out of a provost guard from the Coast Artillery Corps. The provost guard was armed with rifles. There reigned great excitement amongst the soldiers, who nevertheless, although not all of them very willingly, were moving towards the train in obedience to the orders of officers and non-commissioned officers.

Meanwhile, further trouble had arisen when the spectators left the baseball field after the end of the game. It was caused by civilians who interfered with the soldiers. Both sides threw stones and other missiles. The police that came from the field became involved in this fight on the side of the civilians. The sublieutenant of police and one or two of his squad fired their revolvers at the soldiers. The sublieutenant wounded a soldier, who is not a claimant because he lacked American citizenship at the time he received his injury.

The captain in charge of the provost guard had met in the town the Governor, accompanied by the captain of police and a group of policemen. After some explanations had been given it was agreed that the guard should keep the soldiers moving towards the train, and that the police should deal with the civilians. Both the soldiers and the police then approached the place where stones were being showered. The movements of the police thereafter and until the end of the fighting are unknown. A squad of the provost guard, under Corporal Langdon, had advanced close to the street where the train was, when they were fired at from right and left by policemen from street corners. There is also a statement that shots were fired by a civilian in the same way. Corporal Langdon was killed by one of these shots. His own rifle had not been discharged. Men of his patrol had answered the shots of the police, but missed. Shortly afterwards an American lieutenant, accompanied by a soldier who, it was then thought, could identify the policeman who had killed Corporal Langdon, came upon the sublieutenant of police who had been firing at the train. The soldier identified him and the lieutenant requested the captain of the police to arrest him, which he did.

The investigations started after the events were similar in character to those conducted after the disturbances which took place in Panama City on February 14 of the same year (see the Opinion of this Commission in the Baldwin case, Registry No. 9) and the Panaman investigation was similarlyun satisfactory. Different soldiers had stated that they could identify policemen who had fired,

if confronted with them at an early date. The confrontation, when it finally took place, because insisted upon by the American Legation, was doomed to be futile, owing to the lapse of time. The sublieutenant of police was tried for the killing of Corporal Langdon, but his acquittal was a foregone conclusion, as it had long been discovered that the soldier, who identified him on the day of the events, did not identify him as the man who fired the shot that killed Langdon, but as the man who wounded the soldier on the train. Moreover it had also been discovered that Langdon could not have been killed by a shot coming from the direction where the sublieutenant was located. The sublieutenant was not, however, prosecuted for the wounding of the soldier on the train.

In the opinion of the Commission no claim lies against the Republic of Panama for the wounding of Richeson. The policemen were having difficulties with a group of soldiers. The Commission disbelieves the various versions of the soldiers putting the blame on the police. On the other hand the evidence of the soldiers themselves shows that they interfered with the action of the policemen and put the latter in the position of having to defend themselves. Richeson came up very close to the group, but turned and ran when he saw the police draw their revolvers. In the absence of convincing evidence, that the police at that moment overstepped the limit of permissible measures for asserting their authority, the Commission must consider Richeson's case as that of an onlooker, incidentally wounded in the course of the efforts of the police to restore order.

The Commission finds that the death of Corporal Langdon must be attributed to inadequate police protection and improper police action. Whether Langdon was killed by one of the policemen who had been on the baseball field or by some other policeman or by a civilian, the responsibility rests on the Government of Panama whose police failed to maintain order at the scene of the disturbance, although their task was alleviated by the measures taken by the American military authorities, and whose police aggravated the situation by firing on the soldiers instead of dispersing the civilians against whom they could no doubt have asserted their authority if they had used, or even threatened to use, their arms against them.

Claim has been made on behalf of the heirs of Maurice Langdon, being a brother, a half-brother and the descendants of three deceased sisters. There is no evidence that any of them depended upon the deceased for their support. The measure usually adopted in fixing the amount of an award in favor of relations not being the parents of children of the deceased is therefore lacking in this case. The Commission feels that under the circumstances its award should not be for a larger amount than what it considers to express the very minimum of the reparation due by one State to another on account of its responsibility for the death of the latter's citizen.

The claimant William A. Day, together with other non-commissioned officers, had left the baseball field before the end of the game, to carry out the order that all infantrymen in town should be instructed to return to the train. After having discharged this duty, he was himself going to the train when he was struck down by a missile. Some soldiers helped him to the train. His evidence states that the police began to fire at the train shortly after he had gained it; that there was no firing when he saw the police before he was wounded. It is clear from his testimony that he was wounded when the disturbance near the train had just broken out.

Even assuming that the missile that wounded him was thrown by a civilian, of which there is no evidence, the Commission does not find that there is a responsibility upon the Government of Panama for the wounding of the claimant.

*Decision*

The claims presented on behalf of Charlie R. Richeson and W. A. Day are disallowed.

The Republic of Panama is obligated to pay to the United States of America, on behalf of the heirs of Maurice Langdon, the sum of \$2,000, without interest.

CECELIA DEXTER BALDWIN, ADMINISTRATRIX OF THE ESTATE  
OF HARRY D. BALDWIN, AND OTHERS (UNITED STATES) *v.*  
PANAMA

(June 26, 1933. Pages 330-339.)

PROTECTION OF ALIENS: FOREIGN TROOPS. MOB VIOLENCE. ILL TREATMENT BY POLICE, INADEQUATE POLICE PROTECTION. MILITARY PATROLS.—TERRITORIAL SOVEREIGN: RESPONSIBILITY FOR MAINTENANCE OF ORDER. Disturbances between United States soldiers and Panamanian police and civilians on February 14, 1915, at Colón, resulting in wounding of United States military personnel. Disarming of soldiers by customary patrol, requested by Panama and provided by United States military authorities, and efforts to separate them from police and civilians. Failure of police to disarm civilians and to contain them likewise. Retreat of most of soldiers to Canal Zone. Illtreatment of soldiers left behind by police and civilians. *Held* that insufficient police protection and improper police action proved: improper conduct of some soldiers can not justify police, sufficient in numbers to master situation quickly, in attacking, or allowing others to attack, soldiers generally. *Held* also that patrol performed task efficiently and that, therefore, Commission has not to consider whether rights of claimants would have been impaired if patrol had been insufficient; moreover, responsibility for maintenance of order rests upon territorial sovereign. Damages allowed.

*Cross-reference:* Comisión General de Reclamaciones entre Panamá y Estados Unidos de América, Reclamación de los Norteamericanos Cecilia Dexter Baldwin . . . etc., Registro No. 9. (Publicación Oficial, Panamá, 1934.)

*Bibliography:* Hunt, Report, pp. 339-340, and "The United States-Panama General Claims Commission", *Am. J. Int. Law.* vol. 28 (1934), pp. 67, 73; Borchard, "The United States-Panama Claims Arbitration", *Am. J. Int. Law.* vol. 29 (1935), p. 101; Friede, "*Die Entscheidungen . . .*", *Z.a.o.R.u.V.*, Band V (1935), p. 460.

In this case the United States of America have presented claims of, respectively, \$1,250, on behalf of Cecelia Dexter Baldwin, administratrix of the estate of Harry D. Baldwin, also known as Henry G. Baldwin, deceased; \$2,500, on behalf of Joseph Balun \$700, on behalf of Morris I. Berkowitz; \$2,500, on behalf of Everett E. Bowden; \$1,250, on behalf of Webster T. Brandon; \$4,500, on behalf of Joseph A. Donnelly; \$3,750, on behalf of Henry C. Foster; \$1,250, on behalf of Charles Jagatich; \$700, on behalf of Erich Jeschke; \$10,000, on behalf of Augustine A. Kane; \$1,250, on behalf of Nathan H. Kelly; \$1,000, on behalf of Frank Mosouskie; \$2,000, on behalf of Walter Organ; \$2,000, on behalf of Oliver G. Reber; \$1,350, on behalf of Charles B. Reppert, administrator of the estate of Morris C. Stettler, deceased;

\$2,000, on behalf of George Simon; \$1,000, on behalf of Joseph Steinbrenner; \$1,000, on behalf of Lowndes O. Webb. Interest on these amounts is also claimed.

The claims arise out of events which took place during the carnival in the city of Panama in February 1915. In the course of February 13 a number of soldiers from the American forces in the Canal Zone had come on leave to Panama to witness the celebrations. The American military authorities had provided the customary patrol. Such patrols were not only allowed but welcomed by the Panaman Government, as being effective to prevent disturbances arising out of conflicts between soldiers and civilians or between soldiers and the police. The Government of Panama had insisted on having these patrols, asserting that it disclaimed responsibility for such conflicts if patrols were not provided. The American Government, on the other hand, while desirous to cooperate with the Panaman Government, had maintained that whether such patrols were provided or not, the Panaman Government would be responsible for the maintenance of order and for adequate police protection. It appears from the Banks case (Registry Nr. 4) that as late as 1921 the Panaman and the American authorities had somewhat different conceptions of the exact scope of the duties of the patrols; this might become a source of difficulties in the carrying out of the arrangement, but did not affect the situation in the present case. It is however clear that the most perfect delimitation of the task of the patrols must fail to remove the difficulties inherent in the separate exercise of authority by the police over the civilians and by the patrols over the soldiers, when conflicts arise in an intermingled crowd of civilians and soldiers, unless both the police force and the patrols be adequate and unless each of them, under all circumstances, show by their action that they are determined to have not only their own authority but also that of the other respected. It has to be noted that, whether it was customary for the members of the patrol to carry firearms or not, the allegation that they did so on this occasion is unfounded.

The events happened in the early morning of February 14, 1915, in the so-called Cocoa Grove district of the city. Before midnight there had been the excitement of the celebration, but no unusual incidents. Shortly after midnight some minor disturbance occurred, which rapidly spread and developed into a general fight. The main body of the fighting crowd divided into two groups facing each other, the one consisting almost entirely of American soldiers, the other composed of local civilians and the Panaman police. The lieutenant in command of the patrol dealt with the situation by directing his efforts towards separating the soldiers from their opponents and preventing them from attacking the latter. The police should have seconded his efforts by restraining the civilians; they did not do so but continued to consider these as their allies against the soldiers. Both sides threw stones and other missiles and used firearms. From the side where the police were revolver shots were fired, the arms used by the soldiers were three rifles taken from a shooting gallery which they had broken into for the purpose of arming themselves against the revolver fire from the other side. The lieutenant disarmed the soldiers after they had fired a few shots. He had some contact with the police and made them see that the obvious course of action under the circumstances was for them to keep the civilians under control and for him to contain the soldiers. He also left the rifles in the care of a policeman. The police actually contained the civilians for some time, while the lieutenant forced back the soldiers by means of a cordon formed by those of his patrol who were there and by non-commissioned officers present on the spot whom he ordered to assist him. Those forming the cordon had linked hands and were facing the soldiers; they had their backs turned to the side where the civilians and the police were.

While they were thus placed the throwing of stones and other missiles and the shooting from that side continued. After a while the police no longer kept back the civilians, the mob advanced and the revolver fire increased; heavy firearms were now also used. The lieutenant then ordered a quick retreat to the Canal Zone. During the whole of that retreat and until the Canal Zone was reached the soldiers were under rifle fire.

Not all the soldiers had, however, left the city. When the disorder broke out, the proprietors of the saloons had closed their establishments and those soldiers who were within remained there, waiting for the end of the disturbance. There were also soldiers in other parts of the city. The police accompanied by the civilians broke into the saloons in order to conduct the soldiers found there to the police station. In some cases the soldiers were maltreated by the police and the accompanying civilians, in other cases they were, upon entering the street, left defenseless in the hands of the mob, or they were attacked while being escorted to the police station. Soldiers coming to Cocoa Grove unaware of the disturbances which had happened there, were also attacked and even in places distant from that district soldiers were assaulted.

In the course of the events described above a Nicaraguan civilian was killed by a bullet; a number of American soldiers in addition to those claiming in these proceedings, a number of Panaman policemen and some civilians, amongst them the claimant Baldwin, received injuries, and damage to property was done.

Immediately after the events both the American authorities of the Canal Zone and the Panaman judiciary started investigations and each of them allowed the other to be represented at the taking of evidence. The American authorities took the evidence of a great number of soldiers and some civilians. The Panaman judge examined a number of policemen and some civilians and also received the evidence of the soldiers. The latter's evidence was taken in this way: a Spanish translation of their testimony previously rendered before the Canal Zone authorities was translated back into English to them, whereafter they stated in how far they confirmed their statements as translated to them or wished them amended and they further answered questions which the judge put them. The American investigation tended to find out the circumstances under which the American soldiers and one American civilian received injuries. The Panaman investigation was the ordinary investigation in criminal matters, having for its object to discover criminal acts and the persons responsible therefor under the law of Panama; as it did not lead to the discovery of the person who was responsible for the death of the Nicaraguan civilian, or to the establishing of responsibility for the damage done to property, and as the policeman, who had been seen firing from the street into a closed saloon and against whom criminal proceedings were ordered on December 18, 1916, for the wounding of a female servant of that establishment, died on January 4, 1917, both the criminal proceedings against the policeman and the proceedings as to the other criminal acts were terminated in February 1917.

In the Panaman investigation 18 members of the police force were heard. Included in this number are a lieutenant and a policeman who were at the Central Police Station and the sublieutenant in command and three policemen of the Cocoa Grove station who did not leave the station. Of the remaining 12 only two make mention of efforts of the police to contain the civilians. Another, a mounted lieutenant, saw the soldiers retiring to the Canal Zone and declared that from their direction were coming shots produced by arms of large caliber. The police evidence contains no other reference to what happened after the opposing groups first faced each other. The evidence of the captains of police, whose names are mentioned in different statements, both of

soldiers and policemen, has not been taken. No attempt was made to find out the persons responsible for the injuries suffered by the American civilian Baldwin, since, instead of taking the evidence of the person, who Baldwin had been told was Captain Arias, it was thought sufficient to state that there was at the time no Captain Arias in Panama City.

The Government of the United States has submitted to this Commission claims on behalf of one civilian and 17 soldiers. In the course of the proceedings five claims (those of Joseph Balun Morris I. Berkowitz, Charles Jagatich, Erich Jeschke and Frank Mosouskie) were withdrawn because at the time the claimants received their injuries they had not yet become naturalized American citizens.

The claims are based on an alleged failure of the police to afford protection, improper conduct of the police and failure to prosecute the offenders.

The Commission is of opinion that insufficient police protection and improper police action have been proved. The offending police officers have not been prosecuted. There is no doubt that policemen were roughly handled by soldiers, but the improper conduct of some soldiers can not justify the police in attacking, or allowing others to attack, soldiers generally. There were in Panama City and in the neighbourhood of Cocoa Grove district sufficient police to have mastered the whole situation very quickly, if they had adopted the right attitude. They failed to restore order because they did not assert their authority against the civilians, but turned against the soldiers.

At the hearing the Panaman Agent argued that the patrol, which consisted of a lieutenant with nine men, ought to have been stronger, alleging that it did not at all times keep all the soldiers under control and citing in support of that allegation the statement of the lieutenant that, when the cordon was first formed, soldiers repeatedly broke through (the lieutenant stated however also that he brought them back within the cordon) and the testimony of a soldier that after having arrived at the Canal Zone border he and three others went back to Panama. The Commission is of opinion that the patrol, assisted by the non-commissioned officers, whom the lieutenant had the right to commandeer for such assistance, performed their task efficiently. Consequently the Commission does not have to consider whether the rights of the claimants in these proceedings would have been impaired if the patrol had been insufficient. In the opinion of the Commission responsibility for the maintenance of order rests upon the territorial sovereign.

The Commission finds that all the claimants whose claims have been maintained, with the exception of Joseph Steinbrenner, are entitled to an award and will now deal with the individual claims.

Cecelia D. Baldwin, as administratrix of the estate of Harry D. Baldwin, also known as Henry G. Baldwin, deceased, is awarded the sum of \$1,000. Baldwin was beaten by the police while tending to Stettler's wounds in the Panama Athletic Club, and was later beaten by the mob while in the custody of the police. In the first attack, he was punched in the eye by a person alleged to have been Captain Arias, and there is some evidence that this permanently affected his eyesight.

Everett Ezra Bowden is awarded the sum of \$1,250. He was watching a moving picture in the Panama Athletic Club, went outside, was locked out, and was clubbed and kicked in the street by several policemen. He suffered scalp, elbow, and knee injuries and was treated at the hospital and [was] sick in quarters for over a month. There is evidence of a permanent leg and hip injury, but the connection between that and the injuries received on this occasion has not been fully established.

Webster T. Brandon is awarded the sum of \$250. He formed a part of the cordon on Pedro [de] Obarrio Street, and while there was shot through the fleshy part of the hip, from behind. The wound was not serious.

Joseph A. Donnelly is awarded the sum of \$2,500. He was severely beaten, both by the police and by the crowd. He was first clubbed by two policemen near the Panama Athletic Club, then was attacked by a crowd of negroes when he ran away. He hid in a house, where he was found by a policeman who beat him; Donnelly attempted to resist, but desisted when he was clubbed. While in custody, he was again beaten by the crowd, this time into unconsciousness, in spite of the efforts of a mounted policeman to assist him. But Donnelly had been drinking, and his injuries may have resulted in part from his own belligerence. Moreover, though there is evidence of permanent injury to his right ear, the permanent injury to the sight of his right eye, alleged to have resulted, is controverted by his own medical testimony of subsequent eyesight tests.

Henry Foster is awarded the sum of \$500. He was in a carriage approaching the Cocoa Grove, which was stopped by the crowd. A policeman arrested him at pistol point, and on the way to the station the crowd struck at him, shots were fired, and Foster started to run. While running he was shot in the hip from behind, fell and was beaten by the crowd. Evidence of permanent injury is slight.

Augustine A. Kane is awarded the sum of \$5,000. He was shot in the back apparently at an early stage of the riot, fell unconscious, and while in that condition was terribly kicked and beaten. He is permanently disfigured, and his eyesight permanently impaired. He was the most seriously injured of the claimants, and though he may have been shot before the police arrived on the scene, his condition corroborates a statement in the evidence that he was dragged about the street at a time when the police should have been master of the situation.

Nathan H. Kelly is awarded the sum of \$1,250. He ran out of the Panama Athletic Club when the police forced the doors and was beaten unconscious in the street. He received a severe cut in the forehead, and a bayonet wound in the chest. There is no evidence of permanent disability.

Walter Organ is awarded the sum of \$500. He was on the way to the Canal Zone and became included in the group of the retreating soldiers. He was hit on the back of the head, but knows neither who nor what hit him. He was knocked unconscious and came to in the hospital. From the contemporaneous medical report, he must have been severely beaten while unconscious. He was permanently disfigured, but suffered no permanent disability. The award is reduced in amount because of the vagueness of the record as to police activities at the time and in the region of his injuries.

Oliver G. Reber is awarded the sum of \$250. He was in the carriage with Foster, approaching Cocoa Grove. He was pulled from the carriage, fell, and received a long, shallow cut in the back. The exact cause of the injury is not known, but it was a policeman who stopped the carriage and ordered the occupants to put up their hands. Reber was in custody when injured and entitled to protection.

George Simon is awarded the sum of \$1,250. He hid behind the bar in the Panama Athletic Club when the police broke in. One policeman hit him with a rifle and another stuck him with a bayonet, in order to get him out. He went into the street, was chased, was grazed by a bullet fired by a mounted policeman, fell, and was beaten unconscious by the mob. Though he was badly beaten, his injuries are not proven to have caused any serious permanent disability.

The claim of Joseph Steinbrenner is disallowed. His evidence is ambiguous and unconvincing, and seems to indicate that his injuries arose out of a fight with the police in which he was the aggressor. Though he was knocked unconscious, his injuries were not serious, and seem to have all been inflicted in that encounter for which Panama cannot be held accountable.

Charles B. Reppert, administrator of the estate of Morris C. Stettler, deceased, is awarded the sum of \$250. Stettler's injury, a bayonet wound in the chest, was received in a fight with the police in which, by his own statement, he was the aggressor, and no award is rendered therefor for that reason. But he was very roughly carried to the police station in a semiconscious condition, after being taken from the Panama Athletic Club where his wound was being tended, and the award is for this rough treatment of a wounded man.

Lowndes O. Webb is awarded the sum of \$500. He was in a carriage outside of Cocoa Grove, with several other soldiers. The carriage was attacked by a crowd and the occupants thrown out. Webb ran away, and while running was shot in the back of the leg. Though he saw no police in the crowd, his companions did, and one of them saw police in the crowd shooting. Webb incurred no permanent disability.

The Commission decides that the Republic of Panama is obligated to pay to the United States of America, on behalf of the claimants herein, the sum of \$14,500, without interest. This sum is apportioned in the manner indicated above, and all awards are without interest.

---

JOHN W. BROWNE (UNITED STATES) *v.* PANAMA

(June 26, 1933. Pages 530-531.)

---

JURISDICTION: CLAIMS ARISEN AFTER SIGNATURE OF CLAIMS CONVENTION.—INTERPRETATION OF TREATIES. *Held* that Commission has jurisdiction to entertain claims arisen after signature of Claims Convention. July 28, 1926: reference to Walter A. Noyes award, p. 308 *supra*.

NEGLIGENCE.—EVIDENCE: PROOF OF DAMAGE.—CONTRACT, INTERPRETATION: REASONABLE CONSTRUCTION.—INTERPRETATION OF MUNICIPAL LAW. Purchase by Panama in 1929 of right of way. Improvement by Panama of existing road. Partial washout of road in October, 1930, whereafter general reconstruction. *Held* that no adequate evidence brought of negligent construction, nor of damage caused during reconstruction as distinguished from damage by washout. *Held* also that certain arrangement between claimant and Panama would have been so unreasonable that, in the absence of contract which has not been put in evidence, it is difficult to believe that parties did agree upon it; additional argument from Panamanian law.

*Cross-reference:* Comisión General de Reclamaciones entre Panamá y Estados Unidos de América, Reclamación del Norteamericano John W. Browne, Registro No. 14. (Publicación Oficial, Panamá, 1934.)

*Bibliography:* Hunt, Report, p. 532; Borchard, "The United States-Panama Claims Arbitration", *Am. J. Int. Law*, vol. 29 (1935), p. 103; Friede, "*Die Entscheidungen . . .*", *Z.a.ö.R.u.V.*, Band V (1935), pp. 453, 466.

The facts on which this claim is based happened between the signing and the exchange of ratifications of the convention of July 28, 1926. On the grounds stated in the case of Walter A. Noyes (Registry No. 5) the Commission holds that it has jurisdiction to decide upon the claim.

The Government of Panama in 1929 purchased a right of way through a coffee *finca* belonging to John W. Browne and George A. Browne and improved a road already existing along this right of way. In October, 1930, part of the road was washed out by heavy rains and thereafter there was a general repair reconstruction of the road.

Claim is made for \$500. The first ground on which the claim is based is that the washout above referred to was caused by a negligent construction of the road and resulted in damage to claimants' property. The Commission finds no adequate evidence that the washout was the result of negligent construction. The terrain was of that rough and broken type where washouts are difficult to guard against except by a kind of construction which cannot be expected in connection with small country roads.

The second ground on which the claim is based is that in making the general reconstruction of the road after the washout, the workmen rolled rocks onto the property of the claimants. There is no satisfactory evidence as to the damage caused by this action as distinguished from the damage caused by the washout.

The third ground for the claim is that the right of way purchased by the Government was a strip 8 feet in width along its entire length and that in the reconstruction of the road in some places the final road exceeded 8 feet. The contract under which the alleged 8-foot strip was purchased by the Government has not been put in evidence. The Commission is left in doubt whether the right acquired by the Government was to build a road the usable portion of which was to be 8 feet wide or whether the Government's right was to build a road no portion of which, including cuts and fills, should ever exceed 8 feet. The latter arrangement would have been so unreasonable that it is difficult to believe that it occurred, without clear evidence. If the Government was entitled, under its contract, to a usable road 8 feet wide plus necessary cuts and fills, then there is no evidence in the record that the lawful width was exceeded. Moreover, the lands on which the claimants' *finca* was situated were originally *indultado* lands, the grant whereof by the Government to the claimants' predecessor in title reserved the Government's rights for the construction of roads as set forth in art. 102 of law 20 of 1913. Among the rights reserved in this article was that of taking without compensation the right of way necessary for the construction of *caminos de herradura*. There is some question as to whether this phrase includes ordinary country wagon roads or only trails for horses. At any rate, it is clear that the right of the Government under this article extends to whatever property is required for cuts, fills and drains, and it is not shown that the actual road in question after reconstruction exceeded in width a reasonable allowance for a *camino de herradura* under art. 102, with reasonable extensions for cuts and fills.

The Commission decides that the claim must be disallowed.

---

LETTIE CHARLOTTE DENHAM AND FRANK PARLIN DENHAM  
(UNITED STATES) *v.* PANAMA

(June 27, 1933. Pages 516-521.)

---

PROCEDURE: COUNTERACTION.—DENIAL OF JUSTICE: VIOLATION OF LAW, GOOD FAITH.—INTERPRETATION OF MUNICIPAL LAW. Dissolution of conjugal partnership between first claimant and James Fleming Denham by agreement set forth in public instrument executed before Panamanian notary on Novem-

ber 17, 1917, first claimant declaring to be satisfied with half of ganancial property, and waiving all subsequent participation therein. Will made by J. F. Denham before Panamanian notary on March 4, 1918, designating *inter alia* first claimant, her son (second claimant), and five illegitimate children as heirs. Death of J. F. Denham on March 5, 1918. Petition by wife, claiming right to half of estate, to have settlement of ganancial agreement handled in probate proceedings disallowed by Second Circuit Judge of Chiriquí. Recognition by concubine, mother of illegitimate children, on April 11, 1918, in public instrument executed before Panamanian notary, of, *inter alia*, first claimant's half share in ganancial property, first claimant waiving participation made in husband's will. Approval of this agreement on August 13, 1918, by judge who ordered that proper entries be made in public registry. Action brought by concubine before First Circuit Judge of Chiriquí to annul agreement of April 11, 1918, and cancel entries. Judgment of June 27, 1921: agreement declared null, but entries left to stand. Judgment confirmed by Supreme Court. New action brought by concubine to annul order of August 13, 1918, and cancel entries. Counteraction by first claimant to annul agreement of November 17, 1917, and husband's will of March 4, 1918. Judgment of September 12, 1921: counteraction dismissed, order of August 13, 1918, declared null, entries cancelled, new entries ordered in the name of claimants and illegitimate children in equal shares. Judgment confirmed by Supreme Court. *Held* that no denial of justice committed: no manifest violation of law, no manifest bad faith in application of law or weighing evidence.

*Cross-reference:* Comisión General de Reclamaciones entre Panamá y Estados Unidos de América, Reclamación de los Norteamericanos Lettie Charlotte Denham y Frank Parlin Denham, Registro No. 13. (Publicación Oficial, Panamá, 1934.)

*Bibliography:* Hunt, Report, p. 521, and "The United States-Panama General Claims Commission", Am. J. Int. Law, vol. 28 (1934), p. 65; Friede, "*Die Entscheidungen . . .*". Z.a.o.R.u.V., Band V (1935), p. 466.

The United States has presented this claim on behalf of Lettie Charlotte Denham and Frank Parlin Denham for the sum of \$34,104.10 and interest, for loss and damage which it is alleged the claimants sustained as a result of acts of the authorities of Panama in connection with the estate of James Fleming Denham, the deceased husband and father, respectively, of the claimants.

The citizenship of the claimants is duly established.

In the year 1898 James Fleming Denham left his wife and son in the United States of America and took up his residence in El Boquete, Province of Chiriquí, Republic of Panama. The following year, 1899, his family joined him.

Some time later the child fell seriously ill, wherefore Mrs. Denham decided to return with him to the United States. She subsequently resided alternately with her son in California and with her husband in El Boquete. Along about that time Denham entered into illicit relationship with a native woman named Andrea González, by whom he had five children.

This brought about an estrangement between the husband and wife and for some time their relationship was interrupted. In November, 1917, they decided, by mutual consent and according to the laws in force in Panama, to dissolve the conjugal partnership existing as a result of their marriage. The terms and conditions of the agreement are set forth in public instrument no. 1435 executed before notary no. 1 of the Circuit of Panama. The parties thereto declared their conjugal partnership dissolved and Mrs. Denham declared that she had received to her entire satisfaction the sum of B/11,000.00 in payment of half of her

ganancial interest, as follows: B/5,000.00 which she had already received; B/1,000.00 at the time of signing the instrument; and a promissory note payable in San Francisco, California, on November 15, 1919.

The husband, Denham, took over all the assets and liabilities of the partnership to the exclusion of Mrs. Denham, who waived all subsequent participation in the ganancial interests.

The arrangements accessory to this agreement, such as a proposed divorce, were of a private character and are shown in the correspondence exchanged between the spouses on November 20, 1917. In the letters to which reference is made Mrs. Denham expressly ratified the pact made by the public instrument of November 17 of that year and set forth, in part, the following:

"I also promise and agree that, in no case nor under any circumstances will I ask you to contribute to my support, either through legal channels or privately, and I accept the sum stipulated here, \$11,000.00 as my full and complete share of my ganancial property."

Not long afterward Denham returned to El Boquete and his wife proceeded to the United States. On March 3, 1918, at 8 o'clock in the evening Denham was fatally wounded by one Segundo González in the town of Bajo Boquete, Province of Chiriquí. That same night Denham made an open will which it would not have been possible to enforce because it lacked legal requisites.

On the following day, March 4, the wounded man was taken to David for the purpose of sending him, if possible, to the city of Panama.

In the afternoon of the same day Denham made a new will before the notary of the Circuit of Chiriquí and witnesses, as required by law. This will is of record in instrument no. 198 and therein the wife and legitimate child and the five illegitimate children were designated heirs in equal shares, and Andrea González and Manuel Guerra legatees.

Denham died on the morning of March 5 aboard the steamship *David* while *en route* to the city of Panama.

The Second Circuit Judge of Chiriquí, by order of April 6, 1918, opened the testament of James Denham to probate and declared as heirs with equal participation Lettie Charlotte Denham, Frank Parlin Denham, Ana, Virgilia, Roberto, Jaime, and Ricardo González, the last five being children of Andrea González.

Considering that this distribution prejudiced her interests, and believing she had a right to half of the estate, Mrs. Denham made an effort to have the settlement of the ganancial agreement growing out of the conjugal partnership handled in the probate proceedings. The petition to do so was disallowed by the judge, as such a division could only be made separately by way of an ordinary action.

To avoid litigation, Mrs. Denham, in her own right and on behalf of her son, Frank Parlin Denham, as party of one part, and Andrea González, as mother and on behalf of her five minor children, party of the other part, on April 11, 1918, signed instrument no. 335 before the notary of the Circuit of Chiriquí, recognizing Mrs. Denham's half share in the property left by her deceased husband, the other half to be distributed equally among Frank Parlin Denham and the five children of Andrea González. Mrs. Denham waived the participation made in her husband's will; and from the date of the instrument of contract, assumed the administration of the estate until an opportunity should present itself to sell the properties *en masse* or separately. This agreement was, on August 13, 1918, approved by the judge who ordered that the proper entries be made in the public registry.

Believing the rights of her children to be prejudiced by the aforesaid settlement, Andrea González, through her attorney, filed an ordinary civil suit to

annul the contract contained in instrument no. 335 and cancel the entries made in the public registry as a result of the agreement.

The First Circuit Judge of Chiriquí rendered a judgment on June 27, 1921, declaring the agreement of 1918 null, but leaving the entries in the public registry to stand, holding that those entries had been made, not as a result of the agreement, but in obedience to the order of the Second Circuit Judge of August 13, 1918. The Supreme Court of Justice confirmed *in toto* the judgment of the judge of Chiriquí.

The action had as its legal basis the fact that Andrea González had concluded the contract on behalf of her minor children without having obtained the necessary judicial authorization. The claimant has alleged that this omission was remedied by the subsequent approval given by the judge handling the probate proceedings, but the Commission finds such an argument to be unfounded.

On November 7, 1921, Andrea González filed a new action to annul the order of August 13, 1918, rendered in the probate proceedings of the deceased James Fleming Denham's estate, and to cancel the entries made in the property registry as a result of those orders.

The suit was corrected by the plaintiff and when notice was served upon the defendant she answered it and at the same time filed a counteraction to have instrument 1435, and the dissolution of the conjugal partnership incorporated therein, declared null and void; and likewise to have the will, which James Fleming Denham executed before the notary of Chiriquí, instrument no. 198, declared null and void.

To support her action, she alleged, in short, that in the case of the so-called matrimonial capitulations, the inventory of the property belonging to the conjugal partnership as well as other requisites exacted by the Civil Code, had been omitted.

As concerns the will, it was equally alleged that certain essential requisites were omitted and also that the testator could not have possessed the necessary mental capacity for expressing his last will, in view of his serious condition. This litigation gave rise to extended judicial debate, to support which the parties adduced all the evidence they believed pertinent and advanced their respective legal viewpoints. The Circuit Judge of Chiriquí terminated those suits by his judgment of September 12, 1921, in which he declared that the counteraction had not been sustained; that the court order of August 13, 1918, issued in the probate proceedings of the estate of James Fleming Denham, were [*was*] null; that all entries made in the public registry as a result of those orders were cancelled; and, lastly, that the real property registered therein in the name of James Fleming Denham be entered in the name of the heirs, Lettie Charlotte Denham, Frank Parlin Denham, Ana, Virgilia, Roberto, Jaime, and Ricardo González, natural children of Andrea González, to whom the property mentioned belongs in equal shares. This judgment was approved by the Supreme Court of Justice.

The claimants consider that these judgments constitute a denial of justice, as a result of which Panama has incurred international liability.

The Commission has studied carefully all the judicial records of which copies have been presented and does not find evidence of any manifest violation of law or of manifest bad faith in the application of law or in weighing the evidence filed by the parties.

#### *Decision*

The Commission decides that this claim should be disallowed.

---

MARIPOSA DEVELOPMENT COMPANY AND OTHERS (UNITED STATES) *v.* PANAMA*(June 27, 1933. Pages 573-578.)*

JURISDICTION, OBJECTION TO—: CLAIMS ARISEN AFTER EXCHANGE OF RATIFICATIONS OF CLAIMS CONVENTION.—INTERPRETATION OF TREATIES: RULE OF EFFECTIVENESS. *Held* that Commission has no jurisdiction to entertain claims arisen after October 3, 1931, date of exchange of ratifications of Claims Convention, July 28, 1926: rule requiring construction of treaty so that no part of it is without effect deemed not applicable in view of prolixity of language of article VII.

EXPROPRIATION: MOMENT AT WHICH CLAIM FOR—ARISES. PRACTICAL COMMON SENSE, *LOCUS PENITENTIE*.—PROCEDURE: RESERVATION OF MERITS. Enactment on December 27, 1928, of Panamanian law allowing private persons to sue to recover for State public properties in hands of other private persons who have not legitimately acquired them. Action brought on May 2 or 3, 1929, by Mr. Ramón Morales before First Circuit Judge of Colón to recover tract of land purchased by claimants. Judgment of October 3, 1930: validity of claimants' titles sustained. Judgment reversed by Supreme Court on October 20, 1931: tract declared national property, cancellation directed of claimants' titles. *Held* that ordinarily and in this case, claim for expropriation of property arises when possession of owner is interfered with (actual confiscation), and not when legislation is passed which makes later deprivation of possession possible: practical common sense, *locus penitentiae*; and that damage from which claim arose was not sustained prior to October 3, 1931, and, consequently, claim is not within Commission's jurisdiction (*see supra*). Reservation of merits.

*Cross-references:* Annual Digest, 1933-1934, pp. 255-257; Comisión General de Reclamaciones entre Panama y Estados Unidos de América, En representación de la Mariposa Development Company y otros, Registro No. 15. (Publicación Oficial, Panama, 1934.)

*Bibliography:* Hunt, Report, pp. 578-579, and "The United States-Panama General Claims Commission", *Am. J. Int. Law*, vol. 28 (1934), p. 73; Friede, "*Die Entscheidungen . . .*", *Z.a.ö.R.u.V.*, Band V (1935), pp. 454-456.

This is a claim on behalf of the Mariposa Development Company and others. It is based on the alleged unlawful expropriation of a tract of land.

The first question presented relates to the jurisdiction of the Commission. The original convention under which this Commission acts was signed on July 28, 1926. The ratifications thereof were exchanged on October 3, 1931. The Republic of Panama contends that the damage upon which the claim is based was not sustained by the claimants prior to the exchange of the ratifications and that the claim is, therefore, not within the jurisdiction of the Commission. The United States contends that the jurisdiction of the Commission is not limited to the consideration of claims for damages sustained prior to the exchange of ratifications but extends to claims for damages suffered at a later date. Article VII of the convention reads as follows:

"The High Contracting Parties agree to consider the decision of the Commission as final and conclusive upon each claim decided, and to give full effect to such decisions. They further agree to consider the result of the proceedings of the Commission as a full, perfect and final settlement of every such claim

upon either Government, for loss or damage sustained prior to the exchange of the ratifications of the present Convention. And they further agree that every such claim, whether or not filed and presented to the notice of, made, preferred or submitted to such Commission, shall from and after the conclusion of the proceedings of the Commission, be considered and treated as fully settled, barred, and thenceforth inadmissible, provided in the case of the claims filed with the Commission that such claims have been heard and decided.

“This provision shall not apply to the so-called Colon Fire Claims, which will be disposed of in the manner provided for in article I of this Convention.”

It is asserted by the United States that since the second and third sentences of this article provide that all claims for damages sustained prior to the exchange of ratifications are to be considered as disposed of and barred, whether presented to the Commission or not, the first sentence of article VII would be unnecessary and without effect if no claims could be considered arising from damages sustained after the exchange of ratifications and that the rules of interpretation require us to construe the treaty so that no part of it will be without effect. This rule is no stronger than the presumption that the draftsmen of the treaty would not repeat themselves or use unnecessary words. The presumption loses a good deal of its weight when applied to article VII in view of the prolixity of the second and third sentences. The Commission does not feel that it can extend its jurisdiction in order to prevent the first sentence in article VII being superfluous.

A supplementary convention modifying the original convention, was signed on December 17, 1932. Ratifications were exchanged on March 25, 1933. Article I of this supplementary convention provided, *inter alia*, as follows:

“The Commission shall be bound to hear, examine and decide, before July 1, 1933, all the claims filed on or before October 1, 1932.”

The United States argues that this provision, by empowering the Commission to deal with all claims filed before October 1, 1932, made it impossible to sustain the plea of no jurisdiction with regard to any of the claims so filed.

The Commission believes that the provision just quoted was merely intended to extend the dates for filing and deciding claims.

The Commission held in the Noyes case, Registry No. 5, that its jurisdiction extended to claims arising down to the date of the exchange of ratifications of the original convention. The Commission now holds that its jurisdiction does not extend to claims arising after that date, that is to say, after October 3, 1931.

We now turn to the question of when the Mariposa claim arose. In 1913 Herbert H. Howe, who is not a claimant herein, purchased a large tract of land, known as El Encanto, in the Republic of Panama, from an owner whose alleged chain of title went back to a conveyance from the King of Spain in 1689. The Mariposa Development Company and the other claimants herein derive their respective interests in this tract from Howe by subsequent purchase or subpurchase.

In 1917 a law was enacted by the legislature of Panama defining a type of public property known as *bienes ocultos*, or hidden properties. Law 62 of 1924 later provided that private persons might sue to recover such properties for the State, and gave the private suitors a 50 per cent interest in any recovery. This law required that before beginning suit the claimant should submit proofs to the Secretary of Hacienda and that the Attorney General of the Nation should be heard.

On June 20, 1928, one Ramón Morales petitioned the Secretary of Hacienda for permission to sue for the recovery of El Encanto as *bienes ocultos*. The Attorney

General being consulted recommended that the petition be denied on the ground that the title was registered and that the property could not therefore be considered *bienes ocultos*. This opinion of the Attorney General was rendered on October 27, 1928. On December 27, 1928, the legislature enacted law 100 of that year, which provided in part as follows:

“Art. 1. National properties in the hands of private persons who have not legitimately acquired them, and which for any reason cannot be considered hidden lands of the State, can be denounced as if they were, and the Nation can, therefore, exercise the action or actions necessary to return them to its domain following the procedure established for hidden properties in Law 62 of 1924.”

Relying apparently on this provision, the Secretary of Hacienda and Morales, without further submission to the Attorney General, entered into a contract empowering Morales to sue for the recovery of El Encanto. Pursuant to this contract suit was begun by Morales on May 2 or 3, 1929. The Mariposa Company and the other defendants answered. The case was tried before the First Circuit Judge of Colón, who, on October 3, 1930, rendered a decision in the defendants' favor and sustained the validity of the defendants' title[s].

The decision was promptly appealed. On January 13, 1931, the Attorney General of the Nation rendered an opinion recommending that the decision of the Circuit Judge be affirmed. On October 20, 1931, the Supreme Court handed down a decision reversing the lower court, holding that El Encanto was national property and directing the cancellation of the titles registered in the names of the defendants. It is to be noted that although the decision of the lower court came a year before October 3, 1931, the final decision of the Supreme Court was rendered after that date. Articles 537 and 538 of the Judicial Code, specifying the period within which decisions must be rendered by the Supreme Court, were not complied with; if they had been obeyed, the decision would have been rendered long before the date of the exchange of ratifications of the original convention.

The United States contends that the damage upon which this claim is based <sup>1</sup> was sustained by the claimants when the legislature passed the acts and the Government entered into the contract, which made Morales' suit possible, and when that suit was started, and that the opinion of the Supreme Court must be taken as merely the culminating step in a plan for expropriation, the execution of which was begun long before October, 1931.

It is to be noted that the decision of the lower court was favorable to the Mariposa Company. It was not until the rendition of the Supreme Court's opinion that the possession of the Mariposa Development Company was interfered with and its titles canceled. The Commission does not assert that legislation might not be passed of such a character that its mere enactment would destroy the marketability of private property, render it valueless and give rise forthwith to an international claim, but it is the opinion of the Commission that ordinarily, and in this case, a claim for the expropriation of property must be held to have arisen when the possession of the owner is interfered with and not when the legislation is passed which makes the later deprivation of possession possible.

<sup>2</sup> The contention of the United States was that the claims “arose”, within the terms of the convention, when the allegedly confiscatory legislation was enacted and with the Government's consent, applied to claimants' rights by a suit through a government agent to cancel his titles—that the question of the date of the *damages* was not an essential consideration on the question of jurisdiction.—AMERICAN AGENT.

Practical common sense indicates that the mere passage of an act under which private property may later be expropriated without compensation by judicial or executive action should not at once create an international claim on behalf of every alien property holder in the country. There should be a *locus penitentiae* for diplomatic representation and executive forbearance, and claims should arise only when actual confiscation follows.

The Commission holds that the damage from which the Mariposa claim arose<sup>1</sup> was not sustained prior to October 3, 1931, and that the claim is not within its jurisdiction.

The Commission is not concerned with the merits of the claim. The preceding recitation of facts is made solely with a view to determining the date as of which the damage on which the claim is based was sustained. Nothing in the recitation is to be taken as indicating a belief as to the validity or invalidity of the claim, the legality or illegality of any of the facts recited, or as binding the United States or the Republic of Panama in respect to the facts recited in any subsequent proceeding.

---

JOSÉ MARÍA VÁSQUEZ DÍAZ, ASSIGNEE OF PABLO ELÍAS  
VELÁSQUEZ (PANAMA) *v.* UNITED STATES

(June 27, 1933. Pages 651-652.)

---

**JURISDICTION: CLAIMS ARISEN AFTER SIGNATURE OF CLAIMS CONVENTION.—**INTERPRETATION OF TREATIES. *Held* that Commission has jurisdiction to entertain claims arisen after signature of Claims Convention, July 28, 1926: reference to Walter A. Noyes award, p. 308 *supra*.

**RESPONSIBILITY FOR ACTS ASHORE OF SAILORS.—EVIDENCE: TESTIMONY OF WITNESSES BEFORE MUNICIPAL COURT.** Pecuniary loss caused in February, 1931, by sailors of United States navy who during maneuvers landed on island of Casaya. Evidence: testimony of three witnesses before District Judge of Balboa. *Held* that United States liable under international law. Damages allowed.

*Cross-references:* Annual Digest, 1933-1934, p. 258; Comisión General de Reclamaciones entre Panamá y Estados Unidos de América, Reclamación de la República de Panamá en su propio nombre y en representación de José María Vásquez Díaz, Registro No. 19. (Publicación Oficial, Panamá, 1934.)

*Bibliography:* Hunt, Report, pp. 652-653, and "The United States-Panama General Claims Commission", Am; J. Int. Law, vol. 28 (1934), pp. 70-71; Borchard, "The United States-Panama Claims Arbitration", Am. J. Int. Law, vol. 29 (1935), pp. 101, 103; Friede, "*Die Entscheidungen . . .*", Z.a.o.R.u.V., Band V (1935), pp. 453, 459; Annual Digest, 1933-1934, pp. 258-259.

The Republic of Panama files this claim in the sum of \$270.00 without interest on behalf of José María Vásquez Díaz, assignee of Pablo Elías Velásquez, versus the United States of America, for loss and damage which the claimant alleges he suffered at the hands of sailors of the American Navy, upon a plantation located on Casaya Island, Archipelago of Las Perlas, Republic of Panama.

---

<sup>1</sup> See footnote on p. 576.—AMERICAN AGENT. (Note of the Secretariat: this volume, p. 340.)

The Panaman nationality of the claimant is established.

The facts on which this claim is based happened between the signing and the exchange of ratifications of the convention of July 28, 1926. On the grounds stated in the case of Walter E. Noyes (Registry No. 5) the Commission holds that it has jurisdiction to decide the claim.

In the month of February, 1931, several American naval units were holding maneuvers in the Archipelago of Las Perlas. A number of sailors from the fleet landed on one of the islands of the archipelago, called Casaya, and trespassed upon the property called "El Cocal de la Punta de Casaya" which, as its name indicates, was made up largely of a cocoanut grove, that is, a plantation of coconut palms. The sailors took the coconuts, both old and new, and drank the milk they contained, causing Velásquez, who had leased the property for the purpose of harvesting and marketing the fruit, a pecuniary loss estimated in the sum for which claim is brought. The loss and damage sustained is established by the testimony of three competent witnesses, rendered before the Judge of the District of Balboa, Republic of Panama.

From investigation made by the Government of the United States through the Secretary of the Navy, it is observed that it was impossible to fix the ensuing responsibility upon the perpetrators, inasmuch as it was not shown to which war vessel or vessels anchored in the archipelago the contingent of sailors who went ashore belonged.

While this point would have shed light upon the situation, the Commission considers that the offense was committed, that as a consequence of the acts of the sailors the claimant suffered loss and damage to his property, and that as a result the Government of the United States is liable under international law.

#### *Decision*

The United States of America is obligated to pay to the Republic of Panama, on behalf of José María Vásquez Díaz, assignee of Pablo Elías Velásquez, the sum of one hundred dollars (\$100.00) without interest.

---

### GUILLERMO COLUNJE (PANAMA) *v.* UNITED STATES

(*June 27, 1933. Pages 746-749.*)

---

#### ARREST, DETENTION OF ALIEN.—CRIMINAL PROCEEDINGS AGAINST ALIEN.—

**DAMAGES: FACTORS.** Induction of claimant by false pretenses, on September 1, 1917, by Canal Zone detective to come to Zone, where claimant subsequently arrested, brought before District Judge, detained, and released on bond which was returned after hearing on September 15, 1917. *Held* that United States liable for undue exercise of police authority within jurisdiction of Republic of Panama. Amount of damages: short duration of detention, criminal proceedings without delay, and claimant's imprudence taken into account.

*Cross-references:* Annual Digest, 1933-1934, pp. 250-251; Comisión General de Reclamaciones entre Panamá y Estados Unidos de América, Reclamación de la República de Panama en su propio nombre y en representación de Guillermo Colunje, Registro No. 24. (Publicación Oficial, Panamá, 1934.)

*Bibliography:* Hunt, Report, p. 749, and "The United States-Panama General Claims Commission", Am. J. Int. Law, vol. 28 (1934), p. 73; Borchard, "The

United States-Panama Claims Arbitration", Am. J. Int. Law, vol. 29 (1935), p. 101; Friede, "*Die Entscheidungen . . .*", Z.a.ö.R.u.V., Band V (1935), pp. 459-460; Annual Digest, 1933-1934, p. 251.

The Republic of Panama has presented this claim on behalf of Guillermo Colunje in the sum of \$36,000.00 for loss and damage which the claimant alleges he sustained because of his illegal arrest by a police agent of the Canal Zone and of subsequent acts of the authorities of the United States in the Zone.

The Panaman citizenship by naturalization of the claimant has been accepted.

In the month of August, 1917, Guillermo Colunje was the editor in chief of the *Diario de Panamá*, a newspaper published in the Capital of the Republic. He published daily therein a column headed "*Charla Cotidiana*" (Daily Chat) under the *nom de plume* of Lino Tipo. For several days during that month there appeared in the *Panama Morning Journal* an advertisement announcing the arrival of Prof. Omer Elling, who, for the sum of \$2.00 gold, would remit to the sender a certain famous talisman. Both the *Diario de Panamá* and the *Panama Morning Journal* belonged to the same publishing concern and were registered at the Ancón Post Office as second-class mail matter for circulation in the Canal Zone.

The advertisement attracted the attention of the postal authorities of the Canal Zone. Inspector Stacey C. Russell investigated the matter and ascertained that the supposed professor was Guillermo Colunje. The former had one Mortimer Scale purchase a postal order for \$2.00 in favor of Prof. Omer Elling and forward it for the purpose of obtaining the talisman to which the published advertisement referred.

On August 30, 1917, Julio Paz Rodríguez, of the Panama Morning Journal, went to the Ancón Post Office to pay the newspapers' registration fee for circulation in the Canal Zone as second-class mail matter. As a part of the payment of \$5.00 he delivered postal order no. 158595 issued by the Post Office at Balboa in favor of Prof. Omer Elling and indorsed by him, and when the former was interrogated by the postal authorities he informed them that he had received that money order from Colunje in payment of the insertion of the aforesaid advertisement in that newspaper.

After some investigation criminal charges against Guillermo Colunje alias Prof. Omer Elling were preferred in the tribunals of the Zone that same day, for violation of section 1707 of the Postal Code of the United States and its regulations, consisting in the use of the United States mail for fraudulent purposes. The judge issued a warrant for the arrest of Guillermo Colunje, which was delivered by Police Captain Jack Phillips to Canal Zone Detective Temistocles Rivera for execution.

It is established that on September 1, 1917, Rivera went to the offices of the *Diario de Panamá* where he found Colunje engaged in his labors and by false pretenses induced the latter to accompany him to the Canal Zone, and upon arrival there he informed Colunje that he was under arrest, thereupon taking him to the Ancón police station. He was thereafter brought before the District Judge who directed that he be held. Colunje was detained for several hours and released on a bond of \$200.00.

In a hearing held on September 15, 1917, before the District Court of the Canal Zone, the District Attorney made a motion that the proceedings be *nolle-prossed*, to which the judge who presided over the hearing acceded. Colunje was released and the bond he had furnished was returned to him.

It is evident that the police agent of the Zone by inducing Colunje by false pretenses to come with him to the Zone with the intent of arresting him there unduly exercised authority within the jurisdiction of the Republic of Panama

to the prejudice of a Panaman citizen, who, as a result thereof, suffered the humiliation incident to a criminal proceeding. For this act of a police agent in the performance of his functions, the United States of America should be held liable.

The Commission considers, on the other hand, that Colunje's confinement was of short duration and that the judicial authorities of the Zone proceeded without delay in handling Colunje's case. It likewise considers that the latter should have known that he acted imprudently in publishing the advertisement in question and incorrectly in making use of the postal order which brought about his identification.

*Decision*

The Commission decides that the United States of America is obliged to pay to the Republic of Panama on behalf of Guillermo Colunje the sum of \$500.00 without interest.

JUAN AÑORBES (PANAMA) *v.* UNITED STATES

(*June 27, 1933. Pages 762-764.*)

LABOUR ACCIDENT, NEGLIGENCE OF EMPLOYER.—APPLICABLE LAW: CLAIMS CONVENTION.—COMPENSATION. Labour accident on October 23, 1911, to claimant while cleaning engine negligently allowed to be put into motion by superiors. Special Act of Congress of June 30, 1930, extending to him, from that date, benefits of 1916 Compensation Act. *Held* that United States responsible: reference made to Juan Manzo award, p. 314 *supra*; but that claim should be disallowed since claimant between 1911 and 1930 sufficiently employed.

*Cross-reference:* Comisión General de Reclamaciones entre Panamá y Estados Unidos de América, Reclamación de la República de Panamá en su propio nombre y en representación de Juan Añorbes, Registro No. 25. (Publicación Oficial. Panamá, 1934.)

*Bibliography:* Hunt, Report, p. 764; Borchard, "The United States-Panama Claims Arbitration". *Am. J. Int. Law*, vol. 29 (1935), p. 101.

This is a claim on behalf of Juan Añorbes for 25,000 balboas. The claimant is a Panamanian by birth.

On October 23, 1911, Añorbes, then a winchman employed by the Division of Dredges of the Panama Canal at a salary of \$50 per month, sustained a severe fracture of the right arm while cleaning an engine. This resulted in permanent partial disability. Under the compensation law then in force, he was given free hospital and medical treatment and a year's salary as compensation for his injury. Except for a few very brief interims he was employed by the United States Government from December, 1912, to April, 1915, and from January, 1924, to June, 1933, at rates of salary averaging substantially over \$50 per month. By special Act of Congress of June 30, 1930, there were extended to him, from that date, the benefits of the 1916 Compensation Act. He is thereby assured that if his earnings in future drop below \$50 per month the deficiency will be made good under the statute.

The Commission holds that the United States is responsible for the injury to the claimant. He was ordered by his superiors to clean an engine, and those superiors allowed the engine to be put in motion while he was cleaning it.

This, unexplained, is sufficient evidence of negligence. The United States is answerable therefor (see the opinion of this Commission in the claim of Juan Manzo, Registry No. 21).

The compensation of a year's salary originally awarded to the claimant seems clearly inadequate, in view of the seriousness of his injury. It is equally clear, however, that if, from the time of his injury, he had been entitled to the benefits of the system of compensation established by the 1916 Act, which was made applicable to him by the special Act of 1930, he would have been justly treated.

The Commission finds that the claimant has not been prejudiced by the fact that he did not receive the protection of the 1916 compensation law until 1930. During the period from his injury until the passage of the Act of June 30, 1930, the Canal Zone authorities took pains to provide him with employment. The amounts received by him from the United States alone during this period total only slightly less than what he would have received if he had gotten a regular monthly compensation of \$50 during the entire time.

It is to be noted, moreover, that from 1915 to 1924 the claimant was not employed by the United States. The evidence shows that he was gainfully employed during at least part of that period, by the Government of Panama. And in that interval he was twice offered employment by the United States.

The Commission therefore feels that the facts show that the claimant, in net result, is as well off as he would have been if the present system of compensation had been available to him from the time of his injury. Since that present system is adequate and just, the claimant is not entitled to an award. In reaching this conclusion the Commission assumes that the claimant will in the future continue to enjoy the protection afforded by the 1916 act.

The Commission decides that the claim is disallowed.

---

JOSÉ AZAEL RUIZ (PANAMA) *v.* UNITED STATES

(*June 28, 1933. Pages 636-637.*)

---

JURISDICTION: CLAIMS ARISEN AFTER SIGNATURE OF CLAIMS CONVENTION.—INTERPRETATION OF TREATIES. *Held* that Commission has jurisdiction to entertain claims after signature of Claims Convention, July 28, 1926: reference to Walter A. Noyes award, p. 308 *supra*.

RESPONSIBILITY FOR ACTS ASHORE OF SAILORS.—EVIDENCE: TESTIMONY OF WITNESSES, CERTIFICATE. Pecuniary loss caused in March, 1931, by sailors of United States navy who during manœuvres landed on Saboga Island. Evidence: testimony of witnesses, certificate issued by municipal authority. *Held* that United States liable: reference to J. M. Vásquez Díaz award, p. 341 *supra*. Damages allowed.

*Cross-reference:* Comisión General de Reclamaciones entre Panamá y Estados Unidos de América, Reclamación de la República de Panamá en su propio nombre y en representación de José Azael Ruiz, Registro No. 18. (Publicación Oficial, Panamá, 1934.)

*Bibliography:* Hunt, Report, p. 637, and "The United States-Panama General Claims Commission", Am. J. Int. Law, vol. 28 (1934), pp. 70-71; Borchard, "The United States-Panama Claims Arbitration", Am. J. Int. Law, vol. 29 (1935), p. 101; Friede, "*Die Entscheidungen . . .*", Z.a.ö.R.u.V., Band V (1935), pp. 453, 459.

The Republic of Panama files this claim in the sum of \$125.00 without interest on behalf of José Azael Ruiz versus the United States of America, for loss and damage which the claimant alleges he suffered at the hands of sailors of the American Navy, on a plantation belonging to him, located on Saboga Island, Archipelago of Las Perlas, Republic of Panama.

The Panaman nationality of the claimant is established.

The facts on which this claim is based happened between the signing and the exchange of ratifications of the convention of July 28, 1926. On the grounds stated in the case of Walter A. Noyes (Registry No. 5) the Commission holds that it has jurisdiction to decide the claim.

In the month of March, 1931, several units of the American Navy held maneuvers in the Archipelago of Las Perlas. Some of the sailors of that fleet landed on Saboga Island and trespassed upon the claimant's property and ate ripe fruit which he had intended to harvest and market. The resultant loss and damage are established by the testimony of witnesses and by a certificate issued by the municipal authority of the island.

This is a case analogous to that of José María Vásquez Díaz (Registry No. 19) in which the Commission has decided that the United States is liable.

#### *Decision*

The United States of America is obligated to pay to the Republic of Panama, on behalf of José Azael Ruiz, the sum of fifty dollars ( \$50.00) without interest.

### CAROLINE FITZGERALD SHEARER, ADMINISTRATRIX OF THE ESTATE OF GEORGE FITZGERALD (UNITED STATES) *v.* PANAMA

(*June 29, 1933. Pages 111-114.*)

**PRESCRIPTION UNDER MUNICIPAL LAW.—INTERPRETATION, PROOF OF MUNICIPAL LAW.—EVIDENCE: BURDEN OF PROOF.** Acquisition of six-tenths of an acre of *baldío* land on beach, in about 1850, by United States citizen. Enactment in 1882 of Panamanian law converting *baldío* lands into *bienes de uso público* not subject to prescription. Acquisition of land above, in 1886 or 1887, by Mr. George Fitzgerald. Enactment in 1904 of Panamanian law regulating adjudication of "tidal lots". Assertion by Governor of Province that Mr. Fitzgerald had no right but to be adjudicated part of tract on conditions defined by this law. *Held* that claimant failed to prove acquisition of ownership by predecessor, prior to coming into force of law of 1882, by alleged ordinary prescription requiring just title: at material time no public instrument of transfer was registered, and claimant did not show that Panamanian law did not require registration of such instrument as condition for beginning of running of period of possession for ordinary prescription.

*Cross-reference:* Comisión General de Reclamaciones entre Panamá y Estados Unidos de América, Reclamación de la Norteamericana Carolina Fitzgerald Shearer, Registro No. 3. (Publicación Oficial, Panamá, 1934.)

*Bibliography:* Hunt, Report, p. 115; Friede, "*Die Entscheidungen . . .*", Z.a.o.R. u.V., Band V (1935), p. 466.

Claim for \$30,000, with interest, is made on behalf of the heirs of George Fitzgerald, deceased. The claimants are American citizens. The claim is based

on the alleged expropriation, without compensation, by the Panaman Government, in 1905, of a property of an area of sixtenths of an acre, occupied by the deceased on the beach of the Island of Carenero, Province of Bocas del Toro. On the property were a wharf and some buildings.

The record of the proceedings before the Commission mentions the chain of persons who had occupied the land since the middle of the nineteenth century until it was acquired in 1886 or 1887 by George Fitzgerald, who on January 12, 1893, sold the property to his brother Charles Fitzgerald, but repurchased it from the latter on November 2, 1894.

When the first holder occupied the plot, it was *baldio* land. According to the Panaman Government it never ceased to be. Consequently, after the National Assembly of Panama in 1904 had enacted a law (no. 62) regulating the adjudication of "tidal lots" in the Province of Bocas del Toro, the Governor of the Province took the view that the only right that Fitzgerald had, was to be adjudicated part of the property, on the conditions defined by that law.

It has been contended on behalf of the claimant that the land subject matter of this claim had become privately owned land by the effect of legislation which conferred ownership of *baldio* lands on persons who cultivated them. The Commission cannot sustain this contention as there is no evidence of cultivation within the meaning of that legislation. The main contention advanced by the Agent of the United States in support of the claim is, however, that ownership had been acquired by prescription, prior to the coming into force of law 48 of 1882 which converted all *baldio* lands into *bienes de uso público* which are not subject to prescription.

In an affidavit of January 5, 1907, George Fitzgerald stated:

"Approximately sixty (60) years ago this property was squatted on by an American named Tinsley who planted thereon coconut trees and built his residence on the said property.

"Tinsley sold during his life to a native of that locality named Taylor. The date of this transaction is not known to me.

"Taylor died approximately forty (40) years ago, and his daughter, Sarah Humphreys, now living in Bocas del Toro, succeeded to the property.

"After succeeding to the property, Sarah Humphreys sold the same to W. C. Downs, who purported to represent the Connecticut Rubber Company. William C. Downs was an American citizen and the conveyance from Sarah Humphreys to him has been recorded in the United States Consular Office of Bocas del Toro, and also recorded in the courts of Bocas del Toro.

"William C. Downs, after his acquisition of the property, invested thereon large sums of money amounting, I am credibly informed, to from \$20,000 to \$25,000 in the construction of two warehouses on the said property built of timber, one of which is seventy-five feet in length by twenty-five feet in breadth, and the other forty-five feet in length by twenty-four feet in breadth—these warehouses are now standing on the said property—and in the construction of a marine railway for the purpose of hauling ships from the water in order to repair the same, and he carried on at this point a general ship building and repairing business.

"William C. Downs subsequently sold the property to an American named Augustus O. Bourne, and Bourne then sold the property to William Brown, the Deed for the said property having been made before the 'Juez Político Caspar Cervera and L. A. Carnica, Secretary'.

"William Brown died in or about the year 1885, and his widow, who is now living in San José, Costa Rica, succeeded to the property, and sold the same to me for cash about the year 1886. The deed from the Estate of William Brown

was not made out and delivered to me, however, until 1891, and bears the date of March 5th of that year, and this deed has been recorded in the Colombian Consular Office in San José, Costa Rica.

"After purchasing this property, I continued the old business of a ship yard and lumber yard, and have continued the same until I was put out in the manner hereafter to be explained."

and also:

"Approximately ten years ago, the Colombian Government having passed a law requiring those owning lots in the Town of Bocas del Toro to make application for their paper title to the said lots, I applied to the Colombian Government in Bogotá for the papers for certain lots owned by me in Bocas del Toro, and at the same time for the papers for this property on the Island of Carenero. This application was made through my attorney, Dr. Franco, and while the title to the lots within the City of Bocas del Toro was granted me, I was refused papers for the property mentioned herein for the reason that 'the Government would not give papers for any land outside of the Town'. I subsequently again applied through Simon López, but the revolution in Panama having started my papers were never returned."

There is no further evidence of the existence of the deed mentioned in Fitzgerald's affidavit except a statement of the acting American consular agent at Bocas del Toro of December 24, 1904, which enumerates the documents presented to him on that day by Fitzgerald, adding that the latter declared his intention to deliver them to the Governor of the Province, for the purpose of proving and perfecting his titles to the properties to which the documents referred.

The date of the conveyance from Sarah Humphreys to William Downs is unknown. The affidavit says that Sarah Humphreys succeeded to her father, Thomas Taylor, the year of whose death Fitzgerald puts at about 1867, but there is evidence in the record that Taylor's wife lived on the property after her husband's death and that it was to her that Sarah Humphreys succeeded.

The prescription alleged by the American Agent is the ordinary prescription, which requires a just title. The Panaman Agent has argued that such title has not been shown, that the deed by which Sarah Humphreys is alleged to have conveyed the property to Downs was not a public instrument as required for the transfer of real property and that the 10-year period of possession, necessary to acquire real property by ordinary prescription, could not begin to run as from that deed, because only the registration of a public instrument could give possession.

This contention has led to lengthy arguments by both Agents.

The Commission, having given due consideration to all that has been advanced by both sides on the subject, is of opinion that the American Agent has not shown that Panaman law did not at the material time require as a condition for the beginning of the running of the period of possession for ordinary prescription, tradition of the possession through registration of a public instrument.

This claim must, therefore, be disallowed.

---

HAMPDEN OSBORNE BANKS, HAZEL E. HILTBOLD, LEWIS CRANDALL GOLDER, AND RICHARD JOSEPH LEE (UNITED STATES) *v.* PANAMA

(June 29, 1933, dissenting opinion of Panamanian Commissioner, undated. Pages 148-152.)

PROTECTION OF ALIENS; FOREIGN TROOPS, INTERVENTION OF POLICE WITH NAVAL PATROL. MOB VIOLENCE. INADEQUATE POLICE PROTECTION. Arrest on May 11, 1921, in Panama City, of Engineman Lee by naval patrolman Golder of U.S.S. *Tacoma* to take him back to vessel. Intervention of Panamanian policeman to take Lee to police station, giving rise to incident between police, members of United States forces, and civilians, including attack by civilians upon Golder and Lee, arrest of patrolman Hiltbold, and allowing crowd to assault and severely beat Banks, commander of patrol. *Held* that policeman wrong in trying to take Lee from Golder instead of upholding authority of patrol provided at request of Panama; but that attack upon Golder and Lee, although due to his rash action, could not have been prevented by policeman; that no award justified for action against two patrolmen; but that police clearly failed to protect Banks, who is entitled to damages.

*Cross-reference:* Comisión General de Reclamaciones entre Panamá y Estados Unidos de América, Reclamación de los Norteamericanos Hampden Osborne Banks . . . etc., Registro No. 4. (Publicación Oficial, Panamá, 1934.)

*Bibliography:* Hunt, Report, p. 154, and "The United States-Panama General Claims Commission", Am. J. Int. Law, vol. 28 (1934), pp. 67, 73; Borchard, "The United States-Panama Claims Arbitration", Am. J. Int. Law, vol. 29 (1935), p. 101; Friede, "*Die Entscheidungen . . .*", Z.a.o.R.u.V., Band V (1935), p. 460.

This claim is made by the United States of America on behalf of Hampden Osborne Banks, Mrs. Hazel E. Hiltbold, in representation of herself and her minor children, Richard L. Hiltbold and Robert C. Hiltbold, heirs of Valentine Hiltbold, deceased, Lewis Crandall Golder, and Richard Joseph Lee. All the claimants are American citizens.

Ensign Banks, Chief Petty Officer Hiltbold, Engineman First Class Golder and Engineman Second Class Lee were in May 1921 regular members of the United States Navy and were attached to the U.S.S. *Tacoma*, then lying off the city of Panama.

On May 11, Ensign Banks was on duty in Panama City as commander of a patrol provided from the *Tacoma*, Hiltbold and Golder belonged to his patrol, Lee was on shore leave. Lee was in the Cocoa Grove district where he was not allowed to go by the navy regulations and had been drinking. He hit a woman with his elbow, she protested vigorously and he shoved her against the wall of a house. She called in a policeman and was talking to him, while Lee was standing near them. Patrolman Golder arrested Lee in order to take him to the *Tacoma* according to his instructions. In the first statement which Golder made (July 25, 1921) he said that he found Lee in custody of the policeman, in his second statement (August 8, 1921) that the policeman was standing near Lee, but did not have hold of him. Lee says (July 25, 1921) that the policeman was going to arrest him for striking a woman and that before the policeman said anything to him Golder came up and arrested him. The evidence of the Panaman police has to be gathered from the letters which the American Legation received from the Panaman Government in reply to its complaints concerning the incident. Panama holds that the policeman, Teodoro Hernández, no. 186,

informed Lee that he was under arrest, that Golder objected to Lee's arrest and pulled him from his hands. Golder says that he asked the policeman what the trouble was, but could not understand the answer which was given in Spanish and that he thereupon took Lee's arm and started to walk away with him. It also results from one of the letters of the Panaman Government that the woman declared that she had first made her complaint to the patrolman but that he did nothing more than take Lee with him, that she thereupon complained to the policeman who placed the sailor under arrest and that thereupon the patrolman took Lee by one arm and walked off with him and the policeman.

Considering the above-mentioned declarations made on both sides, the Commission can come to no other conclusion than that Golder and not Hernández first took custody of Lee, and that the latter was under his custody when the conflict happened which started the incidents upon which the claims are based. When Golder was waiting for a conveyance to take him and Lee to the harbor, the policeman intervened. He had realized that Golder was not going to take Lee to the police station. He talked to Golder and finally grabbed Lee's arm. Golder did not give in.

The American version of what follows is based upon the declarations of witnesses, submitted *in extenso*. It can be resumed as follows: Golder and Lee were attacked by civilians. Other policeman and Hiltbold arrived. Lee and the two patrolmen were led to the police station; Hiltbold whose evidence indicates that he took a very reasonable view, saying to Golder that the best would be to go all together to the police station and have the matter out there, was grabbed by the belt by a policeman who conducted him to the station at pistol point. Ensign Banks, who had been warned that sailors were being beaten by the police, came upon the scene and was attacked by civilians. He was rescued by two civilians who hurried him to the police station. Both Hiltbold and Banks stated that they approached the group to inquire the cause of what was happening.

The Panaman Government, whose version is based upon information which is not before the Commission, ignores the attack made by the crowd upon Golder and Lee, asserts that all the claimants and also other members of the United States Navy who it is alleged were present assumed a threatening attitude, that Banks rushed in and tried to carry off Lee and minimizes the attack on Banks by saying that private persons intervened to oppose Banks' joining the others in their resistance to the police and that in the struggle the latter was struck by someone unknown.

The two Governments are in agreement as to what happened within the police station:

In the presence of the night judge, Ensign Banks explained that he was the commander of the patrol and expressed his desire to return to the *Tacoma* and asked for protection during his passage through the town, which he received. Hiltbold and Golder were released and Lee was sentenced to 30 days in jail or 15 balboas fine. He was released on the following day, upon payment of that sum.

The Commission feels that the conflict between Hernández and Golder was largely due to the following circumstances: Golder had orders to arrest and send to the *Tacoma* all seamen found in Cocoa Grove contrary to the navy regulations. In the moment of the conflict with Hernández he understood, however, that the latter wanted Lee to be brought to the police station for having struck a woman. It must be supposed that he opposed this wish, because his orders were in conformity with the view taken by the American military and naval authorities, but not shared at that time by the Panaman Government, that members of the United States forces who had committed minor offenses

under Panaman law, should, if arrested by the patrol, be turned over to the said authorities for trial. The policeman, if he was at all authorized under Panaman law to arrest Lee on the complaint made to him by the woman, was however wrong in trying to take Lee from Golder. He should have upheld the latter's authority, instead of provoking an incident between police, members of the United States forces and civilians, since the patrols were provided, at the request of the Panaman Government, for the express purpose of preventing such incidents.

Having thus, for a trivial reason, raised the conflict, the police maintained the attitude of disregarding the rights of the patrol, treating them as if they had no standing in the matter, arresting Hiltbold for no reason and allowing the crowd to interfere and to assault the commander of the patrol. There is evidence in the record (statements of the eyewitnesses Fournier and Lieutenant Hanchett) indicating that no members of the United States Navy were on the spot other than the four claimants. The policemen have clearly not given their Government a true story.

The Commission thinks that there is no evidence showing that the attack upon Golder and Lee, although due to the rash action of policeman Hernández, could have been prevented by that policeman. According to Golder they were not further attacked, and Hiltbold says he was not attacked at all. Although the action of the police towards the two patrolmen was reprehensible, the Commission does not feel that an award would be justified on that account. There was a clear failure by the police to protect Ensign Banks. He was severely beaten by the crowd and only escaped worse through the assistance of the two civilians who helped him to the police station, the crowd still beating him from behind. He is entitled to an award.

#### *Decision*

The claims presented on behalf of Hazel E. Hiltbold, Lewis Crandall Golder and Richard Joseph Lee are disallowed.

The Republic of Panama is obligated to pay to the United States of America, on behalf of Hampden Osborne Banks, the sum of \$750, without interest.

#### *Dissenting opinion of Panamanian Commissioner*

While in accord with the conclusion relative to claimants Lee, Golder and Hiltbold, I do not agree with the reasoning on which it is based nor with the considerations of the majority of the Commission tending to lay upon the Panaman police the sole responsibility for what occurred, without attaching any to the sailors of the *Tacoma*. It is not presumptuous to maintain that pursuant to the evidence in this claim both shared the responsibility.

The evidence itself shows that the cooperation of the naval and military patrols with the Panaman police has been sought to the end of maintaining order among the sailors and soldiers and preventing their having trouble with the residents of the cities of Panama and Colón. But there is nothing to indicate that because of the agreement under consideration, violations of the laws of Panama by sailors, soldiers and patrols should be immune or exempt from the penal jurisdiction of the Republic. Neither is it possible to consider that the patrols are authorized to snatch from the hands of the Panaman police members of naval or military forces who have been arrested for violating penal or police provisions of the Republic of Panama.

There is evidence that the attitude of Ensign Banks when he penetrated the group formed by the police who were taking the sailor and the patrols as well

as a number of civilians to the police station was not wholly pacific; nor is it clearly established that the policemen nearby did not impart the protection which they could have given. Banks himself testifies that the attack was so unexpected and that events developed in such a way that there are ample grounds to suppose that the police did not have time to come forward and protect him.

For these reasons I am of the opinion that likewise in the case of Hampden Osborne Banks the claim should be disallowed.

The foregoing conclusions are likewise applicable to the cases of Richeson *et al.*, Registry No. 7, and Baldwin *et al.*, Registry No. 9, in which my not having made analogous observations when signing was due to the short time available to the Commission and not because I subscribe to all the reasoning on which they are based. I desire to make of record as I enter this reservation that especially in the case of Richeson, Registry No. 7, there is a superabundance of evidence furnished by American Army officers that the conduct of the soldiers during the train episode was highly reprehensible and aggressive, which doubtlessly contributed largely to the regrettable development of the incident. Nevertheless, this evidence has not even been mentioned in the opinion rendered

---

#### WILLIAM GERALD CHASE (UNITED STATES) *v.* PANAMA

(*June 29, 1933, concurring opinion of American Commissioner, undated. Pages 366-374.*)

---

#### PRIVATE RIGHTS.—DISPUTE, DIPLOMATIC SOLUTION OF—AS BAR TO CLAIM.

Purchase by public deeds of September 18, and October 24, 1912, by business partnership, of four-fifths of hereditary rights to certain lands. Transfer of rights to Mr. W. G. Chase by public deed of April 1, 1913, when partnership dissolved. Purchase by Mr. Chase by deed of December 4, 1914, of remaining fifth. Retention by Mr. Chase of considerable part of price of rights to be paid when he should have acquired title of ownership of lands which vendors lacked. Settlement of April 13, 1923, between Mr. Chase and Panamanian authorities negotiated by United States Minister in Panama with full powers from Mr. Chase: comparatively small portion of area lost, but clear title obtained to remainder. *Held* that attitude taken by Panamanian authorities prior to settlement does not give rise to action, and that acting by United States Minister as mediator gave settlement character of diplomatic solution and prevented later bringing of claim.

*Cross-references:* Annual Digest, 1933-1934, pp. 229-230; Comisión General de Reclamaciones entre Panamá y Estados Unidos de América, Reclamación del Norteamericano William Gerald Chase, Registro No. 10. (Publicación Oficial, Panamá, 1934.)

*Bibliography:* Hunt, Report, pp. 375-378, and "The United States-Panama General Claims Commission", *Am. J. Int. Law*, vol. 28 (1934), p. 72; Borchard, "The United States-Panama Claims Arbitration", *Am. J. Int. Law*, vol. 29 (1935), p. 103; Friede, "*Die Entscheidungen . . .*", *Z.a.ö.R.u.V.*, Band V (1935), p. 466; Annual Digest, 1933-1934, pp. 230-231.

The United States of America has filed this claim in the amount of \$492,622.00 on behalf of William Gerald Chase, an American citizen.

After filing of the written pleadings, the respective Agents have made their oral arguments. The Commission, therefore, proceeds to render judgment in the following terms:

The American nationality of the claimant has been duly established.

In September, 1912, William Gerald Chase in behalf of the business partnership of Field & Chase, bought from some of the heirs of Agustín Jované and Manuela Aguilar y Tábara the hereditary rights they had in respect to the lands known as Hato del Sitio de San Juan. By subsequent purchases. Chase acquired four-fifths of such rights in the above-named lands; the remaining fifth of the rights continued to be vested in Josefa Jované de Obaldía, also an heir of the above-named spouses, Jované—Aguilar. The respective contracts of purchase of hereditary rights are contained in public deeds no. 280 of September 18, 1912, and no. 320 of October 24 of the same year. Later, on April 1, 1913, by public deed no. 78 executed before the notary public of the circuit of Bocas del Toro, the Field & Chase partnership was dissolved, and by virtue of article I of the said deed, William Gerald Chase became the only and exclusive owner of the property of the partnership in the Province of Chiriquí.

The deeds no. 280 and no. 320 are of an equal tenor and differ only in regard to the persons of the vendors and the price of the rights which were the subject matter of the contract. These deeds contain, *inter alia*, the following clauses:

“*First.* That in our capacity as legitimate heirs of those who while living were known as Dr. Agustín Jované and Manuela Aguilar y Tábara de Jované, we do sell forever to Mr. William Gerald Chase who represents the commercial firm of Field and Chase, the hereditary rights that may or might belong to us in the lands known as Hato del Sitio de San Juan which lands belonged to Captain Juan Díaz de la Palma and his successors. of which mention is made in Paragraph 3 of Article 2, of Law 3 of 1909, the notorious possession of which on the part of our ancestors and later ourselves has lasted more than 80 consecutive years;

“*Second.* That we give as boundaries of the lands mentioned: north, the *cordillera* of the Andes; south, the sea; east, the Dupi River in its entire course from the *cordillera* to the sea; and west, the Jacaque River from the *cordillera* to its confluence with the Fonseca River and from said confluence to the sea. There is also included in this sale all of these rights which the sellers have or which may correspond to the shares they sell in the lands known as *La Isleta*, which lands were owned by Mr. Francisco Jované and which are still undivided property;

“*Third.* That the livestock, not only cattle but horses as well, that belong to us in the possessions sold and which may appertain to the shares which we represent, we transfer to Mr. Chase at a price of 35 pesos Panama silver per head, engaging ourselves to deliver to Mr. Chase the said animals ready for branding; the buyer paying for the animals as they are branded 0000000;

“*Fourth.* That these rights, as well as the livestock which we sell, we acquired by legitimate family inheritance;

“*Fifth.* That we effect the sale of the lands and of all our rights with *titulos* (*titulos* means either deeds or titles) and annexes for the sum of 57,619 pesos and 3 cents, Panama silver, in lawful currency or its equivalent thus: \$14,404.76 silver at the moment of signing this contract; \$14,404.76 silver, six months afterwards, and \$28,809.51 silver, when we may be in a position to deliver to the buyer the *titulos* of ownership and domain over the lands which we sell, and these in turn are free from all pretension or rights of third parties, and with the boundaries expressly stipulated in Clause 2nd.”

Clause 9 of the deed in reference reads thus:

“That we establish as *titulos* and demarcations the favorable judgment of the National Administrators of Lands whereby our rights may be fully recognized

and whereby there may be adjudicated to us in ownership the lands which we sell and the final judgment of the competent judges which may establish as recognized and legal the traditional boundaries of the Hato del Sitio de San Juan which are the same as have been specified in Clause 2nd of this deed; and we recognize in the purchaser the right to carry on the necessary proceedings to obtain them, the cost of which shall be deductible from the 28,809.51 pesos which are left unpaid until the complete surety of the sale is established.”

By deed dated December 4, 1914, Luis Alberto Tovar sold to Chase his rights in the succession of his wife, Josefa Benigna Jované, for the sum of 1,666.66 balboas leaving one-half of that amount in possession of Chase, to be received when the latter should have acquired the documents or resolutions which might guarantee the ownership or domain of the above-named Hato del Sitio de San Juan.

Chase retained in his possession the following sums: 28,809.51 pesos silver, the equivalent of 14,404.78 balboas or U.S. dollars as per deed no. 280; 9,523.80 pesos silver or 4,761.90 balboas or dollars as per deed no. 320; and 833.33 balboas or dollars as per the Tovar deed, which makes a total of B. 19,999.98.

It may be perceived that what the claimant purchased were certain hereditary rights in the lands of San Juan and that he assumed the burden of obtaining the *título* of ownership which the vendors lacked, notwithstanding the possession which they declared they had. That for this purpose he received the proper authorization from the vendors and an adequate amount to meet the expenses.

The American Agency has maintained that the word *títulos* used by the vendors must be understood as the equivalent of public deeds, instruments or documents, in an attempt to reach the conclusion that Chase did actually buy a right of ownership to the lands of San Juan, and that the only thing which remained to be done was to establish such right by means of appropriate documents. The above-quoted declarations by the vendors and by Chase disprove that assertion. On the other hand, it seems obvious that if it had been merely the case of obtaining copies of existing documents or the original documents themselves, it would not have been necessary to leave as surety in the possession of Chase such a considerable amount as 20,000 balboas or 40,000 pesos silver as a guarantee of compliance with a formality which could not imply an expenditure amounting to that relatively enormous sum of money. In that case, the formality should have consisted only of obtaining copies from notarial offices or from the registry office, which places, in accordance with law, keep under their custody all the acts and contracts relative to real property.

No evidence has been submitted of the existence of any document, public deed or instrument in which any person appears as enjoying or exercising the right of ownership in the lands of San Juan prior to the deeds of 1912.

The vendors bound themselves to deliver to the purchaser the titles of ownership and domain in the lands to which the hereditary rights sold referred, and the lands had to be free from all pretension or right of third parties.

In this connection, it is pertinent to remark that Chase executed a document whereby it appears that in addition to the hereditary rights, he bound himself to continue, on his own account, a litigation which was going on between the Jované heirs and Federico Sagel, who was occupying part of the lands of San Juan.

Shortly after the purchase of the hereditary rights and having entered into possession of the lands in question, Chase was involved in a series of lawsuits and controversies which were decided by the respective authorities.

The claimant sets forth the acts or omissions of the authorities which in his opinion were arbitrary or illegal, but he fails to specify what loss or damage resulted therefrom in each case.

It has also been maintained by the American Agency that Chase's right of ownership was recognized by the Supreme Court of the Republic of Panama in a certain judgment rendered on November 17, 1915, in the case of an adjudication made by the Administrator of Lands to Abigail Franceschi. On that occasion, the Supreme Court said:

"So long as the titles of William Gerald Chase which show him as owner of the lands of San Juan with the boundaries specified in the deeds pertaining thereto, be not invalidated by means of an action brought before the judicial power by anyone who may consider himself to have better rights, the lands of which we are treating—in whole or in part—can not be ceded or adjudicated under the special provisions of law relating to such matters."

It has been stressed that this passage amounts to a recognition of a valid title in Chase, but the Commission finds that such allegation is contradicted by the self-same judgment which is invoked, inasmuch as further on the Court says:

"The Court considers that this is not a case for a pronouncement on the rights of Franceschi as a cultivator nor is it the case of determining the intrinsic value of the title of Chase. Apart from the fact that those are not questions to be decided, such pronouncements would not affect those who have not intervened as parties in the present litigation and could only affect those who have litigated."

In another judgment of the Supreme Court rendered in an action instituted by Chase himself in order to have his possession and that of his vendors recognized in court, so as to obtain a possessory title, the Court said:

"On the other hand, Mr. William Gerald Chase having titles which accredit him as owner and possessor of the lands of the Hato del Sitio de San Juan by purchase of the hereditary rights of the descendants of Señor Agustín Jované, owners of the lands and peaceful possessors thereof for more than 50 years, the action instituted is improper (*improcedente*)."

In view of the fact that in the case in which the judgment partially quoted above was rendered, Chase based his action on the fundamental statement that he lacked an ownership title and that his pleading was intended to obtain a possessory title, the Commission is of the opinion that the judgment of the Supreme Court cannot have the meaning attributed to it, and its scope was limited to the declaration that Chase had resorted to a wrong procedure.

Furthermore, it appears that in a subsequent judgment in an action for revindication (also called in the Colombian Code *an action on domain*) brought by Chase against one Federico Sagel who was occupying part of the lands of San Juan, the judgment of the Court was against Chase. The plaintiff had invoked in support of his pretensions the judgment rendered in the Franceschi case above referred to, and in this connection the Court said:

"In the judgment of the Court which is invoked as favorable to the interests of Chase, it was expressly said that it was not a case of 'determining the intrinsic value of the title of Chase', inasmuch as the question therein discussed was not that of domain but one very different."

The evidence presented shows beyond any reasonable doubt that the Supreme Court of Panama has never decided any action in which the question of ownership or domain of the lands of San Juan has been the subject matter of

the litigation, and therefore, it seems to the Commission that the contention that the Supreme Court of Panama has recognized Chase as owner in fee simple of the lands of San Juan is untenable.

As causes contributing to the resulting loss, the claimant alleges that through the "slander" of his titles to the San Juan property by the Government of Panama and through its constant and public refusal to recognize his rights, his attempts to sell the lands were frustrated. He also alleges that as a consequence of the continuous persecution by the Government; of its failure to give his property due protection; of the absolute disregard of his ownership rights and of the open threats of which he was the object, he was obliged under coercion to sign the settlement deed of 1923.

Among the acts which the claimant points out as arbitrary and illegal in order to reach the above-stated conclusion, is the marginal note which the Registrar General of Property directed to be put on the inscription entry of the Chase deed in the registry books, which note reads as follows:

"NOTE: The foregoing deed was inscribed with all its defects; such as the sellers not having their right inscribed and also not having titles, as appears in the same deed of sale, because article 136 of decree No. 154 of 1913 orders that 'the titles which transfer, modify, or limit the ownership of immovable property, and those titles in which are constituted, modified or extinguished any rights of mortgage or other encumbrance upon such property, originating after January 1, 1914, cannot be inscribed in the Register if previously there has not been inscribed the corresponding title of ownership of that which constitutes, modifies, transfers or extinguishes the right of which the inscription treats', wherefore those originating prior to January 1, 1914, such as the deeds, with which the reinscription is made. 280 of September 18 and 320 of October 24, 1912, which already had been registered in book 1, volume 4, of folios 48 to 55 and 101 to 108 in the Registro which then existed in the Circuit of David, were reinscribable, in spite of the fact that they contain a contract which can be considered provisional whereby the purchasers are obliged to deliver to the seller the titles which they do not have since they have not shown them."

The claimant brands the act of the Registrar as a gratuitous attack upon his registered titles, inasmuch as no question had arisen before him which made necessary any action on his part. The Commission is of the opinion that this charge is not well-founded, inasmuch as article 1790 of the Civil Code provides the following:

"Whenever the Registrar should notice an error of a kind which he himself cannot rectify he shall direct that a marginal note of warning be put on the entry and he shall make it public in the official paper, and notice thereof shall be posted in the office for the knowledge of the interested parties if they could not be personally notified.

"This marginal note does not annul the inscription; but it restricts the rights of the owner in such a way that while it is not cancelled, or, as the case may be, the necessary rectification is not made, no further transaction can be made with reference to the entry in question. If by error a subsequent transaction should be recorded, it will be null and void."

As may be seen, this article imposes on the Registrar a duty which he could not possibly evade without incurring grave responsibility and without jeopardizing the guarantees which the institution of public registry is called upon to give to members of the community.

Another act of the Government to which the claimant points as injurious to his rights, is the telegram which the Secretary of Government and Justice sent

on September 8, 1920, to the Governor of the Province of Chiriquí, wherein certain instructions were given to the Governor in connection with the dispute between Chase and some residents of the Districts of San Félix and San Lorenzo. The Commission does not find anything objectionable in said instructions. Two purposes are evident in that telegram: first, to give ample protection to American citizens precisely because the American occupation of the Province of Chiriquí had come to an end; and, second, to avoid violence on the part of any person, so as to have all rights in dispute duly decided by the competent judicial authorities.

These instructions were unmistakably aimed at the calming of the situation and the seeking of a peaceful and lawful settlement of the land controversies existing among residents of the said districts.

The claimant also mentions the adjudication of land made in favor of Federico Sagel and other persons, and the refusal of the Governor of Chiriquí to instruct the Alcalde of San Félix to refrain from giving permits to cultivators for transitory cultivations as motives for his complaint that the settlement which was finally concluded with the Government of Panama with the intervention of the Minister of the United States, was effected under coercion.

The claim is for the loss of the claimant's property.

The Commission is of the opinion that Chase's difficulties were not attributable to wrongful acts of the Panamanian authorities. His deeds of purchase show that his ownership was dubious. By the settlement of April 13, 1923, he lost a comparatively small portion of the area which he claimed, but he got a clear title to the remainder. The Commission cannot find that the settlement was in any way disadvantageous for him. It should be noted that for the payment of 18,400 balboas which he had to make to the municipalities of San Félix and San Lorenzo he was covered by the amounts which he had retained from the purchase price precisely for such an eventuality. Moreover, the fact that the Minister of the United States in Panama had acted as mediator on his behalf with full powers from him in the negotiations which led up to the settlement gave that settlement the character of a diplomatic solution and prevented the later bringing of a claim.

The charges made by the claimant that the respondent Government deprived him of his property through the foreclosure of a mortgage thereon by the Banco Nacional de Panamá are unfounded.

The claim must be disallowed.

---

*Concurring opinion of American Commissioner*

I concur in the result arrived at by the Commission.

I think that Chase owned San Juan both by prescription and by clear registered title. I think he was injured by the illegal adjudication of part of his land to others, in violation of the ruling of the Supreme Court of Panama in its decision of September 17, 1915, in the case of *Wm. G. Chase v. Abigail Franceschi*, and by the illegal granting of licences to others to cultivate and explore his land. The public authorities did not protect him from trespassers, and when he attempted to protect himself and to have his own agent arrest and remove such trespassers, his agent was prosecuted and wrongfully imprisoned (see the opinion of this Commission in the claim of Abraham Solomon, Registry No. 12). I have the greatest sympathy with Chase in his forlorn and unequal struggle to defend his property.

But whatever may have been his right to redress, I think it was cut off by the settlement agreement of April 13, 1923. While I believe that he was led to that agreement by discouragement and exhaustion, he was not physically coerced.<sup>1</sup> He was free to refuse the agreement and to preserve his claim for injury. He was represented in the negotiation of the agreement by the Minister of the United States. I do not think that the agreement was made under such duress as would invalidate it. Once it was made, it was loyally carried out by the Government of Panama. I think the agreement intended to effect, and did effect, a settlement of the entire controversy regarding San Juan, and that it barred the claim now before us.

---

MARGUERITE DE JOLY DE SABLÁ (UNITED STATES) *v.* PANAMA

(*June 29, 1933, dissenting opinion of Panamanian Commissioner, undated.*  
*Pages 432-450.*)

---

PRIVATE PROPERTY, EXPROPRIATION WITHOUT COMPENSATION, INADEQUATE REMEDY.—DEATH OF CLAIMANT: SUBSISTENCE OF CLAIM, RIGHT TO PRESENT CLAIM ON BEHALF OF EXECUTRIX.—INTERPRETATION OF MUNICIPAL LAW.—EVIDENCE: TITLE PAPERS, MAPS, MEMORIAL, NOTICES, PUBLIC REGISTRATION.—EXHAUSTION OF LOCAL REMEDIES. Adjudication by Panamanian authorities to private individuals, between 1910 and 1930, of 1,362 hectares of privately-owned country estate totaling 3,180 hectares, and granting of temporary cultivator's licences on 309 hectares of remaining part of it to others. Death on October 22, 1914, of owner, immediately succeeded as such by his wife, heiress, and executrix, now claimant. *Held* that United States entitled to present, on behalf of executrix, claim for damages arising out of acts occurring during lifetime of husband: claim belonged to United States and did not lapse on his death. *Held* also that, under Panamanian public land laws, authorities were required to reject all applications for adjudications and licences, even if unopposed, when, as was the case here, they knew that lands were private property instead of public lands; and that machinery of opposition provided by public land laws since 1917 did not constitute adequate remedy to claimant for protection of property (vague description of boundaries in posted and published *edictos* concerning applications for adjudications, no publication of applications for licences, unreasonably brief period for opposition, hardship to oppose each application), and that Panama, therefore, cannot avoid liability because of claimant's failure to oppose each application. Evidence that authorities had full and legally proper notice that estate was private property: title papers and map filed in 1910 before adjudications complained of, similar papers filed, together with memorial, in 1912 before licences complained of, further notices over period of years, inscription of property in public registry, size of estate, length of time during which owned by De Sablas. *Held* further that adjudications and licences were wrongful acts for which Panama interna-

---

<sup>1</sup> [See art. 1118 of the Civil Code quoted. *post*, p. 377.—AMERICAN AGENT.]

*Note of the Secretariat:* The original report, p. 377, quotes the following part of article 1118 of the Civil Code:

"There is intimidation when there is inspired in one of the contracting parties a rational and well-founded fear of suffering an imminent and grave injury to his person *or property*."

tionally responsible: deprivation of alien of property without compensation. Held finally that by reason of Claims Convention, article V, it is unnecessary to consider question of local remedies. Damages allowed.

*Cross-references:* Am. J. Int. Law, vol. 28 (1934), pp. 602-614; Annual Digest, 1933-1934, pp. 241-244; Comisión General de Reclamaciones entre Panamá y Estados Unidos de América, Reclamación de la Norteamericana Margarita Joly de Sabla, Registro No. 11. (Publicación Oficial, Panamá, 1934.)

*Bibliography:* Hunt, Report, pp. 454-456, and "The United States-Panama General Claims Commission", Am. J. Int. Law, vol. 28 (1934), pp. 62-65; Borchard, "The United States-Panama Claims Arbitration", Am. J. Int. Law, vol. 29 (1935), p. 103; Friede, "*Entscheidung . . .*", Z.a.o.R.u.V., Band IV (1934), pp. 925-928.

This claim is presented on behalf of Mrs. T. J. de Sabla, the owner of a tract of land known as "Bernardino" in the Province of Panama. The claimant contends that, during the period from 1910 down to the present, officials of the Government of Panama, though having notice that Bernardino was the private property of the De Sablas, have treated the tract as though it were *baldio* land, and have adjudicated over half of its area to private individuals, and granted numerous temporary cultivator's licenses on Bernardino to others, with the result of rendering the entire tract worthless to its owners.

Bernardino has belonged to the De Sabla family since 1843. It was the property of Teodoro Joly de Sabla, the claimant's husband, from 1897 until his death on October 22, 1914. The claimant succeeded to all his property at his death, and has since been the owner of Bernardino. Panama contends that the claimant is not entitled to present any claim for damages arising out of acts occurring during the lifetime of her husband and prior to her own ownership of the property.

The Commission finds that, as to acts committed during the life of Mr. de Sabla, a claim arose on his behalf. This claim belonged to the United States. It did not lapse on the death of Mr. de Sabla. It was competent for the United States to provide that it should be presented on behalf of Mr. de Sabla's executrix. This has been done. The rules of this Commission are clear on this point. article 13 (*f*) provides that "A claim arising from loss or damage alleged to have been suffered by a national who is dead may be filed on behalf of an heir, executor or administrator". The claimant is both the heiress and executrix of her husband, so recognized both by Panama and by the law of her husband's domicile. The rules require no more. Nothing in the rules suggests that an heir must show that a dead claimant's claim, as such, was bequeathed to her, or that such a claim would have survived under the municipal law of Panama.

The ownership of Bernardino by the De Sablas is not contested. Its total area was 3,180 hectares. From 1910 to 1928, the land authorities adjudicated to private individuals 40 separate tracts totaling 1,718 hectares, all of which the claimant contends were on Bernardino (most but not all of this adjudicated area was within the boundaries of Bernardino; see the discussion of damages below); these adjudications conveyed to the grantees full title to the land adjudicated. From 1917 to 1930, the land authorities granted to private individuals a total of 123 temporary licenses to cultivate land on Bernardino, covering 309 hectares in all. These adjudications and grants of temporary licenses purported to be made pursuant to successive public land laws enacted in Panama in the years 1907, 1913, 1917 and 1925. These laws, though they varied in their details, all gave power to the authorities to make such grants only on government land (*baldíos*) and, in defining such lands, uniformly excepted land which had been legitimately acquired under private titles.

Panama asserts that, under the laws, the authorities were required to grant all applications filed unless opposition was made and that consequently the granting of applications on Bernardino was entirely legal on the part of the authorities, and that this system was not confiscatory by international standards because the land laws in question gave the claimant an adequate means of defending herself against these incursions on her property, by permitting her to file an opposition to any application for an adjudication or a license, and thus to prevent the granting of such applications with respect to her property, so that the claimant's loss is attributable entirely to her own fault in failing to file oppositions and thus arrest the process in each individual case.

The United States contends that, on the contrary, the law required the authorities to reject of their own accord applications for land known to be private. The United States further asserts that if Panama were right in the contention that, under the land laws, applications on known private land had to be granted by the authorities unless opposed, then those laws as applied imposed so unreasonable a burden on private landowners as to fall below international standards.

The Commission cannot agree with Panama that the law required the Public Administrator to grant all unopposed applications for adjudications. It seems clear, on the contrary, that the Administrator, if he had notice that Bernardino was private property, should have refused all applications for adjudications thereon, even if unopposed. Since the land laws by their terms contemplated the adjudication only of public lands, and since the result of granting adjudications on private property was to deprive the owner of his property without compensation, the burden of persuasion on this issue is clearly on Panama. She has failed to sustain it. The Commission finds that the legislative intent to have applications for known private lands refused by the authorities of their own accord, is established by the following facts:

(a) All the land laws, beginning in 1907, contemplated the making of a national land map, to demarcate public from private lands. The clear inference from this requirement is that, once such maps were made, adjudications of lands shown thereon to be private, were to be denied. Otherwise, if private owners had to oppose each application even after the map were made, the making of the map, an expensive task, would have been useless and superfluous. The legislative intent clearly was, not that private owners should have to protect their rights by constant oppositions, but that adjudications should be made only on lands shown to be public on the map, and that the Administrators should reject of their own accord applications for lands appearing as private property on the map. That the failure to make the map prevented this protection from being effective can certainly not be adduced by Panama in support of its contention that the *law* intended to put the entire burden on the private owner.

(b) Pursuant to the plan for a general land map, the laws beginning in 1913 directed the Land Commissions to conduct proceedings to demarcate public from private lands. The initiative in these proceedings was to be taken by the Commission under the 1913 law and all subsequent laws. As to the 1913 law, this is established by decree No. 23 of 1913, which determined the demarcation procedure thereunder. The purpose of such demarcation proceedings clearly was to inform the commission as to what land was public and adjudicable. It follows from this, as from the map project, that the intent of the legislature was that, when the commissions thus got the information as to what was public land, no private land should thereafter be adjudicated, without the necessity of oppositions by private owners. Again as in the case of the land map,

the failure of the commissions to take the steps toward demarcation required by the laws, and to summon owners to present their titles for demarcation, cannot be used to support Panama's contention that Administrators were intended by the law to have no power to deny unopposed applications.

(c) Article 6 of decree No. 23 of 1913 admonished the Administrators of Lands that law 20 of 1913 could not destroy vested rights. If the intent of this law had been to put the onus of defending private titles on the owners, through opposition proceedings, as asserted by Panama, this admonition would be pointless.

(d) Resolution No. 59 of December 4, 1916, specifically stated that "the owner of a property is not liable to find himself at any moment in the position of having to oppose petitions which persons may make for part of the land which belongs to him; that it is just and fair . . . that those same owners should be prevented from having to incur the expense and trouble arising from such oppositions". It was therefore ordered that when the Administrator knows that land applied for is the property of another, either because it is so recorded in his office or because the owner has convincingly exhibited his recorded titles, the Administrator shall file away the petition.

(e) Article 51 of law 63 of 1917 continued the provision that the laws on *baldo* lands cannot destroy rights acquired conformably with pre-existing laws.

(f) Article 185 of the Fiscal Code of 1917 specifically empowered the General Administrator of Lands to disapprove any ruling of the Provincial Administrator affecting preferential or vested rights.

The Commission holds, on the basis of the above-recited considerations, that unopposed applications did not have to be granted, and that Administrators were to refuse adjudications of known private lands, even though no oppositions were filed. The Commission holds as a fact that the Administrator through the entire period in question did have notice that Bernardino was private property, and notice of its extent (see *infra*). Thus the most important protection held out to private owners by the law was denied to claimant, and was denied through the fault of government officials, the Provincial Administrators.

Panama also contends, however, that the remedy of opposition did exist, that it was adequate, and that the claimant's losses are her own fault for not availing herself of that remedy. The Commission holds that this contention is not sustained.

In the case of adjudications, opposition procedure was approximately the same under all of the successive land laws. An individual filed an application, giving the boundaries of the land applied for and its area, asserting that it was *baldo*, and supporting his allegations with the declarations of witnesses. This application was filed with the Provincial Administrator of Public Lands, who was during most of the period in question the Governor of the Province. The Administrator then drew up an *edicto* stating the substance of the application, including the boundaries and area of the tract applied for. This *edicto* was posted in his office for 30 days, and published in a newspaper three times during that period. At the end of the 30 days, any interested person was given 15 days in which to oppose the granting of the application. It is this procedure which Panama contends that the claimant should have followed in every case.

It is by no means clear that, under a fair construction of the land laws prior to 1917, the opposition procedure was open to the claimant at all. The structure of the 1907 and 1913 acts seems to indicate that the legislative intent was that a land map of the entire Republic was to be made, and that Land Commissions were to fix the boundaries between public and private lands. Once this obvious-

ly sound procedure was followed, so that the Government knew what lands it could adjudicate and what lands it could not, applications were to be entertained for adjudications of public lands. The opposition procedure was designed, not to accomplish the primary step of preventing private lands from being adjudicated, but to settle disputes where two individuals claimed the right to be adjudicated the same piece of public land.

This inference as to the original purpose of opposition procedure, made from the general structure of the laws, finds specific confirmation in the case of law 20 of 1913. Articles 65 and 66 thereof indicate that oppositions can only be filed by persons claiming to have a preferred right to the adjudication. This is stated to be the case in the Report of the General Administrator of Lands, June 28, 1922, Memoria of Secretary of Hacienda and Treasury, 1922, p. 313. It is further confirmed by the issuance of resolution No. 59 of December 4, 1916, which found it necessary to state that Administrators should not adjudicate lands belonging to private persons, and required an ocular inspection in case of dispute, a special proceeding not granted in case of oppositions.

From 1917 on, however, claimant clearly could have opposed, and she was once permitted to do so under the 1907 law. Indeed the principal strength of the contention of Panama lies in the fact that, on the four occasions when she did oppose, in 1910, in 1920, and twice in 1923, her oppositions were successful, either because the Administrator pigeonholed the petition, or because the petitioner, on examination of the De Sabla titles, voluntarily withdrew.

The United States contends that the opposition procedure was no real protection. This contention is based on three grounds: first, that the notice provided by the law was in fact inadequate; second, that the period allowed for opposition was unreasonably short when the protection of private property was in question; and third, that to be required to oppose every petition is an unreasonable hardship, particularly in a case where applications were as multifarious as in this one.

The assertion of inadequacy of notice is that, although the *edictos* were both posted and published, the boundaries of the land applied for, as described in the applications and consequently in the *edictos*, were customarily so vague that a landowner could not tell whether the land applied for was on his property or not. Indeed the Executive, in resolution No. 59 of December 4, 1916, recognized this to be the case. And even the recorded adjudications are extremely vague as to boundaries and difficult to plot. They commonly refer to the names of adjacent owners, or to being bounded by *baldíos*, rather than giving recognizable landmarks.

Panama meets this argument by saying that, if the boundaries of the registered adjudications are sufficiently clear to enable the claimant at the present time to know that they are located on Bernardino, then the boundaries given in the applications, and posted in the *edictos*, must likewise have been clear enough to constitute due notice to the claimant that it was her land that was being applied for. But the boundaries which are now registered did not appear in the applications and *edictos*. The registered boundaries are the result of a survey by the land authorities, made subsequent to the publication of the *edicto*, and the fact that the tracts can be approximately located from their registered boundaries in no way bears on the adequacy of the notice to the claimant contained in the *edictos*. Moreover, it is clearly possible for a stated boundary to be so vague that it does not constitute notice to an owner, upon a bare reading thereof, that the tract applied for is on her land, and yet to be explicit enough so that a licensed surveyor, going over the whole property carefully with that purpose, can testify that the tract is located within the owner's land. This argument of Panama would, if anything, throw doubt on the testimony of the surveyor that the tracts are on Bernardino, rather than on the assertion that the

boundaries in the *edictos* were vague. An examination of the recorded boundaries of the adjudicated tracts sustains the claimant's contention in this regard.

In view of the fact that the result of an adjudication on private land might be the uncompensated loss of private property, the period allowed for opposition by the laws, 15 days after a 30-day posting of the *edicto*, also seems unreasonably brief.

There is great force in the contention of the claimant as to the hardship imposed on her by forcing her to resort to opposition on each application. The facts of the case show that one opposition, even when successful, accomplished no more than to kill the particular application opposed, and did not even prevent subsequent grants to the identical persons who had previously been successfully opposed. Beside the many adjudications actually made, a number of other applications were filed which never went to completion. To protect herself by oppositions the claimant would have had to keep a constant watch over the publication of *edictos* and file an opposition to every application which might, by its terms, possibly envisage the adjudication of part of her lands.

The Commission therefore finds that the machinery of opposition, as actually administered, did not constitute an adequate remedy to the claimant for the protection of her property. The contrary contention of Panama is weakened by the fact that, throughout the period in question, high officials of the Government in charge of administering the land laws repeatedly commented publicly on the deficiencies in those laws as administered, with specific reference to the frequency with which private lands were treated as public, in the manner here complained of.

The analogous issues as to temporary licenses may be briefly disposed of. As to the availability of other remedies than opposition, and the legal compulsion on the Alcaldes to grant unopposed applications, the considerations discussed with reference to adjudications are applicable. The laws all contemplated the grant of such licenses only on national property, and there is nothing in them to show that the Alcaldes did not have discretion to deny applications for licenses to cultivate lands known to be private. That the Alcalde of Arraijan did have such knowledge as to Bernardino is established by the evidence (see *infra*).

As to the adequacy of the remedy of opposition to the licenses, the claimant's case is even stronger than with respect to adjudications. No publication of applications for licenses was required by law. As a result, the first knowledge that licenses had been granted came from actual discovery of the licensees on the land. The fact that oppositions were allowed until the land was sown does not relieve the hardship which this system imposed on private owners having large estates. Small tracts can be sown in a very short time. The cumbersome-ness of a system which required the claimant to oppose 123 applications for cultivator's licenses, after discovering the licensees on her land prior to planting, and gave her no general remedy, is obvious.

The Commission therefore finds that the authorities should have afforded the owners of Bernardino protection, by denying applications for grants and licenses thereon, and that Panama cannot avoid liability because of the claimant's failure to oppose each application.

We have stated above that the authorities had notice of the location of Bernardino and of the fact that it was the private property of the De Sablas. Let us consider the evidence on which this conclusion rests. In 1910, before the granting of any of the adjudications complained of, title papers and a map were filed with the Provincial Administrator in connection with a successful opposition to an application for an adjudication of Bernardino lands. In 1912, before the issuance of any of the licenses complained of, similar papers were filed,

together with a memorial, with the Alcalde of Arraijan. Further notices were given over a period of years both to the Administrator and the Alcalde, and similar notice was forcibly given to higher authorities as well. From 1916 on, there was added the constructive notice arising from the inscription of the property in the public registry. Coupled with these facts, the size of Bernardino, located within the respective jurisdictions of the Administrator and of the Alcalde of Arraijan, and the length of time during which it had been owned by the De Sablas, render it most probable that those officials had actual personal knowledge of the facts relating to the property. Indeed the claimant's son states that the status and extent of Bernardino were generally known to the officials whom he consulted.

Without denying these facts, and without denying the claimant's title, Panama does, however, contend, as a matter of law, that the boundaries and area were never brought to the attention of the authorities in the proper manner. This raises an important subsidiary issue, which rests on three arguments—first, that in the course of the chain of title from its earliest known beginning in 1822, successive owners, while only purporting to pass on the estate they had received, in fact altered the boundaries so as to increase the estate, and that such an alteration was of no legal effect unless accomplished by means of statutory delimitation proceedings to which the state was a party; second, that the land law of 1913 specified a means whereby private owners could give the authorities notice of their boundaries, by presenting their titles and having their land demarcated from the public domain, that this law required the owners to take the initiative in these proceedings, and that the claimant never did so; third, that the claimant herself misled the authorities by a registration of the area of her property as 300 hectares in 1916. These contentions will be discussed *seriatim*.

1. *Alteration of boundaries.* This contention is based on a detailed comparison of the boundaries of Bernardino as stated in the successive deeds and registrations from 1822 to date. The first thing to be noted is that the only possible variation in the boundaries of Bernardino, since the earliest deed, is on the north. The tract is bounded on the west by the Bernardino River, and on the east by the Polonia until it flows into the Aguacate and then by the Aguacate until it flows into the Bernardino on the south. The tract is thus bounded on three sides by well-defined landmarks, and has been so bounded from the start. Panama contends, however, as to the northern boundary, that it was first unjustifiably extended to include the headwaters of the rivers, and then further unjustifiably extended so as to give the *cordillera* as the northern boundary.

But the first deed merely says that the lands extend from the Bernardino to the Polonia, and gives no northern boundary. Taken by itself, this description seems logically to include all the land between the two rivers taken in their entirety, and thus the later mention of the headwaters of these rivers was a clearer specification of the old boundaries, and not an extension.

This description, still without specified northern boundary, was substantially repeated in deeds in 1843, 1853, and 1863. In 1869 for the first time a northern boundary is mentioned, as follows:

“. . . and on the North, the *cordillera* from the headwaters of the Bernardino and Cope Rivers to the headwaters of Polonia Brook, with all waters flowing South”.

In the absence of any evidence that this statement of boundary was erroneous, and in fact extended Bernardino beyond its previous location, the Commission cannot find that such a description of the property, made and regis-

tered in 1869, and standing on the registry for the full prescriptive period prior to 1882, constituted a usurpation of public domain which, after over 40 years, required delimitation proceedings in order to validate the stated boundaries.

Such being the case, the Commission attaches no importance to the slight variations in the successive statements of the boundaries of Bernardino in the public registry established by law 13 of 1913. The first registration, in 1916, though mentioning the 1869 deed, gave as the northern boundary simply *baldíos*. But on February 9, 1920, the Registrar, having examined a copy of the 1869 deed, put on the record a notation that the northern boundary was that quoted above from the 1869 deed. This was confirmed by the record of a formal ocular inspection and judicial decree in 1920 referred to at length below.

Thus Panama's allegation that the boundaries were altered is not sustained by the facts, and the Commission holds that the registration of the boundaries expressed in the 1869 deed was proper.

2. *Demarcation under law 20 of 1913.* This contention has been previously discussed. The 1913 public land law contemplated that the Land Commissions should make a land map, and conduct proceedings to demarcate private property from the public domain. The language of art. 6, which says that owners shall present to the commission their primitive titles "within a reasonable period which it (the Commission) may fix" is ambiguous, taken by itself, as to whether the initiative was to be taken by the commission or the owners. But decree No. 23 of 1913, establishing the procedure to be followed by the Commissions, makes it clear that the plan was for the owners to appear only when summoned by the Commission—a procedure perpetuated in law 63 of 1917.

It cannot therefore be said that the law required the claimant to present her titles to the Land Commissions, and that her failure to do so excuses the adjudications of her property. The law imposed a duty on the Commission, which it never fulfilled, both to make a land map, and to demarcate private from public lands, and it is the failure to perform this duty, over a long period, to which the claimant's troubles are principally attributable.

3. *Alteration in registered area.* When Bernardino was registered in T. J. de Sabla's name in the public registry on September 21, 1916, the boundaries were given, but the area was not. Two days later it was registered in the claimant's name. This inscription largely referred back to that in T. J. de Sabla's name, but gave the area as 300 hectares. There is nothing in the inscription to indicate the source of this figure, though Panama asserts that it must have come from the claimant's own statement in the succession proceedings to her husband's estate. The claimant's son asserts that the figure was a typographical error, and that he first discovered it when he procured a certificate of ownership in 1920, to be attached to a memorial addressed to the Governor. In 1920, after the discovery of the error, ocular inspection proceedings were conducted before the Third Circuit Court, the area was determined to be 3,180 hectares, and the decree of the Court to that effect was recorded in the public registry.

Panama contends first, that during the period of registration at 300 hectares, the authorities are to be excused for making adjudications and grants on Bernardino, because the registry only showed an area of 300 hectares, and the authorities could not know where these 300 were located. The Commission considers this position untenable. The registry stated the boundaries of Bernardino, the property within those boundaries was duly registered in the claimant's name, and no reason is perceived why the number of hectares registered as its area should in any way have induced the authorities to grant petitions for lands falling within the registered boundaries. If we assume that the authori-

ties were guided by the registry, then they should not have made grants within the registered boundaries. If they paid no attention to the registry, as seems more likely, then they were not deceived by the error in area.

Panama's next contention is that the ocular inspection, while stated to be a proceeding merely to rectify an erroneous area, actually was for the purpose of altering the boundaries of the tract. This argument has already been discussed in substance. The Commission finds that the ocular inspection was for the purpose stated, and did not involve an alteration of the true boundaries of Bernardino, as registered.

Such being the case, no defect in substance is perceived in the proceedings. A petition was presented to the judge, stating that the purpose of the proceedings was to establish the area of Bernardino, and notice thereof was, as required by law, served on the Fiscal, representing the Government, and on the adjoining landowners, Arias and Icaza. Experts were appointed, one by the claimant and one by the court. They traveled over all the boundaries of the property, and then declared the area to be 3,180 hectares on the basis of their inspection and of the maps before them.

Panama asserts that it was an error for the experts not to use an official map of Panama, instead of the "maps of the Canal engineers" which they stated they used. But the law does not state what maps shall be used, and the fact that the judge approved the survey containing this statement by the experts, and declared the area accordingly, seems conclusive as to its regularity, in the absence of any evidence to the contrary. There is no evidence to show either the impropriety of the proceedings, or that the area thus determined was erroneous.

Panama has failed to establish that the claimant omitted any steps required of her by law in order to establish the boundaries of Bernardino and bring them to the attention of the authorities. The record shows that the authorities had full and legally proper notice of the claimant's rights.

The Commission concludes that the adjudications and licenses granted by the authorities on Bernardino constituted wrongful acts for which the Government of Panama is responsible internationally. It is axiomatic that acts of a government in depriving an alien of his property without compensation impose international responsibility. Panama has attempted to justify the result reached by asserting that the claimant failed to comply with the duties and take advantage of the remedies created by Panaman law. This justification the Commission, for the reasons stated, finds to be unsustainable. In so finding, no imputation of bad faith or discrimination is made against the Government of Panama or its land authorities. As the public statements of its high officials show, it was endeavoring throughout this period to bring order out of a chaotic system of public land administration. In such a period of development and readjustment, it is perhaps inevitable that unfortunate situations like the present one should arise. It is no extreme measure to hold, as this Commission does, that if the process of working out the system results in the loss of the private property of aliens, such loss should be compensated.

By reason of art. V of the convention, it is unnecessary to consider the question of what legal remedies were open to the claimant under the laws of Panama, after the wrongful grants had been made by the Government, to obtain redress for the past wrongs, either against the Government or against the grantees.

It remains only to determine the question of the damages caused to the claimant by the adjudications and licenses.

The question of damages is complicated by the fact that the claimant still retains a registered title to the whole of Bernardino, so far as the record of that property gives any indication. In spite of this fact, since conflicting registered

titles to the adjudicated portions of the property exist in the names of the grantees of these portions, or, in many cases, in the names of their transferees, the Commission must consider that the Bernardino land which has been adjudicated is permanently lost to the claimant. As to this portion, the Commission holds that the proper measure of damages arising from adjudications is to determine the total number of hectares on Bernardino which have been adjudicated, and the value of Bernardino lands per hectare, from the evidence before the Commission, and to award to the claimant the full value of the number of hectares of her property which have been adjudicated.

Accurate determination of the number of hectares on Bernardino which have been adjudicated is difficult. The United States has presented evidence of 40 adjudications totaling 1,718 hectares, all of which it alleges to be on Bernardino. This allegation is supported by a statement by Francisco Moreira, a licensed surveyor of Panama, and by an affidavit by Orlando del Vasto. Both of these witnesses were familiar with the property and both assert actual knowledge of the locations of the adjudicated tracts. Neither one alleges, however, that *all* the adjudications in question are in their entirety on Bernardino. Panama in her pleadings entered a general denial of the United States allegations, but made no specific contentions as to which tracts it claimed to be off Bernardino.

On this state of the record, the Commission, having examined the recorded boundaries of the adjudicated tracts, and entertaining doubts as to whether all of them were on Bernardino, called upon counsel for further explanation. On the basis of that explanation, and giving due weight to the statements of Moreira and del Vasto above mentioned, the Commission finds that 36 of the 40 adjudications in question were on Bernardino, in whole or in part, and that the total area on Bernardino which has been adjudicated is 1,362 hectares.

We turn now from the adjudications to the matter of cultivator's licenses. The evidence indicates that the bulk of the licenses were on the central and southern part of the property, while most of the adjudications were in the northern part. Presumably, the transitory licenses were granted on unadjudicated land. There were granted in all 123 licenses which were certified to be on Bernardino. The aggregate area of these was 309 hectares. The licenses were all temporary, usually for two years, but there is evidence that the licensees often did not leave at the end of the term and did not observe the proper limitations as to area. There is also evidence that these numerous licenses encouraged trespassers to come on the property. There is evidence also that the licensees destroyed the timber and denuded the soil by improper cultivation.

The claimant asserts a constructive total loss of the property because the breaking up of the continuity of the estate by adjudications, coupled with the damage done to forests and soil by the licensees, have rendered impracticable any development of the land.

Much of the evidence as to the value of the land is unsatisfactory. Most of it relates to the value of the timber which was originally on Bernardino. One witness for the claimant valued the land at \$250 per hectare, assuming Bernardino to be in its original condition. Another valued it, apparently as of 1922, at \$100 per hectare for agricultural purposes. In 1912, Mr. de Sabla refused successive cash offers of \$75,000 and \$135,000 for the entire tract. It should be noted, however, that the offerer overestimated the area of Bernardino, giving it as 10,000 acres whereas the correct area appears to have been 7,950 acres or 3,180 hectares. The offerer's agent, William McCoy, who subsequently became comptroller of the American Brakeshoe and Foundry Company, states that he examined and re-examined the property, assisted by expert timber cruisers, and that he considered the property to be worth \$100 per

hectare. Some light is thrown on value by the fact that the Canal Zone authorities made a practice of leasing land in the Canal Zone at the rate of \$5.00 per hectare per year. Carlos Icaza Arosemena, a witness in behalf of Panama and a neighbor of Bernardino, placed the value of 40,000 balboas on Bernardino, apparently in the condition in which it was in 1933. He did not know the extent of the property and disclaimed any knowledge of the value of the forests and even ability to distinguish between different kinds of trees. Ramón Arias F., another witness in behalf of Panama and a neighbor of Bernardino, testified that the lands in Bernardino "may be worth 15 balboas per hectare". He was not acquainted with the lands in their entirety but with that portion of them which adjoined the national highway. He did not know the area.

The higher of the two actual offers made for Bernardino in 1912 was at the rate of \$13.50 an acre for the acreage assumed in that offer, and although the would-be purchaser estimated the acreage at too high a figure, this should not affect the value which he ascribed to the property per acre. Taking everything into consideration, the Commission is of the opinion that this offer gives as close an approximation to the true value per acre of Bernardino in its original state as can be reached. On this assumption, converting acres into hectares, we would get a value of \$33.75 per hectare.

The Commission concludes that the claimant is entitled to receive \$33.75 for each of the 1,362 hectares within Bernardino which have been adjudicated to others and that the balance of Bernardino, amounting to 1,818 hectares, has been deprived of half its value by cultivators licenses and the resulting deforestation and denudation of soil and also by the destruction of continuity resulting from both the adjudications and the cultivators licenses. The result of the computation based on these assumptions fixes the loss of the claimant due to illegal adjudications and licenses at \$76,646.25.

The Commission decides that the Republic of Panama is obligated to pay to the United States of America on behalf of Marguerite de Joly de Sabla the sum of \$76,646.25 without interest.

*Dissenting opinion of Panamanian Commissioner*

It is with profound regret I find it impossible to accept the foregoing decision, as I am not in accord with either the grounds upon which it is based nor with the estimate of damages which the Commission considers the claimant has sustained. Lack of time does not permit me to make a detailed analysis of all the arguments given for showing that Panama has incurred international liability for the acts or omissions of Panaman authorities in connection with Mrs. Joly de Sabla's land.

The land laws of Panama, in their aggregate, afford all the guaranties and protection required by landowners; and as recognized by the majority of the Commission the Government of Panama has put forth a continued effort to correct such defects as are inevitable in all legislation, especially in a new country like Panama and one with very limited wealth.

The majority of the Commission places great stress upon the lack of a general map of the real estate of the Republic, the preparation of which was ordered by a number of the National Assembly's enactments. It is to be observed that while such acts of the Assembly had an evidently praiseworthy object, the Assembly itself, doubtless taking into account the scarcity of funds, omitted to include the necessary appropriation in the budget of expenditures for preparing the map, which involves much work and which could not be done in a short time. It is not bold to make the assertion that few countries of the world have such a map and those which they do have in one form or another

are the outgrowth of work covering many years. This being the case, it is not conceived how, under international law, the lack of such a map can be the basis of liability.

The majority of the Commission accepts as valid the allegation of the claimant that because on some occasion or other she furnished the Administrator of Land of the Province of Panama and the Alcalde of Arraijan maps and titles to her property, those officials were obligated to refuse flatly any petitions which they might receive for adjudications or permits which might embrace the claimant's land. In connection therewith, several times citation is made of resolution No. 59 issued by the Secretariat of Hacienda and the Treasury on December 4, 1916. It is proper to observe that this resolution was drawn to cover a special case in which the petitioner gave definite evidence of his right of domain and of the bounds of his property. So that in all events the principle established by that resolution would be applicable only in cases of proprietors in a like situation.

The claimant has not accompanied her claim with any definite evidence of the northern boundary of her property and she attempts with a military map inadequate for determining this point to have this Tribunal decide so momentous a question. So it is inevitable to conclude that the claimant presented also to the authorities of Panama equally deficient records or evidence, and the conclusion is not overdrawn that her not filing with this claim the maps she says she furnished to the authorities aforesaid was because those maps would not have served to support her statements.

It is evident, therefore, that the authorities of Panama did not have proper grounds upon which to proceed as desired by the claimant.

In view of the foregoing the logical assumption is that the authorities of Panama did not overlook any legitimate right to which Mrs. de Sabla was entitled and hence that their acts have not been violatory of international law.

The contention advanced by the claimant that it was a heavy burden upon her to be continually watching the publication of edicts and opposing any petition which might involve an encroachment upon her land is wholly ungrounded and can be held only as a more or less able recourse taken by the claimant's attorney to impress the Commission. Unfortunately it seems that the attorney accomplished his purpose as regards my honorable colleagues who, in this case, make up the majority of the Tribunal, probably because they are unfamiliar with both the formalities surrounding such adjudications and with the terrain to which they refer. To show the palpable lack of any ground for this argument, the undersigned will enumerate the adjudications shown in the record and the dates thereof. During the years 1909, 1910 and 1911, there were only five adjudications. There were none in 1912, 1913 and 1914, and one each year in 1915 and 1916. In 1917 there were twelve, three or four adjudications from 1918 to 1922 inclusive, one a year, and one each year in 1923 and 1924. This enumeration shows that the burden of bringing opposition was not so grievous as the claimant would attempt to make [it] appear and that if during the years prior to 1917 the claimant had exercised reasonable vigilance over her property, certainly the petitions during the years following would not have amounted to the number they did and that the adjudications giving rise to this claim would not have been made.

Regarding permits for transitory cultivation, the same observation may be made. The 123 permits to which the claimant refers did not all cover the same period or occur during the same year. With a little effort and reasonable vigilance, Mrs. Joly de Sabla would have been able to prevent those permits becoming effective, if they had been for the cultivation of crops on her property. It is proper to observe here that in the certificate of the Alcalde de Arraijan

referring to these permits, they are mentioned as being at Bernardino, without signifying that this means that the permits referred to the property of that name, as there is an adjacent *corregimiento* of the same name. There is nothing in the record to clear up this point.

The evidence submitted to establish the area of the adjudications and the amount of the damage is, as the majority of the Commission recognizes, very deficient. The undersigned considers that with this evidence it is not possible to sentence Panama to pay an indemnity and that hence the claim should be disallowed.

The majority of the Commission considers that the absence of certain evidence of Panama is unfavorable to it, that some value should be accorded the evidence of the claimant, and a decision given in the form rendered. The undersigned is not in agreement with this reasoning, as he considers any award in such circumstances as very hazardous.

Such argument runs counter to the general principle of law that the burden of proof lies on the plaintiff and that the defendant is not under obligation to prove negative facts. With such a finding, in the instant case a claim is held to be established, not because the claimant has presented proof of the assertions made, but because the respondent Government has presented no evidence. The *ex-parte* testimony of Orlando del Vasto and the certificate of Moreira on which the Commission had relied to hold that certain adjudications lay within the property of the claimant and to fix the number of hectares they embrace has a very relative probatory value. There is no other evidence in the record and on the contrary there is grave doubt as to its accuracy, inasmuch as it has not been corroborated by the map produced by the claimant.

After this case was closed, the Commission entertained serious doubts in this regard and decided to ask the Agents for such explanations as they could give relative thereto. These explanations were not, in my opinion, productive of any practical results. The outside attorney of the claimant after continued effort for an entire day ended by relying on the testimony of Del Vasto and Moreira.

For these reasons I am of the opinion that this claim should be disallowed.

---

ABRAHAM SOLOMON (UNITED STATES) *v.* PANAMA

(*June 29, 1933, dissenting opinion of Panamanian Commissioner, undated.*  
*Pages 476-481.*)

---

PROTECTION OF ALIENS: CONVICTION, SENTENCE. Arrest on May 16, 1920, by claimant, employed on large estate, of known poacher subsequently turned over by him to United States soldier and native who, pending poacher's transfer and surrender to police, locked him up at ranch house from where he escaped on May 18, 1920. Claimant convicted of unlawful detention (article 488, Penal Code) and sentenced to 18 months in prison by Judge of Second Circuit. Confirmation by Supreme Court. Release of claimant after one year for good behaviour. *Held* that claimant unlawfully convicted and sentenced: if he was at all accountable for detention, which is very doubtful, then Courts should have applied different article (article 491, Penal Code) which merely provides a fine, because of claimant's intention to surrender poacher to police. Damages allowed.

*Cross-references:* Annual Digest, 1933-1934, pp. 244-246; Comisión General de Reclamaciones entre Panamá y Estados Unidos de América, Reclamación del Norteamericano Abraham Solomon, Registro No. 12. (Publicación Oficial, Panamá, 1934.)

*Bibliography:* Hunt, Report, pp. 488-490, and "The United States-Panama General Claims Commission", Am. J. Int. Law, vol. 28 (1934), p. 66; Borchart, "The United States-Panama Claims Arbitration", Am. J. Int. Law, vol. 29 (1935), p. 102; Friede, "*Die Entscheidungen . . .*", Z.a.ö.R.u.V., Band V (1935), pp. 465-466.

This is a claim on behalf of Abraham Solomon for \$30,000 with interest. Solomon was employed by Wm. G. Chase, in the years 1919 and 1920, to live on the Hacienda San Juan, a large estate in Chiriquí Province, and keep order on the property. On May 16, 1920, Solomon arrested Benito Villamonte, a known poacher, whom he found trespassing on the property. Solomon turned his prisoner over to an American soldier and a native, who took him to the San Juan ranch house, 5 hours' journey distant. Solomon remained behind. At the ranch house, Villamonte was locked up, pending his transfer to David to be surrendered to the police. He remained locked up during all of May 17. On this day Solomon also came to the ranch house expecting to accompany Villamonte to David. On the morning of May 18 Villamonte escaped and was not recaptured.

As a result of these occurrences, criminal proceedings were instituted against Solomon before the Judge of the Second Circuit, in Chiriquí. Solomon was convicted and sentenced to 18 months in prison. Both conviction and sentence were affirmed on appeal by the Supreme Court of Panama. Solomon served a year of his term but was released for the remainder thereof because of good behavior. It is this conviction and sentence which give rise to the claim here presented.

Solomon's arrest of Villamonte, who had been warned to keep off San Juan, seems to have been legal under art. 1575 of the Administrative Code, which allowed the apprehension, by an owner, manager or employee, of a trespasser caught on unfenced property "in which the prohibition to trespass is evident". Indeed Panama conceded this in paragraph IX of her answer, although it was contested on the argument.

But it has been asserted that the detention of Villamonte in the ranch house as opposed to his arrest constituted a crime. Both the opinions of the courts in Panama and the answer of Panama before the Commission indicate that this was the ground on which the conviction was based. The Commission finds that the detention was a not unreasonable incident of the arrest. Villamonte was arrested about 2 o'clock in the afternoon of May 16, arrived at the ranch house at eight in the evening, was held during the 17th, and escaped at breakfast time on the 18th. It was intended to take Villamonte to David, a 12-hour ride. The evidence shows that a day was needed to catch and grainteed the horses for this journey. Nor was the project of transferring the prisoner to David in itself unreasonable. The evidence shows that the local captain of police followed the same course when he arrested trespassers on San Juan. It is moreover very doubtful if Solomon can be held accountable for the incarceration at the ranch house. This seems to have been ordered by Johnson, the manager of the ranch, and carried into effect by a soldier who was not subject to Solomon's control.

The Commission is therefore of the opinion that there was no criminal act for which Solomon could be held responsible. But assuming for argument that Solomon committed an illegal act, either in arresting Villamonte or in imprison-

ing him, the Commission is nevertheless of the opinion that there was no justification for convicting Solomon for the particular offense of which he was found guilty. The courts held that he had violated art. 488 of the Penal Code, which provides as follows:

"A person who locks up or detains another, depriving him of his liberty, shall be punished with from two to three years *reclusion*.

"The same penalty shall be incurred by him who furnishes the place for the execution of the crime.

"The penalties of this article shall be changed to *presidio*, if injuries have been caused to the detained person, when the crime does not involve a higher penalty."

But art. 491 of the Penal Code provides as follows:

"He who, outside of the cases permitted by the law, shall apprehend a person to turn him over to the authorities, shall be punished by a fine of fifty to one hundred balboas."

The Commission is of the opinion that it was clear from the record before the courts that if Solomon was guilty of any crime, with reference either to the arrest of Villamonte or to his incarceration, he was guilty of a violation of art. 491 only, and not of art. 488. There was no evidence in the record to sustain a finding that Solomon did not intend to turn Villamonte over to the police. There was in the record ample evidence that from the first such was the intention. Solomon, Greenleaf, and Johnson testify to this effect and Villamonte himself swears that he was told that he was to be taken to Horconcitos for punishment.

Solomon's earlier history shows his inclination to co-operate with the authorities. For over a year, from July, 1918, until his employment by Chase in October, 1919, he had been a member of a detachment of American troops stationed in Chiriquí and had repeatedly assisted the police in making arrests. This background was familiar to all who participated in the trial, and was specifically testified to by the David police captain and by Chase. Such a situation emphasizes the unreasonableness of assuming that Solomon arrested Villamonte for any purpose other than to surrender him to the authorities. Incidentally, it should be noted that both the Attorney General of the Republic and the dissenting Justice of the Supreme Court urged that Solomon's sole offense was a violation of art. 491.

The Commission finds that the conviction and imprisonment of the claimant herein constituted a palpable injustice.

The evidence, and particularly that submitted by Panama with its reply brief, establishes beyond question that there was a high state of public sentiment in Panama which had a direct bearing on the prosecution of Solomon. Solomon had been for over a year, just prior to his employment by Chase, one of the best known and most active members of the detachment of American troops under Major Pace which originally went to Chiriquí to supervise the 1918 elections, and remained thereafter to protect Americans residing in that province and to assist the local police in arresting offenders against Americans.

There has been much discussion between the parties hereto as to the functions of this detachment of soldiers. Their functions bear only indirectly on this case, since Solomon was no longer a soldier when he arrested Villamonte. But what does bear on the case is that Panama not only concedes, but vehemently asserts in its pleadings herein, that the presence of these soldiers was extremely distasteful both to the public and to the authorities in Panama. Constant diplomatic efforts were made to have them withdrawn from the

province, and the correspondence and other evidence adduced by Panama shows that popular feeling was intense and that it was shared by the authorities.

Not only Solomon's association with the soldiers but also his employment by Chase was a ground for local enmity. Chase, we know from his claim (Registry No. 10), had been in constant conflict with the authorities since 1912 over the title to San Juan, and was locally unpopular. It is significant that Panama asserts in its reply brief that the real purpose of Pace's detachment in remaining in Chiriquí after the 1918 elections were over, was to protect Chase in his alleged wrongful possession of San Juan. Whether this contention is accurate or not, it must be taken to represent public opinion in Panama, and it accentuates the unpopularity of Solomon's position.

Examples of this hostile state of feeling abound in the record of the trial in Panama. The governor, when asked about the functions of the soldiers, said that as far as he knew they were merely on a pleasure trip, which was obviously not the case.

The fact that four separate investigations were instituted against Solomon, the fact that the charge was changed to illegal imprisonment after an earlier charge of wounding had been dropped for lack of evidence, and that the case was revived after being moribund for months, the unexplained change of trial judges during the final proceedings, the fact that the Fiscal in his address to the lower court denounced the soldiers, emphasized Solomon's connection with them, and quite improperly went out of his way to excite hostility to Solomon by reciting a story about him which had no relation to any evidence in the record, all taken together lend credence to the theory that the proceeding was sustained, not by the ordinary motive of punishing an offense, but by strong local sentiment.

The Commission cannot avoid the conclusion, arising largely out of Panama's own evidence and contentions, that the claimant's conviction was unconsciously influenced by strong popular feeling. So to hold is not to cast any personal aspersions on the judges involved. The unavoidable susceptibility of local judges to local sentiment is a matter of common knowledge. One of the primary purposes of international arbitration is to avoid just such susceptibility, and to remedy its consequences.

The Commission decides that the Republic of Panama is obligated to pay to the United States of America on behalf of Abraham Solomon, the sum of \$ 5,000, without interest.

*Dissenting opinion of Panamanian Commissioner*

The undersigned regrets that he must dissent completely from the decision of the majority of the Commission, since he considers its bases in fact and in law erroneous.

Abraham Solomon, ex-soldier in the American Army, was an employee in the service of W. G. Chase on a farm that the latter had in the San Juan lands, to which Chase had no legal title of domain, for which reason the latter kept up constant disputes with residents or denizens who had settled in that region. On May 16, 1920, Solomon arrested a countryman named Benito Villamonte, on the pretext that he was hunting on the San Juan lands without permission. That was the pretext invoked by Solomon himself in a statement that he made to a newspaper of David called *Ecos del Valle*, and in the first testimony that he gave before the judge. After arresting him, Solomon took him to a house in Galique, where he kept him in his power for some time and then turned him over to an American soldier and a countryman, to be taken to San Juan farm. There Villamonte was kept imprisoned during the whole

night of the 16th, all day and night of the 17th and during the early hours of the 18th, on the morning of which day Villamonte succeeded in escaping from his prison. When Villamonte escaped, Solomon and a soldier started out in pursuit of the fugitive and when Solomon found him in a thicket, he called to him to halt, discharging his firearm. Villamonte later appeared before the authorities with a slight wound on the head, but although the fact of the shots was confessed by Solomon himself, it was not proved legally either that Villamonte's wound was caused by a bullet or that Solomon was to blame for the wound.

For these acts Solomon was indicted as a violator of chapter I, title XIII, book II of the Penal Code in force in 1920, which treats of illegal detention. In the third paragraph of article 488 of that chapter a major penalty is provided when wounds have been caused in making the illegal arrest. The judge consequently had to investigate the accusation made by Villamonte that Solomon had wounded him with a firearm, but as there was not sufficient proof of this he was exonerated of that charge in the decision. On the other hand, considering the fact of illegal arrest and detention fully proved, he declared Solomon guilty and sentenced him to the minimum penalty of two or three years' imprisonment provided by article 488 of the Penal Code, which was, however, reduced by one-fourth, that is, the sentence imposed was one of 18 months.

During the trial, Solomon had his defender and enjoyed the benefit of freedom on bail. Of the 18 months' imprisonment to which his sentence was reduced, he served only one year, at the end of which he was granted conditional liberty for the rest of the sentence and did not serve his sentence in the common jail, as should have done a convict on which the penalty of imprisonment (*reclusion*) had been imposed, but, on account of the mediation of the United States Government in his favor he passed it at the central police barracks, occupying the room of the chief of police and being treated with special consideration, as Solomon himself declares.

The decision on this claim is based on the opinion held by the majority of the Commission that the Panama courts which passed on the case brought against Abraham Solomon should not have sentenced him as guilty and that in case he was guilty they should not have applied article 488 of the Penal Code, but article 491. Both the decision of the court of first instance and that of the Supreme Court of Justice abound in juridical reasoning that has not been refuted, but rather re-enforced, before this Commission, and the grounds for this decision are not in conformity, in the writer's opinion, with the facts brought out in the case.

The majority commits an error in describing Villamonte, the victim of the arrest and illegal detention perpetrated by Solomon, as a "known poacher". In the proceedings is no evidence showing that Villamonte was a poacher. It has been demonstrated, moreover, that poaching, under Panamanian law, does not constitute a crime, and therefore nobody can be arrested for poaching. And the very legal basis that is cited in justification of the arrest by Solomon is article 1575 of the Administrative Code, which does not refer to poachers, but to trespassers.

Neither is there any basis in the proceedings for the statement that is made in the decision of the majority, that Villamonte had been told not to enter the San Juan lands. Those lands did not form a fenced property, nor was there on them "a plain prohibition to enter"; neither Chase nor his employees could make such a prohibition, because he was not the owner of those lands, as is proved by the documents connected with his claim (Register No. 10).

The evidence which appears to have formed the criterion for the majority is evidence *ad hoc*, consisting of affidavits signed by the very persons

responsible for the illegal acts that took place in the Province of Chiriquí under the military occupation which that Province suffered during the years 1918 to 1920. Those persons are, first, the claimant Solomon, his employer (*patrón*) Chase and an employee of Chase named Johnson. These statements are partial on account of personal interest, and their lack of merit is generally demonstrated by the numerous contradictions that there are between those affidavits, prepared *ex profeso* for the benefit of this claim, years after the occurrences, and the documents and statements of those same persons at the time when the acts took place, beginning with the arrest and illegal confinement of Villamonte and ending with the sentencing of Solomon.

The statement made in the decision, that it was intended to take Villamonte to David, and that for that reason he was kept locked up at San Juan for two days, proves that illegal arrest and detention took place. If there really was such intention, there was no justification for it, because it has been proved before this Commission, with quotations from the pertinent provisions of law, that there was no official at David who could have passed judgment as a court of first instance on Villamonte as a "trespasser". If there actually had been "trespassing", Villamonte should have been taken at once before the Alcalde of the District (who was a two or three hours' journey distant from the place of the arrest) by the same person who arrested him and not turned over to other unauthorized persons for the latter to keep him deprived of his liberty as was done, from early in the afternoon of the 16th of May until the morning of the 18th, that is, on three different days. The fact that Johnson or a soldier locked Villamonte up at San Juan, after Solomon had arrested him and had turned him over to a soldier and a peasantman who was a friend of Chase, did not relieve Solomon of responsibility, for although he had helpers in his crime, he continued to be the principal author of it. Solomon committed the offense defined and punished by article 488 of the Penal Code in force in Panama in 1920, and his sentence was therefore perfectly legal. If that sentence can be characterized, by anything, it is by its leniency, since the judge applied only the minimum penalty of two years, further reduced by one fourth.

In the proceedings there is abundant proof that the act performed by Solomon was one of the many acts of intimidation that Chase and his employees carried out under protection of the military occupation, against numerous residents of the Districts of San Félix and San Lorenzo, in his determination to have himself recognized as owner of some lands to which he held no title of domain, acts among which may be cited the burning of dwellings of country people, admitted by Chase himself in his statement before the judge in the case and by Johnson himself in his affidavit.

The conclusion reached by the majority is also erroneous that, in the sentences handed down by the courts of first and second instance in the case conducted against Solomon, a strong popular feeling produced by the military occupation of the Province of Chiriquí unconsciously exerted an influence. In the proceedings there is proof that that occupation had ceased more than a year before the case against Solomon was brought to an end in Chiriquí. That "unconscious influence" is a mere assumption and not a proved fact. Two officials documents appearing in the proceedings, known to the United States Government and never refuted by that Government, refer to the fact that Solomon killed a person named Cruz Jiménez, whom he was pursuing when he was a soldier. The officers of the American troops stationed in Chiriquí stated to officials of the Panamanian Government that the act took place in Costa Rican territory and the Panamanian Government, trusting the word of honor of American military men, refrained from carrying the matter further. If any intention to persecute Solomon had existed on the part of the Panamanian

Government, because of the popular or national feeling on account of the occupation, it would have been easy for it to do so by means of a judicial investigation of that killing. On the other hand, not only the claimant Solomon but his associates Chase and Johnson have declared in their respective affidavits that "the atmosphere of the trial was friendly" and falsely attribute Solomon's sentence to influence of the executive branch on the judge of first instance. But it is to be noted concerning this point that the claimant Government has not proved or even claimed that such influence was exerted in the court of second instance.

The decision cites as an example of "hostile feeling" against Solomon the fact that the Governor of the Province of Chiriquí, when asked what the duties of the soldiers were, said that they were on a pleasure trip. As the decision is not sufficiently explicit on the point, the undesigned Commissioner considers it pertinent to call attention to the fact that the question put to the Governor referred to the American soldiers who *were in San Juan*. The Governor said (and there is no document or statement contradicting it) that the soldiers had given him to understand that they were in San Juan on a pleasure trip.

The writer cannot see how that assertion can be considered an act of hostility.

The affirmation that the charge against Solomon was changed is not correct. Solomon was indicted on one single charge: that of violating the chapter of the Penal Code that treats of illegal detentions. The investigation relative to the alleged wound of Villamonte is included under this charge, in virtue of the provisions of paragraph 3 of article 488 of the Penal Code. Likewise it is to be observed that in mentioning "the unexplained change of judges during the final proceedings" the decision commits a double error. Firstly, there was no change of judge, from the indictment to the passing of sentence, and secondly, because conclusions cannot be based on mere suspicions. There was a change of judge on the Chiriquí Circuit before the case against Solomon was started. If this change were due to an illegal and improper cause, it was the business of the claimant Government to submit positive proof of it, which it has not done. At any rate, there are references in the proceedings to publicly known facts, proving that the change of judge had nothing to do with the case brought against Solomon.

When the decision says that there was a *palpable injustice* in the sentencing and imprisonment of Solomon, a palpable error is committed. As the Mexican-American Commission said in the Chattin case, "an accused person can not be convicted unless the Judge is convinced of his guilt and has acquired this view from legal evidence. An international tribunal can never replace the important first element, that of the Judge's being convinced of the accused's guilt; it can only in extreme cases, and then with great reserve, look into the second element, that is: the legality and sufficiency of the evidence" (*Opinions of the Commission*, p. 436).

Nor can any international responsibility against Panama be deduced, even granting that the Panamanian tribunals did commit an error in condemning Solomon, for the claimant was tried under all the guaranties allowed him by the law.

There is no denial of justice when there is a probable cause or sufficient reason for arresting and trying a person as responsible for an ordinary crime. Denial of justice consists essentially in depriving a person of the means needed for him to defend himself before the courts and that by being deprived of those means of defense he is made to suffer an unjust sentence. "Bad administration of justice alone", says Borchard, "is not enough to cause a government to intervene in behalf of a citizen who claims to have been unjustly treated by the courts in another country" (*Diplomatic Protection of Citizens Abroad*, p. 197).

“Not even a decision based on an erroneous interpretation of the law will permit it. There must be fraud, corruption and denial of legal opportunity to present the case” (Borchard, work cited, p. 332; Moore, *International Arbitrations*, pp. 2134 and 3497).

The decision against the claimant not only was just, but mild. But even if it had been unjust or severe, it is evident, as Borchard says, that “the State is not responsible for the mistakes or errors of its courts” and that “there is no international obligation of the State to see that the decisions of its courts are intrinsically just”. It is not possible to admit that foreigners, under pretext of denial of justice, should enjoy the special privilege of having the sentences passed on them by the local tribunals subjected to review by an international tribunal, so that the latter may decide whether the judge’s view of the law was correct or not. This proposition is sound, because while local judges may make mistakes, international judges are not exempt from error.

Because of what has been set forth, I consider that this claim should be rejected.

---

#### PANAMA AND ABUNDIO CASELLI (PANAMA) *v.* UNITED STATES

(*June 29, 1933, dissenting opinion of Panamanian Commissioner, undated.*  
*Pages 625-629.*)

---

JURISDICTION, PRESENTATION OF CLAIM: CLAIM BROUGHT BY STATE ON BEHALF OF ALIEN.—INTERPRETATION OF TREATY: INFERENCE FROM SILENCE, OBVIOUS, NATURAL, ORDINARY, REASONABLE MEANING, LANGUAGE IN WHICH DRAFTED AND EXECUTED.—PRIVATE PROPERTY, EXPROPRIATION: MEANING OF EXPRESSIONS. Treaty of 1903 between United States and Panama: transfer of Canal Zone to United States. Executive Agreement of 1904: delimitation of Zone boundaries. Sale in 1909 by Mr. A. Caselli, Swiss citizen, of half interest in tract of land to Panama. Suit brought by Mr. Caselli on October 17, 1913, on the ground that price paid was less than half of true value. Decree of Supreme Court of October 16, 1914, giving Panama option of returning tract or paying balance. Exchange on February 11, 1915, of ratifications of Boundary Convention of 1914 transferring some lands, among which the tract bought from Mr. Caselli, from Panama to Canal Zone, and others from Canal Zone to Panama. *Held* that Commission competent to decide Mr. Caselli’s claim: jurisdiction expressly conferred by article I, Claims Convention. *Held* also that, in the absence of any provision to this effect, neither party obligated to make payment for land transferred (no inference of such obligation from mere silence; obvious and natural interpretation of Boundary Convention: exchange of properties); and that tract bought from Mr. Caselli did not continue to be “private property” within meaning of article VI, Canal Treaty of 1903, safeguarding rights of owners of private property: Treaty, drafted and executed in English only, must be interpreted according to ordinary English usage; and that use of term “expropriated” in article I, paragraph 4, Claims Convention, does not amount to admission by United States either of taking of tract other than under Convention of 1914, or of obligation to make compensation in money: passing to United States of perpetual use, occupation and control of tract may be described as “expropriation”, and compensation for it may be made by transfer of other property instead of by money payment (obvious and reasonable explanation: “expropriated” used by way of description of claim, not as admission

in regard to merits, facts, in which case parties would have specially submitted to this Commission question of compensation normally and appropriately belonging to Joint Land Commission).

*Cross-references:* Annual Digest, 1933-1934, pp. 438-441; Comisión General de Reclamaciones entre Panamá y Estados Unidos de América, Reclamación de la República de Panamá en su propio nombre y en representación de Abundio Caselli, Registro No. 16. (Publicación Oficial, Panamá, 1934.)

*Bibliography:* Hunt, Report, pp. 632-633, and "The United States Panama General Claims Commission", Am. J. Int. Law, vol. 28 (1934), pp. 65-73; Friede, "Die Entscheidungen . . .", Z.a.ö.R.u.V., Band V (1935), p. 457.

This is a claim for 14,969 balboas, with interest, on behalf of Abundio Caselli, or the Government of Panama, as their respective interests may appear. Caselli is a Swiss citizen, but jurisdiction to decide the claim is expressly conferred on the Commission by art. I of the convention under which it acts.

In 1903 the United States entered into a treaty with the Republic of Panama. This treaty transferred the Panama Canal Zone to the United States. The treaty did not transfer title to the Zone; it transferred the use, occupation and control of the Zone in perpetuity, together with such rights as the United States would possess if it were the sovereign thereof. In 1904 the specific boundaries of the Zone were delimited by executive agreement.

Caselli and one Pellas were the owners, *pro indiviso*, of a portion of a tract of land known as El Tivoli, in the city of Panama. For the sake of brevity this portion of the larger tract is hereinafter called simply El Tivoli. In 1909 Caselli sold to the Government of Panama his half-interest in the property, less a small part thereof which he had previously sold to one Abad.

On October 17, 1913, Caselli brought suit against the Government to set aside the sale for *lesión enorme*, the ground for the action being that the price paid by the Government was less than half the true value of the property. The suit was decided in Caselli's favor by the Supreme Court of Panama which, on October 16, 1914, entered a decree giving the Government the option of rescinding the sale and returning the property or paying the balance of the price declared by the Court to be just.

The Government has never rescinded nor returned the property. On February 11, 1915, the Government owned Caselli's former share of El Tivoli subject to no lien or encumbrance in favor of Caselli. On that date, Panama and the United States exchanged ratifications of a boundary convention.

This convention contained no express conveyance of any property by either party to the other; it simply fixed boundaries for the Canal Zone somewhat different from the boundaries fixed in the original Canal Zone treaty of 1903 and delimited in 1904. The result of the Boundary Convention of 1914 was, however, to place in the Canal Zone some lands which had previously been a part of the Republic of Panama, and to place in the Republic of Panama some lands which had been previously in the Canal Zone. Among the lands which passed to the Canal Zone was El Tivoli.

The Boundary Convention of 1914 says nothing about payment by either party for the land transferred by the change in boundaries. When the parties to a document intend to create an obligation to make substantial money payments, they usually say so. We cannot infer an obligation to make payments from mere silence. The obvious and natural interpretation of the convention of 1914 is that it effected an exchange of properties and that each party was compensated by the properties received from the other. This conclusion is reinforced by the fact that the United States has not claimed compensation for the land which the convention of 1914 excluded from the Canal Zone and

returned to Panama, although part of this land had been purchased by the United States from the old French Canal Company, a private person, just as El Tivoli was purchased from Caselli.

But the Boundary Convention of 1914 refers back to the original Canal treaty of 1903, and provides that the rights acquired under the Canal treaty shall not be impaired. Article VI of the Canal treaty contains a provision safeguarding the rights of the owners of private property. This article provides:

“The grants herein contained shall in no manner invalidate the titles or rights of private land holders or owners of private property in the said Zone or in any of the lands or waters granted to the United States by the provisions of any article in this treaty . . .”

The article then goes on to provide for compensation in case private property is taken or damaged. Panama argues that El Tivoli, because it had been purchased from private persons and had not become property of public use, was “private property” when the Boundary Convention of 1914 took effect; that the convention of 1914 transferred to the United States not title but the use, occupation and control of the property in perpetuity; that in spite of the passage of the use, occupation and control, El Tivoli continued to be private property entitled to the protection of article VI of the 1903 treaty; and that when the United States entered upon and used the property it became obligated to make payment to Panama. The Commission does not agree with this reasoning. In the first place, the treaty of 1903 was drafted and executed in English only. Its words must be interpreted according to ordinary English usage. By that usage, private property is property belonging to private persons as contra-distinguished from property belonging to the state. The private nature of property by that usage does not depend upon the nature of the property but upon the nature of the owner. By that usage El Tivoli was public and not private property. It did not fall under article VI. In the second place, there is no evidence in the record that the United States ever entered upon El Tivoli or made any use of it, and, in the third place, had there been evidence of such an entry by the United States, it would not have indicated an assertion of any right in excess of the right of use, occupation and control transferred by the operation of the Boundary Convention of 1914.

At the hearing, reference was made to the terms of the paragraph in article I of the Claims Convention which submits this claim to the Commission. That paragraph reads as follows:

“As a specific exception to the limitation of the claims to be submitted to the Commission against the United States of America it is agreed that there shall be submitted to the Commission the claims of Abbondio [*Abundio*] Caselli, a Swiss citizen, or the Government of Panama and José C. Monteverde, an Italian subject, or the Government of Panama, as their respective interests in such claims may appear, these claims having arisen from land purchased by the Government of Panama from the said Caselli and Monteverde and afterwards expropriated by the Government of the United States, and having formed in each case the subject matter of a decision by the Supreme Court of Panama.”

It was suggested that the use of the word “expropriated” in this paragraph amounts to an admission by the United States that there was some sort of a taking by the United States of the property of El Tivoli other than the transfer under the convention of 1914, and that the use of the word “expropriated” also amounts to an admission by the United States that there was an obligation to make compensation in money. It is conceded that the convention of 1914

passed to the United States the use, occupation and control of El Tivoli in perpetuity. That in itself may be described as an expropriation. Nothing further need be inferred in order to make the word "expropriated" appropriate. Nor does the use of the word "expropriated" imply an obligation to make money compensation. There is no reason why compensation for an expropriation should not be made, as apparently it was made under the 1914 convention, by the reciprocal transfer of other property.

The obvious and reasonable explanation of the use of the word "expropriated" in the paragraph from the Claims Convention, quoted above, is that it was used by way of identification and description of the claim and that it was not intended as an admission in regard to the merits of the claim or in regard to any of the facts upon which the claim is based. If an admission of liability had been intended, it is to be assumed that the parties would have stated simply and expressly that they intended to admit liability and submit only the question of compensation.

This conclusion is further strengthened by the consideration that if the use of the word "expropriated" in the Claims Convention had been meant to have the effect of conceding the liability of the United States to make compensation for El Tivoli, there would have been nothing for this Commission to do except to fix the amount of the compensation. In other words, a special submission would have been made to this Commission for the sole purpose of having the Commission do something which normally and appropriately would be done by the Joint Land Commission. Such an assumption does not seem reasonable.

The Commission decides that the claim must be disallowed.

*Dissenting opinion of Panamanian Commissioner*

This is a case which, in normal circumstances, would have had to be decided by the Mixed Commission to which article VI of the Canal treaty of November 18, 1903, refers. Pursuant to this provision the United States of America was bound to pay the owners of land or private properties for the damage caused to the properties or land which it might be necessary to use in the Canal work. It devolves on said Mixed Commission only to evaluate and adjust the damage referred to. The liability of the American Government in this regard was admitted beforehand by the treaty itself. The authority of the Commission was limited in each case to passing upon the validity of the titles of the claimant and upon the amount of indemnity.

In the General Claims Convention of July 28, 1926, which created this Commission, the high contracting parties incorporated the paragraph of article I which is quoted in the majority opinion.

It is evident that the object of this provision was to give the Commission jurisdiction in two cases in which the claimants were foreigners or could be subrogated by the Government of Panama, and also to extend to this Commission the handling of claims originally under the jurisdiction of the Mixed Commission. It is obvious that in these cases it devolved upon this Commission to proceed conformably with the terms of the treaty which created the Mixed Commission, in the manner set forth.

Notwithstanding the lucid provision quoted, the majority of the Commission has departed from the perfectly clear tenor thereof and, on grounds inapplicable to the question, has decided to disallow the claim, with the result that the stipulation cited has become of no effect whatsoever.

For the reasons set forth, I regret to have to record my inability to agree with the decision of the majority.

---

PANAMA AND JOSÉ C. MONTEVERDE (PANAMA) *v.* UNITED STATES

(June 29, 1933, dissenting opinion of Panamanian Commissioner, undated.  
Pages 631-632.)

JURISDICTION PRESENTATION OF CLAIM: CLAIM BROUGHT BY STATE ON BEHALF OF ALIEN.—INTERPRETATION OF TREATY: INFERENCE FROM SILENCE, OBVIOUS, NATURAL, ORDINARY, REASONABLE MEANING, LANGUAGE IN WHICH DRAFTED AND EXECUTED.—PRIVATE PROPERTY, EXPROPRIATION: MEANING OF EXPRESSIONS. Treaty of 1903 between United States and Panama: transfer of Canal Zone to United States. Executive Agreement of 1904: delimitation of Zone boundaries. Sale in 1909 by Mr. Pellas of half-interest in tract of land to Panama. Assignment by Pellas' widow in 1912 of all his rights relating to tract to Mr. J. C. Monteverde, Italian subject. Suit brought by Mr. Monteverde on the ground of *lesión enorme*. Decree of Supreme Court of November 1, 1918, giving Panama option of returning tract or paying balance. Payment of balance by Panama. Exchange on February 11, 1915, of ratifications of Boundary Convention of 1914 transferring some lands, among which the tract bought from Mr. Pellas, from Panama to Canal Zone, and others from Canal Zone to Panama. *Held* that Commission competent to decide Mr. Monteverde's claim: jurisdiction expressly conferred by article I, Claims Convention. *Held* also that claim belongs entirely to Panama. Claim disallowed on identical grounds as claim presented by Panama in its own name and representing Abundio Caselli (see p. 377 *supra*).

*Cross-reference:* Comisión General de Reclamaciones entre Panamá y Estados Unidos de América, Reclamación de la República de Panamá en su propio nombre y como subrogante de José C. Monteverde, Registro No. 17. (Publicación Oficial, Panamá, 1934.)

*Bibliography:* Hunt, Report, pp. 632-633, and "The United States-Panama General Claims Commission", Am. J. Int. Law, vol. 28 (1934), pp. 65, 73; Friede, "Die Entscheidungen . . .", Z.a.ö.R.u.V., Band V (1935), p. 457.

This is a claim for 17,634 balboas, on behalf of José C. Monteverde, or the Government of Panama, as their interests may appear. Monteverde is an Italian subject, but jurisdiction to decide the claim is expressly conferred upon the Commission by art. I of the convention under which it acts.

The facts of this case are substantially identical with those in the claim of Abundio Caselli (Registry No. 16). Monteverde is the successor in interest of Pellas who, with Caselli, was in 1909 the owner *pro indiviso* of that part of the El Tivoli property with which both claims are concerned. Like Caselli, Pellas sold his half-interest in the property in 1909 to the Government of Panama. Pellas died, and in 1912 his widow assigned to Monteverde all her rights relating to El Tivoli. Like Caselli, Monteverde brought suit against the Government to rescind for *lesión enorme*. His first suit was unsuccessful, but in his second suit the Supreme Court of Panama, on November 1, 1918, entered a decree in his favor giving the Government the option of returning the property or paying the balance of the price declared by the Court to be just. The Government never returned the property but has chosen the other alternative and paid to Monteverde the price decreed by the Court.

The property, which is the identical tract with which the Commission dealt in the Caselli case, became a part of the Canal Zone by the Boundary Convention of 1914. The only difference between this and the Caselli case is that

here it is even more clear that the claim belongs in its entirety to the Government of Panama.

As to the merits of the claim the considerations are identical with those in the Caselli case. The Commission holds that the claim is unfounded on the authority of its decision in that case.

The Commission decides that the claim must be disallowed.

*Dissenting opinion of Panamanian Commissioner*

For the same reasons set forth in the case of Panama as substitute for Caselli, Registry No. 16, I am not in agreement with this decision.

---

COMPAÑÍA DE NAVEGACIÓN NACIONAL (PANAMA) *v.* UNITED STATES

(*June 29, 1933, dissenting opinion of Panamanian Commissioner, undated.  
Pages 812-815.*)

---

TERRITORIAL WATERS OF PANAMA CANAL ZONE: THREE-MILE LIMIT, ORDINARY RULES FOR DELIMITATION, RULE OF INNOCENT PASSAGE, CIVIL ARREST OF MERCHANT VESSELS IN TERRITORIAL WATERS.—EVIDENCE: PROOF OF EXCEPTIONS TO GENERAL RULES OF INTERNATIONAL LAW. Collision on May 11, 1923, between steamer *Torba Linda*, belonging to General Petroleum Corporation, and steamer *David*, belonging to claimant. Action brought on September 16, 1925, by General Petroleum Corporation before United States District Court for Canal Zone on the ground that collision took place in United States territorial waters and was caused by *David's* negligence. Arrest on September 18, 1925, of *David* by United States marshal off Flamenco Island. *David* released on bond next day. Validity of arrest sustained by Judge of United States District Court on October 27, 1925. Settlement between parties on April 25, 1927. Claim for damages brought before Commission on ground, *inter alia*, that arrest of *David* was beyond jurisdiction of United States District Court and, therefore, illegal. *Held* that article 2, Canal Treaty of 1903, merely fixes boundaries between Panamanian and Canal Zone territorial waters, and not seaward limit of the latter, which is left to operation of rules of international law; and that *David* was arrested at point within three-mile limit according to ordinary rules for measuring territorial waters. *Held* also that rule of innocent passage does not prohibit sovereign from arresting on civil process merchant ships passing through territorial waters: no clear authority to support such exception to clearly established general rule of extension of sovereignty over three-mile zone. Claim disallowed.

*Cross-references:* Am. J. Int. Law, vol. 28 (1934), pp. 596-599; Annual Digest, 1933-1934, pp. 137-139; Comisión General de Reclamaciones entre Panamá y Estados Unidos de América, Reclamación de la República de Panamá en su propio nombre y en representación de la Compañía de Navegación Nacional, Registro No. 26. (Publicación Oficial, Panamá, 1934.)

*Bibliography:* Hunt, Report, pp. 819-820, and "The United States-Panama General Claims Commission", Am. J. Int. Law, vol. 28 (1934), p. 62; Borchart, "The United States-Panama Claims Arbitration", Am. J. Int. Law, vol. 29 (1935), pp. 103-105; Friede, "Die Entscheidungen . . .", Z.a.ö.R.u.V., Band V (1935), pp. 463-465; Annual Digest, 1933-1934, p. 139.

This is a claim on behalf of the Compañía de Navegación Nacional for 27,932.78 balboas, with interest. The claimant is a Panamanian national.

On May 11, 1923, the steamer *Yorba Linda*, belonging to the General Petroleum Corporation, collided with the steamer *David*, belonging to the Compañía de Navegación Nacional.

On June 20, 1924, the Compañía de Navegación Nacional started suit against the General Petroleum Corporation in the First Circuit Court of Panama, claiming that the collision was caused by the *Yorba Linda's* negligence. The General Petroleum Corporation was not a resident of Panama, and apparently had no property in Panama. The suit was not begun by personal service but through service by publication under articles 470-473 of the Judicial Code of Panama. The Petroleum Company never appeared. The Panamanian Court designated an attorney to represent it. The case was tried. Evidence of negligence and of damages was submitted by the plaintiff. No evidence was put in by the defendant, although an argument on the law was made by the attorney appointed to represent it by the court. A judgment was given in favor of the Navegación Company. On September 1, 1925, this judgment was affirmed by the Supreme Court of Panama, the damages being fixed at 27,103.50 balboas, plus attorneys' fees of 383.10 balboas. The judgment was never satisfied. It is conceded that the proceedings which resulted in this judgment, including the method of service, were entirely regular and proper under the law of Panama and that the judgment was valid under that law. It is clear, however, on account of the nature of the service, that the judgment was not valid in the Canal Zone.

On September 16, 1925, fifteen days after the Supreme Court decision in the Panamanian suit, the Petroleum Company filed a libel against the Navegación Company in the United States District Court for the Canal Zone, alleging that the collision took place in territorial waters of the United States and that it was caused by the *David's* negligence. This was a proceeding *in rem*. There was, of course, no personal service.

The filing of the libel was followed on September 18, 1925, by the arrest of the *David* by the United States marshal. On the following day a stockholder of the Navegación Company gave a bond in the sum of \$30,000, and the *David* was released. A hearing was held before Judge Martin of the United States District Court regarding the validity of the *David's* arrest. On October 27, 1925, Judge Martin handed down an opinion sustaining the arrest.

The suit proceeded in a leisurely way until, on April 25, 1927, the parties arrived at a settlement agreement. Under this agreement the Petroleum Company paid to the Navegación Company \$16,250, the Canal Zone suit was dismissed, the obligation under the Panamanian judgment was canceled, and releases were exchanged.

The claimant before this Commission asserts that the arrest of the *David* was illegal and beyond the jurisdiction of the United States District Court and that this illegal arrest and the resulting necessity of giving a bond and defending the suit in the Canal Zone forced the claimant into a settlement which it would not otherwise have made, and inflicted damages upon it comprising not only the difference between the amount of the Panamanian judgment and the amount of the payment under the settlement agreement, but also the expenses of litigation and the injury to the company's standing resulting from the Canal Zone suit.

The assertion that the arrest was beyond the jurisdiction of the District Court is based upon two theories, first, that the arrest took place outside of the territorial waters of the Canal Zone and, second, that the *David* was exercising

the right of innocent passage and was therefore immune from arrest, even if within Canal Zone waters.

A preponderance of the evidence before the United States District Court showed that the arrest of the *David* was effected within a few hundred yards of Flamenco Island and probably between that island and San José Rock off the Pacific entrance of the Panama Canal.

The claimant contends that the extent of the territorial waters of the Canal Zone was fixed by the treaty of 1903, the executive agreement of 1904, and the treaty of 1914, which respectively cede, delimit and modify the delimitation of the Canal Zone. Article 2 of the treaty of 1903 defines the Canal Zone as extending into the Pacific Ocean to a distance of 3 marine miles from mean low watermark, and then goes on to make a specific grant of the Islands of Perico, Naos, Culebra and Flamenco, from which the claimant concludes that Flamenco must have been considered as outside of the territorial waters previously defined, and that since the arrest of the *David* occurred on the seaward side of Flamenco, that arrest must have occurred outside of territorial waters.

The Commission cannot follow this reasoning. While the treaties undoubtedly fix the boundary between Panamanian territorial waters and the territorial waters of the Canal Zone, it is clear that they do not purport to fix the seaward limit of the territorial waters of the Zone. That is left to the operation of the rules of international law. Both the Island of Flamenco and the point at which the *David* was arrested are within the 3-mile limit according to the ordinary rules for measuring territorial waters, without considering the question of whether the Island of Flamenco, which appears to be a fortified point guarding the entrance of the Canal, would not itself carry its own 3-mile zone clearly including the *situs* of the arrest.

We now turn to the question raised by the assertion that the *David* should have been exempted from arrest under the rule of innocent passage. An exhaustive research was made into the authorities upon this question by the Agents, and the point was argued with great thoroughness. The general rule of the extension of sovereignty over the 3-mile zone is clearly established. Exceptions to the completeness of this sovereignty should be supported by clear authority. There is a clear preponderance of authority to the effect that this sovereignty is qualified by what is known as the right of innocent passage, and that this qualification forbids the sovereign actually to prohibit the innocent passage of alien merchant vessels through its territorial waters.

There is no clear preponderance of authority to the effect that such vessels when passing through territorial waters are exempt from civil arrest. In the absence of such authority, the Commission cannot say that a country may not, under the rules of international law, assert the right to arrest on civil process merchant ships passing through its territorial waters.

Incidentally it may be said that the evidence and maps submitted to the Commission raise a real question as to whether the point at which the *David* was arrested was not in fact a roadstead subject to the rules which pertain to harbors rather than those which pertain to ordinary coastal waters within the 3-mile zone.

The Commission decides that the arrest of the *David* was not in excess of jurisdiction and therefore that the claim must be disallowed.

*Dissenting opinion of Panamanian Commissioner*

I am not in agreement with the decision of the majority of the Commission. This claim, as set forth in the decision, is based upon two points: the first

that the arrest of the *David* took place outside the territorial waters of the Canal Zone, and the second that, although it is admitted that it took place within such waters, the *David* was in the exercise of the right of innocent passage and was therefore exempt from arrest by the coastal authorities.

The decision of the majority sets aside the first contention by affirming that the place where the arrest took place was within the jurisdictional waters of the Canal Zone; the second by maintaining the theory that although the right of innocent passage exists and even when it is admitted that this right constitutes a limitation of coastal sovereignty, this right of passage does not make the ship exercising it immune to civil arrest.

I am not in accord with either conclusion and I shall take them up separately.

The marginal sea of the Canal Zone in the Pacific was defined by the Canal treaty of 1903 which established that it extended 3 marine miles beginning at mean low watermark. Due to the proximity of territorial waters of the Zone with those of the port of Panama, a specific agreement became necessary to determine the dividing line between the waters of both. This was accomplished by the boundary treaty of 1914. The resultant line fixed the northern boundary of the Canal Zone's marginal sea. But inasmuch as the aforesaid treaty did not attempt to establish the seaward limit of said territorial waters, it is clear that the determination thereof should be made according to the rules of international law, that is, by a line which, in the sea itself, follows as far as possible the sinuities of the coast.

The Canal Zone District Court did not follow this rule. What Judge Martin did was to take the most salient points of the coast (among them a reef called Pulperia which, at low tide, reaches nearly a mile into the sea) and from these points draw lines parallel to the route of the Canal and run them out 3 miles. Then the Court joined their termini by drawing *straight lines* to the end of the northern boundary fixed by the treaty of 1914. Of course, by using this method the point where the marshal said that he had arrested the *David* was within the territorial waters of the Zone.

The method employed by the court is contrary to international law and also contrary to the application made in practice under the Canal treaty in matters dealing with the territorial waters of the Zone.

It is proper to point out that although there exists the general rule that the acts of the authorities are presumed to be correct, such a presumption does not appear to be tenable when these authorities have taken as a basis for their acts a method contrary to law. The fact that the court undertook the task of delimiting all the marginal sea of the Canal Zone—which was not necessary to decide a case which depended upon the simple fact of whether the point of arrest was more than 3 miles from the coast—and the fact that in doing so it used a method contrary to international law, far from serving as a basis for a presumption in favor of the official so doing, rather lead to the presumption that the place of the arrest would have been found to be beyond his jurisdiction if the correct method had been followed.

Let us pass now to the second question, the so-called right of innocent passage. The opinion of the majority admits, as I have said, the existence of that right; it admits that it constitutes a limitation of territorial sovereignty and that the sovereign cannot impede said passage, but it denies that it carries with it exemption from civil arrest by the territorial authorities.

I am not in accord with this conclusion of the majority which is contrary to the very nature of the right of innocent passage and which considerably abridges it and does not seem to be based upon creditable authorities in international law. It is not necessary to enter into an extended study of the right of innocent passage, as the Agents have already exhausted the subject in the

hearings. Suffice it to say that this right, as is seen from the many citations of authorities made by both parties, has been considered as a necessary appendage to the freedom of navigation on the high seas. To subject a merchant ship sailing coastwise within the 3-mile limit to civil arrest by coastal authorities, violently interrupts such passage and notably abridges the freedom of the seas referred to. There are, on the other hand, authorities of high standing in international law, who expressly establish the lack of jurisdiction by littoral authorities in such cases. See for example the resolutions adopted in 1894 by the Institute of International Law and especially the juridical investigation carried out by the most prominent American international jurists (Research in International Law, Harvard Law School) which served as a basis for the Hague Conference on the Codification of International Law.

It is proper to point out also that the claimant does not maintain that absolute immunity exists from the jurisdiction of the littoral authorities; that it does not allege, for example, lack of jurisdiction in the case of an offense committed within territorial waters in the course of innocent passage, although some writers deny jurisdiction even in such cases; the claimant also accepts that the ship is obliged to comply with orders and maritime regulations which contribute to the safety of navigation, or that are of a sanitary or police character. The claimant maintains only that in case of a civil action growing out of a collision occurring previously beyond the jurisdiction of the littoral authorities, the latter were without jurisdiction later to interfere with the passage of the same ship by means of a civil suit not affecting in any way territorial sovereign interests.

But another important reason obliges me to dissent at this point. An examination of the Canal Treaty of 1903 indicates that with respect to the Canal Zone (including naturally territorial waters) Panama did not grant to the United States absolute sovereignty but only those functions of sovereignty which were necessary for the construction, use, maintenance, and sanitation of the Canal. All authority not included within these functions corresponds to the Republic of Panama by implicit reservation. In my opinion the authority exercised in the case of the *David* has no relation whatsoever with the functions mentioned. Moreover, I believe that the right of passage which pursuant to international law exists in favor of all nations should be applied *a fortiori* when treating of the nation which made the grant in terms which implied a conveyance of relative sovereignty, not absolute, and in circumstances in which the right invoked is vital to the state making the grant, as it cut in two its own territory and left itself obliged to cross territorial waters of the state receiving the grant in order to carry on its coastwise trade.

I am therefore of the opinion that the *David* was arrested outside of the territorial waters of the Zone and, in any case, in violation of the right of innocent passage; that serious damage was sustained by the Compañía de Navegación Nacional as a direct consequence of the arrest, which the United States is obligated to indemnify.

---

## TABLE OF CASES

(Parts I, II and III)

	<i>Pages</i>	<i>Pages</i>
<b>Adams, David J., The</b> ( <i>see</i> Lewis, Jesse) . . . . .	321	
<b>Adams, Gust</b> . . . . .	321	
<b>Administrative Decision No. I</b> (Tripartite Claims Commission)	203	
<b>Administrative Decision No. II</b> (Tripartite Claims Commission)	212	
<b>Amschler, Joseph</b> . . . . .	234	
<b>Añorbes, Juan</b> . . . . .	344	
<b>Argonaut, The</b> ( <i>see</i> Owners of the <i>Argonaut</i> and the <i>Colonel Jonas H. French</i> )		
<b>Baldwin, Cecelia Dexter, and others</b> . . . . .	328	
<b>Banks, Hampden Osborne, and others</b> . . . . .	349	
<b>Bethune, Henry James</b> . . . . .	32	
<b>Biro, Mrs. Julius</b> . . . . .	231	
<b>British Subjects, Several (Iloilo Claims)</b> . . . . .	158	
<b>Brower, Isaac</b> . . . . .	109	
<b>Brown, Agnes Ewing</b> . . . . .	307	
<b>Brown, Robert E.</b> . . . . .	120	
<b>Browne, John W.</b> . . . . .	333	
<b>Burt, George Rodney</b> . . . . .	93	
<b>Cadenhead, Representatives of Elizabeth</b> . . . . .	40	
<b>Canadian Hay Importers, Several</b>	142	
<b>Canadian Claims for Refund of Duties</b> ( <i>see</i> Canadian Hay Importers, Several)		
<b>Canadienne, The</b> . . . . .	29	
<b>Caselli, Abundio</b> . . . . .	377	
<b>Castañeda, Francisco and Gregorio, and another</b> . . . . .	313	
<b>Cayuga Indians</b> . . . . .	173	
<b>Charterers and Crew of the <i>Kate</i></b>	77	
<b>Chase, William Gerald</b> . . . . .	352	
<b>China Navigation Co., Ltd.</b> . . . . .	64	
<b>Colonel <i>Jonas H. French</i>, The</b> ( <i>see</i> Owners of the <i>Argonaut</i> and the <i>Colonel Jonas H. French</i> )		
<b>Colunje, Guillermo</b> . . . . .	342	
<b>Compañía de Navegación Nacional</b> . . . . .	382	
<b>Coquillam, The</b> ( <i>see</i> Owners of the Cargo of the <i>Coquillam</i> )		
<b>Crane, Charles R.</b> . . . . .	244	
<b>Cuba Submarine Telegraph Company, Ltd.</b> . . . . .	118	
<b>Cunningham and Thompson Company and others</b> . . . . .	171	
<b>Denham, Lettie Charlotte, and Frank Parlin Denham</b> . . . . .	312	
<b>Denham, Lettie Charlotte, and Frank Parlin Denham</b> . . . . .	334	
<b>De Sabla, Marguerite de Joly</b>	358	
<b>Dylla, Hugo</b> . . . . .	277	
<b>Earnshaw, D., and others</b> . . . . .	160	
<b>Eastern Extension, Australasia and China Telegraph Company, Ltd.</b> . . . . .	112	
<b>Eastry, The</b> ( <i>see</i> Sivewright, Bacon and Co.)		
<b>Ellison, Howard Henry, and others</b> . . . . .	274	
<b>Favourite, The</b> ( <i>see</i> McLean, Laughlin)		
<b>Federer, Mary</b> . . . . .	268	
<b>Fijian Land Claims</b> ( <i>see</i> Burt, George Rodney; Henry, Benson Robert; Williams, Heirs of John B.; Brower, Isaac M.)		
<b>Filo, Elizabeth, and Bertha Salay</b> . . . . .	286	
<b>First National Bank of Boston, The</b> . . . . .	266	
<b>Fox, Max</b> . . . . .	249	
<b>Frederick Gerring, Jr., The</b> ( <i>see</i> Owner of the <i>Frederick Gerring, Jr.</i> )		
<b>Frenkel, Emil</b> . . . . .	282	
<b>Gasper, Charles</b> . . . . .	277	
<b>Glasgow King Shipping Company (Limited), The</b> . . . . .	27	

	<i>Pages</i>		<i>Pages</i>
Glover, Griff . . . . .	233	Neugass, Henry . . . . .	235
Gottlieb, Friederike . . . . .	234	<i>Newchwang</i> , The ( <i>see</i> China Navigation Co., Ltd.)	
Great Northwestern Telegraph Company of Canada . . . . .	35	Noyes, Walter A. . . . .	308
Grubnau Bros., Inc., and Atlantic Mutual Insurance Company . . . . .	250	<b>O</b> rtlieb, Estate of Alexander . . . . .	240
<b>H</b> ardman, William . . . . .	25	Owner of the <i>Frederick Gerring, Jr.</i> . . . . .	41
Hawaiian Claims, ( <i>see</i> Redward, F. H. and others)		Owner of the <i>Horace B. Parker</i> . . . . .	153
<i>Horace B. Parker</i> , The ( <i>see</i> Owner of the <i>Horace B. Parker</i> )		Owner of the <i>R. T. Roy</i> . . . . .	147
Henry, Benson Robert . . . . .	100	Owner of the <i>Sarah B. Putnam</i> . . . . .	156
Hemming, H. J. Randolph . . . . .	51	Owner of the <i>Thomas F. Bayard</i> . . . . .	154
Heppe, Kurt . . . . .	232	Owners, Officers and Men of the <i>Wanderer</i> . . . . .	68
Hois, Louis John . . . . .	260	Owners of the <i>Argonaut</i> and the <i>Colonel Jonas H. French</i> . . . . .	60
Home Frontier and Foreign Missionary Society of the United Brethren in Christ . . . . .	42	Owners of the Cargo of the <i>Coquiltam</i> . . . . .	45
Iloilo Claims ( <i>see</i> British Subjects, Several)		Owners of the <i>Jessie</i> , the <i>Thomas F. Bayard</i> and the <i>Pescawha</i> . . . . .	57
Indian Motocycle Company . . . . .	252	Owners of the <i>Lindisfarne</i> . . . . .	21
<b>J</b> essie, The ( <i>see</i> Owners of the <i>Jessie</i> , the <i>Thomas F. Bayard</i> and the <i>Pescawha</i> )		Owners of the <i>Sidra</i> . . . . .	53
<b>K</b> app, Benjamin Albert . . . . .	246	Owners of the <i>Tattler</i> . . . . .	48
<i>Kate</i> , The ( <i>see</i> Charterers and Crew of the <i>Kate</i> )		<b>P</b> arsons, J. . . . .	165
<i>King Robert</i> , The ( <i>see</i> Glasgow King Shipping Company, Ltd.)		Payne, Herbert . . . . .	230
Klein, Karl . . . . .	241	Pentz, Anton . . . . .	242
Kohn, Rosa H. . . . .	251	Perkins, Cyrus Wilfred . . . . .	275
<b>L</b> ewis, Jesse . . . . .	85	Perry, James . . . . .	315
<i>Lindisfarne</i> . The ( <i>see</i> Owners of the <i>Lindisfarne</i> )		<i>Pescawha</i> , The ( <i>see</i> Owners of the <i>Jessie</i> , the <i>Thomas F. Bayard</i> , and the <i>Pescawha</i> )	
<i>Lord Nelson</i> , The ( <i>see</i> Bethune, Henry James)		<b>R</b> edward, F. H., and others . . . . .	157
Luzon Sugar Refining Company, Ltd. . . . .	165	Richeson, Charlie R., and others . . . . .	325
<b>M</b> anzo, Juan . . . . .	314	Rio Grande Irrigation and Land Company, Ltd. . . . .	131
Mariposa Development Company and others . . . . .	338	Rothmann, Henry . . . . .	253
Margulies, Jacob . . . . .	279	<i>R. T. Roy</i> , The ( <i>see</i> Owner of the <i>R. T. Roy</i> )	
McArthur, Erna . . . . .	285	Rudolph, Alexander Karl . . . . .	235
McLean, Laughlin . . . . .	82	Ruiz, José Azael . . . . .	345
Monteverde, José C. . . . .	381	<b>S</b> arah B. Putnam, The ( <i>see</i> Owner of the <i>Sarah B. Putnam</i> )	
		Schneider, William, and Joseph Bleier . . . . .	231
		Shearer, Caroline Fitzgerald . . . . .	346
		Short, Camilla . . . . .	278
		<i>Sidra</i> , The ( <i>see</i> Owners of the <i>Sidra</i> )	
		Sivewright, Bacon and Co. . . . .	36
		Solomon, Abraham . . . . .	370

TABLE OF CASES

389

	<i>Pages</i>		<i>Pages</i>
Stahl, Adolfo . . . . .	290	Vásquez Díaz, José María . . . . .	341
Studer, Adolph G. . . . .	149	von Campen, Harald Waldemar . . . . .	277
Szanto, John, and others . . . . .	277		
<b>Tattler, The</b> ( <i>see</i> Owners of the <i>Tattler</i> )		<b>Wanderer, The</b> ( <i>see</i> Owners, Officers and Men of the <i>Wanderer</i> )	
Tellech, Alexander . . . . .	248	Webster, Successors of William . . . . .	166
<i>Thomas F. Bayard, The</i> ( <i>see</i> Owner of the <i>Thomas F. Bayard</i> )		William, Heirs of John B. . . . .	104
<i>Thomas F. Bayard, The</i> , ( <i>see</i> Owners of the <i>Jessie</i> , the <i>Thomas F. Bayard</i> and the <i>Pescawha</i> )		<b>Yukon Lumber</b> . . . . .	17
Transatlantic Trust Company . . . . .	274	<b>Zafiro, The</b> ( <i>see</i> Earnshaw D. and Others)	
<b>Ujvari, John</b> . . . . .	289	Zecchetto, Louis . . . . .	259
Union Bridge Company . . . . .	138	Zohrer, George and Theresa . . . . .	272



## INDEX

(PARTS I, II and III)

### A

- ABANDONMENT OF RIGHTS: 174
- ACKNOWLEDGMENT OF RIGHT: *see* Claimant
- Actio in rem*: 86
- ADMINISTRATIVE DECISION: 203, 212
- ADMISSION OF LIABILITY: *see* Liability
- AGENTS:
- Agreement between: 171
  - Inquiry of agents by Tribunal: *see* Damages
- AGREEMENT: *see* Agents; Interpretation. Treaties, agreements
- AGGRESSION, END OF: 286
- ALIEN PROPERTY: *see* Aliens, Seizure of private property
- ALIENS (*see also* Jurisdiction; Private Rights):
- Arrest, detention, imprisonment: 231, 315, 342
  - Criminal proceedings, conviction, sentence: 315, 342, 370
  - Discrimination:
    - between aliens: 112, 118
    - between aliens and own nationals: 112, 118
  - Municipal law, Knowledge of aliens of: *see* Municipal Law
  - Protection:
    - foreign troops: 325, 328, 349
    - insurgents: 158
    - military patrols: 328
    - mob violence: 42, 309, 325, 328, 349
    - murder: 312
    - naval patrol: *see infra*
    - police:
      - ill treatment by: 321, 328
      - inadequate police protection: 325, 328, 349
      - intervention of police with naval patrol: 349
    - prosecution, punishment of offenders: 309, 312, 321
    - standards: 42
  - Rights of aliens, generally recognized rule of international law: 40
  - Seizure of private property: 231
  - Taxation: 231
- ALTERNATIVE CLAIM: *see* Claim
- AMENDMENT OF PLEADINGS: *see* Procedure
- AMERICAN RULES OF THE ROAD: 64

**AMOUNT:**

- Of claim: see Claim, Amount
- Of damages: see Damages

ANGARY: 112

ANNEXATION: 158; *see also* Claims, Pending claims; Debts, Liquidated debts; Delict; Private Rights

APPARENT MEANING: *see* Interpretation, Treaties, agreements

APPLICABLE LAW: 131, 314

- Claims Convention: 314, 344
- Framing of new rules by Tribunal: 113, 118
- Lex loci delicti commisi*: 29, 53
- Lex loci solutionis*: 260, 266, 268

ARREST: 248; *see also* Aliens; Territorial Waters

AUSTRO-HUNGARIAN BANK:

- Liquidation: 242
- Nationality, dual: 242

AUTHORITY: *see* Delegation of authority by one State to another

AWARD: *see* Enforcement; Jurisdiction, Money award; Postponement of Award

**B**

BAILMENT: 268

BELA KUN RÉGIME: *see* Revolutionary régime

BERING SEA AWARD AND REGULATIONS: 69, 77

BLOCKADE: 112

BOATS: *see* Vessel, Seizure

BONDED PUBLIC DEBTS: *see* Debts, Public debts

BOND, RELEASE ON: *see* Vessel, Seizure of vessel

BURDEN OF PROOF: *see* Evidence

**C**

CABLES, SUBMARINE:

- International character: 112
- Protection of submarine cables, International Convention for the: 112, 118

CABLES, TELEGRAPH: *see* Telegraph Cable

CAPTURE OF VESSEL: *see* Vessel

CARE, NECESSARY: *see* Maritime Law

CARGO: *see* Vessel, Seizure of cargo

CAUSAL CONNEXION: 286

CERTIFICATE: *see* Evidence, Documents

CESSION OF SOVEREIGNTY: *see* Private Rights; Sovereignty

- CIRCUMSTANCES: *see* Liability, Officials; Maritime Law  
 Special circumstances: 40
- CIVIL AUTHORITIES, RESPONSIBILITY FOR ACTS OF: 248; *see also* Aliens; Consul;  
 Customs, Authorities; Expropriation
- CLAIM (*see also* Dispute; Jurisdiction):  
 Alternative: 17  
 Amount: 36, 48, 51, 57  
 Claims Convention: *see* Applicable Law; Jurisdiction  
 Compromising of claim: 203; *see also* Agents; Settlement between parties, *infra*  
 Contradiction between primary and alternative claim: 17  
 Espousal: *see* Jurisdiction. Claim brought by State on behalf of alien; Protecting  
 Power of Indian Tribe  
 Exaggeration: 57  
 Fraudulent character: 57  
 Good faith: 57  
 Interested party: *see* Presentation, *infra*; Waiver, *infra*  
 Moment at which - arises: 174; *see also* Expropriation  
 Nationality of claim: 203, 233, 234 (*bis*), 246, 253, 259, 275, 278, 279  
 Pending claims and conquest, annexation, State succession: 121  
 Preparation: 203  
 Presentation: 131, 203; *see also* Interest  
   alien, on behalf of: 377, 381  
   executrix, on behalf of: 358  
   interested party, on behalf of: 109  
 Primary: 17  
 Private interest in claim: 131, 203  
 Separation of claims: 48  
 Settlement between parties: 41; *see also* Agents; Compromising, *supra*  
 Waiver of claim by interested party binding upon State: 48  
 Withdrawal: 203
- CLAIMANT:  
 Conduct (*see also* Damages, Failure of claimant to act; Laches):  
   acknowledgment of right: 86  
   awareness of risk: 42, 112, 118, 166  
   failure:  
     to co-operate in collecting evidence: *see* Evidence, Collecting evidence  
     to react on declaration: 45  
   lack of prudence: 61  
   possibility to avoid grievance: 17  
   previous statements: 286, 307, 321  
 Death: 358
- COLLISION: *see* Vessel
- COLONIAL TAX POLICY: 42
- COMITY: 112
- COMMON SENSE, PRACTICAL: 338
- COMMUNICATIONS OVER HIGH SEAS: 112
- COMPENSATION: *see* Damages, Fair compensation; Expropriation, Without compensa-  
 tion; Labour Accident; War, Measures
- COMPROMISING: *see* Claim, Compromising of

- CONCLUSION OF PEACE: *see* Interpretation, Contracts
- CONDUCT:
- Of claimant: *see* Claimant
  - Of military operations: *see* War, Military operations
- CONFISCATION: *see* Vessel, Seizure of boats and seines
- CONQUEST: *see* Claim, Pending claims; Debts, Liquidated debts; Private Rights
- CONSUL:
- Implicit approval of action taken by consul, liability: 51
- CONTRABAND: 112
- CONTRACT: 17, 27, 173, 307, 333; *see also* Interpretation, Contracts; Liability, State contracts
- CONVICTION: *see* Aliens, Criminal proceedings
- COUNSEL FEES: 35
- COUNTERACTION: *see* Procedure
- COURSE: *see* Maritime Law
- COURT DEPOSIT: *see* Deposit
- CREW: *see* Territorial Waters, Arrest
- CRIMINAL PROCEEDINGS: *see* Aliens
- CURRENCY: *see* Debts, Currency notes; Debts, Public debts; Debts, Valorization; War, Consequences; War, Measures, compensation
- CUSTODY-DEPOSIT: *see* Deposit
- CUSTOMS:
- Authorities: *see* Municipal Law, Application
  - Duties, exemption of ship's equipment: 171

## D

- DAMAGE (*see also* Loss; Personal Injuries; Telegraph Cable; Vessel):
- Determination of damage, injury, Principles, rules for: 212
  - Proof: 147, 154, 333
  - Property damage: 286
- DAMAGES (*see also* Compensation; Labour Accident; Maritime Law, Demurrage):
- Contract value: 139
  - Deduction of sum due to defendant: 69
  - Dependants, Support of: 325
  - Detention of officers and crew: 78
  - Determination, Accurate: 93, 175
  - Equality is equity, Maxim that: 175
  - Factors: 342
  - Failure of claimant to act: 139
  - Fair compensation: 139
  - Indirect damages: 64
  - Inquiry of agents by Tribunal: 45
  - Invoice value: 250, 252

Lump sum: 93, 105  
 Market value: 230  
 Nominal damages: 109  
 Principle:  
   generally recognized: 33  
   of international law: 139  
   of law of damages: 64  
 Profits, Lost: 48, 57, 64, 69, 78, 82, 93, 153, 154, 156  
 Property, Value of: 33  
 Punitive damages: 325  
 Reduce damages, Obligation to: 156  
 Speculative and precarious value: 109  
 Trouble: 57, 69, 78, 82  
 Use:  
   loss of: 64, 153  
   value of: 33

## DEATH:

Of claimant: *see* Claimant  
 Of debtor: *see* Debtor

## DEBTOR, DEATH OF: 274

## DEBTS:

Applicable law: *see* Applicable Law  
 Currency notes as evidence of debt: 242  
 Discharge: 260, 266  
 Liquidated debts and conquest, annexation, State succession: 121  
 Meaning of term: 212  
 Nationals, State liability for debts of: *see* Liability, Nationals  
 Pre-War: 290  
 Public: 282  
   bonded public debts:  
     exceptional war measures: 285  
     interest:  
       collection of interest coupons: 272, 274, 277, 278  
       foreign currency clause: 244  
       place of payment: 244  
       State succession and liability for interest: 235, 241  
       suspension of interest payment: 289  
     unauthorized exchange of pre-war bonds: 290  
   treasury notes: 251  
 Valorization: currency, rate of exchange: 213

DECISION: *see* Administrative decision; General principles for decision of claims;  
 Interest, Postponement of decision

DECISION *ex parte*: *see* Municipal Court

DECISIONS AND OPINIONS, TERMINOLOGY USED IN: 203

DECLARATORY JUDGMENT: *see* Jurisdiction

DEFENCE: *see* Waiver

DEFENDANT NOT REAL PARTY IN INTEREST: 27

DELEGATION OF AUTHORITY BY ONE STATE TO ANOTHER: 69, 77

DELETIONS: *see* Evidence, Documents

## DELICT:

Conquest, annexation, State succession: liability for delict: 157

DEMURRAGE: *see* Maritime Law.

## DENIAL:

Denial of justice: 40, 86, 120, 174

good faith: 93, 334

procedure: 93

violation of law: 93, 334

Denial of liability: *see* Liability

DEPENDANTS: *see* Damages

DEPENDANT STATE, INTERNATIONAL RESPONSIBILITY FOR: 149

## DEPOSIT:

Court deposit: 260, 266

Custody deposit: 268

*Depositum irregulare, regulare*: 268

DEPRECIATION: *see* War, Consequences

DESTRUCTION OF PRIVATE PROPERTY: *see* War, Private Property

DETENTION: *see* Aliens, Arrest

DIPLOMATIC SOLUTION OF DISPUTE: *see* Dispute

DISABILITY, PERSONS UNDER: 174

DISCRIMINATION: *see* Aliens

## DISPUTE:

Diplomatic solution of dispute as bar to claim: 352

DOCUMENTS: *see* Evidence

DUAL NATIONALITY: *see* Austro-Hungarian Bank; Nationality

DURESS: 249

DUTY: *see* Vessel, Breach of duty

## E

EFFECTIVENESS, RULE OF: *see* Interpretation, Contracts; Interpretation. Treaties, agreements

EMPLOYER: *see* Labour Accident

ENFORCEMENT (*see also* Municipal Law):

Of awards: 203

ENROLMENT IN ARMY: 249; *see also* Military Service

## EQUALITY:

Equity, Maxim that equality is: *see* Damages

Of States, Fundamental principle of equality: *see* Jurisdiction, Immunity

EQUITY: 112, 118, 120, 147, 166, 174, 315; *see also* Damages, Equality

ERROR IN JUDGMENT: *see* Vessel, Seizure of vessel, good faith

ESPOUSAL OF CLAIMS: *see* Jurisdiction, Claim brought by State on behalf of alien; Protecting Power of Indian Tribe

EVIDENCE (*see also* Claimant, Conduct):

Burden of proof: 21, 36, 53, 64, 69, 100, 160, 212, 233, 274(*bis*), 277(*bis*), 278, 285, 286, 346

## Collecting evidence:

failure to co-operate in: 147

negligence in: 286

Contract, Proof of: 307

Damage, Proof of: *see* Damage

Debts, Currency notes as evidence of: *see* Debts

## Documents:

affidavits: 60, 154, 278, 307, 321

certificate: 36, 53, 345

correspondence: 307

deletions: 105

maps: 358

memorial: 358

receipt: 154

## report:

of investigations by parties: 29

of military commander: 165

unsigned document: 27

validation: 105

Either side, Evidence furnished by: 60

Exceptions, Proof of: *see* General Rules of International Law

Fault, Proof of: 21, 29, 53

Interrogatories: 246

Maritime law, Rule of evidence in:

recognized in U.S. and Gr. Br.: 53

universally admitted: 21

## Municipal Court:

decision, evidential value of: 64

witnesses before Municipal Court, testimony of: 341

Nationality, Proof of: *see* Nationality

nationality of vessel: *see* Vessel

Notice: 358

Previous statements: *see* Testimony, *infra*: Claimant, Conduct

*Prima facie* evidence: 246

Probabilities, Inherent: 322

*Proprio motu*, Tribunal acting: 36

Registration, Public: 358

Seizure, Place of: 147

## Testimony:

rebuttal of claimant's testimony by own previous statement: 286

uncorroborated, improbable: 286

unsupported, but rebutted: 246

Usual: 153

Witness: 345; *see also* Municipal Court, *supra*

claimant as witness: 246, 279, 286

EXCEPTIONS: *see* General Rules of International Law; Interpretation

EXCHANGE, RATE OF: *see* Debts, Valorization; War, Measures, compensation

EXECUTRIX: *see* Claim, Presentation

EXHAUSTION OF LOCAL REMEDIES: 86, 120, 142, 147, 149, 358

EXPATRIATION: *see* Naturalization

EXPROPRIATION: 112

Inadequate remedy: 358

Meaning of expression: 377, 381

Moment at which claim for expropriation arises: 338

Without compensation: 358

EXTRAJUDICIAL ACTION: 25, 40, 42, 86, 149

## F

FAIR DEALING: 174

FAULT: 64; *see also* Claimant, Conduct; Evidence; Liability

FEDERAL LIABILITY: *see* Liability

FINAL JUDGMENT: *see* Procedure

FISHING: *see* Territorial Waters

FISHING LICENCES:

Recognition of foreign: 156

FISHING VESSELS: 41, 48, 61, 85, 147, 153, 154, 156, 171

FOREIGNERS: *see* Aliens

FOREIGN TROOPS: *see* Aliens, Protection

FORFEITURE: *see* Vessel, Seizure of boats and seines, of cargo, of vessel

FUNCTIONS AND JURISDICTION OF COMMISSION: 203

FUR-SEALING, CONVENTIONAL PROTECTED ZONE OF: 57, 68, 77, 82 *see also* Bering Sea  
Award and Regulations

## G

GENERAL PRINCIPLES FOR DECISION OF CLAIMS: 203

GENERAL PRINCIPLES OF JUSTICE: *see* Justice

GENERAL PRINCIPLES OF LAW: *see* Damages, Principle

GENERAL RULES OF INTERNATIONAL LAW:

Exceptions to such rules, Proof of: 382

GOOD FAITH: 42, 60, 86, 174; *see also* Claim; Denial of Justice; Vessel, Search;  
Vessel, Seizure of vessel

## H

HARBOUR REGULATIONS: 21

HIGH SEAS (*see also* Communications; Vessel, Seizure of vessel):

Applicability on high seas of International and American Rules of the Road: 64

## I

IMMUNITY OF JURISDICTION: *see* Jurisdiction, Immunity

IMPLICIT APPROVAL: *see* Consul

- IMPLIED WAIVER: *see* Waiver
- IMPRESSMENT INTO MILITARY SERVICE: *see* Military Service
- IMPRISONMENT: *see* Aliens, Arrest
- INDEMNITY: *see* Damages
- INDIAN TRIBE:
- Legal status: 173
  - Migration: 173
  - Nationality: 173
  - Protecting Power: 173, 174
  - Treaty (contract) with: 173
- INEVITABILITY OF COLLISION: 21
- INJURY: *see* Damage; Personal Injuries; War, Measures
- INNOCENT PASSAGE: *see* Territorial Waters, Passage
- INLAND RULES OF UNITED STATES: 54
- INQUIRY OF AGENTS BY TRIBUNAL: *see* Damages
- INSURGENTS: *see* Aliens, Protection
- INTENTION: *see* Interpretation, Contracts; Interpretation, Treaties, agreements; Liability, Officials
- INTEREST: 21, 30, 35, 36, 45, 51, 69, 78, 83, 139, 161, 174, 213; *see also* Debts, Public debts
- Dies a quo*: 33
  - Postponement of decision: 48
  - Presentation of claims: 54, 58, 64
  - Rate: 33, 272
- INTEREST IN CLAIM, PRIVATE: *see* Claim
- INTERLOCUTORY JUDGMENT: *see* Procedure
- INTERNATIONAL LAW (*see also* Aliens, Rights; General Rules of International Law; Jurisdiction, Immunity; Maritime Law, Fundamental principle; Subjects of International Law):
- Principle of international law: 60, 112, 118, 139, 174
- INTERNATIONAL RULES OF NAVIGATION: *see* Maritime Law
- INTERNATIONAL RULES OF THE ROAD: *see* Maritime Law
- INTERNMENT: 248
- INTERPRETATION:
- Contracts:
    - “conclusion of peace”: 275
    - effectiveness, rule of: 244
    - facts: 105
    - fairness: 105
    - intention of parties: 105, 260, 266
    - reasonable view, most: 109
    - terms: 244
  - Exceptions: 69
  - Municipal law: 120, 131, 166, 253, 259, 260, 266, 268, 279, 307, 315, 333, 334, 346, 358; *see also* Municipal Court; Municipal Law

Treaties, agreements: 153, 154, 203, 212, 275, 289, 308, 313, 333, 341, 345; *see also* Municipal Court  
 apparent, obvious meaning: 174, 377, 381  
 effectiveness, rule of: 174, 235, 338  
 indirect consequences of carrying into effect of Treaty provisions: 212  
 intention: 86  
 language in which drafted and executed: 377, 381  
 minutes of Council of Newfoundland: 156  
 natural meaning: 377, 381  
 negotiations: 86  
 ordinary meaning: 377, 381  
 reasonable meaning: 377, 381  
*res judicata*: 154, 171  
 silence, inference from: 377, 381  
 substance and form: 174  
 terms: 86, 308

INVESTIGATIONS BY PARTIES: *see* Evidence, Documents, report

## J

JUDGMENT: *see* Error in Judgment; Jurisdiction, Declaratory judgment; Procedure, Interlocutory, final judgments

JURISDICTION: 166, 231(*bis*), 232, 233, 234(*bis*), 235, 248, 249, 277; *see also* Functions and Jurisdiction of Commission; Territorial Waters  
 Claim brought by State on behalf of alien: 377, 381  
 Claims arisen after:  
   exchange of ratifications of Claims Convention: 338  
   signature of Claims Convention: 308, 313, 333, 341, 345  
 Declaratory judgment: 175  
 Immunity of: fundamental principle of juridical equality of States: 86  
 Money award: 175  
 Objection to: 289, 308, 338  
 Power of Tribunal to decide on own jurisdiction: 131  
 Raising *ex officio* of question of jurisdiction: 203

JUSTICE: 174, 315

## L

LABOUR ACCIDENT:

  Compensation: 314, 344  
 Negligence of employer: 314, 344

LACHES: 174; *see also* Claimant, conduct

LAW: *see* Applicable Law; Damages, Principle; International Law; Maritime Law; Municipal Law

LEGAL TENDER: 260

*Lex loci delicti commissi*: *see* Applicable Law

*Lex loci solutionis*: *see* Applicable Law

- LIABILITY (*see also* Debts; Delict; Error in Judgment; Good Faith; Responsibility):  
 Admission of: 21, 32, 35, 64  
 Breach of duty or liability of vessel: 21  
 Denial of: 36, 57  
 Extent of:  
   for seizure of vessel: 69, 82  
   in case of State succession: 203  
   when both vessels at fault: 30, 54  
   when part of damage chargeable to unidentified wrongdoers: 160  
 Fault and liability, International Rules of the Road: 29  
 Nationals, State liability for debts of: 213  
 Officials, liability for acts of:  
   consul: *see* Consul  
   intention: 138  
   war circumstances: 138  
 State contracts and Federal liability: 174
- LIGHT DUES: 171
- LIMITATION, STATUTES OF: 174
- LIQUIDATION: *see* Austro-Hungarian Bank
- LOCAL REMEDIES: *see* Exhaustion of
- Locus penitentiae*: 338
- Locus solutionis*: *see* Applicable Law; Debts, bonded public debts, interest
- LOSS (*see also* Damage):  
 Necessary war loss: *see* War  
 Personal pecuniary loss or damage: 40
- LUMP SUM: *see* Damages

## M

- MARITIME LAW (*see also* American Rules of the Road; Harbour Regulations; Inland Rules of United States)  
 Anchoring: 54  
 Breach of duty or liability of vessel: 21  
 Circumstances: 21  
 Course, Unlawful change of: 314  
 Demurrage: 21, 36, 64  
 Fog, Dense: 54  
 Fundamental principle of international: 57, 69  
 International Rules of Navigation: 314  
 International Rules of the Road: 29, 64  
 Maritime skill: 21  
 Navigation: 54  
 Necessary care: 21  
 Tide: 60  
 United States and Great Britain, Rule of maritime law recognized in: 53
- MARITIME SKILL: *see* Maritime Law
- MEASURES:  
 Sanitary measures: *see* War, Measures  
 War measures: *see* War, Measures

MERCHANTMAN, CONVERTED: 160

MERCHANT VESSEL:

Civil arrest of merchant vessel in territorial waters: *see* Territorial Waters  
 Responsibility for actions of merchant vessel in naval forces: 160

MERITS, RESERVATION OF: *see* Procedure

MIGRATION OF INDIAN TRIBE: 173

MILITARY AUTHORITIES, FORCES (*see also* War):

Responsibility for acts of: 40, 230, 248, 249, 250, 252, 253. 279

MILITARY COURT:

Military duty: ruling of military Court: 40

MILITARY DUTY: *see* Military Court; Municipal Law

MILITARY OPERATIONS, CONDUCT OF: *see* War

MILITARY PATROLS: *see* Aliens, Protection

MILITARY SERVICE (*see also* Enrolment in Army):

Impressment into: 248, 249  
 Performance of: 253

MOB VIOLENCE: *see* Aliens, Protection

*Modus vivendi*: 86

MONEY AWARD: *see* Jurisdiction

MOTION, PRELIMINARY: *see* Procedure; *see also* Jurisdiction, Objection to

MUNICIPAL COURT (*see also* Evidence; Vessel, Capture; Vessel, Seizure of cargo, of vessel):

Binding force of interpretation by Municipal Court of municipal law and treaty: 86  
 Decision *ex parte*: 60  
*Res judicata* of decision: 64, 275

MUNICIPAL LAW (*see also* Aliens; Interpretation; Municipal Court; Nationality):

Application:

improper exercise by United States officers of authority under British law: 69, 82  
 proper interpretation and application: 60  
 wrongful application by customs authorities: 45, 48

Binding force of municipal law designed to implement treaty: 86

Enforcement:

abroad: 17

failure to enforce: 86

warning of forthcoming enforcement, public: 86

Knowledge of aliens of: 142

Military duty governed by: 40

Prescription under: 346

Primitiv municipal law, Interpretation of: 93, 104, 109, 166

Proof of: 149, 346

MURDER: 312

**N****NATIONALITY** (*see also* Naturalization; Vessel):

- Determination of nationality by municipal law: 248, 249
- Dual: 248, 249; *see also* Austro-Hungarian Bank
- Ex officio* of question of nationality, Raising: 203
- Indian tribe, nationality of: 173
- Proof of: 279
- Protection, Nationality and right to: 253, 259, 279

**NATURALIZATION:**

- Expatriation: 253, 259, 279
- Misuse of new nationality: 253
- Return to adopted country, Effect of: 253, 259, 279

**NAVAL FORCES:** *see* Merchant vessel**NAVAL PATROL:** *see* Aliens, Protection**NECESSARY CARE:** *see* Maritime Law**NECESSARY WAR LOSSES:** *see* War**NECESSITY OF WAR:** *see* War**NEGLIGENCE:** 17, 42, 64, 333; *see also* Evidence, Collecting evidence; Labour Accident**NEGOTIATIONS:** *see* Interpretation, Treaties, agreements**NEUTRALITY AND PUBLIC SERVICE:** 112, 118**NEUTRAL-OWNED CARGO:** *see* Vessel, Seizure of cargo**NEUTRAL PROPERTY:** 138**NEUTRALS:** 112**O****OBJECTION:** *see* Jurisdiction; Motion, Preliminary**OBLIGATION:**

- In rem:* 17
- Personal: 17

**OCCUPATION, EFFECTIVE:** 109**OFFICIALS:** *see* Liability**ORDER, MAINTENANCE OF:** *see* Territorial Sovereign**P****PANAMA CANAL ZONE:**

- Territorial Waters of: *see* Territorial Waters

**PARTIES:** *see* Defendant not Real Party in Interest**PARTY IN INTEREST:** *see* Defendant not Real Party in Interest**PASSAGE, INNOCENT:** *see* Territorial Waters

- PAYMENT OF OBLIGATIONS: 203
- PAYMENT, PLACE OF: *see* Applicable Law; Debts, bonded public debts, interest
- PEACE, CONCLUSION OF: *see* Interpretation, Contracts
- PECUNIARY LOSS OR DAMAGE, PERSONAL: *see* Loss
- PERSONAL INJURIES: 286
- PERSONAL OBLIGATION: *see* Obligation
- PERSONAL PECUNIARY LOSS OR DAMAGE: *see* Loss
- PLEADINGS, AMENDMENT OF: *see* Procedure
- POLICE: *see* Aliens, Protection; War, Police measure
- POSSESSION: *see* Wrongful possession and use
- POSTPONEMENT OF AWARD: 171; *see also* Interest, Postponement of decision
- PRECEDENTS: 203
- PRELIMINARY MOTION: *see* Procedure
- PRESCRIPTION: 174; *see also* Municipal Law
- PRESENTATION OF CLAIM: *see* Claim
- PRESUMPTION: 142
- PRE-WAR DEBT: *see* Debts
- PRE-WAR TRANSACTION: 275
- PRIMARY CLAIM: *see* Claim
- PRIMITIVE LAW: *see* Municipal Law
- PRINCIPLE OF EQUITY: *see* Equity
- PRINCIPLE OF FAIR DEALING: *see* Fair Dealing
- PRINCIPLE OF INTERNATIONAL MARITIME LAW: *see* Maritime Law
- PRINCIPLE OF JUSTICE: *see* Justice
- PRINCIPLES FOR DECISION: *see* General of Claims
- PRINCIPLES FOR DETERMINATION OF DAMAGE, INJURY: *see* Damage
- PRINCIPLES OF LAW: *see* Damages; International Law
- PRIVATE INTEREST IN CLAIM: *see* Claim
- PRIVATE PROPERTY (*see also* Aliens; Expropriation; Private Rights; War, Private property):  
 Meaning of expression: 377, 381
- PRIVATE RIGHTS: 352; *see also* Expropriation  
 Private rights acquired previous to conquest, cession of sovereignty, annexation,  
 State succession: 93, 100, 104, 109, 121, 149, 166
- PROCEDURE (*see also* Claim; Defendant not Real Party in Interest; Jurisdiction; Postponement of Award; Waiver):  
 Briefs, Additional: 279  
 Claimant:  
 examination of: 279  
 oral arguments by claimant's personal attorney: 279  
 sworn statement of: 290  
 Counteraction: 334  
 Defendants, Joint: 213  
 Interlocutory, Final judgments: 213, 235, 241, 289  
 Merits, Reservation of: 338

Motion, Preliminary: 131, 166  
 Pleadings, Amendment of: 35, 138, 156  
 Relaxation of rules: 279

PROFITS, LOST: *see* Damages

PROOF, BURDEN OF: *see* Evidence

PROPERTY: *see* Damage; Neutral Property; Private Property

PROSECUTION OF OFFENDERS: *see* Aliens, Protection

PROTECTING POWER OF INDIAN TRIBE:

Laches: 174

Right to sue: 173

PROTECTION: *see* Aliens; Nationality

PUBLIC DEBTS: *see* Debts

PUBLIC SERVICE: *see* Neutrality

PUBLIC VESSEL: *see* Vessel

PUNISHMENT OF OFFENDERS: *see* Aliens, Protection

## R

RATE OF EXCHANGE: *see* Debts, Valorization; War, Measures, compensation

RELEASE ON BOND: *see* Vessel, Seizure of vessel

REQUISITION: 112; *see also* War, Private property

*Res judicata*: *see* Interpretation of Treaties; Municipal Court

RESPONSIBILITY: *see* Aliens; Dependent State; Liability; Merchant Vessel; Military Authorities; Revolutionary Régime; Sailors

RETURN TO ADOPTED COUNTRY: *see* Naturalization

REVOLUTIONARY (BELA KUN) RÉGIME:

Bonded public debts: suspension of interest payment: 289

Responsibility for acts or: 286

RISK: *see* Claimant, Conduct

## S

SAILORS:

Responsibility for acts ashore of: 160, 341, 345

SANITARY MEASURES: *see* War, Measures

SEARCH OF VESSEL: *see* Vessel, Search

SEA WARFARE: *see* War

SECURITIES: *see* War, Consequences

SEINES: *see* Vessel, Seizure

SEIZURE: *see* Aliens; Evidence; State Property; Vessel; War

SENTENCE: *see* Aliens, Criminal proceedings

SEPARATION OF CLAIMS: *see* Claim

SETTLEMENT OF CLAIM: *see* Claim

SHIP: *see* Vessel

SHIP'S EQUIPMENT: *see* Custom's Duties

SOVEREIGNTY (*see also* Territorial Sovereign):

    Cession of: 158; *see also* Private Rights

    Exercise of: 42

STANDARDS OF PROTECTION: *see* Aliens, Protection

STATE:

    Dependent: *see* Dependent State

    Succession of States: *see* State Succession

STATE CONTRACTS: *see* Liability

STATE PROPERTY:

    Seizure of: 17

STATE SUCCESSION: 158; *see also* Claims, Pending claims; Debts, Public debts; Liability, Extent; Private Rights

STATUTES OF LIMITATION: *see* LIMITATION

SUBJECTS OF INTERNATIONAL LAW: 173

SUBMARINE CABLES: *see* Cables

SUCCESSION OF STATES: *see* State Succession

SUZERAINTY: 121

## T

TAXATION: *see* Aliens; Customs Duties; Light Dues

TAX POLICY: *see* Colonial Tax Policy

TELEGRAPH CABLE:

    Damage to: 35

TENDER, LEGAL: *see* Legal Tender

TERMINOLOGY: *see* Decisions and Opinions

TERRITORIAL SOVEREIGN:

    Responsibility for maintenance of order: 328

TERRITORIAL WATERS (*see also* Vessel, Seizure of boats and seines):

    Arrest:

        of crew in territorial waters: 60

        civil arrest of merchant vessel in territorial waters: 382

    Commercial activities of foreign fishing vessels in territorial waters: 171

    Delimitation, ordinary rules for: 382

    Fishing: 60, 86, 154

    Jurisdiction: 60, 86

    Panama Canal Zone, territorial waters of: 382

    Passage, Rule of innocent: 382

    Three-mile limit: 60, 382

TESTIMONY: *see* Evidence  
 THREE-MILE LIMIT: *see* Territorial Waters  
 TIDE: *see* Maritime Law  
 TORT, INTERNATIONAL: 138  
 TRADING: *see* Territorial Waters, Commercial activities  
 TRANSFER, MEASURES OF: *see* War, Measures  
 TREASURY NOTES: 251  
 TREATIES: *see* Indian Tribe; Interpretation  
 TRIBE: *see* Indian Tribe  
 TROOPS, FOREIGN: *see* Aliens, Protection  
 TROUBLE: *see* Damages

## U

USE: *see* Damages; Wrongful Possession and Use

## V

VALIDATION: *see* Evidence, Documents  
 VALORIZATION: *see* Debts  
 VESSEL (*see also* Fishing Vessel; Merchantman, Converted; Merchant Vessel):  
   Breach of duty or liability of: 21  
   Capture, pronounced illegal and void by Municipal Court: 32  
   Collision: 21, 27, 53, 64, 314  
   Damage: 36  
   Nationality, Proof of: 36, 53  
   Public: 160  
   Repairs of foreign vessel, Refusal of: 153  
   Sealing of firearms, ammunition: 57  
   Search:  
     good faith of searching officers, but error in judgment: 57  
   Seizure of:  
     boats and seines in territorial waters, confiscation, forfeiture: 60  
     cargo:  
       condemnation by Municipal Court, forfeiture: 85; neutral-owned: 112  
       vessel: 41, 45, 48, 68, 82, 85, 147  
     condemnation by Municipal Court: 85  
     delivery of British vessel to British authorities, release by British administrative decision: 68, 82  
     escape: 147  
     forfeiture: 85  
     good faith, fair conduct, of seizing officers, but error in judgment: 45, 69, 77, 82  
     high seas, on: 77, 82  
     illegality, determination of: 69, 82  
     Municipal Court proceedings: 45  
     place of seizure: *see* Evidence  
     probable cause: 45, 69  
     reasonable ground: 77  
     release, release on bond: 45, 48; *see also* delivery, *supra*  
     threat to seize: 61, 156  
 Visitation: 69

VIOLENCE: *see* Aliens, Protection, mob violence

VISITATION: *see* Vessel

*Vis major*: 25

## W

WAIVER:

Of claim:

by interested party binding upon State: *see* Claim, Waiver  
implied waiver: 17

Of defence. Implied waiver: 142

WAR (*see also* Blockade; Pre-War Transaction; Private Rights):

Circumstances. War: *see* Liability, Officials

Consequences:

depreciation of currency, currency notes: 213, 277  
depreciation of securities: 232, 277

Looting: 160

Measures. War:

compensation, currency, rate of exchange, interest: 212  
damage, injury resulting from: 212  
exceptional: 212, 231, 233, 266, 277; *see also* Debts, Public debts  
sanitary measures: 25  
transfer, measures of: 212

Merchantman, Converted: 160

Military operations, conduct of: 158, 165

Necessary war losses: 25, 112, 118, 158, 165

Necessity of war: 25

Police measure: 165

Private property:

confiscation: 235  
destruction of private property in time of war: 25, 112, 118, 160, 165  
requisition: 230  
seizure: 230, 250, 252

Sea warfare: 112, 118, 160

WITHDRAWAL: *see* Claim

WITNESS: *see* Evidence, Municipal Court

WRONGFUL APPLICATION OF MUNICIPAL LAW BY CUSTOMS AUTHORITIES: *see* Municipal Law

WRONGFUL POSSESSION AND USE: Amount of indemnity, generally recognized principle: 33

---



Printed in the Netherlands  
15848—January 1956—1,750

Price: \$U.S. 4.00; 28/- stg.; Sw. fr. 17.00  
(or equivalent in other currencies)

United Nations publication  
Sales No.: 1955.V.3